UNIFORM COMMERCIAL CODE COMMITTEE

REPORT PREPARED FOR THE MAY 8, 2009 COUNCIL MEETING

1. Next Scheduled Meeting of the Committee.

Next scheduled meeting of the Committee: None planned at this time.

2. Council Approval.

No Committee matter requires Council approval at this time.

3. Membership.

Just recently, I circulated the attached memoranda and other information to all committee members.

4. Accomplishments Toward Committee Objectives.

I continue to monitor reported Michigan cases on a daily basis for any notable UCC decisions and am keeping abreast of proposed changes to the UCC originating with either the ALI or NCCUSL.

5. Meetings and Programs.

The Committee has not scheduled on its own or in conjunction with the other organizations any programs. However, I will be speaking on a topic of "Personal Property Transactions" at the Business Boot Camp II to be held twice in December, 2009.

6. Publications.

Nothing to report.

7. Legislative/Judicial Administrative Developments.

The Joint Article 9 Review Committee recently conducted meetings in February and March of this year to consider proposed changes to Article 9 of the UCC. Attached to this Report are copies of (i) the Review Committee's meeting notes for March 6-8, 2009; and (ii) draft proposed Amendments to Article 9 for the meeting of NCCUSL's Drafting Committee held on February 6-8, 2009.

8. Miscellaneous.

Nothing to report.

Patrick E. Mears

BARNES & THORNBURG LLP

MEMORANDUM

TO: All Members of the UCC Committee

FROM: Patrick E. Mears

DATE: April 27, 2009

RE: Recent Developments

Accompanying this memorandum is a motion to dissolve a TRO that was entered by the Wayne County Circuit Court after Visteon commenced an action in that court alleging that Tyco was threatening to cease shipments of goods pursuant to written contracts. (This action was thereafter removed to the United States District Court for the Eastern District of Michigan.) It appears from these that Tyco requested adequate assurance (see attached letters and response) under UCC § 2-609 and demanded the imposition of COD terms pursuant to UCC § 2-702(1). This litigation illustrates the punch and counterpunch that can be thrown by buyer and seller in these types of disputes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

VISTEON CORPORATION,

Plaintiff,

vs.

TYCO ELECTRONICS CORPORATION,

Defendant,

Case No. 2:09-CV-10728

Judge Denise Page Hood
Magistrate R. Steven Whalen

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MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER WITH BRIEF IN SUPPORT

Defendant, Tyco Electronics Corporation ("Tyco Electronics"), pursuant to Fed. R. Civ. P. 65(b)(4), respectfully moves the Court for an order dissolving the Temporary Restraining Order ("TRO") entered by the Wayne County Circuit Court on February 19, 2008. A copy of the TRO is appended as Exhibit A.

In the alternative, Defendant moves the Court, pursuant to Fed. R. Civ. P. 65(b)(4) and (c) to modify the TRO and require Plaintiff Visteon Corporation ("Visteon") to give security in an amount proper to pay the costs and damages sustained by Tyco Electronics if it is found to have

been wrongfully restrained.

Tyco Electronics submits the following brief to support this motion.

BRIEF IN SUPPORT OF MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

This is a case about money damages. Tyco Electronics has not refused to supply parts to Visteon. It has always stated it will continue to sell Visteon parts -- just not on 55 days **credit** and not without a representation of **solvency**. The only costs to Visteon of Tyco Electronics' demand for assurance was the modest cost of capital -- probably little more than $20,000 per 60 day period. Taking unfair advantage of the *ex parte* TRO process, Visteon led the state court to believe it would shut down production and ruin the auto industry --- rather than draw this small sum out of its $1.18 billion cash or available credit lines. By omission,Visteon misled the state court about its finances, never revealing its precarious financial condition. In bad faith,Visteon accused Tyco Electronics of having no grounds for insecurity when industry predictions of a Visteon bankruptcy abound and it has retained bankruptcy lawyers. Rather than exercise the good faith required by the Uniform Commercial Code, Visteon abused the judicial system in an attempt to shift its financial risk to Tyco Electronics. This was not the first time Visteon has used a state court's power to shift its own financial risks to its suppliers.

Tyco Electronics' actions and proposed terms to Visteon have been eminently reasonable, judged by any standard. Tyco Electronics' actions are in full compliance with the Uniform Commercial Code 2-609 assurances provisions. Visteon's actions are not. This Court should immediately dissolve the state court TRO so wrongfully entered.

II. STATEMENT OF RELEVANT FACTS

Tyco Electronics is in the business of, among other things, supplying automotive component parts to Visteon, who manufactures parts for original equipment auto manufacturers ("OEM"s). [Affidavit of Heidi Sanfilippo ¶4 , Verified Complaint ¶¶ 7-8]. Terms are set forth in a series of written documents for purchase and sale between Visteon and Tyco Electronics, including Tyco Electronics' "Terms and Conditions of Sale" ("Terms"). [Sanfilippo Aff ¶4 ; Exhibit B (Terms & Conditions of Sale)]. Tyco Electronics' Terms are incorporated into each acknowledgment of a Visteon purchase order as well as Tyco Electronics' invoices to Visteon. [Sanfilippo Aff ¶ 4]. Visteon also has a set of Terms and Conditions.[1] Tyco Electronics' standard payment terms require cash in advance. However, if an open account credit is established and maintained to Tyco Electronics' satisfaction, payment terms are net thirty days from date of shipment. [Sanfilippo Aff ¶4; Exhibit B ¶6]. All parts shipments are subject to Tyco Electronics' approval of Visteon's financial condition. If the financial condition of Visteon becomes unsatisfactory to Tyco Electronics, it may, in its sole discretion, defer or decline shipment or condition of shipment upon receipt of satisfactory security or cash payments in advance. [Sanfilippo Aff ¶ 4; Exhibit B ¶ 5]. As a practical matter, notwithstanding these terms, Visteon has been paying Tyco Electronics approximately 55 days after delivery, on average. [Sanfilippo Aff ¶ 4].

Exacerbated by declining sales in the auto industry, Visteon's financial condition has been deteriorating for some time. [Sanfilippo Aff ¶5]. In April and May 2008, Tyco Electronics and Visteon exchanged correspondence over Tyco Electronics' dissatisfaction with Visteon's payment

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[1] This motion does not require resolution of any conflicts between the parties' respective terms. It addresses the parties rights under the assurance provisions of the Uniform Commercial Code.

practices. [Sanfilippo Aff ¶5]. In December 2008, Tyco Electronics requested a further meeting with Visteon. [Sanfilippo Aff ¶ 6].

On January 15, 2009, Tyco Electronics representatives including Tyco Electronics' Controller for its Global Automotive Division, North America, Heidi Sanfilippo, met with Visteon representatives, requesting an update on Visteon's financial condition. [Sanfilippo Aff ¶6; Verified Complaint ¶¶27-8]. At the meeting, Tyco Electronics learned the following: Visteon had a high burn rate for its cash in the third quarter of 2008. [Sanfilippo Aff ¶7]. Visteon has earned no profits in the past eight years. [Sanfilippo Aff ¶7]. Visteon has no plan which would return it to profitability at any specified future time. [Sanfilippo Aff ¶7]. In December 2008, Visteon's Issuer Default Rating had been downgraded by at least one ratings agency to "CC," "risk of default probable." This meant Visteon faced increased difficulty in procuring additional loans, making default on its existing loans or credit extensions a distinct probability. [Sanfilippo Aff ¶ 8; Exhibit C (article reporting rating downgrade)]. Finally, Visteon advised Tyco Electronics nothing was due on its debts until next year, that there were no restrictive covenants on outstanding loans and that Visteon had additional borrowing capacity. [Sanfilippo Aff ¶7]. As set forth below, some of these statements may have been less than completely accurate. Tyco Electronics advised Visteon it would evaluate the information and get back to them within a couple of weeks. [Sanfilippo Aff¶9].

On January 26, 2009, The Wall Street Journal published an article entitled "*Bankruptcy Fears Grip Auto-Parts Companies.*" [Sanfilippo Aff ¶ 10; Exhibit D (WSJ article)]. The article reported that Visteon "had hired bankruptcy advisers to prepare for possible bankruptcy proceedings 'according to' people familiar with these matters." Although these people said this

does not mean a bankruptcy filing is imminent, according to the article, "a Visteon spokesman did not return messages seeking comment." On January 28, 2009, Visteon filed an 8-K with the SEC which appeared to indicate Visteon had substantially exhausted its available credit. [Sanfilippo Aff ¶11; Exhibit E (8-K Report)]. On January 29, *Automotive News* reported Ford's statement it "was not contemplating any large-scale support for struggling auto parts maker Visteon Corp. and sees no need to inject cash into its former affiliate." [Sanfilippo Aff ¶ 12; Exhibit F (*Automotive News* article)]. A substantial portion of Visteon's sales are to Ford. *Id.* *Automotive News* also reported Visteon "has come under intense pressure from steep production cuts by major automakers and tight credit conditions." *Id.* Based on the information provided by Visteon and subsequent reports, Tyco Electronics' Controller for Global Automotive Division, North America, Heidi Sanfilippo, concluded there was reason for serious concern about whether Visteon would be able to pay for delivered parts if Tyco Electronics continued to allow payment in 55 days credit and that it would not be paid due to bankruptcy preferences if Visteon filed for, or were drawn into, bankruptcy. [Sanfilippo Aff ¶ 13].

By a letter of January 29, 2009, Tyco Electronics made a written demand for assurances of performance under UCC 2-609(1) and as permitted by law. [Sanfilippo Aff ¶14; Exhibit G (1/29/09 letter)]. As assurance, Tyco Electronics requested that Visteon agree to "Net Immediate" payment terms by February 8, 2009, i.e. payment would be due two business days after delivery. In other words, Tyco Electronics would no longer extend credit. However, Visteon did not demand cash in advance, cash on delivery or that Visteon pull forward payments on deliveries already made, although that would have provided greater assurance. [Sanfilippo Aff ¶ 14].

Visteon acknowledged Tyco Electronics' January 29, 2009 letter was a demand for

assurances pursuant to UCC 2-609 via a response letter received by Tyco Electronics on February 5, 2009 (misdated as January 4, 2009). [Sanfilippo Aff ¶15; Exhibit H (1/4/09 letter)]. To Tyco Electronics' surprise, Visteon denied there were reasonable grounds for insecurity. Visteon stated its year-end cash balance was $1.18 billion and that it had "additional borrowing capacity under existing credit facilities."

Visteon's letter failed to provide the requested assurance or any other commercially reasonable assurance of performance. [Sanfilippo Aff ¶16]. Cash and credit availability do not address a company's solvency and did not assuage Tyco Electronics' concern about the effect of potential bankruptcy on Tyco Electronics' ability to receive payment. [Sanfilippo Aff ¶16]. Tyco Electronics' exposure to loss for delivered goods without the requested assurance is approximately $1.7 million. [Sanfilippo Aff ¶13].

Pursuant to U.C.C. §2-609(1) and its contract rights, Tyco Electronics suspended performance of parts delivery on February 9, 2009. [Sanfilippo Aff ¶17]. Nevertheless, on February 10, 2009, Tyco Electronics reiterated its willingness to supply parts to Visteon if it received adequate assurance. [Sanfilippo Aff ¶17; Exhibit I (TE's 2/10/09 letter)]. Visteon responded by threatening litigation. [Sanfilippo Aff ¶ 18; Exhibit J (Visteon's 2/10/09 letter)].

Visteon then filed the lawsuit and its *Ex Parte* motion for temporary restraining order. Visteon did not furnish the state court with complete information about its financial condition and may have provided information which was less than completely accurate. Visteon disclosed its $1.18 billion cash position but failed to disclose its extensive debt ($2.76 billion) nor its concern about breach of debt covenants which it publically reported just two weeks later. [Motion for TRO, p. 6; Verified Complaint ¶ 39; Sanfilippo Aff ¶ 7]. Visteon stated "[Visteon has] additional

borrowing capacity under existing credit facilities" but failed to reveal the amount. [Motion for TRO, p. 6; Verified Complaint ¶39]. Visteon failed to reveal that on February 3, 2009, it had filed an 8-K report with the Securities and Exchange Commission which stated that Visteon's borrowing represented "substantially all of the availability under [its] Credit Agreement at this time." On February 25, 2009, Visteon issued a press release which can be interpreted to state that Visteon has exhausted all of its U.S. credit facility. [Sanfilippo Aff ¶ 19; Exhibit K (Visteon Press release)].

On February 25, 2009, Visteon issued that press release and held an analyst call to report its 2008 results. [Sanfilippo Aff ¶ 19]. Information reported revealed Visteon's financial situation is severely distressed. Visteon reported that revenues had plummeted 42 percent with a net annual loss of $663 million, nearly double that of the prior year. [Sanfilippo Aff ¶ 20; Exhibit K (Visteon Press release); Exhibit L (Bloomberg Report)]. Half of those losses were from the fourth quarter of 2008. Visteon attributed its financial results to the global economic slowdown and the OEMs' rapid reduction of auto production levels in every market. [Exhibit K]. Although Visteon had previously told Tyco Electronics it had no debt covenants, Visteon reported it "cannot assure" that it will remain in compliance with its debt covenants because shrinking worldwide auto demand will reduce cash flow and liquidity. [Sanfilippo Aff ¶20; Exhibit K]. In an alarming and virtually unprecedented move, Visteon refused to take questions at the analyst call, stating: "In view of volatile macro-economic and industry conditions, Visteon is not providing guidance for future periods." [Sanfilippo Aff ¶ 21; Exhibit K, p. 2]. Dow Jones News reported its assessment of Visteon's disclosures with this statement: "Visteon Corp.'s (VC) bankruptcy risk intensified Wednesday after the auto-parts maker posted a wider fourth-quarter loss resulting in its eight-

straight unprofitable year." [Sanfilippo Aff ¶22; Exhibit M (cnnmoney.com)]. "The results underscore the dire situation facing Visteon." [Exhibit M].

The parties have continued to negotiate during the pendency of this matter. Tyco Electronics offered to permit payment 15 days after delivery. [Sanfilippo Aff ¶23]. Visteon's press release, analyst call, and media reports of February 25, 2009 have exacerbated the insecurity over receiving payments for parts to be delivered. In addition to the matters referenced above, CBS Marketwatch reports its analysis of the significance of the day's events, including the following:

* "The fact the company refused to take questions from analysts discussing the latest results is a likely indicator they are preparing to go into Chapter 11."

* "Visteon can be commended for hanging in there as long as it has... . But Visteon can't continue at this pace much longer without also throwing itself at the mercy of a federal bankruptcy court judge."

[Sanfilippo Aff ¶22; Exhibit N (CBS Marketwatch article)].

The publications corroborate that Tyco Electronics' has reasonable grounds for insecurity and was justified in its demand for assurances. Moreover, Visteon's announcements of February 25, 2009 demonstrated that extension of 15 days credit would not be sufficient security against non-payment for delivered parts in the event of a Visteon bankruptcy. Following the analyst's call, Tyco Electronics sought answers from Visteon's Assistant Treasurer, Mike Lewis. Mr. Lewis, was unable or unwilling to answer satisfactorily a series of questions addressed to him by Ms. Sanfilippo. He admitted Visteon's loans carried covenants, contrary to his prior representation to Tyco Electronics. He stated he would not address whether Visteon planned a bankruptcy filing within the next 90 days since that was a legal matter. [Sanfilippo Aff ¶24]. On the afternoon of

February 25, before Visteon responded to the earlier offer of 15 days credit, Tyco Electronics sent an email to Visteon indicating it is still willing to extend 15 days credit, but will require a letter of solvency in order to do so. [Sanfilippo Aff¶23; Exhibit O (Sanfilippo E-mail)]. On February 26, Reuters reported a statement by KDP Investment Advisors, that Visteon "may choose to forgo a bond interest payment due in March and instead try to shore up financing to fund itself through a bankruptcy restructuring." [Sanfilippo Aff ¶25; Exhibit P (Reuters article)].

On February 26, Tyco Electronics sent an email inquiring of the status and indicating that in the absence of such assurances, cash on delivery would be required. [Sanfilippo Aff ¶25; Exhibit Q (Sanfilippo email to Barrett)]. To date, Visteon has not provided the assurances which Tyco Electronics needs to continue its own performance without risk of substantial financial loss. [Sanfilippo Aff ¶25].

III. PROCEDURAL POSTURE

On February 19, 2009, Visteon filed its Verified Complaint and Jury Demand in the Wayne County Circuit Court. Visteon concurrently filed an *Ex Parte* Motion for Temporary Restraining Order. The state court granted Visteon's motion the same day, requiring Tyco Electronics to continue supplying components to Visteon [Exhibit A]. The state court's TRO went further than the relief requested in the motion by ordering Tyco Electronics to specifically perform all terms of the contract, even though there was no other issue of breach before the court. The state court declined to require Visteon to post a bond.

Tyco Electronics removed the case to this Court on February 26, 2009 (Notice of Removal, Doc No. 1), and now seeks to dissolve the TRO (or in the alternative, to modify it and impose a requirement for Visteon to post adequate security). [Copies of all state court pleadings and

motions are appended to Tyco Electronics' Notice of Removal, Doc. No. 1].

IV. APPLICABLE STANDARDS

A district court has full authority to "dissolve or modify state court injunctions issued prior to removal." *Eberspaecher N. Am., Inc. v. Van-Rob, Inc.*, 544 F.Supp.2d 592, 603 (E.D. Mich. 2008) (quoting *Clio Convalescent Ctr. v. Michigan Dept of Consumer and Indus. Svces*, 66 F. Supp. 857, 877(E.D. Mich. 1999)) (citing *Resolution Trust Corp. v. Bayside Developers*, 43 F.2d 1230 (9th Cir. 1994); 28 U.S.C. ¶ 1450)(appended as Exhibit S). In a motion to dissolve an injunction, the movant bears the burden of proof. *Burkey v. Ellis*, 483 F.Supp. 897, 915 (N.D. Ala. 1979).

The Court considers four factors in determining whether to grant injunctive relief:

(1) the plaintiff's likelihood of success on the merits of the action;

(2) the irreparable harm to the plaintiff that could result if the court does not issue the injunction;

(3) the public interest; and

(4) the possibility the injunction would cause substantial harm to others.

[*Id.*]

The district court must make specific findings concerning each of the four factors, unless fewer than four are dispositive of the issue. *Lorrilard Tobacco Co. v. Amouri's Grand Foods, Inc.*, 453 F.3d 377, 380 (6th Cir. 2006).

"[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a[n] ...injunction," and an injunction must not be granted in the absence of irreparable harm. *Lucero v. Detroit Public Schools*, 160 F. Supp. 2d 767, 801 (quoting *Reuters Ltd v. United*

Press Int'l, 903 F.2d 904, 907)(2d Cir. 1990); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)("[t]he absence of a likelihood of irreparable injury...standing alone[] make[s] preliminary injunctive relief improper"). Irreparable harm has been defined as "harm shown to be noncompensable in terms of money damages." *Wisdom Import Sales Co., v. Labatt Brewing Co., Ltd.*, 339 F.3d 101, 113-14 (2d Cir. 2003). When there is an adequate remedy at law, such as monetary damages, equitable relief will not be granted. *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995)("[W]here monetary damages may provide adequate compensation, a preliminary injunction should not issue")(citing *Loveridge v. Pendleton Woolen Mills, Inc.*, 788 F.2d 914 (2d Cir. 1986)).

Plaintiff must show a **strong** or **substantial** likelihood of success on the merits based on governing law. *Zimmer, Inc. v. Albring*, No. 08-CV-12484, 2008 WL 2604969 (E.D.Mich. June 27, 2008)(slip copy)(appended as Exhibit R); *Wachovia Securities, L.L.C. v. Stanton*, 571 F.Supp.2d 1014 (N.D. Iowa 2008)(emphasis added).

Any injunctive relief must be narrowly tailored to fit specific violations. *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994)(citing *Society For Good Will To Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir.1984).

When injunctive relief is granted, security sufficient to compensate the damages that may be incurred by a wrongfully enjoined party are mandatory. Fed.R.Civ.P. 65(c). This requirement attaches following removal even though the state court may not have required security. *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 438 (1974) (after case was removed rules of federal procedure applied to state court injunction).

V. ARGUMENT

A. **Plaintiff's Damages Are Solely Monetary and Not Irreparable Harm**

This case involves money damages, not irreparable harm. The requested assurances were for Visteon to pay for future deliveries in a shorter period of time and - as Visteon's condition deteriorated -- to provide a letter of solvency. Visteon has itself established the requested assurances will cause it only monetary damages if it has been wronged. Visteon represented to the state court, as well as Tyco Electronics, it has the financial ability to pay for future shipments because of its $1.18 billion cash-in-hand and credit availability. If these representations were true, then Visteon established it can easily pay for delivered parts on fifteen days credit rather than fifty-five days. If Tyco Electronics' demands for assurance in the form of earlier payment were later found to be wrongful, any damages to Visteon would consist of lost interest on money withdrawn from its cash account or the borrowing costs to finance the earlier payments. Visteon's predictions of plant shutdown and the ensuing apocalyptic consequences for itself and the OEMs cannot be valid. It is not plausible that Visteon would choose self-destruction over incurring a very modest amount of short-term borrowing cost or lost interest.

When a party faces what it alleges is a wrongful anticipatory repudiation or breach of contract, its proper course is to cover by paying as demanded and pursue adequate compensatory or other correct relief at a later date in the course of ordinary litigation. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C.Cir. 1958)). Plaintiff is required to make every reasonable effort to mitigate its alleged damages. *McCullagh v Goodyear Tire & Rubber Co.*, 342 Mich 244, 69 N.W.2d. 731, 737 (1955). Plaintiff "cannot through [its] own conduct transform an injury compensable in money damages to an irreparable injury." *Commodex Sys. Corp. v. GTE Telnet Communications Corp.*,

543 F. Supp. 164, 165 (S.D.N.Y. 1982).

"[T]he classic remedy for breach of contract is an action at law for damages. If the injury complained of may be compensated by an award of monetary damages, then an adequate remedy at law exists and no irreparable harm may be found as a matter of law." *Cellnet Commc'n, Inc.v. New Par*, 291 F. Supp. 2d 565, 570 (E.D. Mich. 2003)(quoting *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 966 F.Supp. 540, 543 (E.D. Mich. 1997); *Paw Paw Wine Distributors, Inc. v. Joseph E. Seagram & Sons Inc.*, 603 F. Supp. 398, 401 (W.D. Mich. 1985)(although purchasing wine from another distributor was more expensive, plaintiff did not suffer irreparable harm and money damages were adequate). A party's harm is only irreparable if it cannot be adequately compensated. *Eberspaecher, supra* at 12 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E.F. Hutton & Co.*, 403 F. Supp. 336, 343 (E.D. Mich. 1975).

This case is very similar to *Eberspaecher, supra*. There, the plaintiff-manufacturer of auto exhaust products obtained a state court injunction prohibiting its parts supplier from stopping shipment after the supplier made a demand for a price increase and gave notice of intent to stop shipment if the plaintiff did not concur. The manufacturer alleged the same types of irreparable harm which Visteon alleges here: inability to fulfill commitment to customers, production line shut down within a few days, idling of employees, idling of OEM employees, OEM plant shutdowns, and damage to reputation and good will. It also alleged a risk of insolvency it if had to meet the new prices (whereas here, Visteon has made no such relative to shorter credit terms). Following removal to this Court, the Court dissolved the state court injunction because there was no irreparable harm. The Court decided the harm that the plaintiff alleged was compensable by

monetary damages.[2] The court disregarded the manufacturer's claim it would be forced into insolvency because it had provided no affidavits or evidence this was so.

Here, although the assurance deals with extension of credit rather than price, the outcome should be the same. Tyco Electronics seeks earlier payment. Visteon does not contend it cannot make the earlier payment; to the contrary, it asserts it is well positioned to do so. If Visteon's representations about its financial capabilities are true, Visteon clearly has no intent of shutting down production. It can be fully compensated for the extra costs it incurs by utilizing other credit sources or its own cash rather than credit extended by Tyco Electronics. There is an adequate remedy at law and thus there is no irreparable harm.

B. It is Tyco Electronics, not Visteon, which has a Strong Likelihood of Success on the Merits

Resolution of this dispute is governed by the Uniform Commercial Code's assurance provisions. MCL §440.2-609. Indeed, this is a classic case for which the provisions were designed and Tyco Electronics is well within its rights to suspend shipment until it receives adequate assurances.

i. Tyco Electronics Had Legitimate Grounds for Insecurity and Made a Reasonable Demand for Assurance under UCC 2-609(1)

The Uniform Commercial Code recognizes the value of a contract is not merely the promise of performance, but the receipt of what was promised under the contract. MCL 440.2609. Section 2-609[1] provides: "Whenever reasonable grounds for insecurity arise with respect to the

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[2] The court in *Eberspaecher* considered and disregarded law in *Kelsey-Hayes Co. v. Galtaco Redlaw Castings Corp.*, 749 F.Supp. 794 (E.D.Mich.1990)(normal legal remdy of accepting supplier breach and suing for damagesis inadequate in the auto industry.) The *Kelsey-Hayes* court predicted the Michigan Supreme Court would eliminate the illegality requirement for duress. However, it did not. Under Michigan law, there is no duress without illegal conduct.

performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return." This section:

> . . . rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due is an important feature of the bargain. . . . A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to belief that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance.

(Commentary 1 to MCL 440.2609)

An aggrieved seller "is permitted to suspend his own performance and any preparation therefore, with excuse for any resulting necessary delay, until the situation has been clarified." Comment 2 to MCL 440.2609. He is "given the right to require adequate assurance that the other party's performance will be duly forthcoming .... [and] ... may treat the contract as broken if reasonable grounds for insecurity are not cleared up within a reasonable time." Comment 3 to MCL 440.2609. Grounds for insecurity do not have to arise from or be directly related to the contract in question. Comment 3 to MCL 440.2609.

There can be no serious question that Tyco Electronics had reasonable grounds for insecurity justifying its January 29 demand for assurances of payment. Visteon had debt double its cash, a high cash burn rate, a lengthy record of financial losses, plans which would not return Visteon to profitability at any set date, and it reportedly had retained bankruptcy lawyers.[3] Nor

[3] Visteon relied on *In re Beeche Sys*, 164 BR 12 (Bankr NDNY 1994) for the proposition that a bankruptcy filing does not trigger reasonable grounds for insecurity. However, *Beeche*, is

can there be any serious question the grounds for insecurity became much greater thereafter, justifying Tyco Electronics' February 25 revised demand for assurances. Contrary to Visteon's earlier representations to Tyco Electronics, Visteon announced it had debt falling due this year and there were loan covenants which it may not be able to meet. Visteon refused to give future guidance or answer analyst questions. Auto industry and market analysis of Visteon's condition, based on its public disclosures, is that it must be headed for bankruptcy court. Thus, Tyco Electronics' insecurity about whether it would be paid if Visteon entered bankruptcy in the near future is consistent with the view of other industry experts.

The Uniform Commercial Codes requirement of good faith governs the assurance process. *Enron Power Marketing, Inc. v. Nevada Power Co.*, No. 3 Civ 9318 2004 WL 2290486, at 5 (S.D.N.Y. October 12, 2004)(appended as Exhibit T). By asserting Tyco Electronics had no grounds for insecurity, Visteon has not acted in good faith. In the face of reports of potentially imminent demise of a failing company in a flailing industry and bankruptcy lawyers retained reasonable minds could not dispute whether Tyco Electronics had reasonable grounds for insecurity on January 29 and even graver concerns on February 25.

ii. Visteon Failed to Provide Commercially Reasonable Assurances; Thus Tyco Electronics Was Entitled To Suspend Performance

Visteon's assurance it has $1.18 billion cash when it has double that amount in debt and bankruptcy lawyers retained does nothing to address the risk to Tyco Electronics should Visteon be forced into, or voluntarily, seek the protection of a bankruptcy court. Tyco Electronics would

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distinguishable. When Beeche filed for bankruptcy it had already performed its contractual obligations. There was no evidence bankruptcy would cause loss to the opposing party. The present case involves continuing obligations by Visteon and a high probability of substantial loss to Tyco Electronics if Visteon enters bankruptcy.

be exposed to losses of about $1.7 million under bankruptcy preferences. Rather than provide the requested assurances, Visteon used the state court as a hammer to compel Tyco Electronics to continue to ship, improving Visteon's situation to the detriment of Tyco Electronics'. Reasonable assurances need not be the assurance demanded, but they must be commercially reasonable. The test is what are the minimum kinds of promises or acts on the part of the promisor that would satisfy a reasonable merchant in the position of the promisor that his expectation of receiving due performance will be fulfilled. *Hawkland Uniform Commercial Code* Series 2-603.03. Adequacy of the assurance depends on the circumstances. *Enron Power, supra.* Factors which are considered include the reputation of the promisor, the grounds for insecurity and the kinds of assurances available. *Enron Power, supra.*

The commentary to the Uniform Commercial Code identifies a seller's reduction of credit as a classic illustration of the type of assurances an insecure seller may demand. A seller with reasonable grounds for insecurity based on a buyer's shaky financial condition can justifiably assure the buyer's performance by reducing the credit it previously extended and requiring the buyer to make payments within a shorter time frame. Commentary 4 to MCL 440.2609. The assurances Tyco Electronics demanded were imminently reasonable according to commercial standards. Many suppliers in Tyco Electronics' position would have demanded more assurance. Tyco Electronics would have been better protected against loss if it demanded cash in advance and that Tyco Electronics promptly pay up the amounts owed on recent deliveries. Instead, Tyco Electronics' first demand for assurances merely limited credit extension to two days on future deliveries. As its grounds for insecurity grew, Tyco Electronics indicated it would extend credit for fifteen days, provided Visteon provide a letter of solvency. Alternatively, Visteon could pay

C.O.D. The requested assurances substantially reduce, but do not eliminate Tyco Electronics' risk of loss.

Visteon failed to provide any assurance against bankruptcy loss. Indeed, some of the verbal assurances it gave proved to be untrue. Tyco Electronics' temporary suspension of performance was well within its rights under Michigan's Uniform Commercial Code, MCL ¶ 440.2609(1). Moreover, Visteon's failure to provide commercially reasonable assurances within a reasonable time acts as a repudiation of the contract. MCL 440.2609(4). When anticipatory repudiation occurs, the other party may await performance for a commercially reasonable period and may suspend his own performance. MCL 440.2610(a) & (c).

Visteon has little, if any, likelihood of success on the merits. It obtained the state court TRO only by presenting, on an ex parte basis, an incomplete and misleading picture of its financial condition to the court. Had the state court received an accurate portrayal of Visteon's condition, it could not have concluded Visteon had a likelihood of success on the merits. Michigan's Uniform Commercial Code establishes the parties rights in this situation and Tyco Electronics' suspension of shipping is fully consistent with the law.

C. **The Public Interest Supports Dissolving the TRO**

Visteon argued the public interest would be served by a TRO and preliminary injunction because otherwise production lines throughout the industry would shut down. [Motion for TRO ¶ 1]. Visteon did not present any evidence it could not pay sooner in order to keep its production lines running. To the contrary, it asserted it was so flush with cash and credit, Tyco Electronics should have no concern about being paid. There is no public interest in allowing a failing corporation to hold a parts supplier hostage as it attempts to improve its position to the detriment

of its supplier.

On the other hand, UCC 2-609 reflects the public interest in providing a smooth and uniform execution of the laws to ensure a commercial environment marked by predictability and certainty. Dissolving the TRO serves the public's interest in preserving the enforceability of contracts and the law by forcing the parties to adhere to the terms of the contract mutually agreed upon. The UCC 2-609 allows a party to require adequate assurance that the other party will meet his obligations under the contract. When applied within the limits of reasonableness and good faith, this law creates certainty and fairness in the commercial environment which promotes an inviting and trusting marketplace. The detrimental effects on the public of an unstable, disorderly market are amply demonstrated by the current American economic turmoil.

D. **The TRO is Overly Broad and Draconian In Scope**

Tyco Electronics urges the court to dissolve the TRO entirely, but if it leaves any portion intact, it must at a minimum modify it so that it is narrowly tailored to the alleged breach. Injunctive relief may not be so vague as to "put the whole conduct" of a defendant at the "peril of a summons for contempt." *Hartford-Empire Co. v. U.S.*, 323 U.S. 386, 409-10, 65 S.Ct. 373, 89 L.Ed. 322 (1945). The conduct which is demanded or prohibited by the order must be specific; the order must address no more conduct than is necessary, and may not simply be a command against "all possible breaches" of the law. *Id.*; *Tuttle v. Arlington Cty. School Bd.*, 195 F.3d 698 (4th Cir. 1999) ("An injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends ... although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation.") (citation omitted).

The relief ordered by the state court in paragraphs 2 and 3 of the TRO is overly broad, prohibiting Tyco Electronics from terminating its supply of parts for **any reason** or taking "**any action** inconsistent with its obligations" and requiring Tyco Electronics to specifically perform **all** of its obligations under the agreements. [Ex. A, TRO ¶¶2 & 3 (emphasis added)]. The only relief Visteon could conceivably be entitled to, based on its complaint, is the command that Tyco Electronics "immediately resume shipments of the Parts ... pursuant to the parties' agreements." [Ex. A, TRO ¶1]. *Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775* (2d Cir. 1994) (Preliminary injunction vacated because it was not limited to specific violation of statute, but instead contained general prohibition on content that could be published and sold).

Of course, Tyco Electronics vigorously asserts that the injunction is inconsistent with law and equity and it should be dissolved entirely. However, if this Court is not so inclined, it must modify the TRO. Unless the order is modified, Tyco Electronics must ship or face contempt allegations no matter what happens -- including whether Visteon fails to pay for parts deliveries or files for bankruptcy. The purpose of a TRO is to prevent a specific irreparable harm, not to turn the Court into a weapon for the strategic advantage of one party to a contract. Modification of the TRO by elimination of the overly broad paragraphs 2 and 3 is therefore required by the principles of equity, should the Court not dissolve it entirely as Tyco Electronics urges. If the TRO is not dissolved, Paragraph 5 stating it remains in full force and effect until further order of the state court must be modified. A state court TRO automatically expires ten days after removal to federal court. *Granny Goose Foods* at 438; Fed. R. Civ. Proc. 81(c).

E. Security is Mandatory Under the Federal Rules

Federal courts may not issue a preliminary injunction or temporary restraining order unless

the movant gives security in an amount "that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c) Although the security requirement does not automatically attach to a state court TRO upon removal, when a case has been removed to federal court, the Federal Rules of Civil Procedure (and other provisions of federal law) govern the mode of proceedings. *Granny Goose Foods* at 438; Fed. R. Civ. Proc. 81(c). Moreover, this court's power to modify the TRO empowers it to impose the federal bond requirement. *Clio Convalescent Ctr. v. Mich Dep't of Consumer & Indus Services*, 66 F.Supp.2d 875, 877 (E.D. Mich. 1999) (citing *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230 (9th Cir. 1994) and 28 U.S.C. § 1450) ("A district court can dissolve or modify state court injunctions issued prior to removal."); Fed. R. Civ. P. 65(b)(4)). Thus Plaintiff should be required to post the federally-mandated security which accompanies the issuance of injunctive relief under Fed. R. Civ. P. 65(c).

Tyco Electronics estimates that compliance with the TRO exposes it to the risk of loss of $1.7 million. [Sanfilippo Aff ¶13]. This represents the estimated invoices for goods delivered over which may become subject to a ninety-day bankruptcy preference period. If any portion of the TRO remains in effect, Tyco Electronics requests the Court to require Visteon to post security in this amount .

VI.. CONCLUSION

For the reasons stated above, Tyco Electronics respectfully requests this Court dissolve the TRO immediately. If the Court does not dissolve the TRO, Tyco Electronics respectfully request

the Court modify it as requested above and require Plaintiff to immediately post adequate security.

Respectfully submitted,

/s/ Kathleen A. Clark
Donald H. Dawson, Jr.(P29692)
Kathleen A. Clark (P43295)
DAWSON & CLARK PC
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Detroit, Michigan 48226-6243
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Attorneys for Defendant

Dated: February 27, 2009

Tyco Electronics

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Tyco Electronics Corporation
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Berwyn, PA 19312-2423

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January 29, 2009

Mr. Mike Lewis
Assistant Treasurer
Visteon Corporation
One Village Center Drive
Van Buren Township, MI 48111

Re: Payment Terms

Dear Mr. Lewis:

As been previously communicated, Tyco Electronics is changing payment terms for Visteon Corporation and all of its affiliates worldwide ("Visteon") to "Net Immediate" effective February 9, 2009. Under these terms, payment for a shipment is due no later than two business days after delivery to Visteon.

Given current economic conditions, the rapid financial deterioration within the automotive industry, and recent press reports, including the article appearing in The Wall Street Journal on Monday, Tyco Electronics is justifiably insecure with regard to Visteon's ability to continue to make payments. This change is a prudent and reasonable course of action and fully permitted by law, including Section 2-609 of the Uniform Commercial Code and similar laws. Should market conditions worsen or Visteon's financial position change further, TE reserves the right to revisit Visteon's payment terms.

To confirm that Visteon agrees with the revised payment terms and that it has adjusted its purchasing and payment systems accordingly, we must receive revised purchase orders reflecting "Net Immediate" terms no later than February 8. Without such confirmation, firming orders and/or releases with shipments scheduled after February 8 will be rejected.

Tyco Electronics values its continued relationship with Visteon and has supported Visteon as a valued business partner with competitive prices, quality service and solid engineering support over the years. Tyco Electronics desires to continue to supply Visteon, but requires these changes in order to be prudent in its business dealings.

Sincerely,

John J. Mitchell
Vice President, Finance & Controller,
Tyco Electronics - Automotive

[redacted]

Heather Barrett
Senior Purchasing Manager
Electronics Commodity
Purchasing

Visteon Corporation
One Village Center
Van Buren Twp., MI 48111
Phone: 734-710-7951
hbarrett@visteon.com

January 4, 2009

Ms. Heidi Sanfilippo
North American Controller
Tyco Electronics Corporation
3800 Reidsville Road
Winston Salem NC 27101-2166

Re: Tyco's Threatened Breach of Contract

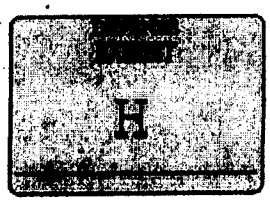
Dear Ms. Sanfilippo:

I am writing in response to the letter dated January 29, 2009. We take issue with the basis upon which you have sent this letter. Specifically, there are no reasonable grounds for insecurity justifying your demand for assurance of performance under the Uniform Commercial Code. Visteon Corporation ("Visteon") has materially complied with the terms of our contract and will continue to do so going forward.

Over the past 12 months Tyco Electronics Corporation ("Tyco") has invoiced Visteon over $18.1 million USD for production goods and Tyco has been paid for every invoice other than invoices that are not yet due or are the subject of a dispute. We certainly will work with you to clear up your misconceptions around the operation of our terms, but please understand that the Visteon Standard Payment Terms are an integral part of the purchase order contracts governing Tyco's supply of goods to Visteon.

With respect to the vague concerns you have raised in your January 29, 2009 letter concerning Visteon's financial condition, we would like to direct your attention to the following facts:

- Visteon is, in fact, current on its payment obligations to Tyco for all amounts properly invoiced and due under Visteon's purchase orders with Tyco as of January 30, 2009.
- As indicated in our press release dated January 13, 2009, Visteon's 2008 year end cash balance is $1.18 billion USD and we have additional borrowing capacity under existing credit facilities.
- Visteon has no significant near-term maturities.
- In January of 2005, Visteon disclosed a comprehensive three-year business plan to improve and restructure its operations. Since that time we have divested, closed or restructured 30 non-core or underperforming facilities and we have aggressively transformed our business. It should be noted that Visteon completed the three-year improvement plan at a lower cost and with greater savings than originally planned.



Despite the significant challenges facing our industry at this time, we have made great strides during the past three years to restructure our business to ensure our long term viability and improve our financial performance. Our strong cash position and successful restructuring efforts have Visteon well positioned for the future despite these unprecedented times in our industry. Obviously, we would be happy to further elaborate on these facts and others if requested.

We trust this adequately addresses the concerns raised in your letter, even though you had no basis, in our view, for presenting those concerns in this way. None of the issues you raised constitute commercially reasonable grounds to request adequate assurance under 2-609 of the UCC. Section 2-609 of the UCC is not a tool to renegotiate contract terms.

Please be aware that in the event that Tyco suspends delivery of product to Visteon or takes any other unilateral action contrary to the terms of our existing contracts, Visteon will aggressively pursue all of its legal rights and remedies. As you know, any interruption to the delivery of products to Visteon will seriously impact Visteon's manufacturing operations as well as the operations of Visteon's customers. As you also know, the financial losses caused by any such interruption will be catastrophic. Visteon will hold Tyco legally responsible for all direct, indirect and consequential damages related to any such interruption and we specifically reserve our right to set off these damages against any future payments that may be owed Tyco.

Based on the foregoing, we urge you to withdraw the demands stated in your January 29, 2009 letter and immediately confirm Tyco's intent to honor its existing contractual commitments to Visteon.

Thank you for your attention to this matter.

Very truly yours,

Heather Barrett

Heather Barrett
Senior Purchasing Manager
Electronics Commodity Purchasing

Cc: Barbara Bac, Felicia Somogyi, Paul Roe

Tyco Electronics

Tyco Electronics Corporation
3800 Reidsville Road
Winston-Salem, NC USA 27101-2166

336-727-5309 tel
www.tycoelectronics.com

February 10, 2009

Heather Barrett, Senior Purchasing Manager
Electronics Commodity Purchasing
Visteon Corporation
One Village CenterVan Buren Township, MI 48111

Re: Payment Terms

Dear Ms. Barrett:

I am writing in response to your letter we received on February 5, as well as to recap certain recent communications.

Contrary to Visteon's assertions, Tyco Electronics ("TE") has reasonable grounds for insecurity of receiving payment. Under the Uniform Commercial Code, unless Visteon provides TE with adequate assurances of payment, TE may, among other remedies, suspend its performance.

Visteon's current payment status and cash position do not give TE adequate assurance of Visteon's ability to make payments in the future, particularly given the continued deterioration of the automotive industry. TE has reached this conclusion based on an analysis of Visteon's financial statements, as well as other available information, and has taken this action to reduce its financial risk associated with extension of credit. Recent news continues to be negative concerning Visteon's financial status and reinforces TE's view. In addition to matters addressed in TE's January 29 letter, recent press reports have indicated that S&P recently cut Visteon's credit rating to "CCC", with a negative outlook; Ford will not provide aid to Visteon; and Visteon has continued to draw down it's revolving credit facility.

TE remains willing to sell products to Visteon, but only if TE is adequately assured that it will receive payment. Therefore, TE will continue to require payment terms of "Net Immediate" as set forth in the January 29 letter. Under "Net Immediate" terms, TE will require payment within two days of delivery to Visteon. To administer these terms, we will assume three days for transit and, therefore, payment will be due five days after the shipment/invoice date.

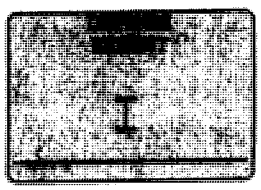
As previously stated, TE will not accept new releases or firming orders until it has received such adequate assurances, which are to be in the form of revised purchase orders confirming the new payment terms. In the alternate, you may provide a letter expressly agreeing to these payment terms.

To clarify another point, no early payment discount will apply to these terms.

We look forward to Visteon's confirmation of "Net Immediate" credit terms.

Sincerely,

Heidi Sanfilippo
Controller GAD, North America



Barbara Bac
Global Purchasing Director - Electronics

Visteon Corporation
One Village Center
Van Buren Twp., MI 48111
Phone: 734.710.2253
bbac@visteon.com

February 10, 2009

Ms. Heidi Sanfilippo
Controller
Tyco Electronics Corporation
MS 079-031
Winston-Salem, NC 27101

Re: Tyco's Breach of Contract – Immediate Action Required

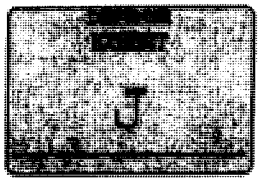
Dear Ms. Sanfilippo:

I am writing in connection with your letter dated January 29, 2009, which again purports to invoke Section 2-609 of the Uniform Commercial Code to excuse Tyco Electronics ("Tyco") open breach of its contractual agreements with Visteon Corporation as well as its agreements with Visteon's subsidiaries that purchase parts directly from Tyco (together "Visteon"). I am informed that Tyco has carried through on its threats to interrupt the supply of parts and has demanded that Visteon pull forward all outstanding payables and implement cash in "Net Immediate" terms on all future shipments.

Over the last few weeks, Visteon representatives have repeatedly provided you with written and verbal assurances concerning Visteon's ability and willingness to meet its ongoing contractual obligations in response to your requests. Unfortunately, your most recent letter completely dismisses these discussions as well as Visteon's good faith attempts to share information and work with Tyco in order to address the concerns that you have raised.

Pursuant to various purchase orders issued by Visteon (the "Purchase Orders"), Tyco is obligated to manufacture and timely supply certain component parts ("Component Parts") to Visteon and/or the Visteon legal entity identified as the "Buyer" on the Purchase Orders in accordance with Visteon's releases. As you know, each Purchase Order is a binding and enforceable contract that is governed exclusively by Visteon's Global Terms for Production Parts and Non-Production Goods and Services and under which Tyco expressly agreed that "[t]ime and quantity are of the essence" for delivery of the Component Parts. As a result, Tyco is required to deliver and does not have any right to unilaterally terminate or delay delivery of the Component Parts to Visteon. Tyco's interruption of the timely supply of Component Parts constitutes an open breach and repudiation of the Purchase Orders.

Because Visteon cannot timely obtain the Component Parts from another source, if Tyco continues to hold shipments, not only will Visteon's plants will be shut down, but due to the lack of supply, Visteon will not be able to supply its customers, and those customers'



manufacturing facilities may be forced to cease operation. In this event, Visteon will suffer catastrophic damages for which Tyco will be solely liable.

Please be informed that Visteon will aggressively move to protect its legal rights under the Purchase Orders, including seeking immediate injunctive relief. Visteon will direct its counsel to hold Tyco and its officers and owners (and any others involved in this reckless decision) personally responsible for all direct, indirect and consequential damages caused by Tyco's failure to perform. Please also understand that Visteon will exercise its contractual set off right against any and all outstanding payables to Tyco to the extent necessary to recoup damages or losses Visteon suffers in the event of a supply disruption.

Please ask your legal counsel to contact Michael Sharnas, Assistant General Counsel, Visteon Corporation immediately at 734.710.5236. I would like to have our counsel coordinate directly with your in-house or outside counsel as we proceed towards litigation.

Thank you for your attention to this matter.

Very truly yours,

Barbara Bac

Barbara Bac

D R A F T

FOR DISCUSSION ONLY

AMENDMENTS TO UNIFORM

COMMERCIAL CODE ARTICLE 9

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

For Drafting Committee Meeting, February 6-8, 2009

WITHOUT PREFATORY NOTE

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

January 13, 2009

DRAFTING COMMITTEE ON AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in amending this Act consists of the following individuals:

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AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9

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AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9

[Agenda Item III.A.]

SECTION 9-607. COLLECTION AND ENFORCEMENT BY SECURED PARTY.

(a) **[Collection and enforcement generally.]** If so agreed, and in any event after default, a secured party:

* * *

(3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

* * *

(b) **[Nonjudicial enforcement of mortgage.]** If necessary to enable a secured party to exercise under subsection (a)(3) the right of a debtor to enforce a mortgage nonjudicially,

the secured party may record in the office in which a record of the mortgage is recorded:

(1) a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) the secured party's sworn affidavit in recordable form stating that:

(A) a default has occurred with respect to the obligation secured by the mortgage [and assigned to the secured party]; and

(B) the secured party is entitled to enforce the mortgage nonjudicially.

Reporter's Note

1. The amendment to paragraph (b)(2)(A) is for clarification only; it does not reflect a change in meaning. Accordingly, the amendment should apply to all transactions governed by Article 9, including those that were entered into before the effective date of the amendment.

2. Subsection (a) is left unamended. There appears to be no need to clarify that the phrase "after default" refers to a default with respect to the obligations secured by the security interest in question. The phrase appears frequently in Part 6, see, e.g., Sections 9-609(a), 9-610(a), 9-612(b), 9-616(c)(1)(A), 9-617(a), 9-620(c), 9-624(a), and qualifying in subsection (a) might suggest that the phrase is intended to have a different meaning there from the meaning elsewhere.

[Agenda Item III.B.]

SECTION 9-602. WAIVER AND VARIANCE OF RIGHTS AND DUTIES. Except as otherwise provided in Section 9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

* * *

(7) Sections 9-610(b), 9-611, 9-613, and 9-614, which deal with disposition of collateral;

* * *

(10) Sections 9-620, 9-621, and 9-622, which deal with acceptance of collateral in satisfaction of obligation;

* * *

Official Comment

1. **Source.** Former Section 9-501(3).

2. **Waiver: In General.** Section 1-102(3) addresses which provisions of the UCC are mandatory and which may be varied by agreement. With exceptions relating to good faith, diligence, reasonableness, and care, immediate parties, as between themselves, may vary its provisions by agreement. However, in the context of rights and duties after default, our legal

system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. As stated in former Section 9-501, Comment 4, "no mortgage clause has ever been allowed to clog the equity of redemption." The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense. This section, like former Section 9-501(3), codifies this long-standing and deeply rooted attitude. The specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions that are not specified in this section are subject to the general rules in Section 1-102(3).

3. **Nonwaivable Rights and Duties.** This section revises former Section 9-501(3) by restricting the ability to waive or modify additional specified rights and duties: (i) duties under Section 9-207(b)(4)(C), which deals with the use and operation of consumer goods, (ii) the right to a response to a request for an accounting, concerning a list of collateral, or concerning a statement of account (Section 9-210), (iii) the duty to collect collateral in a commercially reasonable manner (Section 9-607), (iv) the implicit duty to refrain from a breach of the peace in taking possession of collateral under Section 9-609, (v) the duty to apply noncash proceeds of collection or disposition in a commercially reasonable manner (Sections 9-608 and 9-615), (vi) the right to a special method of calculating a surplus or deficiency in certain dispositions to a secured party, a person related to secured party, or a secondary obligor (Section 9-615), (vii) the duty to give an explanation of the calculation of a surplus or deficiency (Section 9-616), (viii) the right to limitations on the effectiveness of certain waivers (Section 9-624), and (ix) the right to hold a secured party liable for failure to comply with this Article (Sections 9-625 and 9-626). For clarity and consistency, this Article uses the term "waive or vary" instead of "renounc[e] or modify[]," which appeared in former Section 9-504(3).

This section provides generally that the specified rights and duties "may not be waived or varied." However, it does not restrict the ability of parties to agree to settle, compromise, or renounce claims for past conduct that may have constituted a violation or breach of those rights and duties, even if the settlement involves an express "waiver."

Section 9-610(c) limits the circumstances under which a secured party may purchase at its own private disposition. Transactions of this kind are equivalent to "strict foreclosures" and are governed by Sections 9-620, 9-621, and 9-622. With the exception of Section 9-620(e), the provisions of these sections cannot be waived by the debtor or a secondary obligor. See Section 9-624(b).

4. **Waiver by Debtors and Obligors.** The restrictions on waiver contained in this section apply to obligors as well as debtors. This resolves a question under former Article 9 as to whether secondary obligors, assuming that they were "debtors" for purposes of former Part 5, were permitted to waive, under the law of suretyship, rights and duties under that Part.

5. **Certain Post-Default Waivers.** Section 9-624 permits post-default waivers in limited circumstances. These waivers must be made in agreements that are authenticated. Under Section 1-201, an "'agreement' means the bargain of the parties in fact." In considering waivers

under Section 9-624 and analogous agreements in other contexts, courts should carefully scrutinize putative agreements that appear in records that also address many additional or unrelated matters.

SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT.

* * *

(c) **[Purchase by secured party.]** A secured party may purchase collateral:

(1) at a public disposition; or

(2) at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

Official Comment

* * *

7. **Public vs. Private Dispositions.** This Part maintains two distinctions between "public" and other dispositions: (i) the secured party may buy at the former, but normally not at the latter (Section 9-610(c)), and (ii) the debtor is entitled to notification of "the time and place of a public disposition" and notification of "the time after which" a private disposition or other intended disposition is to be made (Section 9-613(1)(E)). It does not retain the distinction under former Section 9-504(4), under which transferees in a noncomplying public disposition could lose protection more easily than transferees in other noncomplying dispositions. Instead, Section 9-617(b) adopts a unitary standard. Although the term is not defined, as used in this Article, a "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

A secured party's purchase of collateral at its own private disposition is equivalent to a "strict foreclosure" and is governed by Sections 9-620, 9-621, and 9-622. With the exception of Section 9-620(e), the provisions of these sections cannot be waived by the debtor or a secondary obligor. See Section 9-624(b).

* * *

SECTION 9-624. WAIVER.

(a) **[Waiver of disposition notification.]** A debtor or secondary obligor may waive the right to notification of disposition of collateral under Section 9-611 only by an agreement to that effect entered into and authenticated after default.

(b) **[Waiver of mandatory disposition.]** A debtor may waive the right to require disposition of collateral under Section 9-620(e) only by an agreement to that effect entered into and authenticated after default.

(c) **[Waiver of redemption right.]** Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under Section 9-623 only by an agreement to that effect entered into and authenticated after default.

Official Comment

1. **Source.** Former Sections 9-504(3), 9-505, 9-506.

2. **Waiver.** This section is a limited exception to Section 9-602, which generally prohibits waiver by debtors and obligors. It makes no provision for waiver of the rule prohibiting a secured party from buying at its own private disposition. Transactions of this kind are equivalent to "strict foreclosures" and are governed by Sections 9-620, 9-621, and 9-622.

[Agenda Item III.C.]

SECTION 9-625. REMEDIES FOR SECURED PARTY'S FAILURE TO COMPLY WITH ARTICLE.

* * *

(c) **[Persons entitled to recover damages; statutory damages ~~in consumer-goods transaction~~ <u>if collateral is consumer goods</u>.]** Except as otherwise provided in Section 9-628:

(1) a person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) for

its loss; and

(2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price.

* * *

[Agenda Item III.D.]

SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT.

* * *

(b) **[Commercially reasonable disposition.]** Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

* * *

Official Comment

* * *

2. **Commercially Reasonable Dispositions.** Subsection (a) follows former Section 9-504 by permitting a secured party to dispose of collateral in a commercially reasonable manner following a default. Although subsection (b) permits both public and private dispositions, including dispositions conducted over the Internet, "every aspect of a disposition . . . must be commercially reasonable." This section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned. Subsection (a) does not restrict dispositions to sales; collateral may be sold, leased, licensed, or otherwise disposed. Section 9-627 provides guidance for determining the circumstances under

which a disposition is "commercially reasonable."

* * *

SECTION 9-613. CONTENTS AND FORM OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL: GENERAL. Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

(A) describes the debtor and the secured party;

(B) describes the collateral that is the subject of the intended disposition;

(C) states the method of intended disposition;

(D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) states the time and place of a public disposition or the time after which any other disposition is to be made.

* * *

Official Comment

* * *

2. **Contents of Notification.** To comply with the "reasonable authenticated notification" requirement of Section 9-611(b), the contents of a notification must be reasonable. Except in a consumer-goods transaction, the contents of a notification that includes the information set forth in paragraph (1) are sufficient as a matter of law, unless the parties agree otherwise. (The reference to "time" of disposition means here, as it did in former Section 9-504(3), not only the hour of the day but also the date.) Although a secured party may choose to include additional information concerning the transaction or the debtor's rights and obligations, no additional information is required unless the parties agree otherwise. A notification that lacks some of the information set forth in paragraph (1) nevertheless may be sufficient if found to be reasonable by the trier of fact, under paragraph (2). A properly completed sample form of notification in

paragraph (5) or in Section 9-614(a)(3) is an example of a notification that would contain the information set forth in paragraph (1). Under paragraph (4), however, no particular phrasing of the notification is required.

A notification of a public disposition by auction conducted over the Internet satisfies paragraph (1)(E) if it states the date and time of the scheduled beginning and end of the auction and the Uniform Resource Locator (URL) or other Internet address where information about the collateral may be obtained and bids may be placed.

[Agenda Item IV.]

ARTICLE 11 – EFFECTIVE DATE AND TRANSITION PROVISIONS

* * *

Legislative Note: *Article 11 affects transactions that were entered into before the effective date of the 1972 amendments to Article 9, which were supplanted by the version of Article 9 that has been in effect in all States since at least January 1, 2002. Inasmuch as very few, if any, of these transactions remain outstanding, States may wish to repeal Article 11.*

[Agenda Item V.]

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

(a) **[Article 9 definitions.]** In this article:

* * *

(4) "Accounting", except as used in "accounting for", means:

(A) in a consumer transaction, a record:

~~(A)~~(i) authenticated by a secured party;

~~(B)~~(ii) indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

~~(C)~~(iii) identifying the components of the obligations in reasonable detail; and

(B) in a transaction other than consumer transactions, a record:

(i) authenticated by a secured party;

(ii) indicating as of the date of the record, the amount that, if received by the secured party, would entitle the debtor to the filing of a termination statement under Section 9-513(c); and

(C) identifying the components of the obligations in reasonable detail.

* * *

SECTION 9-210. REQUEST FOR ACCOUNTING; REQUEST REGARDING LIST OF COLLATERAL OR STATEMENT OF ACCOUNT.

(a) **[Definitions.]** In this section:

(1) "Request" means a record of a type described in paragraph (2), (3), or (4).

(2) "Request for an accounting" means a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.

* * *

(b) **[Duty to respond to requests.]** Subject to subsections (c), (d), (e), and (f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within 14 days after receipt:

(1) in the case of a request for an accounting, by authenticating and sending to the debtor or to a person designated by the debtor in a request for an accounting, an accounting; and

(2) in the case of a request regarding a list of collateral or a request regarding a

statement of account, by authenticating and sending to the debtor an approval or correction.

* * *

(e) **[Request for accounting or regarding statement of account; no interest in obligation claimed.]** A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record:

(1) disclaiming any interest in the obligations; and

(2) if known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) **[Charges for responses.]** A debtor is entitled without charge to one response to a request under this section during any six-month period. The secured party may require payment of a charge not exceeding $25 for each additional response.

Reporter's Note

The foregoing is based on a proposal submitted by Robert Zadek.

[Agenda Item VI.]

SECTION 9-317. INTERESTS THAT TAKE PRIORITY OVER OR TAKE FREE OF SECURITY INTEREST OR AGRICULTURAL LIEN.

* * *

(b) **[Buyers that receive delivery.]** Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a

security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) **[Lessees that receive delivery.]** Except as otherwise provided in subsection (e), a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) **[Licensees and buyers of certain collateral.]** A licensee of a general intangible or a buyer, other than a secured party, of ~~accounts, electronic chattel paper, general intangibles, or investment property~~ collateral other than tangible chattel paper, documents, goods, instruments, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

* * *

Official Comment

* * *

6. **Purchasers Other Than Secured Parties.** Subsections (b), (c), and (d) afford priority over an unperfected security interest to certain purchasers (other than secured parties) of collateral. They derive from former Sections 9-301(1)(c), 2A-307(2), and 9-301(d). Former Section 9-301(1)(c) and (1)(d) provided that unperfected security interests are "subordinate" to the rights of certain purchasers. But, as former Comment 9 suggested, the practical effect of subordination in this context is that the purchaser takes free of the security interest. To avoid any possible misinterpretation, subsections (b) and (d) of this section use the phrase "takes free."

Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (tangible chattel paper, documents, instruments, and security certificates). To obtain priority, a buyer must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection. Even if the buyer gave value without knowledge and before perfection, the buyer would take subject to the security interest if perfection occurred before physical delivery of the

collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all security interests created by the lessor, even if perfected. See Section 9-321.

Normally, there will be no question when a buyer of chattel paper, documents, instruments, or security certificates "receives delivery" of the property. See Section 1-201 (defining "delivery"). However, sometimes a buyer or lessee of goods, such as complex machinery, takes delivery of the goods in stages and completes assembly at its own location. Under those circumstances, the buyer or lessee "receives delivery" within the meaning of subsections (b) and (c) when, after an inspection of the portion of the goods remaining with the seller or lessor, it would be apparent to a potential lender to the seller or lessor that another person might have an interest in the goods.

The rule of subsection (b) obviously is not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. Therefore, with respect to such intangibles (including accounts, electronic chattel paper, general intangibles, and investment property other than certificated securities), subsection (d) gives priority to any buyer who gives value without knowledge, and before perfection, of the security interest. A licensee of a general intangible takes free of an unperfected security interest in the general intangible under the same circumstances. Note that a licensee of a general intangible in ordinary course of business takes rights under a nonexclusive license free of security interests created by the licensor, even if perfected. See Section 9-321.

Unless Section 9-109 excludes the transaction from this Article, a buyer of accounts, chattel paper, payment intangibles, or promissory notes is a "secured party" (defined in Section 9-102), and subsections (b) and (d) do not determine priority of the security interest created by the sale. Rather, the priority rules generally applicable to competing security interests apply. See Section 9-322.

* * *

Reporter's Note

The application of subsection (d) is expanded to cover buyers of all types of collateral that are not capable of possession. Although in all likelihood the amendment reflects the intention of the Article 9 Drafting Committee, it appears sufficiently substantive so as to constitute a change in the rule rather than a clarification. If so, the amendment would be inapplicable to transactions entered into before its effective date. The Joint Review Committee may wish to express a view as to whether the result under the amendment might be reached today under Section 1-103(a) (the UCC "must be liberally construed and applied to promote its underlying purposes and policies").

[Agenda Item VII.A.]

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

(a) **[Article 9 definitions.]** In this article:

* * *

(7) "Authenticate" means:

(A) to sign; or

(B) ~~to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.~~ with present intent to authenticate or adopt a record, to attach to or logically associate with the record an electronic sound, symbol, or process

Official Comment

9. **Definitions Relating to Medium Neutrality.**

* * *

b. **"Authenticate"; "Communicate"; "Send."** The terms "authenticate" and "authenticated" generally replace "sign" and "signed." "Authenticated" replaces and broadens the definition of "signed," in Section 1-201, to encompass authentication of all records, not just writings. (References to authentication of, e.g., an agreement, demand, or notification mean, of course, authentication of a record containing an agreement, demand, or notification.) The terms "communicate" and "send" also contemplate the possibility of communication by nonwritten media. These definitions include the act of transmitting both tangible and intangible records. The definition of "send" replaces, for purposes of this Article, the corresponding term in Section 1-201. The reference to "usual means of communication" in that definition contemplates an inquiry into the appropriateness of the method of transmission used in the particular circumstances involved.

Reporter's Note

The definition has been conformed to the definition of "sign" in Section 7-102(a)(11).

[Agenda Item VII.B.]

SECTION 9-105. CONTROL OF ELECTRONIC CHATTEL PAPER.

(a) **[General rule: control of electronic chattel paper.]** A secured party has control of electronic chattel paper if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was [issued or] transferred [assigned].

(b) **[Specific facts giving control.]** A system satisfies subsection (a), and a secured party has control of electronic chattel paper, if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

[Paragraph (b)(2)—Alternative A]

(2) the authoritative copy identifies the secured party as the assignee of the record or records;

[Paragraph (b)(2)—Alternative B]

(2) the authoritative copy identifies the secured party as: ~~the assignee of the record or records~~

(A) the person to which the record or records were issued; or

(B) if the authoritative copy indicates that the record or records have been transferred, the person to which the record or records were most recently [transferred] [assigned];

[Paragraph (b)(2)—Alternative C]

(2) the authoritative copy identifies the secured party as ~~the assignee of the record or records~~ the person to which the record or records were most recently [transferred] [assigned];

[End of Alternatives]

(3) the authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) copies or ~~revisions~~ amendments that add or change an identified assignee of the authoritative copy can be made only with the [participation] [consent] of the secured party;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any ~~revision~~ amendment of the authoritative copy is readily identifiable as ~~an~~ authorized or unauthorized ~~revision~~.

Reporter's Note

1. This Section has been revised to conform to Section 7-106, which defines control of an electronic document of title. Section 7-106 differs from Section 9-105 in three substantive ways.

First, whereas Section 9-105 contemplates that a person (secured party) having control of electronic chattel paper is an assignee of chattel paper, Section 7-106 (which is not limited to secured parties) expands the control concept to include a person to which an electronic document of title is issued. Pending the Committee's determination whether Section 9-105 should likewise apply to a secured party to which electronic chattel paper has been issued, paragraphs (a) and (b)(2)(B) of the draft present bracketed alternatives. Also bracketed is the choice of using language of "transfer" or "assignment."

Second, Section 9-105(4) requires the "participation" of the secured party. Section 7-106(b)(4) replaces "participation" with "consent." Official Comment 4 to Section 9-105(4) suggests that these two words are not synonyms: "[P]aragraph (4) contemplates that control requires that it be a physical impossibility (or sufficiently unlikely or implausible so as to approach practical impossibility) to add or change an identified assignee without the participation of the secured party (or its authorized representative). It would not be enough for the assignor merely to agree that it will not change the identified assignee without the assignee-secured party's consent."

The Joint Review Committee should consider whether either of these substantive changes is appropriate. Implicit in the Joint Review Committee's decision to conform Section 9-105 to Section 7-106 is its approval of the third substantive change: Satisfaction of the requirements currently enumerated in Section 9-105 would become sufficient, but not necessary, to establish control. Control may arise under the general standard (new subsection (a)) even where the specific requirements are not satisfied.

2. The change from current Section 9-105 to the revised Section *ipso facto* may result in a secured party's achieving control of electronic chattel paper. In these circumstances, control would date from the effective date of the revision and would not relate back.

[Agenda Item VIII.]

SECTION 9-316. ~~CONTINUED PERFECTION OF SECURITY INTEREST FOLLOWING~~ EFFECT OF CHANGE IN GOVERNING LAW.

* * *

(h) **[Effect on filed financing statement of change in governing law.]** A financing statement filed pursuant to the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) is effective to perfect a security interest in collateral to which a security interest attaches within four months after the debtor changes its location to another jurisdiction if the financing statement otherwise would have been effective to perfect a security interest in the collateral. If a security interest that is perfected by a financing statement that is effective under the preceding sentence becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) or the expiration of the four-month period, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

Reporter's Note

1. Where a debtor changes its location, the law governing perfection generally changes also. See Section 9-301(1). Current Section 9-316 addresses security interests that are perfected (i.e., that have attached and as to which any required perfection step has been taken) before the debtor changes its location. It does not apply to security interests that have not attached before the debtor's location changes. Suppose, for example, that Debtor is an individual who resides in Pennsylvania. Lender perfects a security interest in Debtor's inventory by filing in Pennsylvania. Then, without Lender's knowledge, Debtor's principal residence is relocated to New Jersey. Under Section 9-316, Lender's security interest in inventory on hand as of the relocation date remains perfected for four months thereafter (or, if earlier, until perfection would have ceased under Pennsylvania law). However, although Lender's security interest attaches to inventory that Debtor acquires after relocating to New Jersey, the security interest is unperfected because Lender has not filed in New Jersey.

New subsection (h) would change the result. In the example, Lender's filing in Pennsylvania would be effective to perfect a security interest in inventory acquired by Debtor within the four months after Debtor relocates (assuming that the financing statement would not have become ineffective earlier). The security interest will remain continuously perfected if, before the expiration of the four-month period (and before the financing statement would have become ineffective), the security interest is perfected under the law of New Jersey. Otherwise, the security interest will become unperfected at the end of the four-month period (or, if earlier, when perfection would have ceased) and will be deemed never to have been perfected.

Under current law, a competing secured party generally can rely on the public record in New Jersey to determine its priority as to collateral acquired by Debtor post-relocation. However, under new subsection (h), the priority of Lender's security interest might be based on its Pennsylvania filing. This possibility imposes a new risk on competing creditors.

2. Although new subsection (h) is likely to be most useful to creditors having a security interest in inventory and receivables, it would apply to all kinds of collateral.

3. The addition of subsection (h) will require explanatory and other changes to the Official Comments. The revised Comments will also explain the application of this subsection to entities that convert from one organizational form to another.

[Agenda Item IX.A.]

SECTION 9-326. PRIORITY OF SECURITY INTERESTS CREATED BY NEW DEBTOR.

* * *

Official Comment

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2. **Subordination of Security Interests Created by New Debtor.** This section addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor.

Subsection (a) subordinates the original debtor's secured party's security interest perfected against the new debtor solely under Section 9-508. The security interest is subordinated to security interests in the same collateral perfected by another method, e.g., by filing against the new debtor. As used in this section, "a filed financing statement that is effective solely under Section 9-508" refers to a financing statement filed against the *original debtor* that ~~continues to be~~ is effective under Section 9-508 to perfect a security interest in the collateral in question. It does not encompass a new initial financing statement providing the name of the new debtor, even if the initial financing statement is filed to maintain the effectiveness of a financing statement under the circumstances described in Section 9-508(b). Nor does it encompass a financing statement filed against the original debtor which remains effective against collateral transferred by the original debtor to the new debtor. See Section 9-508(c). Concerning priority contests involving transferred collateral, see Sections 9-325 and 9-507.

[Agenda Item IX.B.]

SECTION 9-316. ~~CONTINUED PERFECTION OF SECURITY INTEREST FOLLOWING~~ EFFECT OF CHANGE IN GOVERNING LAW.

* * *

(i) **[Effect of change in governing law on financing statement filed against original debtor.]** If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) and the new debtor is located in another jurisdiction, the following rules apply:

(1) The financing statement is effective to perfect a security interest in collateral

in which the new debtor has or acquires rights before or within four months after the new debtor becomes bound under Section 9-203(d), if the financing statement otherwise would have been effective to perfect a security interest in the collateral.

(2) A security interest that is perfected by the financing statement and which becomes perfected under the law of the other jurisdiction before the earlier of (i) the expiration of the four-month period or (ii) the time the financing statement would have become ineffective under the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) remains perfected thereafter.

(3) A security interest that is perfected by the financing statement but which does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

Reporter's Note

1. New subsection (i) is similar to new subsection (h). Whereas the latter addresses a given debtor's change of location, the former addresses situations in which a successor to the debtor becomes bound as debtor by the original debtor's security agreement. See Section 9-203(d).

Consider the difficulty faced by Lender under the facts of Official Comment 5 to Section 9-316:

> Debtor is a Pennsylvania corporation. Debtor grants to Lender a security interest in Debtor's existing and after-acquired inventory. Lender perfects by filing in Pennsylvania. Debtor's shareholders decide to "reincorporate" in Delaware. They form a Delaware corporation (Newcorp) into which they merge Debtor. By virtue of the merger, Newcorp becomes bound by Debtor's security agreement. See Section 9-203. After the merger, Newcorp acquires inventory to which Lender's security interest attaches. Because Newcorp is located in Delaware, Delaware law governs perfection of a security interest in Newcorp's inventory. See Sections 9-301, 9-307.

Delaware's current Section 9-316(a) applies to the pre-merger collateral that was

transferred from Debtor to Newcorp, and in which Lender held a security interest perfected under Pennsylvania law. Under this section, Lender's security interest in the transferred collateral remains perfected for one year after the merger (assuming that perfection would not have ceased earlier under Pennsylvania law). Because Lender's financing statement was filed in Pennsylvania and not Delaware, current Section 9-316(a) would have no application to inventory acquired by Newcorp, a Delaware corporation, after the merger. For the same reason, Lender's security interest in Newcorp's post-merger inventory would be unperfected until Lender files against Newcorp in Delaware.

Under new subsection (i), however, the financing statement filed in Pennsylvania would be effective to perfect a security interest that attaches to the post-merger collateral. The new subsection would eliminate the risk that a change in Debtor's location would result in security interests in post-relocation collateral being unperfected until Lender discovers the relocation and files in Delaware. The perfection afforded by the Pennsylvania financing statement would end four months after the merger (reincorporation) unless Lender perfects under Delaware law within the four-month period (or, if earlier, before the financing statement would have become ineffective under Pennsylvania law).

2. In many cases, an original debtor (Debtor, a Pennsylvania corporation) will merge into a corporation (Survivor, a Delaware corporation) that has been operating before the merger. In these cases, subsection (i) would affect Lender's security interest not only in inventory acquired by Survivor after the merger but also in inventory held by Survivor at the time of the merger. Where Lender files against Debtor's inventory in Pennsylvania before the merger, amended Section 9-316 would yield the following results (assuming that the financing statement would not have become ineffective under Pennsylvania law):

a. *Transferred inventory.* Lender's perfected security interest in the inventory that Survivor acquired from Debtor would remain perfected for one year after the merger. See subsection (a). If Lender perfects under Delaware law within the year, then the security interest would remain perfected thereafter. See subsection (b).

b. *Survivor's pre-merger inventory.* Lender's security interest in collateral that Survivor had on hand at the time of the merger would attach and become perfected when Survivor becomes a new debtor. It would remain perfected for four months after Survivor becomes a new debtor. If Lender perfects under Delaware law within the four-month period, then the security interest would remain perfected thereafter. See subsection (i).

c. *Inventory acquired post-merger.* Lender's security interest in collateral that Survivor acquires within four months after Survivor becomes a new debtor would become perfected when Survivor acquires the collateral. If Lender perfects under Delaware law within the four-month period, then the security interest would remain perfected thereafter. See subsection (i).

3. The cases described in Note 2 also may give rise to a "double-debtor" problem, in which Lender and Survivor's secured parties hold competing security interests in the same inventory. Section 9-326 contains the priority rules addressing this problem. They have been amended to take account of new subsection (i).

4. Although new subsection (i) is likely to be most useful to creditors having a security interest in inventory and receivables, it would apply to all kinds of collateral.

5. The addition of subsection (i) will require explanatory and other changes to the Official Comments. The revised Comments will also explain the application of this subsection to entities that convert from one organizational form to another.

SECTION 9-326. PRIORITY OF SECURITY INTERESTS CREATED BY NEW DEBTOR.

(a) **[Subordination of security interest created by new debtor.]** Subject to subsection (b), a security interest created by a new debtor which is perfected by a filed financing statement that is effective solely under Section 9-508 or Sections 9-508 and 9-316(i) in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under Section 9-508 or Sections 9-508 and 9-316(i).

(b) **[Priority under other provisions; multiple original debtors.]** The other provisions of this part determine the priority among conflicting security interests in the same collateral perfected by filed financing statements that are effective solely under Section 9-508 or Sections 9-508 and 9-316(i). However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound.

Reporter's Note

Section 9-326 resolves the priority of conflicting security interests in situations like the following:

SP-D holds a security interest in the existing and after-acquired inventory of Debtor, a Pennsylvania corporation. In 2007 SP-D perfected its security interest by filing a financing statement against Debtor in Pennsylvania. SP-S holds a security interest in the existing and after-acquired inventory of Survivor, which also is a Pennsylvania corporation. In 2008 SP-S perfected its security interest by filing a financing statement against Survivor in Pennsylvania. In 2009 Debtor merges into Survivor.

Under current law, SP-D's security interest would attach to inventory that Survivor had on hand at the time of the merger or acquired after the merger. Section 9-508 makes SP-D's financing statement effective to perfect its security interest in this inventory, even though the financing statement was filed against Debtor. The first-to-file-or-perfect rule (Section 9-322(a)(1)) would award priority to SP-D. However, it is subject to Section 9-326, which awards priority to SP-S. Section 9-326 identifies the subordinated security interest as one that is "perfected by a filed financing statement that is effective solely under Section 9-508."

Suppose instead that Survivor is a Delaware corporation and that SP-S perfected by filing in Delaware. As in the previous example, SP-D's security interest would attach to inventory that Survivor had on hand at the time of the merger or acquired after the merger. Here, SP-D faces two problems: Not only does SP-D's financing statement name Debtor and not Survivor, but it also is filed where Debtor is located (Pennsylvania) and not where Survivor is located (Delaware). Section 9-508 solves the first problem for SP-D, but not the second. Thus, until SP-D files in Delaware, SP-D's security interest in inventory that Survivor had on hand at the time of the merger or acquired after the merger would be unperfected.

New subsection (i) would address this second problem by making SP-D's Pennsylvania filing effective with respect to inventory that Survivor had at the time of the merger and inventory that Survivor acquired within four months after the merger. To insure that the first-to-file-or-perfect rule subordinates a security interest like SP-D's, Section 9-326 would be amended to subordinate a security interest that is perfected by a financing statement that is "effective solely under Section 9-508 or Sections 9-508 and 9-316(i)."

SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.

(a) **[General priority rules.]** Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according

to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

* * *

(b) **[Time of perfection: proceeds and supporting obligations.]** For the purposes of subsection (a)(1):

(1) the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; ~~and~~

(2) the time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation; and

(3) the time of filing or perfection as to a security interest in collateral which remains perfected under Section 9-316(i)(2) is the time the security interest becomes perfected under the law of the other jurisdiction.

* * *

Reporter's Note

Consider this example:

> SP-D holds a security interest in the existing and after-acquired inventory of Debtor, a Pennsylvania corporation. In 2007 SP-D perfected its security interest by filing a financing statement against Debtor in Pennsylvania. SP-S holds a security interest in the existing and after-acquired inventory of Survivor, a Delaware corporation. In 2008 SP-S perfected its security interest by filing a financing statement against Survivor in Delaware. In 2009 Debtor merges into Survivor. Shortly after the merger, Survivor acquires additional inventory.

SP-S's security interest would attach to the post-merger inventory and would be perfected by SP-S's filing in Delaware. SP-D's security interest also would attach to the post-

merger inventory and, under new Section 9-316(i), would be a perfected security interest until four months after the merger. Because SP-D's security interest would be perfected by a financing statement that is "effective solely under . . . Sections 9-508 and 9-316(i)," Section 9-326(a) would subordinate SP-D's security interest to SP-S's.

Now suppose that SP-D files an initial financing statement against Survivor in Delaware before the expiration of the four-month period. Under new Section 9-316(i)(2), SP-D's security interest in the inventory that Survivor acquired post-merger would remain perfected after the period expires. SP-D's Delaware filing should not, however, elevate the priority of SP-D's subordinate security interest. SP-S was the first to file against Survivor; Debtor never had an interest in the collateral in question, which Survivor acquired independently of the merger. But once SP-D files against Survivor in Delaware, SP-D's security interest in this collateral no longer would be perfected by a financing statement that is "effective solely under . . . Sections 9-508 and 9-316(i)" and so no longer would be covered by the subordination rule in Section 9-326(a).

The amendments to Section 9-322(a) and (b) would preserve the subordination by dating SP-D's priority, for purposes of the first-to-file-or-perfect rule, from the time of its Delaware filing. The amendments would relieve SP-S, which was the first secured party to file against Survivor, from any need to check for subsequent filings by competing secured parties. (Note that the amendments would not affect the rule in Section 9-325(a), which governs the priority of security interests in inventory that Debtor transferred to Survivor in the merger.)

[Agenda Item X.]

[no draft]

[Agenda Item XI.]

SECTION 8-106. CONTROL.

* * *

(d) A purchaser has "control" of a security entitlement if:

(1) the purchaser becomes the entitlement holder; ~~or~~

(2) the securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) another person has control of the security entitlement on behalf of the

purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.

Official Comment

* * *

4. Subsection (d) specifies the means by which a purchaser can obtain control of a security entitlement. Three mechanisms are possible, analogous to those provided in subsection (c) for uncertificated securities. Under subsection (d)(1), a purchaser has control if it is the entitlement holder. This subsection would apply whether the purchaser holds through the same intermediary that the debtor used, or has the securities position transferred to its own intermediary. Subsection (d)(2) provides that a purchaser has control if the securities intermediary has agreed to act on entitlement orders originated by the purchaser if no further consent by the entitlement holder is required. Under subsection (d)(2), control may be achieved even though the original entitlement holder remains as the entitlement holder. Finally, a purchaser may obtain control under subsection (d)(3) if another person has control and the person acknowledges that it has control on the purchaser's behalf. Control under subsection (d)(3) parallels the delivery of certificated securities and uncertificated securities under Section 8-301. Of course, the acknowledging person cannot be the debtor.

SECTION 9-104. CONTROL OF DEPOSIT ACCOUNT.

(a) **[Requirements for control.]** A secured party has control of a deposit account if:

(1) the secured party is the bank with which the deposit account is maintained;

(2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or

(3) the secured party becomes the bank's customer with respect to the deposit account.

Official Comment

* * *

3. **Requirements for "Control."** This section derives from Section 8-106 of Revised Article 8, which defines "control" of securities and certain other investment property. Under subsection (a)(1), the bank with which the deposit account is maintained has control. The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor's deposit account is maintained may assert a claim against the deposit account.

Under subsection (a)(2), a secured party may obtain control by obtaining the bank's authenticated agreement that it will comply with the secured party's instructions without further consent by the debtor. The analogous provision in Section 8-106 does not require that the agreement be authenticated. An agreement to comply with the secured party's instructions suffices for "control" of a deposit account under this section even if the bank's agreement is subject to specified conditions, e.g., that the secured party's instructions are accompanied by a certification that the debtor is in default. (Of course, if the condition is the *debtor's* further consent, the statute explicitly provides that the agreement would *not* confer control.) See revised Section 8-106, Comment 7.

Under subsection (a)(3), a secured party may obtain control by becoming the bank's "customer," as defined in Section 4-104. As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-401(a), 4-403(a).

Subsection (a) contains no analogue to Section 8-106(d)(3), which provides that a purchaser has control of a security entitlement if another person has control of the security entitlement on behalf of the purchaser or if the other person, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser. However, inasmuch as subsection (a) does not displace the common law of agency, see Section 1-103(b), a secured party has control of a deposit account if its agent has control. Of course, the debtor cannot qualify as an agent for the secured party for purposes of the secured party's having control. Cf. Section 9-313, Comment 3.

* * *

[Agenda Item XII.A.]

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

(a) **[Article 9 definitions.]** In this article:

* * *

(10) "Certificate of title" means a certificate of title with respect to which a

statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

* * *

SECTION 9-311. PERFECTION OF SECURITY INTERESTS IN PROPERTY SUBJECT TO CERTAIN STATUTES, REGULATIONS, AND TREATIES.

(a) **[Security interest subject to other law.]** Except as otherwise provided in subsection (d), the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt Section 9-310(a);

(2) [list any certificate-of-title statute covering automobiles, trailers, mobile homes, boats, farm tractors, or the like, which provides for a security interest to be indicated on the certificate as a condition or result of perfection, and any non-Uniform Commercial Code central filing statute]; or

(3) a certificate-of-title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) **[Compliance with other law.]** Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as

otherwise provided in subsection (d) and Sections 9-313 and 9-316(d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

* * *

Reporter's Note

The underlying premise of Section 9-311(b), which defers to the perfection requirements of certificate-of-title statutes, is that notation of a security interest on the certificate of title affords notice of the security interest to third parties. Accordingly, the definition of "certificate of title" in Section 9-102(a)(10) covers only those certificates "with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral."

Some certificate-of-title statutes arguably permit or require that security interests in goods subject to the statute be noted on the certificate (or that an application for a certificate provide information concerning security interests in the goods) but do not specify the requirements "for obtaining priority over the rights of a lien creditor." To date, the only reported case on the issue appears to be *In re Harper*, 516 F.2d 1180 (10th Cir. 2008). In *Harper*, a security interest in the debtor's vehicle was noted on a certificate of title issued by by the Muscogee (Creek) Nation. The Nation's certificate-of-title requirements state that "[n]otice of liens against said vehicle shall be placed upon said title upon request of the lending institution." The court held, however, that the certificate in question was not a "certificate of title" as defined in Article 9:

> The language contained in the title for identifying a first and second lienholder cannot substitute for some Nation law concerning the legal effect of such identification. The Nation statute allowing for lien notation at the request of a lending institution . . . never mentions the word ''perfection'' let alone indicates that lien notation is required to perfect a security interest in a vehicle. Nor is there any indication of whether perfection occurs upon application for a title or when the application is issued noting the lien.

Harper, 510 F.2d at 1187-88.

The Joint Review Committee may wish to consider whether Article 9 should be revised so that, where a certificate-of-title statue (1) requires (or permits) a security interest in goods

subject to the statute to be noted on the certificate (or that an application for a certificate provide information concerning security interests in the goods) but (2) does not specify the requirements for obtaining priority over the rights of a lien creditor, a security interest is perfected by notation (or by submission of an application providing the information).

[Agenda Item XII.B.]

SECTION 9-316. CONTINUED PERFECTION OF SECURITY INTEREST FOLLOWING CHANGE IN GOVERNING LAW.

(a) **[General rule: Effect on perfection of change in governing law.]** A security interest perfected pursuant to the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) remains perfected until the earliest of:

(1) the time perfection would have ceased under the law of that jurisdiction;

(2) the expiration of four months after a change of the debtor's location to another jurisdiction; or

(3) the expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

* * *

(d) **[Goods covered by certificate of title from this state.]** Except as otherwise provided in subsection (e), a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this State remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) **[When subsection (d) security interest becomes unperfected against purchasers.]** A security interest described in subsection (d) becomes unperfected as against a purchaser of the

goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under Section 9-311(b) or 9-313 are not satisfied before the earlier of:

(1) the time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this State; or

(2) the expiration of four months after the goods had become so covered.

* * *

Official Comment

* * *

5. **Goods Covered by Certificate of Title.** Subsections (d) and (e) address continued perfection of a security interest in goods covered by a certificate of title. The following examples explain the operation of those subsections.

Example 8: Debtor's automobile is covered by a certificate of title issued by Illinois. Lender perfects a security interest in the automobile by complying with Illinois' certificate-of-title statute. Thereafter, Debtor applies for a certificate of title in Indiana. Six months thereafter, Creditor acquires a judicial lien on the automobile. Under Section 9-303(b), Illinois law ceases to govern perfection; rather, once Debtor delivers the application and applicable fee to the appropriate Indiana authority, Indiana law governs. Nevertheless, under Indiana's Section 9-316(d), Lender's security interest remains perfected until it would become unperfected under Illinois law had no certificate of title been issued by Indiana. (For example, Illinois' certificate-of-title statute may provide that the surrender of an Illinois certificate of title in connection with the issuance of a certificate of title by another jurisdiction causes a security interest noted thereon to become unperfected.) If Lender's security interest remains perfected, it is senior to Creditor's judicial lien.

Example 9: Under the facts in Example 8, five months after Debtor applies for an Indiana certificate of title, Debtor sells the automobile to Buyer. Under subsection (e)(2), because Lender did not reperfect within the four months after the goods became covered by the Indiana certificate of title, Lender's security interest is deemed never to have been perfected against Buyer. Under Section 9-317(b), Buyer is likely to take free of the security interest. Lender could have protected itself by perfecting its security interest

either under Indiana's certificate-of-title statute, see Section 9-311, or, if it had a right to do so under an agreement or Section 9-609, by taking possession of the automobile. See Section 9-313(b).

The results in Examples 8 and 9 do not depend on the fact that the original perfection was achieved by notation on a certificate of title. Subsection (d) applies regardless of the method by which a security interest is perfected under the law of another jurisdiction when the goods became covered by a certificate of title from this State.

Example 9A. Debtor, who lives in Mississippi, owns a recreational boat that is subject to Lender's security interest. Mississippi's certificate-of-title laws do not cover watercraft, and so Lender perfects by filing a financing statement in Mississippi. Debtor wishes to use the boat exclusively on a lake in Alabama, but Alabama law prohibits Debtor from doing so without first applying for an Alabama certificate of title. When Debtor delivers an application for an Alabama certificate to the appropriate authority and pays the applicable fee, the boat becomes covered by an Alabama certificate of title and Alabama law governs perfection, the effect of perfection or nonperfection, and priority of the security interest. See Section 9-303. Under Alabama's Section 9-316(d), Lender's security interest remains perfected until it would have become unperfected under Mississippi law had the boat not become covered by the Alabama certificate of title (e.g., because the effectiveness of the filed financing statement lapses). However, as against a purchaser of the boat for value, Lender's security interest would become unperfected and would be deemed never to have been perfected if Lender fails to reperfect under Alabama's Section 9-311(b) or 9-313 in a timely manner. See subsection (e).

Section 9-337 affords protection to a limited class of persons buying or acquiring a security interest in the goods while a security interest is perfected under the law of another jurisdiction but after this State has issued a clean certificate of title.

* * *

Reporter's Note

New Example 9A clarifies the operation of Section 9-316(d). Consider the following variation:

Debtor, who lives in Mississippi, owns a recreational boat that is subject to Lender's security interest. Mississippi's certificate-of-title laws do not cover watercraft, and so Lender perfects by filing a financing statement in Mississippi. After the filing, Debtor moves to Alabama and applies for an Alabama certificate of title for the boat.

One might argue that the analysis of Example 9A would apply equally to the variation, i.e., that Alabama's Section 9-316(d) would determine the outcome. On the other hand, one might argue that Alabama's Section 9-316(d) would not apply because, "when the goods

[became] covered by a certificate of title from this State," (i.e., Alabama), Lender's security interest in the boat was not perfected "under the law of another jurisdiction." Rather, once Debtor moved to Alabama and Alabama law began to govern perfection of the security interest, the security interest was perfected under the law of Alabama, i.e., under Alabama's Section 9-316(a). The Joint Review Committee may wish to consider whether the existing statute clearly supports only one of the suggested results and, if the statute does not, whether and how the issue should be expressly resolved.

[Agenda Item XIII.]

[Section 9-406, paragraphs (d) & (e)—Alternatives A & B]

SECTION 9-406. DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; RESTRICTIONS ON ASSIGNMENT OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES, AND PROMISSORY NOTES INEFFECTIVE.

* * *

(d) **[Term restricting assignment generally ineffective.]** Except as otherwise provided in subsection (e) and Sections 2A-303 and 9-407, and subject to subsection (h), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

(1) prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment,

claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

[Alternative A]

(e) **[Inapplicability of subsection (d) to certain sales.]** Subsection (d) does not apply to the sale, including a sale pursuant to a disposition (Section 9-610), of a payment intangible or promissory note.

[Alternative B]

(e) **[Inapplicability of subsection (d) to certain sales.]** Subsection (d) does not apply to the sale, other than a sale pursuant to a disposition (Section 9-610), of a payment intangible or promissory note.

[Section 9-406, paragraphs (d) & (e)—Alternative C]

SECTION 9-406. DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; RESTRICTIONS ON ASSIGNMENT OF ACCOUNTS; AND CHATTEL PAPER; ~~PAYMENT INTANGIBLES, AND PROMISSORY NOTES~~ INEFFECTIVE.

(d) **[Term restricting assignment generally ineffective.]** Except as otherwise provided in subsection (e) and Sections 2A-303 and 9-407, and subject to subsection (h), a term in an agreement between an account debtor on an account or chattel paper and an assignor ~~or in a promissory note~~ is ineffective to the extent that it:

(1) prohibits, restricts, or requires the consent of the account debtor ~~or person obligated on the promissory note~~ to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account; or chattel paper~~, payment~~

~~intangible, or promissory note~~; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account~~;~~ or chattel paper~~;~~ ~~payment intangible, or promissory note~~.

(e) ~~**[Inapplicability of subsection (d) to payment intangibles.]** Subsection (d) does not apply to the sale of a payment intangible or promissory note.~~ [Reserved.]

[End of Alternatives]

* * *

Reporter's Note

See the Reporter's Note to Section 9-408.

SECTION 9-408. RESTRICTIONS ON ASSIGNMENT OF PROMISSORY NOTES, HEALTH-CARE-INSURANCE RECEIVABLES, AND CERTAIN GENERAL INTANGIBLES INEFFECTIVE.

(a) **[Term restricting assignment generally ineffective.]** Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) would impair the creation, attachment, or perfection of a security interest; or

(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

Paragraph (b)—Alternative A

(this is paired with § 9-406(e), Alternative A)

(b) **[Applicability of subsection (a) to sales of certain rights to payment.]** Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale, including a sale pursuant to a disposition (Section 9-610), of the payment intangible or promissory note.

Paragraph (b)—Alternative B

(this is paired with § 9-406(e), Alternative B)

(b) **[Applicability of subsection (a) to sales of certain rights to payment.]** Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale, other than a sale pursuant to a disposition (Section 9-610), of the payment intangible or promissory note.

Paragraphs (a) & (b)—Alternative C

(this is paired with § 9-406(d) & (e), Alternative C)

(a) **[Term restricting assignment generally ineffective.]** Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent

of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) would impair the creation, attachment, or perfection of a security interest; or

(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) ~~[Applicability of subsection (a) to sales of certain rights to payment intangibles.]~~ ~~Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.~~ [Reserved.]

[End of Alternatives]

* * *

Reporter's Note

Section 9-406(a) contains a broad override of contractual restrictions on assignability of receivables. Section 9-408(a) contains a similar, but narrower, override. The most significant difference between the two concerns whether an assignee may enforce the assigned receivable against the account debtor or other obligor, notwithstanding a provision in the underlying contract that purports to prevent an assignee from doing so.

The draft contains three pairs of alternatives for addressing the allocation of transactions between the broader override in Section 9-406(a) and the narrower override in Section 9-408(a).

The distinction is most likely to matter where the collateral is the right to payment of a loan. Under current law, if the right to payment of the loan is evidenced by chattel paper, then a contractual restriction would not be effective to restrict the assignee's right to enforce against the account debtor. If, however, the right to payment of the loan is evidenced by an instrument, or is a payment intangible, then a contractual restriction would not be effective to restrict the assignee's right to enforce against the account debtor if the assignment is made for collateral purposes. If, however, the assignment is a sale of the payment intangible or promissory note,

then Section 9-408(a) applies and the assignee's right to enforce is limited by any contractual restriction. Whether current Section 9-406 or 9-408 applies to a foreclosure sale of the receivable by an assignee for collateral purposes is unclear.

The policy underlying the existing allocation of transactions between the two sections also is not completely clear. If the idea is to protect borrowers who contract for freedom from enforcement by assignees, then Section 9-408(a)—which does not impair otherwise effective contractual restrictions on enforcement by assignees—should apply to all assignees, including those who take an assignment for security and then seek to enforce their security interests by collecting the unpaid loan from the obligor or account debtor under Section 9-607. This approach—which respects otherwise effective contractual restrictions on enforcement regardless of whether the loan is sold or assigned for security—is reflected in Alternative C.

Both Alternative A and Alternative B retain the distinction between sales (as to which Section 9-408(a) applies) and assignments for security (as to which Section 9-406(b) applies). These alternatives differ only in their treatment of foreclosure sales. Alternative A would treat foreclosure sales like any other sale: Section 9-408(a) would apply, and the buyer would be bound by a contractual restriction on enforcement, even though the seller was not. Under Alternative B, Section 9-406(a) would leave a buyer at a foreclosure sale free to enforce.

Consider this example:

> Borrower makes a loan to Lender. The loan is not evidenced by chattel paper. The loan agreement (or note) provides that Lender's rights may not be assigned and, if Lender wrongfully assigns the rights, an assignee may not enforce Borrower's obligation to pay. Lender assigns the right to payment (i.e., the payment intangible or instrument) to Assignee.
>
> If the assignment to Assignee is a sale, then Section 9-408(a) applies and the contractual restrictions are ineffective with respect to the creation, attachment, and perfection of Assignee's security interest. This would be the result under all three pairs of alternatives.
>
> If the assignment to Assignee is for security:
>
> > Under Alternative A, the restriction would not be effective (i.e., Section 9-406(a) would apply) if Assignee itself sought to collect from Borrower. However, the restriction would be effective (i.e., Section 9-408(a) would apply) if Assignee sold (at foreclosure or otherwise) to a buyer who sought to collect.
> >
> > Under Alternative B, the restriction would not be effective if Assignee itself sought to collect or if Assignee sold to a buyer at foreclosure (and, presumably, if the foreclosure buyer resold). However, the restriction

would be effective against nonforeclosure buyers who did not take through a foreclosure buyer.

Under Alternative C, the restriction would be effective (i.e., Section 9-408(a) would apply) against all third parties, including Assignee, a buyer from Assignee at foreclosure, and a nonforeclosure buyer.

[Agenda Item XIV.]

[no draft]

[Agenda Item XV.]

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

Official Comment

5. **Receivables-related Definitions.**

* * *

d. **"General Intangible"; "Payment Intangible."** "General intangible" is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. As used in the definition of "general intangible," "things in action" includes rights that arise under a license of intellectual property, including the right to exploit the intellectual property without liability for infringement. The definition has been revised to exclude commercial tort claims, deposit accounts, and letter-of-credit rights. Each of the three is a separate type of collateral. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not "account debtors" having the rights and obligations set forth in Sections 9-404, 9-405, and 9-406. In particular, tortfeasors, banks, and persons obligated on letters of credit are not obligated to pay an assignee (secured party) upon receipt of the notification described in Section 9-404(a). See Comment 5.h. Another important consequence relates to the adequacy of the description in the security agreement. See Section 9-108.

"Payment intangible" is a subset of the definition of "general intangible." The sale of a payment intangible is subject to this Article. See Section 9-109(a)(3). Virtually any intangible right could give rise to a right to payment of money once one hypothesizes, for example, that the account debtor is in breach of its obligation. The term "payment intangible," however, embraces only those general intangibles "under which the account debtor's *principal* obligation is a

monetary obligation." (Emphasis added.)

In classifying intangible collateral, a court should begin by identifying the particular rights that have been assigned. The account debtor (promisor) under a particular contract may owe several types of monetary obligations as well as other, nonmonetary obligations. If the promisee's right to payment of money is assigned separately, the right is an account or payment intangible, depending on how the account debtor's obligation arose. When all the promisee's rights are assigned together, an account, a payment intangible, and a general intangible all may be involved, depending on the nature of the rights.

A right to the payment of money is frequently buttressed by ancillary covenants, such as covenants in a purchase agreement, note, or mortgage requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve the creditworthiness of the promisor, such as covenants restricting dividends and the like. This Article does not treat these ancillary rights separately from the rights to payment to which they relate. For example, attachment and perfection of an assignment of a right to payment of a monetary obligation, whether it be an account or payment intangible, also carries these ancillary rights. Among these ancillary rights are the lessor's rights with respect to leased goods that arise upon the lessee's default. See Section 2A-523. Accordingly, and contrary to the opinion in *In re Commercial Money Center, Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006), where the lessor's rights under a lease would constitute chattel paper, an assignment of the lessor's right to payment under the lease would be chattel paper, even if the assignment purports to exclude those ancillary rights.

Every "payment intangible" is also a "general intangible." Likewise, "software" is a "general intangible" for purposes of this Article. See Comment 25. Accordingly, except as otherwise provided, statutory provisions applicable to general intangibles apply to payment intangibles and software.

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SECTION 9-109. SCOPE.

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Official Comment

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5. **Transfer of Ownership in Sales of Receivables.** A "sale" of an account, chattel paper, a promissory note, or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest. The term also includes the sale of an enforcement right. For example, a "[p]erson entitled to enforce" a negotiable promissory note (Section 3-301) may sell its ownership rights in the instrument. See Section 3-203, Comment 1 ("Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3,

which do not depend upon whether the instrument was transferred under Section 3-203."). Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This Article rejects decisions reaching a contrary result, e.g., *Dennis Joslin Co. v. Robinson Broadcasting*, 977 F. Supp. 491 (D.D.C. 1997).

Nothing in this section or any other provision of Article 9 prevents the transfer of full and complete ownership of an account, chattel paper, an instrument, or a payment intangible in a transaction of sale. However, as mentioned in Comment 4, neither this Article nor the definition of "security interest" in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation. This Article applies to both types of transactions. The principal effect of this coverage is to apply this Article's perfection and priority rules to these sales transactions. Use of terminology such as "security interest," "debtor," and "collateral" is merely a drafting convention adopted to reach this end, and its use has no relevance to distinguishing sales from other transactions. See PEB Commentary No. 14.

Following a debtor's outright sale and transfer of ownership of a receivable, the debtor-seller retains no legal or equitable rights in the receivable that has been sold. See Section 9-318(a). This is so whether or not the buyer's security interest is perfected. (A security interest arising from the sale of a promissory note or payment intangible is perfected upon attachment without further action. See Section 9-309.) However, if the buyer's interest in accounts or chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified buyer can reach the sold receivable and achieve priority over (or take free of) the buyer's unperfected security interest under Section 9-317. This is so not because the seller of a receivable retains rights in the property sold; it does not. Nor is this so because the seller of a receivable is a "debtor" and the buyer of a receivable is a "secured party" under this Article (they are). It is so for the simple reason that Sections 9-318(b), 9-317, and 9-322 make it so, as did former Sections 9-301 and 9-312. Because the buyer's security interest is unperfected, for purposes of determining the rights of creditors of and purchasers for value from the debtor-seller, under Section 9-318(b) the debtor-seller is deemed to have the rights and title it sold. Section 9-317 subjects the buyer's unperfected interest in accounts and chattel paper to that of the debtor-seller's lien creditor and other persons who qualify under that section.

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[Agenda Item XVI.]

SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.

(a) **[General priority rules.]** Except as otherwise provided in this section, priority

among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

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Official Comment

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4. **Competing Perfected Security Interests.** When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection. "Filing," of course, refers to the filing of an effective financing statement. "Perfection" refers to the acquisition of a perfected security interest, i.e., one that has attached and as to which any required perfection step has been taken. See Sections 9-308 and 9-309.

> **Example 1:** On February 1, A files a financing statement covering a certain item of Debtor's equipment. On March 1, B files a financing statement covering the same equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the equipment. On May 1, A makes a loan to Debtor and obtains a security interest in the same collateral. A has priority even though B's loan was made earlier and was perfected when made. It makes no difference whether A knew of B's security interest when A made its advance.

The problem stated in Example 1 is peculiar to a notice-filing system under which filing may occur before the security interest attaches (see Section 9-502). The justification for determining priority by order of filing lies in the necessity of protecting the filing system–that is, of allowing the first secured party who has filed to make subsequent advances without each time having to check for subsequent filings as a condition of protection. Note, however, that this first-to-file protection is not absolute. For example, Section 9-324 affords priority to certain purchase-money security interests, even if a competing secured party was the first to file or perfect.

Under a notice-filing system, a filed financing statement indicates to third parties that a person may have a security interest in the collateral indicated. With further inquiry, they may discover the complete state of affairs. Where a financing statement that is ineffective when filed

becomes effective thereafter, the policy underlying the notice-filing system determines the "time of filing" for purposes of subsection (a)(1). For example, upon the debtor's ratification of the unauthorized filing of an otherwise sufficient initial financing statement, the filing becomes authorized and the financing statement becomes effective. Because the authorization does not increase the notice value of the financing statement, the time of the unauthorized filing is the "time of filing" for purposes of this subsection (a)(1). A different result would obtain where an initial financing statement is ineffective because the name of the debtor is incorrect and seriously misleading and the filing office changes its standard search logic so that the name on the financing statement no longer is seriously misleading. See Section 9-506(c). Because the financing statement did not afford notice to third parties until the search logic changed and the financing statement became effective, the time of the change is the "time of filing" for purposes of subsection (a)(1).

> **Example 2:** A and B make non-purchase-money advances secured by the same collateral. The collateral is in Debtor's possession, and neither security interest is perfected when the second advance is made. Whichever secured party first perfects its security interest (by taking possession of the collateral or by filing) takes priority. It makes no difference whether that secured party knows of the other security interest at the time it perfects its own.

The rule of subsection (a)(1), affording priority to the first to file or perfect, applies to security interests that are perfected by any method, including temporarily (Section 9-312) or upon attachment (Section 9-309), even though there may be no notice to creditors or subsequent purchasers and notwithstanding any common-law rule to the contrary. The form of the claim to priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection as long as there is no intervening period without filing or perfection. See Section 9-308(c).

> **Example 3:** On October 1, A acquires a temporarily perfected (20-day) security interest, unfiled, in a negotiable document in the debtor's possession under Section 9-312(e). On October 5, B files and thereby perfects a security interest that previously had attached to the same document. On October 10, A files. A has priority, even after the 20-day period expires, regardless of whether A knows of B's security interest when A files. A was the first to perfect and maintained continuous perfection or filing since the start of the 20-day period. However, the perfection of A's security interest extends only "to the extent it arises for new value given." To the extent A's security interest secures advances made by A beyond the 20-day period, its security interest would be subordinate to B's, inasmuch as B was the first to file.

In general, the rule in subsection (a)(1) does not distinguish among various advances made by a secured party. The priority of every advance dates from the earlier of filing or perfection. However, in rare instances, the priority of an advance dates from the time the advance is made. See Example 3 and Section 9-323.

SECTION 9-509. PERSONS ENTITLED TO FILE A RECORD.

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Official Comment

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3. **Unauthorized Filings.** Records filed in the filing office do not require signatures for their effectiveness. Subsection (a)(1) substitutes for the debtor's signature on a financing statement the requirement that the debtor authorize in an authenticated record the filing of an initial financing statement or an amendment that adds collateral. Also, under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment. A person who files an unauthorized record in violation of subsection (a)(1) is liable under Section 9-625(b) and (e) for actual and statutory damages. Of course, a filed financing statement is ineffective to perfect a security interest if the filing is not authorized. See Section 9-510(a). Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section. See Sections 1-103, 9-502, Comment 3. This Article applies to other issues, such as the priority of a security interest perfected by the filing of a financing statement. See Section 9-322, Comment 4.

[Agenda Item XVII.]

SECTION 9-109. SCOPE.

(a) **[General scope of article.]** Except as otherwise provided in subsections (c) and (d), this article applies to:

(1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

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Official Comment

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2. **Basic Scope Provision.** Subsection (a)(1) derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which

transactions give rise to a "security interest," the definition of that term in Section 1-201 must be consulted. When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it. Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to the application of this Article, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102.

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[Agenda Item XVIII.A.1.]

SECTION 9-515. DURATION AND EFFECTIVENESS OF FINANCING STATEMENT; EFFECT OF LAPSED FINANCING STATEMENT.

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(b) **[Public-finance or manufactured-home transaction.]** Except as otherwise provided in subsections (e), (f), and (g), an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of 30 years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction.

(f) **[Transmitting utility financing statement.]** If a debtor is a transmitting utility and a filed initial financing statement so indicates, the financing statement is effective until a termination statement is filed.

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Reporter's Note

The amendment to subsection (f) is substantive. It applies only to financing statements filed after its effective date.

[Agenda Item XVIII.A.2.]

SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS. Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

* * *

(3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) perfection of a security interest in the goods by filing a fixture filing;

(B) perfection of a security interest in timber to be cut; and

(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

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Official Comment

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5. **Law Governing Perfection: Exceptions.** The general rule is subject to several exceptions. It does not apply to goods covered by a certificate of title (see Section 9-303), deposit accounts (see Section 9-304), investment property (see Section 9-305), or letter-of-credit rights (see Section 9-306). Nor does it apply to possessory security interests, i.e., security interests that the secured party has perfected by taking possession of the collateral (see paragraph (2)), security interests perfected by filing a fixture filing (see subparagraph (3)(A)), security interests in timber to be cut (subparagraph (3)(B)), or security interests in as-extracted collateral (see paragraph (4)).

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b. **Fixtures.** Application of the general rule in paragraph (1) to perfection of a security

interest in fixtures would yield strange results. For example, perfection of a security interest in fixtures located in Arizona and owned by a Delaware corporation would be governed by the law of Delaware. Although Delaware law would send one to a filing office in Arizona for the place to file a financing statement as a fixture filing, see Section 9-501, Delaware law would not take account of local, nonuniform, real-property filing and recording requirements that Arizona law might impose. For this reason, paragraph (3)(A) contains a special rule for security interests perfected by a fixture filing; the law of the jurisdiction in which the fixtures are located governs perfection, including the formal requisites of a fixture filing. Under paragraph (3)(C), the same law governs priority. Fixtures are "goods" as defined in Section 9-102.

The filing of a financing statement to perfect a security interest in collateral of a transmitting utility constitutes a fixture filing with respect to goods that are or become fixtures. See Section 9-501(b). Accordingly, to perfect a security interest in this collateral by a fixture filing, a financing statement should be filed in the office specified by Section 9-501(b) as enacted in the jurisdiction in which the goods are located. Where the fixtures collateral is located in more than one State, filing in more than one State will be necessary to perfect a security interest in all the collateral by a fixture filing. Of course, a security interest in nearly all types of collateral (including fixtures) of a transmitting utility may be perfected by filing in the office specified by Section 9-501(a) as enacted in the jurisdiction in which the transmitting utility is located. However, such a filing will not be effective as a fixture filing except with respect to goods that are located in that jurisdiction.

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SECTION 9-501. FILING OFFICE.

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(b) **[Filing office for transmitting utilities.]** The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of [ ]. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

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Official Comment

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5. **Transmitting Utilities.** The usual filing rules do not apply well for a transmitting utility (defined in Section 9-102). Many pre-UCC statutes provided special filing rules for railroads and in some cases for other public utilities, to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. Former Section 9-401(5) recreated and broadened these provisions, and subsection (b) follows this approach. The nature of the debtor will inform persons searching the record as to where to make a search.

A given State's subsection (b) applies only where the local law of that State governs perfection. As to most collateral, perfection by filing is governed by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). Where a security interest in goods is perfected by a filing a fixture filing, however, the law of the jurisdiction in which the goods are located governs perfection. See Section 9-301(3)(A). As a consequence, filing in the filing office of more than one State may be necessary to perfect a security interest in collateral of a transmitting utility by a fixture filing. See Section 9-301, Comment 5.b.

[Agenda Item XVIII.B.]

SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.

(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

(1) subject to subsection (f), if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public organic record ~~of~~ filed with the debtor's jurisdiction of organization ~~which shows the debtor to have been organized~~;

* * *

(f) **[Name of registered organization.]** If the public organic record indicates more than one name of the debtor, then, for purposes of subsection (a)(1), "the name of the debtor indicated on the public organic record" means:

(1) the name of the debtor which is indicated on the most recently filed record that is intended to state, amend, or restate the debtor's name; and

(2) if that record indicates more than one name of the debtor, the name of the debtor which that record states to be the debtor's name.

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

(a) **[Article 9 definitions.]** In this article:

* * *

(50) "Jurisdiction of organization", with respect to a registered organization, means the jurisdiction under whose law the organization is formed or organized.

* * *

(67A) "Public organic record" means a record or records composed of the record initially filed with a State or the United States to form or organize an organization and any record filed with the State or the United States which [amends or restates] [effects an amendment or restatement of] the initial record, if the record or records are available to the public for inspection. The term includes an organic record or records of a business trust that is initially filed with a State and any record filed with the State which [amends or restates] [effects an amendment or restatement of] the initial record, if a statute of the State governing business trusts requires that the record or records be filed with the State and the record or records are available to the public for inspection.

* * *

(70) "Registered organization" means an organization formed or organized solely under the law of a single State or the United States ~~and as to which the State or the United States must maintain a public record showing the organization to have been organized~~ by the filing of a public organic record with the State or United States. The term includes a business trust that is

formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust's organic record be filed with the State.

* * *

Reporter's Note

1. The amendments to Section 9-503 and the related amendments to Sections 9-102 are meant to designate more clearly the public record that is relevant to determining the name of a debtor that is a registered organization. The relevant public record is always a "public organic record," which is defined to be a record that is "filed with the State." A public record that the State creates, such as a certificate of good standing or an index of domestic corporations, would not be a "public organic record" and so would be irrelevant to the determination of the debtor's name under Section 9-503(a)(1).

Section 9-503(f) covers two cases where the public organic record may indicate more than one name for the debtor. Under paragraph (1), the name that must be provided in the financing statement is the name that is indicated on the most recently filed public record that is intended to state, amend, or restate the debtor's name. If that record indicates more than one name of the debtor, the name that must be provided is the name that the record states to be the debtor's name.

The references to the "public organic record" in Section 9-503(a) and "the most recently filed record" in Section 9-503(f) are not meant to refer to any randomly filed record. Rather, they are meant to refer to the public organic record filed with respect to the debtor and most recently filed record that constitutes part of that public organic record. The Joint Review Committee may wish to consider whether these phrases should be amplified in the text.

2. The amendments to the definition of "registered organization" also are meant to clarify that the term includes an organization that is created without the need for a public record but that is "formed" only when a public filing has been made. For example, under Delaware law, a statutory trust is "created by a governing instrument," Del. Code Ann. tit. 12, § 1301, but is "formed at the time of the filing of the initial certificate of trust in the office of the Secretary of State or at any later date or time specified in the certificate of trust." Del. Code Ann. § 1310(b). The second sentence of the definition clarifies that a Massachusetts business trust is a registered organization. The Joint Review Committee may wish to consider whether the application of the second sentence should be extended to all organizations.

[Agenda Item XVIII.C.]

SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.

(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

(1) if the debtor is a registered organization and is not a trustee acting with respect to property held in trust, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

(2) if the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) if the debtor is (i) a trust that is not a registered organization or (ii) a trustee acting with respect to property held in trust, only if the financing statement:

(A) provides the name specified for the trust in its organic ~~documents~~ record or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and

(B) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; and

(4) in other cases:

(A) if the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

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Official Comment

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2. **Debtor's Name.** The requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name. Subsection (a) explains what the debtor's name is for purposes of a financing statement. If the debtor is a "registered organization" (defined in Section 9-102 so as to ordinarily include corporations, limited partnerships, and limited liability companies), then the debtor's name is the name shown on the public records of the debtor's "jurisdiction of organization" (also defined in Section 9-102). Subsections (a)(2) and (a)(3) contain special rules for decedent's estates and common-law trusts. (Subsection (a)(1) applies to business trusts that are registered organizations; however it does not apply to a trustee acting with respect to property held in trust, even if the trustee is a registered organization.)

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Reporter's Note

The amendments are meant to clarify current law. The Joint Review Committee did not discuss the proposed change to subsection (a)(3)(A).

[Agenda Item XVIII.D.]

SECTION 9-307. LOCATION OF DEBTOR.

(a) **["Place of business."]** In this section, "place of business" means a place where a debtor conducts its affairs.

(b) **[Debtor's location: general rules.]** Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than one place of business is

located at its chief executive office.

(c) **[Limitation of applicability of subsection (b).]** Subsection (b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor is located in the District of Columbia.

Official Comment

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3. **Non-U.S. Debtors.** Under the general rules of ~~this section~~ subsection (b), a non-U.S. debtor ~~normally~~ often would be located in a foreign jurisdiction and, as a consequence, foreign law would govern perfection. When foreign law affords no public notice of security interests, the general rule yields unacceptable results.

Accordingly, subsection (c) provides that the ~~normal~~ general rules for determining the location of a debtor ~~(i.e., the rules in subsection (b))~~ apply only if they yield a location that is "a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." The phrase "generally requires" is meant to ~~include~~ describe legal regimes that generally require notice in a filing or recording system as a condition of perfecting nonpossessory security interests in the relevant collateral in transactions of the type involved, but which permit perfection by another method (e.g., control, automatic perfection, temporary perfection) in limited circumstances. A jurisdiction that has adopted this Article or an earlier version of this Article is such a jurisdiction. If the rules in subsection (b) yield a jurisdiction whose law does not generally require notice in a filing or registration system with respect to the relevant collateral in transactions of the type involved, and if none of the special rules in subsections (e), (f), (i), and (j) applies, the debtor is located in the District of Columbia with respect to the relevant collateral.

Example 1: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in its accounts. Under subsection (b)(3), Debtor would be located in

England. However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection of a security interest in accounts on giving public notice in a filing, recording, or registration system for purposes of perfecting a security interest in the accounts. Otherwise, Debtor is located in the District of Columbia. Under Section 9-301(1), perfection, the effect of perfection, and priority are governed by the law of the jurisdiction of the debtor's location–here, England or the District of Columbia (depending on the content of English law).

Example 2: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in equipment located in London. Under subsection (b)(3) Debtor would be located in England. However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection on giving public notice in a filing, recording, or registration system for perfection of a security interest in equipment. Otherwise, Debtor is located in the District of Columbia. Under Section 9-301(1), perfection is governed by the law of the jurisdiction of the debtor's location, whereas, under Section 9-301(3), the law of the jurisdiction in which the collateral is located–here, England–governs priority.

Under this rule, a debtor may be located in one jurisdiction for purposes of a security interest in one type of collateral and a different jurisdiction for a security interest in another type of collateral.

The foregoing discussion assumes that each transaction bears an appropriate relation to the forum State. In the absence of an appropriate relation, the forum State's entire UCC, including the choice-of-law provisions in Article 9 (Sections 9-301 through 9-307), will not apply. See Section 9-109, Comment 9.

SECTION 9-101. SHORT TITLE.

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Official Comment

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4. **Summary of Revisions.**

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c. **Choice of Law.**

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Location of non-U.S. debtors. If, applying the foregoing rules, a debtor is located in a jurisdiction whose law does not generally require public notice as a condition of perfection of a nonpossessory security interest in the relevant collateral in transactions of the type involved, the entity is deemed located in the District of Columbia. See Section 9-307. Thus, to the extent that this Article applies to non-U.S. debtors, perfection could be accomplished in many cases by a domestic filing.

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Reporter's Note

The proposed revisions to the Comment are meant to clarify when subsection (c) applies and the meaning of the phrase, "a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system." The following, submitted by Steve Weise and Neil Cohen, explains the revisions concerning the latter issue:

> It is not clear how to apply the criterion in § 9-307(c) that a jurisdiction in which the debtor would be located under § 9-307(b) (the "foreign jurisdiction") will qualify as the location of the debtor only if the law of the foreign jurisdiction "generally requires" filing with respect to a non-possessory security interest in order to beat a lien creditor. For convenience, here is the full text of § 9-307(c):
>
> (c) [Limitation of applicability of subsection (b).] Subsection (b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor is located in the District of Columbia.
>
> The use of the word "generally" to modify "requires" raises several questions:
>
> Is the "generally requires" test applied to all collateral or just transaction collateral?
>
> First, it is not clear whether the reference to "the collateral" in connection with the filing test means that the foreign filing system must apply (i) to all collateral within the scope of Article 9, or (ii) only collateral within the scope of Article 9 and part of the secured transaction at hand.
>
> The Review Committee tentatively decided at the October 2008 meeting that the

§ 9-307(c) test should be interpreted in the context of the particular transaction so that satisfaction of the "generally requires" criterion would be measured by reference only to collateral of the type in the secured transaction. This interpretation has the advantage of not "disqualifying" a foreign jurisdiction that requires filing in a transaction of the sort at hand (and has an available filing system) just because, with respect to other types of property not present in the transaction, filing is not required.

Should the "generally requires" test be interpreted even more narrowly so as to refer to the foreign jurisdiction's filing rules with respect to the transaction collateral in the type of transaction at hand?

Construing the "generally applies" test so as to apply only to the type of collateral involved in the deal may not solve all problems, though. There are some types of collateral as to which, even under Article 9, the necessity of filing depends on the nature of the transaction (e.g., filing is required for a non-PMSI in consumer goods, but not for a PMSI; filing is required for security interest in payment intangibles securing an obligation, but not for a security interest that is the interest of a buyer of payment intangibles.)

In view of this difference in filing requirements depending not only on the nature of the collateral but also on the nature of the transaction, does the phrase "generally applies" mean that it is sufficient if the foreign filing system covers the type of collateral (without regard to the nature of the transaction involved) or whether the foreign filing system must also cover the type of the collateral and the type of transaction involved. Examined from a different perspective, does a jurisdiction fail the "generally applies" test if other transactions involving the collateral at hand do not require a filing for perfection, but the jurisdiction's law requires a filing for perfection for the collateral at hand in the sort of transaction at hand. The Review Committee's initial determination was that the criterion was to be applied at the level of the type of collateral involved.

Several scenarios can be imagined in which a different result would obtain depending on the interpretation of the "generally requires" criterion. Three are presented below. The Review Committee may wish to consider whether, in light of the following scenarios, to recommend an interpretation of the criterion that is specific both to the collateral and the transaction type:

1. Non-PMSI security interest in consumer goods. Assume that the transaction is a non-PMSI security interest in consumer goods and that the law in the foreign jurisdiction, like Article 9, requires a filing for that collateral in this sort of transaction but does not require a filing for the same type of collateral in a different sort of transaction (such as a PMSI in consumer goods):

1.1. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if "generally" is interpreted to mean something like "almost always", then the foreign

jurisdiction would be "disqualified" as the debtor's location because other transactions in the same property (PMSI security interest in consumer goods or sale of payment intangibles) would not require a filing in the foreign jurisdiction and the debtor would be located in DC, even though a filing could have been made in the foreign jurisdiction.

1.2. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if "generally" is interpreted to mean something like "a bunch of the time", then the foreign jurisdiction would be "qualified" as the debtor's location because there are enough circumstances involving that type of collateral where a filing is required. The debtor would be located in the foreign jurisdiction and a filing would occur there.

1.3. If 9-307(c) is a rule that is specific to the collateral and the transaction and if the "generally requires" criterion is interpreted so as to require filing for the type of collateral and transaction in the foreign jurisdiction only if filing is required for the type of collateral and transaction under Article 9, then the jurisdiction would qualify as the debtor's location and it would not matter whether "generally" means "almost always" or "a bunch of the time".

1.4. If 9-307(c) is a collateral/deal-specific rule and if "generally" is interpreted to mean that filing is "required" in the foreign jurisdiction (for the collateral in this deal) whether or not filing is "required" under Article 9, then the jurisdiction would qualify as the debtor's location and it would not matter whether "generally" means "almost always" or "a bunch of the time".

2. Security interest arising from the sale of a payment intangible. Assume that the transaction is the sale of a payment intangible and that, under the law of the foreign jurisdiction, like Article 9, filing is not required for perfection, but other secured transactions involving the same collateral (such as a security interest securing an obligation) require a filing:

2.1. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if "generally" is interpreted to mean something like "almost always", then the foreign jurisdiction would be "disqualified" as the debtor's location (as in scenario #1) because there are too many secured transactions involving the same property as to which the foreign jurisdiction does not require a filing (e.g., sale of payment intangibles) and the debtor would be located in DC, even Article 9, like the foreign jurisdiction does not require a filing in the context of this transaction.

2.2. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if "generally" is interpreted to mean something like "a bunch of the time", then the foreign jurisdiction would be "qualified" as the debtor's location because there are enough transactions in the same property (e.g., security interest in payment intangibles to secure an obligation) that do require a filing in the foreign jurisdiction. Thus, the debtor would be located in the foreign jurisdiction, which does not require a filing for the transaction at

hand.

2.3. If 9-307(c) is a a rule that is specific to the collateral and the transaction and if "generally" is interpreted so as to require filing for the type of collateral and transaction in the foreign jurisdiction only if filing is required for the type of collateral and transaction under Article 9, then the jurisdiction would qualify as the debtor's location because neither jurisdiction requires filing for the type of transaction. The debtor would be located in the foreign jurisdiction, which does not require a filing for the transaction at hand.

2.4. If 9-307(c) is a collateral/deal-specific rule and if the "generally requires" criterion is interpreted to mean that filing is "required" in the foreign jurisdiction (for the collateral in this deal) whether or not filing is "required" under Article 9, then the jurisdiction would not qualify as the debtor's location because there is no filing there. The debtor would be located in DC, which does not require a filing.

3. A foreign jurisdiction whose law is partially like Article 9. Assume that the transaction is a sale of accounts and the foreign jurisdiction requires filing when there is a security interest in accounts to secure an obligation, but not for a sale of accounts.:

3.1. If 9-307(c) is a collateral-specific specific (but not transaction-specific) rule and if "generally" is interpreted to mean something like "almost always", then the foreign jurisdiction would be "disqualified" as the debtor's location because there are too many secured transactions involving the same type of collateral as to the foreign jurisdiction does not require a filing (e.g., sale of accounts) and the debtor would be located in DC, where a filing would be required under Article 9.

3.2. If 9-307(c) is a collateral-specific specific (but not transaction-specific) rule and if "generally" is interpreted to mean something like "a bunch of the time", then the foreign jurisdiction would be "qualified" as the debtor's location because there are enough transactions in the same type of collateral (e.g., security interest in accounts to secure an obligation) that do require a filing. Thus, the debtor would be located in the foreign jurisdiction, which does not require a filing in the transaction at hand even though Article 9 requires a filing.

3.3. If 9-307(c) is a rule that is specific to the collateral and the transaction and if "generally" is interpreted so as to required filing for the type of collateral and transaction in the foreign jurisdiction only if filing is required for the type of collateral and transaction under Article 9, then the jurisdiction would not qualify as the debtor's location because the Article 9 jurisdiction does require a filing, but the foreign jurisdiction does not require a filing, for the type of collateral and transaction. The debtor would be located in DC, where a filing would be required.

3.4. If 9-307(c) is a collateral/deal-specific rule and if the "generally requires"

criterion is interpreted to mean that filing is "required" in the foreign jurisdiction (for the collateral in this deal) whether or not filing is "required" under Article 9, then the jurisdiction would not qualify as the debtor's location because there is no filing there. The debtor would be located in DC, where a filing would be required.

[Agenda Item XVIII.E.]

SECTION 9-307. LOCATION OF DEBTOR.

* * *

(f) **[Location of registered organization organized under federal law; bank branches and agencies.]** Except as otherwise provided in subsection (i), a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a State are located:

(1) in the State that the law of the United States designates, if the law designates a State of location;

(2) in the State that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location; ~~or~~

(3) in the State in which the designated office of the registered organization, branch, or agency is located, if the law of the United States authorizes the registered organization, branch, or agency to designate its main office, home office, or other comparable office; or

(~~3~~)(4) in the District of Columbia, if ~~neither paragraph (1) nor paragraph (2)~~ ~~applies~~ none of the preceding paragraphs applies.

* * *

Official Comments

5. **Registered Organizations Organized Under Law of United States; Branches and Agencies of Banks Not Organized Under Law of United States.** Subsection (f) specifies the location of a debtor that is a registered organization organized under the law of the United States. It defers to the law of the United States, to the extent that that law determines, or authorizes the debtor to determine, the debtor's location. Thus, if the law of the United States designates a particular State as the debtor's location, that State is the debtor's location for purposes of this Article's choice-of-law rules. Similarly, if the law of the United States authorizes the registered organization to designate its State of location, the State that the registered organization designates is the State in which it is located for purposes of this Article's choice-of-law rules. The law of the United States authorizes certain registered organizations to designate a main office, home office, or other comparable office. See, e.g., 12 U.S.C. Sections 22 and 1464(a); 12 C.F.R. Section 552.3. Where the registered organization designates an office pursuant to such an authorization, the State in which the designated office is located is the location of the debtor for purposes of Section 9-307(f). In other cases, the debtor is located in the District of Columbia.

~~In some cases, the law of the United States authorizes the registered organization to designate a main office, home office, or other comparable office. See, e.g., 12 U.S.C. Sections 22 and 1464(a); 12 C.F.R. Section 552.3. Designation of such an office constitutes the designation of the State of location for purposes of Section 9-307 (f)(2).~~

Subsection (f) also specifies the location of a branch or agency in the United States of a foreign bank that has one or more branches or agencies in the United States. The law of the United States ~~authorized~~ authorizes a foreign bank (or, on behalf of the bank, a federal agency) to designate a single home state for all of the foreign bank's branches and agencies in the United States. See 12 U.S.C. Section 3103(c) and 12 C.F.R. Section 211.22. As authorized, the designation constitutes the State of location for the branch or agency for purposes of Section 9-307(f), unless all of a foreign bank's branches or agencies that are in the United States are licensed in only one State, in which case the branches and agencies are located in that State. See subsection (i).

In cases not governed by subsection (f) or (i), the location of a foreign bank is determined by subsections (b) and (c).

[Agenda Item XVIII.F.]

[no draft]

[Agenda Item XVIII.G]

[no draft]

[Agenda Item XVIII.H.]

SECTION 9-509. PERSONS ENTITLED TO FILE A RECORD.

(a) **[Person entitled to file record.]** A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) the debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c); or

(2) the person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

* * *

(d) **[Person entitled to file certain amendments.]** A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) the secured party of record authorizes the filing; or

(2) the amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by Section 9-513(a) or (c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

* * *

Official Comment

* * *

6. **Amendments; Termination Statements Authorized by Debtor.** Most amendments may not be filed unless the secured party of record, as determined under Section 9-511, authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization of the secured party of record is not required for the filing of a termination statement if the secured party of record failed to send or file a termination statement as required by Section 9-513, the debtor authorizes it to be filed, and the termination statement so indicates. Although prudence usually dictates that an authorization to file be evidenced by an authenticated record, an authorization under subsection (d) is effective even if it is not in an authenticated record. Compare subsection (a)(1).

* * *

[Agenda Item XIV.I.]

SECTION 9-706. WHEN INITIAL FINANCING STATEMENT SUFFICES TO CONTINUE EFFECTIVENESS OF FINANCING STATEMENT.

(a) **[Initial financing statement in lieu of continuation statement.]** The filing of an initial financing statement in the office specified in Section 9-501 continues the effectiveness of a financing statement filed before this [Act] takes effect if:

(1) the filing of an initial financing statement in that office would be effective to perfect a security interest under this [Act];

(2) the pre-effective-date financing statement was filed in an office in another State or another office in this State; and

(3) the initial financing statement satisfies subsection (c).

* * *

(c) **[Requirements for initial financing statement under subsection (a).]** To be effective for purposes of subsection (a), an initial financing statement must:

(1) satisfy the requirements of Part 5 for an initial financing statement;

(2) identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) indicate that the pre-effective-date financing statement remains effective.

Official Comment

* * *

2. **Requirements of Initial Financing Statement Filed in Lieu of Continuation Statement.** Subsection (c) sets forth the requirements for the initial financing statement under subsection (a). These requirements are needed to inform searchers that the initial financing statement operates to continue a financing statement filed elsewhere and to enable searchers to locate and discover the attributes of the other financing statement. The notice-filing policy of this Article applies to the initial financing statements described in this section. Accordingly, an initial financing statement that substantially satisfies the requirements of subsection (c) is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading. See Section 9-506.

A single initial financing statement may continue the effectiveness of more than one financing statement filed before this Article's effective date. See Section 1-102(5)(a) (words in the singular include the plural). If a financing statement has been filed in more than one office in a given jurisdiction, as may be the case if the jurisdiction had adopted former Section 9-401(1), third alternative, then an identification of the filing in the central filing office suffices for purposes of subsection (c)(2). If under this Article the collateral is of a type different from its type under former Article 9–as would be the case, e.g., with a right to payment of lottery winnings (a "general intangible" under former Article 9 and an "account" under this Article), then subsection (c) requires that the initial financing statement indicate the type under this Article.

[Agenda Item XIV.J.]

SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.

(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the

name of the debtor:

* * *

(4) in other cases:

(A) except as provided in subsection (g), if the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

* * *

(g) **[Exception for individual debtor's name.]** Subject to subsection (h), a financing statement that does not provide the individual name of the debtor nevertheless sufficiently provides the name of a debtor who is an individual if:

(1) it provides the name of the individual which is indicated on a [driver's license] or [identification card] that, at the time the financing statement is filed, has been issued to the individual by this State and has not yet expired or [been cancelled]; and

(2) the filing office indexes the financing statement in such a manner that a search of the records of the filing office under the name indicated, using the filing office's standard search logic, if any, would disclose the financing statement.

(h) **[Multiple licenses or cards.]** If this State has issued to an individual more than one [driver's license] or [identification card] of a kind described in subsection (g)(1), the one that was issued most recently is the one to which the subsection refers.

SECTION 9-506. EFFECT OF ERRORS OR OMISSIONS.

(a) **[Minor errors and omissions.]** A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) **[Financing statement seriously misleading.]** Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) or (g) is seriously misleading.

(c) **[Financing statement not seriously misleading.]** If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) or (g), the name provided does not make the financing statement seriously misleading.

(d) **["Debtor's correct name."]** For purposes of Section 9-508(b), the "debtor's correct name" in subsection (c) means the correct name of the new debtor.

(e) **[Individual "debtor's correct name."]** If a debtor who is an individual changes his or her name by virtue of Section 9-507(d), the "debtor's correct name" in subsection (c) means the name of the debtor indicated on the [driver's license] or [identification card] that indicates a name different from the name provided on the financing statement.

SECTION 9-507. EFFECT OF CERTAIN EVENTS ON EFFECTIVENESS OF FINANCING STATEMENT.

* * *

(b) **[Information becoming seriously misleading.]** Except as otherwise provided in

subsection (c) and Section 9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under Section 9-506.

(c) **[Change in debtor's name.]** If a debtor so changes its name that a filed financing statement becomes seriously misleading under Section 9-506:

(1) the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change; and

(2) the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change.

(d) **[Name sufficient only under Section 9-503(g).]** If, after the filing of a financing statement that provides a name that is sufficient only under Section 9-503(g), this State issues to the debtor a [driver's license] or [identification card] that indicates a name different from the name provided, the debtor changes his or her name for purposes of subsection (c).

Reporter's Note

1. New Section 9-503(g) would provide an exception to Section 9-503(a)(4): the name on the debtor's driver's license or identification card would be sufficient as the name of the debtor on a financing statement. New Section 9-503(h) would cover the case where the State has issued more than one qualifying license or identification card to the same debtor.

2. Different States use different terms for the driver's licenses and identification cards they issue. Accordingly, the words "driver's license" and "identification card" appear in brackets. If the Joint Review Committee finds the approach of Section 9-503(g) appropriate, a Legislative Note should be added to explain the brackets.

3. The phrase "or [been cancelled]" in Section 9-503(g) is a placeholder. The Joint Review Committee should consider what events, other than expiration of a license or ID card,

should result in the document's no longer providing a sufficient name for the debtor. Possibilities include the State's confiscation of the document, the State's taking action that makes clear on the face of the document that the document no longer is in effect, and the State's cancellation of the document (which event may or may not be evidenced on the license). Inasmuch as different States may use different terms for these events, bracketed language together with a Legislative Note may be appropriate.

4. To satisfy Section 9-503(g), the name provided on the financing statement must be the same as the name indicated on the license. For example, a filing against "Joseph A. Jones" or "Joseph Jones" would not satisfy Section 9-503(g) if Jones's driver's license shows his name to be "Joseph Allan Jones." Determining whether the name provided on the financing statement is the same as the name indicated on the license must not be done mindlessly. For example, the order in which the components of an individual's name appear on a driver's license differs among the States. Some States, such as Illinois, put the individual's "last name" (as the term is used on the financing statement form in Section 9-521) last, e.g., "Joseph Allan Jones." But even where the driver's license puts the individual's "last name" first, the driver's license may indicate that the name appearing first is the debtor's "last name" for the purpose of the financing statement. This would be the case, for example, with a driver's license on which the debtor's name appears as "Jones, Joseph Allan."

If the filing office is unable to input the name indicated on the license, the name on the license would be insufficient under Section 9-503(g) unless the financing statement would be disclosed by a search under the name indicated on the license, using the filing office's standard search logic. Likewise, if the filing office does not allow a search to be conducted under the name indicated on the license, a financing statement providing that name would be insufficient under Section 9-503(g), even if the filing office can and does input the exact name provided.

5. The draft refers to a license or ID card issued by "this State." Perfection of a security interest by filing is determined by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). A debtor who is an individual is located at the individual's principal residence. Thus, a given State's Section 9-503 will apply during any period when the debtor maintains his principal residence in that State. Consider the following example:

> Debtor, who resides in Illinois, grants a security interest to SP in certain business equipment. SP files a financing statement with the Illinois filing office. The financing statement provides the name appearing on Debtor's Illinois driver's license ("Joseph Allan Jones"). Illinois' Section 9-503(g) would make this filing sufficient to satisfy subsection (a)(4), even though Debtor's correct middle name is Alan, not Allan. As long as Illinois remains Debtor's principal residence, Debtor's acquisition of a driver's license or ID card from another State would not affect the effectiveness of the Illinois filing.

6. Where the debtor relocates by changing his principal residence, perfection will be governed by the law of the debtor's new location. As a consequence of the application of that

State's Section 9-316, a security interest that is perfected by filing under the law of the debtor's former location will remain perfected for four months after the relocation, and thereafter if the secured party perfects under the law of the debtor's new location. Consider the following example:

> Debtor, who resides in Illinois, grants a security interest to SP in certain business equipment. SP files a financing statement in Illinois that provides a name that is sufficient under Illinois' Section 9-503(g). On January 1, Debtor relocates to Indiana. Upon the relocation, the governing law changes from the law of Illinois to the law of Indiana. However, under Indiana's Section 9-316, a security interest perfected by the Illinois filing remains perfected for four months, i.e., through the end of April. If SP does not file in Indiana before the four-month period expires, then the security interest will become unperfected and will be deemed never to have been perfected as against a purchaser of the collateral for value. See Indiana's Section 9-316(b).

In the example, the name on Debtor's Illinois driver's license would be irrelevant for purposes of Indiana's Section 9-503(g), inasmuch as it was not issued by "this State," i.e., Indiana. (Of course, a financing statement providing that name might satisfy Indiana's Section 9-503(a)(4) (i.e., it might be the individual name of the debtor) or might be effective under Section 9-506 (i.e., it might not be seriously misleading).

7. A financing statement satisfying Section 9-503(g) would have the same priority as it would have had, had it provided the individual name of the debtor under Section 9-503(a).

8. The rule in Section 9-503(g) has been drafted as an exception to the rule in Section 9-503(a)(4). The Joint Review Committee may wish to consider whether the rule should appear instead as an alternative.

9. After the filing of a financing statement satisfying Section 9-503(g), the issuing State may issue a duplicate, substitute, or additional license or ID card to the debtor. Where the name on the new document differs from that provided by the financing statement, the issuance of the new document would be constitute a change of the debtor's name. See new Section 9-507(d). The effect of a name change under Section 9-507(d) would be the same as if the debtor actually changed names.

The Joint Review Committee may wish to consider whether the effectiveness of a financing statement should be affected by the cancellation of a license or similar event.

10. In some cases, Section 9-503(a) may require a financing statement to provide the name of an individual as debtor, even if the debtor is not an individual. See Sections 9-503(a)(2) (debtor that is a decedent's estate), (a)(3) (debtor that is a trust whose organic documents do not specify a name for the trust). If the approach of Section 9-503(g) is acceptable, the Joint Review Committee should consider whether it should be expanded to cover the name of all individuals

shown as debtor, even those that are not themselves the debtor. Any such expansion would likely require changes to Section 9-503(g) as well as to other sections.

Regardless of the approach it decides to take towards specifying the name of an individual debtor, the Joint Review Committee may wish to consider whether to clarify that, where the debtor is not an individual but the financing statement must provide the name of an individual as debtor, the financing statement must provide the name in the field designated for the name of an individual debtor.

11. Adoption of the exception in Section 9-503(g) would change current law. A financing statement that is effective under Section 9-503(g) and is filed before the subsection's effective date should take effect on the effective date, which would be the "time of filing" for purposes of Section 9-322(a)(1). Additional text will be necessary for implementation.

Joint Article 9 Review Committee
Meeting Notes for March 6-8, 2009

Prepared by Professor Stephen L. Sepinuck

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The Committee's goal is to prepare a draft set of revisions for a first reading at the ULC's annual meeting this summer. That draft will deal with the issues on the Joint Review Committee's issue list. The Joint Review Committee will also at that time seek permission from both of its sponsors to address a few other issues. After further Committee review, the revisions will be presented to the ALI for consideration and approval in the spring of 2010 and to the ULC for consideration and approval in the summer of 2010.

1. Strict foreclosure as the only way to "waive" the prohibition on a private sale to a secured party

§ 9-602 comment 3 * * *
Section 9-610(c) limits the circumstances under which a secured party may purchase at its own private disposition. Transactions of this kind are equivalent to "strict foreclosures" and are governed by Sections 9-620, 9-621, and 9-622. The provisions of these sections can be waived only as provided in Section 9-624(b).

§ 9-610 comment 7 * * *
A secured party's purchase of collateral at its own private disposition is equivalent to a "strict foreclosure" and is governed by Sections 9-620, 9-621, and 9-622. The provisions of these sections can be waived only as provided in Section 9-624(b).

The Committee agreed to this. It concluded that any sale to the secured party is a disposition and is subject to the rules of either § 9-610 or § 9-620.

2. Conform Heading of § 9-625(c) to Text

(c) **[Persons entitled to recover damages; statutory damages ~~in consumer-goods transaction~~ if collateral is consumer goods.]** Except as otherwise provided in Section 9-628: * * *

Reporter's Note
The heading for subsection (c) has been conformed to the text. Article 9 includes headings for the subsections as an aid to readers. Unlike section captions, which are part of the UCC, see Section 1-107, subsection headings are not a part of the Official Text itself.

The Committee agrees to this.

3. Disposition via Internet

§ 9-610 comment 2 **Commercially Reasonable Dispositions.** Subsection (a) follows former Section 9-504 by permitting a secured party to dispose of collateral in a commercially reasonable manner following a default. Although subsection (b) permits both public and private dispositions, including public and private dispositions conducted over the Internet, "every aspect of a disposition . . . must be commercially reasonable." This section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned. Subsection (a) does not restrict dispositions to sales;

collateral may be sold, leased, licensed, or otherwise disposed. Section 9-627 provides guidance for determining the circumstances under which a disposition is "commercially reasonable."

§ 9-613 comment 2 * **
This section applies to a notification of a public disposition conducted over the Internet. A [notification of a]n Internet disposition satisfies paragraph (1)(E) if it states the time when the disposition is scheduled to begin and states a Uniform Resource Locator (URL) or other Internet address at or through which a potential transferee may participate in the disposition.

The bracketed language to § 9-613 comment 2 was added by the reporter at the meeting. There was discussion of whether reference to URL might become antiquated. There was also some question of how far deep the address must be (*e.g.*, e-bay, or the specific page of the sale). Ultimately, the Committee agreed to the following substitute language:

This section applies to a notification of a public disposition conducted electronically, such as on the Internet. In such a disposition, the place of disposition is the electronic location. For example, under current technology, a notification containing the URL or other Internet address at which the site of the public disposition can be accessed suffices.

4. Payoff Letter

[Alternative A – Prepared by an Advisor]

§ 9-102(a)(4) "Accounting", except as used in "accounting for", means a record:

(A) authenticated by a secured party;

(B) indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

(C) identifying the components of the obligations in reasonable detail; and

(D) if requested, in the case of an obligation that can be satisfied by the payment of money, the accounting shall include a payoff statement as of a date specified in the request. The specified date must be no later than 30 days from the date of the request. The payoff statement must indicate the date on which it was prepared and the payoff amount as of that date; information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount; the payoff cutoff time, if any; the address or place where payment must be made; and any limitation as to the authorized method of payment. The payoff statement may include a statement that: "This payoff figure is based on the assumption that you and any other debtor or obligor fulfill all of your obligations with respect to this debt and the collateral between (the date as of which the payoff amount is calculated) and the payoff date, and that no other conditions change." As used in this paragraph, "payoff amount" means an amount which, if received by a secured party, would entitle a debtor to the release of the security interest in the collateral[, unless other non-monetary obligations remain].

[Alternative B – Prepared by an Advisor]

§ 9-102(a)(4) "Accounting", except as used in "accounting for", means a record:

(A) in a consumer transaction, a record:

~~(A)~~(i) authenticated by a secured party;

~~(B)~~(ii) indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

~~(C)~~(iii) identifying the components of the obligations in reasonable detail; and

(B) in a transaction other than consumer transactions, a record:

(i) authenticated by a secured party;

(ii) indicating as of a specified date not more than 5 days after such record is requested, the payoff amount; and

(iii) identifying the components of the obligation in reasonable detail, including:

(1) the date on which the record was prepared;

(2) the payoff amount as of the specified date;

(3) the payoff cutoff time, if any;

(4) the address or place where payment must be made; and

(5) any limitation as to the authorized method of payment. As used in this paragraph, "payoff amount" means an amount which, if received by a secured party, would entitle a debtor to the filing of a termination statement under Section 9-513(c). Such amount may include an amount reasonably necessary to ensure compliance with any non-monetary or contingent obligations of a debtor, which are part of a secured obligation.

§ 9-210 * * *

(b) **[Duty to respond to requests.]**

(1) Subject to subsections (c), (d), (e), and (f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within ~~14~~ three days after receipt:

(~~1~~A) in the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and

(~~2~~B) in the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

(2) If the payoff amount changes, for any reason, after a secured party has complied with the request for an accounting, the secured party may amend the accounting at any time up to the moment the secured party has received the payoff amount as set forth in the accounting.

* * *

(g) **[Failure to respond to requests.]** If a secured party to which a request has been given pursuant to subsection (a) does not send a timely response that substantially complies with subsection (b), (c), (d), or (e), the secured party is liable to the debtor for any actual damages caused by the failure plus $500, but not punitive damages. [A

secured party that does not pay the damages provided in this subsection within 30 days after receipt of a written notice of the amount of actual damages sustained by a debtor, may also be liable for reasonable attorney's fees and costs.]

The Committee concluded that although there may be a problem in this area, it would be incredibly difficult to craft a solution that is appropriate to both complex and simple transactions. The Committee therefore decided not to recommend either alternative and not to work further on the issue.

5. Expansion of § 9-317(d)

§ 9-317 * * *

(b) **[Buyers that receive delivery.]** Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) **[Licensees and buyers of certain collateral.]** A licensee of a general intangible or a buyer, other than a secured party, of ~~accounts, electronic chattel paper, general intangibles, or investment property~~ collateral other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

The Committee agreed to this.

6. Definition of "Authenticate"

§ 9-102(a)(7) "Authenticate" means:

(A) to sign; or

(B) ~~to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record~~ with present intent to [adopt or accept] [authenticate or adopt] a record, to attach to or logically associate with the record an electronic sound, symbol, or process.

The Committee decided to go with "adopt or accept." It will deal endeavor to convince the ULC's Style Committee that this is the appropriate approach.

7. Definition of "Control"

§ 9-105(a) **[General rule: control of electronic chattel paper.]** A secured party has control of electronic chattel paper if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned.

(b) **[Specific facts giving control.]** A system satisfies subsection (a), and a secured party has control of electronic chattel paper, if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the secured party as the assignee of the record or records;

(3) the authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) copies or ~~revisions~~ amendments that add or change an identified assignee of the authoritative copy can be made only with the ~~participation~~ consent of the secured party;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any ~~revision~~ amendment of the authoritative copy is readily identifiable as ~~an~~ authorized or unauthorized ~~revision~~.

Comment 2. **"Control" of Electronic Chattel Paper.** This Article covers security interests in "electronic chattel paper," a new term defined in Section 9-102. This section governs how "control" of electronic chattel paper may be obtained. Subsection (a), which derives from Section 16 of the Uniform Electronic Transactions Act, sets forth the general test for control. Subsection (b) sets forth a safe harbor test that if satisfied, results in control under the general test in subsection (a).

* * *

Comment 4. **Development of Control Systems.** This Article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of electronic chattel paper in a commercial context. However, achieving control under this section requires more than the agreement of interested persons that the elements of control are satisfied. For example, paragraph (4) contemplates that control requires that it be a physical impossibility (or sufficiently unlikely or implausible so as to approach practical impossibility) to add or change an identified assignee without the ~~participation~~ consent of the secured party (or its authorized representative).

The Committee agreed to this despite some concerns expressed about fraud and duplication. The conclusion was that the current standards are too rigid and are to some extent an historical anachronism (because much looser standards exist under other analogous, more modern statutes.

8. Effectiveness of a filed financing statement with respect to property acquired after the debtor's relocation to another jurisdiction

§ 9-316 * * *

(h) **[Effect on filed financing statement of change in governing law.]** The following rules apply to a security interest that attaches within four months after the debtor changes its location to another jurisdiction:

(1) Subject to paragraph (4), a financing statement filed pursuant to the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) is effective to perfect a security interest in the collateral if the financing statement would have been effective to perfect a security interest in the collateral had the debtor not changed its location.

(2) Subject to paragraph (4), if a security interest that is perfected by a financing statement that is effective under subsection (1) becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) or the expiration of the four-month period, it remains perfected thereafter.

(3) If the security interest does not become perfected under the law of the other jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(4) A security interest that is perfected solely by a financing statement that is effective solely under paragraph (1) is deemed to be unperfected as against a buyer, lessee, or licensee of the collateral until it is perfected under the law of the other jurisdiction.

§ 9-322 * * *

(b) **[Time of perfection: proceeds and supporting obligations.]** For the purposes of subsection (a)(1):

(1) the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; ~~and~~

(2) the time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation; and

(3) subject to subsection (h), the time of filing or perfection as to a security interest in collateral which remains perfected under Section 9-316(h)(2) is the time the security interest becomes perfected under the law of the other jurisdiction.

* * *

(h) **[Limitation on subsection (b)(3).]** Subsection (b)(3) does not affect the priority of competing security interests, each of which remains perfected under Section 9-316(h)(2).

The revised draft of this approach protects buyers, lessors, and licensees (§ 9-316(h)(4)), and secured parties who first perfect in the new jurisdiction (§ 9-322(b)). The Committee agreed to this.

9. Effectiveness of a filed financing statement with respect to property acquired by new debtor located in a different jurisdiction

§ 9-316 * * *

(i) **[Effect of change in governing law on financing statement filed against original debtor.]** If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) and the new debtor is located in another jurisdiction, the following rules apply:

(1) Subject to paragraph (4), the financing statement is effective to perfect a security interest in collateral in which the new debtor has or acquires rights before or within four months after the new debtor becomes bound under Section 9-203(d), if the financing statement would have been effective to perfect a security interest in the collateral had it been acquired by the original debtor.

(2) Subject to paragraph (4), a security interest that is perfected by the financing statement and which becomes perfected under the law of the other jurisdiction before the earlier of the expiration of the four-month period or the time the financing statement would have become ineffective under the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) remains perfected thereafter.

(3) A security interest that is perfected by the financing statement but which does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(4) A security interest that is perfected solely by a financing statement that is effective solely under paragraph (1) is deemed to be unperfected as against a buyer, lessee, or licensee of the collateral until it is perfected under the law of the other jurisdiction.

Concern was expressed about the added complexity and whether the problem justifies the added the complexity. Concern was also expressed with transition, given that states are not likely to enact this with a uniform enactment date. Nevertheless, the Committee agreed to this.

10. Differences between control requirements under § 8-106 and §§ 9-104, 9-106

§ 9-104(a) **[Requirements for control.]** A secured party has control of a deposit account if:

(1) the secured party is the bank with which the deposit account is maintained;

(2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; ~~or~~

(3) the secured party becomes the bank's customer with respect to the deposit account; or

(4) another person has control of the deposit account on behalf of the secured party, or, having previously acquired control of the deposit account, acknowledges that it has control on behalf of the secured party.

Comment 3 * * *

Under subsection (a)(4), a secured party may obtain control if another person has control and the person acknowledges that it has control on the secured party's behalf.

The Committee agreed to this and to a similar change to § 9-106. There was extensive discussion of whether the priority rule in § 9-328(2)(B)(iii) should be added to § 9-327. In other words, whether the priority rules for deposit accounts and investment property should be harmonized given that the perfection rules will be harmonized. The Committee agreed to this.

11. Effect of anti-assignment clauses

§ 9-406(e) [Inapplicability of subsection (d) to certain sales.] Subsection (d) does not apply to the sale, other than a sale pursuant to a disposition under Section 9-610, of a payment intangible or promissory note.

§ 9-408(b) [Applicability of subsection (a) to sales of certain rights to payment.] Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale, other than a sale pursuant to a disposition under Section 9-610, of the payment intangible or promissory note.

It was noted, that this change would allow a secured party to collect on a note with an anti-assignment clause but if the secured party had conducted a strict foreclosure first, it could not. Therefore, the Committee decided to change the additional language to "a disposition under Part 6," to allow the secured party who strictly forecloses to still collect. With that change, the Committee agreed to this.

12. Definition of "Certificate of Title"

[Alternative A – Prepared by an Advisor]

§ 9-102(a)(10) "Certificate of title means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate or on the documentation provided to the issuer of the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

[Alternative B – Prepared by an Advisor]

§ 9-102(a)(10) "Certificate of title means a certificate of title with respect to which a statute ~~provides~~ requires the security interest in question to be indicated on the certificate or on the documentation provided to the issuer of the certificate ~~as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral~~.

The Committee tentatively decided to add a sentence to the current definition that expressly includes a record maintained pursuant to state statute that provides a system maintained by a governmental unit for recording both ownership of and security interests in specific goods and that provides for priority over lien creditors. The reporter will draft appropriate language..

13. Property going from uncertificated state to certificated state

§ **9-316 comment 5 * * ***

Example 9A. Debtor, who lives in Mississippi, owns a recreational boat that is subject to Lender's security interest. Mississippi's certificate-of-title laws do not cover watercraft, and so Lender perfects by filing a financing statement in Mississippi. Debtor wishes to use the boat exclusively on a lake in Alabama, but Alabama law prohibits Debtor from doing so without first applying for an Alabama certificate of title. When Debtor delivers an application for an Alabama certificate to the appropriate authority and pays the applicable fee, the boat becomes covered by an Alabama certificate of title and Alabama law governs perfection, the effect of perfection or nonperfection, and priority of the security interest. See Section 9-303. Under Alabama's Section 9-316(d), Lender's security interest remains perfected until it would have become unperfected under Mississippi law had the boat not become covered by the Alabama certificate of title (e.g., because the effectiveness of the filed financing statement lapses). However, as against a purchaser of the boat for value, Lender's security interest would become unperfected and would be deemed never to have been perfected if Lender fails to reperfect under Alabama's Section 9-311(b) or 9-313 in a timely manner. See subsection (e).

Reporter's Note

New Example 9A clarifies the operation of Section 9-316(d). Consider the following variation:

> Debtor, who lives in Mississippi, owns a recreational boat that is subject to Lender's security interest. Mississippi's certificate-of-title laws do not cover watercraft, and so Lender perfects by filing a financing statement in Mississippi. After the filing, Debtor moves to Alabama and applies for an Alabama certificate of title for the boat.

The Committee agreed to the draft of comment 9A, which applies when the debtor does not move, and agreed that a new comment should be written along the lines of that in the Reporter's Note, to indicate that if the debtor moves from a state in which the boat is not certificated to a state that does certificate boats, then § 9-316(a) governs, not § 9-316(d). As a result, if the debtor does not obtain a certificate, perfection continues for only four months, not for as long as perfection would last under the original state.

14. Classification of "stripped" rentals

§ 9-102 comment 5d * * *

In classifying intangible collateral, a court should begin by identifying the particular rights that have been assigned. The account debtor (promisor) under a particular contract may owe several types of monetary obligations as well as other, nonmonetary obligations. If the promisee's right to payment of money is assigned separately, the right is an account or payment intangible, depending on how the account debtor's obligation arose. When all the promisee's rights are assigned together, an account, a payment intangible, and a general intangible all may be involved, depending on the nature of the rights.

A right to the payment of money is frequently buttressed by ancillary covenants, such as covenants in a purchase agreement, note, or mortgage requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve the creditworthiness of the promisor, such as covenants restricting dividends and the like. This Article does not treat these ancillary rights separately from the rights to payment to which they relate. For example, attachment and perfection of an assignment of a right to payment of a monetary obligation, whether it be an account or payment intangible, also carries these ancillary rights. Among these ancillary rights are the lessor's rights with respect to leased goods that arise upon the lessee's default. See Section 2A-523. Accordingly, and contrary to the opinion in *In re Commercial Money Center, Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006), if the lessor's rights under a lease constitute chattel paper, an assignment of the lessor's right to payment under the lease also would be chattel paper, even if the assignment excludes those ancillary rights.

The comment indicates that something that is ancillary can be stripped without changing classification but something that is not ancillary cannot be, and the Committee discussed whether the distinction between those two situations could be clearly applied. The Committee also discussed whether the added language conflicts with language in the previous paragraph.

The Committee decided to adopt this comment, but changed the first use of the word "covenant" in the last paragraph to "rights," added the word "However" to the beginning of the paragraph, and replaced "those ancillary" in the last line with "other."

15. Ratification of unauthorized filing on priority

§ 9-322 comment 4 * * *

Under a notice-filing system, a filed financing statement indicates to third parties that a person may have a security interest in the collateral indicated. With further inquiry, they may discover the complete state of affairs. When a financing statement that is ineffective when filed becomes effective thereafter, the policy underlying the notice-filing system determines the "time of filing" for purposes of subsection (a)(1). For example, upon the debtor's ratification of the unauthorized filing of an otherwise sufficient initial financing statement, the filing becomes authorized and the financing statement becomes effective. See Section 9-509, Comment 3. Because the authorization does not increase the notice value of the financing statement, the time of the unauthorized filing is the "time of filing" for purposes of this subsection (a)(1). A different result would obtain where an initial financing statement is ineffective because the name of the debtor is incorrect and seriously misleading and the filing office changes its standard search logic so that the name on the financing statement no longer is seriously misleading. See Section 9-506(c). Because the financing statement did not afford notice to third parties until the search logic changed and the financing statement became effective, the time of the change is the "time of filing" for purposes of subsection (a)(1).

The Committee agreed to this addition to the comment but to delete everything from "[a] different result" to the end of the paragraph and to make the example more expressly cover the debtor's authentication of a security agreement post-filing. It also added language to make it clear that the point is not limited to § 9-322(a)(1). The final language will be something like the following:

Under a notice-filing system, a filed financing statement indicates to third parties that a person may have a security interest in the collateral indicated. With further inquiry, they may discover the complete state of affairs. When a financing statement that is ineffective when filed becomes effective thereafter, the policy underlying the notice-filing system determines the "time of filing" for purposes of subsection (a)(1) and the other priority rules of this part. For example, the debtor's authentication of a

security agreement or ratification of an unauthorized filing of an otherwise sufficient initial financing statement, the filing becomes authorized and the financing statement becomes effective. See Section 9-509, Comment 3. Because the authorization does not increase the notice value of the financing statement, the time of the unauthorized filing is the "time of filing" for purposes of this subsection (a)(1).

16. Amendment to Overrule *Highland Capital*

§ 8-103 * * *

(h) An obligation, share, participation or interest does not satisfy section 8-102(a)(13)(ii) or section 8-102(a)(15)(i) merely because the issuer or a person acting on its behalf:

(i) records [transfer thereof] [the holders of interests therein] for a purpose other than registration of transfer, or

(ii) [could record transfers thereof] [could, but does not, maintain books] for the purpose of registration of transfer.

Comment 9. Subsection (h) rejects the holding of *Highland Capital Management LP v. Schneider*, 8 N.Y.3d 406 (2007). The registrability requirement in the definition of "registered form," and its parallel in the definition of "security," are satisfied only if the business arrangement is such that books are maintained for the purpose of registration of transfer, including the determination of rights under Section 8-207(a) (or if, in the case of a certificated security, the security certificate so states). It is not sufficient that the issuer records ownership, or records transfers thereof, for other purposes. Nor it is sufficient that the issuer, while not in fact maintaining books for the purpose of registration of transfer, could do so, for such is always the case. Subsection (h) is declaratory of the proper interpretation of the foregoing definitions, not a change in the law.

The Committee agreed to this and to the concept that is should be an amendment to the uniform text.

17. Irrelevance of parties' intent to characterization of the transaction

§ 9-109 comment 2. **Basic Scope Provision.** Subsection (a)(1) derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a "security interest," the definition of that term in Section 1-201 must be consulted.

When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it. Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to the application of this Article, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102.

The Committee agreed to this.

18. Papering Out Electronic Chattel Paper

§ 9-105 comment 5b * * *

The definition of electronic chattel paper does not dictate that it be created in any particular fashion. For example, a record consisting of a tangible writing may be converted to electronic form (e.g., by creating electronic images of a signed writing). Or, records may be initially created and executed in electronic form (e.g., a lessee might authenticate an electronic record of a lease that is then stored in electronic form). In either case the resulting records are electronic chattel paper. Likewise, tangible chattel paper results when chattel paper in electronic form is converted to tangible form.

§ 9-330 comment 3 * * *

For a security interest qualify for priority under subsection (a) or (b), the secured party must "take[] possession of the chattel paper or obtain[] control of the chattel paper under Section 9-105." When chattel paper comprises one or more tangible records and one or more electronic records, a secured party satisfies this requirement if it has possession of all the tangible records and control of all the electronic records.

The Committee agreed to this but modified the last clause to read "a secured party satisfies this requirement if it has possession of the tangible records and control of the electronic records."

19. Hybrid chattel paper

§ 9-330 comment 3 * * *

For a security interest qualify for priority under subsection (a) or (b), the secured party must "take[] possession of the chattel paper or obtain[] control of the chattel paper under Section 9-105." When chattel paper comprises one or more tangible records and one or more electronic records, a secured party satisfies this requirement if it has possession of all the tangible records and control of all the electronic records.

The Committee agreed to this.

20. Notification of Strict Foreclosure

Unlike Section 9-611, this section contains no "safe harbor," which excuses an enforcing secured party from notifying certain secured parties and other lienholders. This is because, unlike Section 9-610, which requires that a disposition of collateral be commercially reasonable, Section 9-620 permits the debtor and secured party to set the amount of credit the debtor will receive for the collateral subject only to the requirement of good faith. An effective acceptance discharges subordinate security interests and other subordinate liens. See Section 9-622. If collateral is subject to several liens securing debts much larger than the value of the collateral, the debtor may be disinclined to refrain from consenting to an acceptance by the holder of the senior security interest, even though, had the debtor objected and the senior disposed of the collateral under Section 9-610, the collateral may have yielded more than enough to satisfy the senior security interest (but not enough to satisfy all the liens). Accordingly, this section imposes upon the enforcing secured party the risk of the filing office's errors and delay. The holder of a security interest who is entitled to notification under this section but ~~does not receive it~~ to whom the enforcing secured party does not send notification has the right to recover under Section 9-625(b) any loss resulting from the ~~enforcing~~ secured party's noncompliance with this section.

The Committee agreed to this.

21. Transmitting utilities – lapse period

(f) **[Transmitting utility financing statement.]** If a debtor is a transmitting utility and a filed initial financing statement so indicates, the financing statement is effective until a termination statement is filed.

The Committee agreed to this without discussion.

22. Transmitting utilities – choice of governing law

§ 9-301 comment 5b * * *

The filing of a financing statement to perfect a security interest in collateral of a transmitting utility constitutes a fixture filing with respect to goods that are or become fixtures. See Section 9-501(b). Accordingly, to perfect a security interest in goods of this kind by a fixture filing, a financing statement must be filed in the office specified by Section 9-501(b) as enacted in the jurisdiction in which the goods are located. If the fixtures collateral is located in more than one State, filing in all of those States will be necessary to perfect a security interest in all the fixtures collateral by a fixture filing. Of

course, a security interest in nearly all types of collateral (including fixtures) of a transmitting utility may be perfected by filing in the office specified by Section 9-501(a) as enacted in the jurisdiction in which the transmitting utility is located. However, such a filing will not be effective as a fixture filing except with respect to goods that are located in that jurisdiction.

§ 9-501 comment 5 * * *

A given State's subsection (b) applies only if the local law of that State governs perfection. As to most collateral, perfection by filing is governed by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). However, the law of the jurisdiction in which goods that are or become fixtures are located governs perfection by fixture filing. See Section 9-301(3)(A). As a consequence, filing in the filing office of more than one State may be necessary to perfect by fixture filing a security interest in fixtures collateral of a transmitting utility. See Section 9-301, Comment 5.b.

The Committee agreed to this without discussion.

23. Name of registered organization; definition of registered organization

§ 9-503(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

(1) subject to subsection (f), if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public organic record ~~of~~ filed with or issued by the debtor's jurisdiction of organization ~~which shows the debtor to have been organized~~;

* * *

(f) **[Name of registered organization.]** If the public organic record indicates more than one name of the debtor, then, for purposes of subsection (a)(1), "the name of the debtor indicated on the public organic record" means:

(1) if the public organic record is composed of a single record, the name that is stated as the name of the debtor;

(2) if the public organic record is composed of more than one record, the name of the debtor which is indicated on the most recently filed or issued record that is intended to amend or restate the debtor's name; and

(3) if the record specified in paragraph (2) indicates more than one name of the debtor, the name of the debtor which that record states to be the debtor's name.

§ 9-102(a) * * *

(50) "Jurisdiction of organization", with respect to a registered organization, means the jurisdiction under whose law the organization is formed or organized.

* * *

[Alternative A]

(67A) "Public organic record" means:

(A) a record or records composed of the record initially filed with a State or the United States to form or organize an organization and any record filed with the State or the United States which effects an amendment or restatement of the initial record, if the record or records are available to the public for inspection;

(B) [a] [an organic] record or records of a business trust that is initially filed with a State and any record filed with the State which effects an amendment or restatement of the initial record, if a statute of the State governing business trusts requires that the record or records be filed with the State and the record or records are available to the public for inspection; and

(C) a charter issued by a State or the United States which authorizes the organization to [commence business] [commence the business of banking or another regulated business].

[Alternative B]

(67A) "Public organic record" means:

(A) a record or records composed of the record initially filed with a State or the United States to form or organize an organization, or to constitute an organization as a statutory business trust, and any record filed with the State or the United States which effects an amendment or restatement of the initial record, if the record or records are available to the public for inspection; and

(B) a charter issued by a State or the United States which authorizes the organization to [commence business] [commence the business of banking or another regulated business].

* * *

(70) "Registered organization" means an organization formed or organized solely under the law of a single State or the United States ~~and as to which the State or the United States must maintain a public record showing the organization to have been organized~~ by the filing of a public organic record with the State or United States or with respect to which the State or United States has issued a charter that authorizes the organization to [commence business] [commence the business of banking or another regulated business]. [The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust's organic record be filed with the State.]

The text of § 9-102(a)(70) was revised to cover banks that are created by a charter. The Committee went with "commence business" rather than with "commence the business of banking or another regulated business." The Committee also decided to keep the last sentence in brackets

With respect to § 9-102(a)(67A), the Committee went with Alternative A (including the bracketed word), but to expand (C) to cover amendments and public inspection. There was also concern about whether the word "charter" in § 102(a)(67A) was sufficient. The Committee will consider this further.

Both provisions will be expanded to make it clear that entities formed by a state or federal statute are registered organizations, regardless of whether a charter is actually every issued.

The addition of § 9-503(f) was agreed to in principle, but the rule in § 9-503(f)(1) will be moved and become the main rule in § 9-503(a)(1).

24. Name of individual debtors

[Alternative A – Only-if Rule]

§ 9-503(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

* * *

(4) if the debtor is an individual to whom this State has issued a [driver's license] or [identification card] that, at the time the financing statement is filed, has not expired or [been cancelled], only if it provides the name of the individual which is indicated on the [driver's license] or [identification card]; and

* * *

(g) **[Multiple licenses or cards.]** If this State has issued to an individual more than one [driver's license] or [identification card] of a kind described in subsection (a)(4), the one that was issued most recently is the one to which the subsection refers.

[Alternative B – Safe-harbor Rule]

§ 9-503(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

* * *

(4) in other cases:

(A) except as provided in subsection (g), if the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

* * *

(g) **[Exception for individual debtor's name.]** Subject to subsection (h), a financing statement that does not provide the individual name of the debtor nevertheless sufficiently provides the name of a debtor who is an individual if:

(1) it provides the name of the individual which is indicated on a [driver's license] or [identification card] that, at the time the financing statement is filed,

has been issued to the individual by this State and has not yet expired or [been cancelled]; and

(2) the filing office indexes the financing statement in such a manner that a search of the records of the filing office under the name indicated, using the filing office's standard search logic, if any, would disclose the financing statement.

(h) **[Multiple licenses or cards.]** If this State has issued to an individual more than one [driver's license] or [identification card] of a kind described in subsection (g)(1), the one that was issued most recently is the one to which the subsection refers.

SECTION 9-506. EFFECT OF ERRORS OR OMISSIONS.

(a) **[Minor errors and omissions.]** A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) **[Financing statement seriously misleading.]** Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) or (g) is seriously misleading.

(c) **[Financing statement not seriously misleading.]** If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) or (g), the name provided does not make the financing statement seriously misleading.

(d) **["Debtor's correct name."]** For purposes of Section 9-508(b), the "debtor's correct name" in subsection (c) means the correct name of the new debtor.

(e) **[Individual "debtor's correct name."]** If a debtor who is an individual changes his or her name by virtue of Section 9-507(d), the "debtor's correct name" in subsection (c) means the name of the debtor indicated on the [driver's license] or [identification card] that indicates a name different from the name provided on the financing statement.

[end of alternatives]

§ 9-507(d) **[Name sufficient only under Section 9-503(g).]** If, after the filing of a financing statement that provides a name that is sufficient [*Alternative A:* under Section 9-503(a)(4),] [*Alternative B:* only under Section 9-503(g),] this State issues to the debtor a [driver's license] or [identification card] that indicates a name different from the name provided, the debtor changes his or her name for purposes of subsection (c).

The Committee began by discussing the scope of the problem and seemed to reach a consensus (not unanimous) that a change was warranted. It then moved to which of the approaches would be best. It was noted that neither the priority approach nor the only-if approach protects the secured party from an earlier filing one an old version of the debtor's ID name (for existing collateral) or a filing under a different version of the name filed when the debtor didn't have an ID.

It then became clear that if the Committee recommends the "priority approach" (not among the drafted alternatives but advocated by some advisors) and not all states enact it (or not all at the same time) then we end up with different priority rules in different states. That is compounded by the fact that perfection is governed by the location of the debtor but priority is governed by the location of the collateral. The priority approach would also require amendments to §§ 9-317, 9-320, 9-321, 9-322, and 9-324 to avoid possible circular priority problems.

The Committee then decided to hold a conference call in the coming weeks to select among the approaches. In the interim, it worked on refining the only-if and safe harbor approaches.

With respect to the only-if rule, the Committee concluded that the license/ID should be used only if it does not appear on its face to have expired. It then concluded that there should be a "waterfall" of acceptable ID's: (i) if there is a driver's license, then the name on that is the name to use; (ii) if there is no driver's license and if there is a state-issued ID, then use then name on that; and (iii) if the debtor has neither of these IDs, then either go to the name on the passport or simply fall back to the debtor's correct name. There was also general agreement that if a license expires or a new license or ID is issued, and the waterfall rule then points to a different name, then it should be viewed as a name change for the purposes of § 9-507(c).

The Committee also agreed that the Alternative B version of § 9-503(g), which deals with the problem of when the ID issuer uses characters (such as accent marks) that the UCC filing office cannot index, is needed regardless of whether it recommends the safe-harbor, only-if, or some other approach. Moreover, that rule should be applied to any type of debtor.

With respect to the safe-harbor approach, after extended discussion the Committee decided to go with any driver's license or state-issued ID that has not expired on its face. The Committee decided it did not need the rules of § 9-503(h) or § 9-507(d) of Alternative B.

The Committee tentatively decided that rule for a decedent's estate should be unaffected by the only-if or safe-harbor rule. The Committee tentatively decided that the rule for settlors should be unaffected by the only-if rule.

25. Transmitting Utilities

§ 9-301 comment 5b * * *

The filing of a financing statement to perfect a security interest in collateral of a transmitting utility constitutes a fixture filing with respect to goods that are or become fixtures. See Section 9-501(b). Accordingly, to perfect a security interest in goods of this kind by a fixture filing, a financing statement must be filed in the office specified by Section 9-501(b) as enacted in the jurisdiction in which the goods are located. If the fixtures collateral is located in more than one State, filing in all of those States will be necessary to perfect a security interest in all the fixtures collateral by a fixture filing. Of

course, a security interest in nearly all types of collateral (including fixtures) of a transmitting utility may be perfected by filing in the office specified by Section 9-501(a) as enacted in the jurisdiction in which the transmitting utility is located. However, such a filing will not be effective as a fixture filing except with respect to goods that are located in that jurisdiction.

§ 9-501 comment 5 * * *

A given State's subsection (b) applies only if the local law of that State governs perfection. As to most collateral, perfection by filing is governed by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). However, the law of the jurisdiction in which goods that are or become fixtures are located governs perfection by fixture filing. See Section 9-301(3)(A). As a consequence, filing in the filing office of more than one State may be necessary to perfect by fixture filing a security interest in fixtures collateral of a transmitting utility. See Section 9-301, Comment 5.b.

The Committee agreed to this.

26. Application of § 9-307(c) to registered organization

§ 9-307(f) **[Location of registered organization organized under federal law; bank branches and agencies.]** Except as otherwise provided in subsection (i), a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a State are located:

(1) in the State that the law of the United States designates, if the law designates a State of location;

(2) in the State that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location; ~~or~~

(3) in the State in which the designated office of the registered organization, branch, or agency is located, if the law of the United States authorizes the registered organization, branch, or agency to designate its main office, home office, or other comparable office; or

~~(3)~~(4) in the District of Columbia, if ~~neither paragraph (1) nor paragraph (2) applies~~ none of the preceding paragraphs applies.

§ 9-307 comment 3. **Non-U.S. Debtors.** Under the general rules of this section, a non-U.S. debtor often would be located in a foreign jurisdiction and, as a consequence, foreign law would govern perfection. When foreign law affords no public notice of security interests, the general rule yields unacceptable results.

Accordingly, subsection (c) provides that the normal rules for determining the location of a debtor (i.e., the rules in subsection (b)) apply only if they yield a location that is "a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." The phrase "generally requires" is meant to include legal regimes that generally require notice in a filing or recording system as a condition of perfecting nonpossessory security interests, but which permit perfection by another method (e.g., control, automatic perfection, temporary perfection) in limited circumstances. A jurisdiction that has adopted this Article or an earlier version of this Article is such a jurisdiction. If the rules in subsection (b) yield a jurisdiction whose law does not generally require notice in a filing or registration system and none of the special rules in subsections (e), (f), (i), and (j) applies, the debtor is located in the District of Columbia.

§ 9-307 comment 5. **Registered Organizations Organized Under Law of United States; Branches and Agencies of Banks Not Organized Under Law of United States.** Subsection (f) specifies the location of a debtor that is a registered organization organized under the law of the United States. It defers to the law of the United States, to the extent that that law determines, or authorizes the debtor to determine, the debtor's location. Thus, if the law of the United States designates a particular State as the debtor's location, that State is the debtor's location for purposes of this Article's choice-of-law rules. Similarly, if the law of the United States authorizes the registered organization to designate its State of location, the State that the registered organization designates is the State in which it is located for purposes of this Article's choice-of-law rules. The law of the United States authorizes certain registered organizations to designate a main office, home office, or other comparable office. See, e.g., 12 U.S.C. Sections 22 and 1464(a); 12 C.F.R. Section 552.3. Where the registered organization designates an office pursuant to such an authorization, the State in which the designated office is located is the location of the debtor for purposes of Section 9-307(f). In other cases, the debtor is located in the District of Columbia.

~~In some cases, the law of the United States authorizes the registered organization to designate a main office, home office, or other comparable office. See, e.g., 12 U.S.C. Sections 22 and 1464(a); 12 C.F.R. Section 552.3. Designation of such an office constitutes the designation of the State of location for purposes of Section 9-307 (f)(2).~~

Subsection (f) also specifies the location of a branch or agency in the United States of a foreign bank that has one or more branches or agencies in the United States. The law of the United States ~~authorized~~ authorizes a foreign bank (or, on behalf of the bank, a federal agency) to designate a single home state for all of the foreign bank's branches and agencies in the United States. See 12 U.S.C. Section 3103(c) and 12 C.F.R. Section 211.22. As authorized, the designation constitutes the State of location for the branch or agency for purposes of Section 9-307(f), unless all of a foreign bank's branches or

agencies that are in the United States are licensed in only one State, in which case the branches and agencies are located in that State. See subsection (i).

The Committee agreed to this.

27. Application of § 9-503(a) to debtor that is both a trust and a registered organization

(a) **[Sufficiency of debtor's name.]** A financing statement sufficiently provides the name of the debtor:

(1) if the debtor is a registered organization and is not a trustee acting with respect to property held in trust, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

(2) if the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) if the debtor is a trust that is not a registered organization or a trustee acting with respect to property held in trust, only if the financing statement:

(A) provides the name specified for the trust in its organic ~~documents~~ record or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and

(B) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; * * *

The Committee agreed to this.

28. Correction statements

SECTION 9-518. CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD.

(a) **[~~Who may file~~Statement with respect to record indexed under person's name.]** A person may file in the filing office a ~~correction~~ statement of a claim with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed.

[Alternative A]

(b) **[Sufficiency of ~~correction~~ statement under subsection (a).]** A ~~correction~~ statement of a claim under subsection (a) must:

(1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) indicate that it is a ~~correction~~ statement of a claim; and

(3) provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

[Alternative B]

(b) **[Sufficiency of ~~correction~~ statement under subsection (a).]** A ~~correction~~ statement of a claim under subsection (a) must:

(1) identify the record to which it relates by:

(A) the file number assigned to the initial financing statement to which the record relates; and

(B) if the ~~correction~~ statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed [or recorded] and the information specified in Section 9-502(b);

(2) indicate that it is a ~~correction~~ statement of a claim; and

(3) provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

[End of Alternatives]

(c) **[Statement by secured party of record.]** A person may file in the filing office a statement of a claim with respect to a record filed there if the person is a secured party of record with respect to the financing statement to which the record relates and believes that the person who filed the record was not entitled to do so under Section 9-509(d).

[Subsection (d)—Alternative A]

(d) **[Sufficiency of statement under subsection (c).]** A statement of a claim under subsection (c) must:

(1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) indicate that it is a statement of a claim; and

(3) provide the basis for the person's belief that the person who filed the record was not entitled to do so under Section 9-509(d).

[Subsection (d)—Alternative B]

(d) **[Sufficiency of statement under subsection (c).]** A statement of a claim under subsection (c) must:

(1) identify the record to which it relates by:

(A) the file number assigned to the initial financing statement to which the record relates; and

(B) if the statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed [or recorded] and the information specified in Section 9-502(b);

(2) indicate that it is a statement of a claim; and

(3) provide the basis for the person's belief that the person who filed the record was not entitled to do so under Section 9-509(d).

[End of Alternatives]

~~(c)~~(e) **[Record not affected by ~~correction~~ statement of claim.]** The filing of a ~~correction~~ statement of a claim under this Section does not affect the effectiveness of an initial financing statement or other filed record.

The Committee agreed to this. This change would allow the debtor to file a statement if it thinks there is something wrong in the filed records as to it; and the secured party to file a statement if it thinks there is something wrong in the files as to it.

29. Official Forms

[see IACA memorandum at end of this report]

IACA set up a forms committee to review the issues raised by the Review Committee at its last meeting. It came up with a new form that eliminates the need for social security numbers, state organizational numbers. Those are no longer necessary (they were added out of a concern that not all states would enact revised Article 9 and we might have multiple filings in a single jurisdiction against different registered organizations with the same name). Correlative changes to § 9-516(b) will be made. The also moves some things (*e.g.*, box for transmitting utility) from the addendum to the main page.

The Committee decided to divide the check boxes in line 5 into a 5a and 5b, with the former including transmitting utility, manufactured home, and public finance transaction (for which filers may check no more than one box) and the latter including non-UCC filing and ag lien (either or both of which the filer check if applicable).

On the amendment form, the Committee suggested moving the termination box down so that it is not right next to the continuation box.

The Committee agreed to the redrafted forms.

The Committee also discussed changing the form's reference to "last name" to "surname" and decided to seek input on how to deal with debtors who have both a maternal and paternal surname.

30. § 9-318 is not a priority rule

§ 9-318 comment 5. Not a Priority Rule. If a debtor sells an account, chattel paper, payment intangible or promissory note to a buyer, and the debtor later transfers an interest in the same receivable to another purchaser, a priority contest arises. If the

interests are such that the priority contest is governed by Article 9, it is resolved by application of the priority rules of Article 9. Subsection (a) does not import the common-law principle of *nemo dat quod non habet* to displace those rules. In many circumstances the priority rules of Article 9 will give the interest of the second purchaser priority over the buyer's previously-acquired ownership interest. To the extent that the priority rules entail such priority, the debtor necessarily has "power to transfer rights in the collateral" within the meaning of Section 9-203(b)(3). See Section 9-203(b)(3), Comment 6. Subsection (b) is essentially a codification of the foregoing principles as applied to a particular contest of the foregoing type, and various comments note that these principles apply to other particular contests. See Section 9-318, Comment 4; Section 9-317, Comment 6. These principles apply generally to all priority contests of the foregoing type. However, when a buyer's ownership interest is awarded priority under the applicable Article 9 priority rule, the identification of the applicable rule as one of "priority" does not imply that the seller has retained any interest.

> **Example 2:** SP-1, having authority to do so, files a financing statement against Debtor covering accounts. Debtor then sells to SP-2 a particular account, with requisites for attachment satisfied, and SP-2 files a financing statement against Debtor covering the account. Debtor later grants to SP-1 a security interest (either by sale or by security transfer) in the account, authenticating an appropriate security agreement and with value being given. SP-2 cannot invoke *nemo dat* to claim priority over SP-1 in the account. Rather, the priority dispute is resolved under the relevant priority rule of Article 9. In this case, SP-1 has priority over SP-2 as first to file, under Section 9-322(a)(1). SP-1's security interest in the account attached because Debtor had "power to transfer rights in the collateral" within the meaning of 9-203(b)(3). If the grant to SP-1 was a sale, SP-2 has no interest in the account; if the grant to SP 1 was a security transfer, SP-2 owns the account subject to SP-1's security interest.

The Committee tentatively agreed to this.

31. Priority in Proceeds

§ 9-322 comment 8 * * *

If two security interests in the same original collateral are entitled to priority in an item of proceeds under subsection (c)(2), the security interest having priority in the original collateral has priority in the proceeds.

The Committee agreed to this.

32. Secured Party's Authorization to file amendments

§ 9-509 comment 6. **Amendments; Termination Statements Authorized by Debtor.** Most amendments may not be filed unless the secured party of record, as determined under Section 9-511, authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization of the secured party of record is not required for the filing of a termination statement if the secured party of record failed to send or file a termination statement as required by Section 9-513, the debtor authorizes it to be filed, and the termination statement so indicates. Although a person filing a record would be prudent to obtain and retain an authenticated record authorizing the filing, an authorization under subsection (d) is effective even if it is not in an authenticated record. Compare subsection (a)(1).

The Committee agreed to this.

33. Application of § 9-506 to § 9-706(c) information

§ 9-706 comment 2 **Requirements of Initial Financing Statement Filed in Lieu of Continuation Statement.** Subsection (c) sets forth the requirements for the initial financing statement under subsection (a). These requirements are needed to inform searchers that the initial financing statement operates to continue a financing statement filed elsewhere and to enable searchers to locate and discover the attributes of the other financing statement. The notice-filing policy of this Article applies to the initial financing statements described in this section. Accordingly, an initial financing statement that substantially satisfies the requirements of subsection (c) is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading. See Section 9-506.

The Committee agreed to this.

34. Wrongful filings

SECTION 9-513A. TERMINATION OF WRONGFULLY FILED RECORD; REINSTATEMENT.

(a) [**"Government employee."**] In this section, "government employee" means:

(1) an employee or elected or appointed official of this State, the United States, or a governmental unit of this State or the United States; and

(2) a member of an authority, board, or commission established by this State, the United States, or a governmental unit of this State or the United States.

(b) **[Application of this section.]** This section applies only with respect to a filed financing statement that indicates all secured parties of record to be individuals, identifies as a debtor an individual who was a government employee at or before the time the financing statement was filed, and was filed by an individual not entitled to do so under Section 9-509(a). If the financing statement indicates more than one debtor, the provisions of this section apply only with respect to those debtors who are individuals and were government employees at or before the time the financing statement was filed.

(c) **[Affidavit of wrongful filing.]** A government employee identified as a debtor in a filed financing statement [to which this section applies] may file in the filing office a notarized affidavit, made under oath or penalty of perjury, in the form prescribed by the [Secretary of State], stating that the financing statement was filed by an individual not entitled to do so under Section 9-509(a). The [Secretary of State] shall adopt and, upon request, make available to a government employee a form of affidavit to be used under this subsection.

(d) **[Termination statement by filing office.]** If an affidavit is filed under subsection (c), the filing office shall promptly file a termination statement with respect to the financing statement. The termination statement must indicate that it was filed pursuant to this section.

(e) **[No fee charged or refunded.]** The filing office shall not charge a fee for the filing of an affidavit under subsection (c) or a termination statement under subsection (d). The filing office shall not return any fee paid for filing the financing statement to which the affidavit relates, whether or not the financing statement is reinstated under subsection (h).

(f) **[Notice of termination statement.]** On the same day that a filing office files a termination statement under subsection (d), it shall send to the secured party of record for the financing statement a notice advising the secured party of record that the termination statement has been filed. The notice shall be sent by certified mail, return receipt requested, to the address provided for the secured party in the financing statement.

(g) **[Action for reinstatement.]** An individual who believes in good faith that the individual was entitled to file the financing statement as to which a termination statement was filed under subsection (d) may file an action to reinstate the financing statement. The exclusive venue for an action shall be in the [circuit] court for the county where the filing office in which the financing statement was filed is located or, if the government employee resides in this State, the county where the government employee resides. The action shall have priority on the court's calendar and shall proceed by expedited hearing.

(h) **[Action for reinstatement successful.]** If, in an action under subsection (g), the court determines that the financing statement should be reinstated, the secured party of record may provide a copy of the court's judgment or order to the filing office. If the filing office receives a copy within 30 days after the entry of the judgment or order, the filing office shall promptly file a record that identifies by its file number the initial

financing statement to which the record relates and indicates that the financing statement has been reinstated.

(i) **[Effect of reinstatement.]** Except as otherwise provided in subsection (j), upon the filing of a record reinstating a financing statement under subsection (h), the effectiveness of the financing statement is retroactively reinstated and the financing statement shall be considered never to have been ineffective as against all persons and for all purposes. If the effectiveness of a financing statement that is reinstated would have lapsed between the time of the filing of the termination statement and the time of the filing of the record reinstating the financing statement, the secured party of record may file a continuation statement not later than 30 days after the time of the filing of the record reinstating the financing statement. Upon the timely filing of a continuation statement, the effectiveness of the financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective had no termination statement been filed by the filing office.

(j) **[Exception to subsection (i).]** A financing statement whose effectiveness is reinstated shall not be effective as against a person that purchased the collateral in good faith and for value between the time of the filing of the termination of the financing statement and the time of the filing of the record reinstating the financing statement.

(k) **[Liability for wrongful filing.]** If, in an action under subsection (g), the court determines that the individual who filed the financing statement was not entitled to do so under Section 9-509(a), the government employee may recover from the individual the costs and expenses, including reasonable attorneys' fees, that the government employee incurred in the action. [This recovery is in addition to any recovery to which the government employee is entitled under Section 9-625.]

The proposal protects current public employees but not former government employees. In that sense, it draws a line between protecting public officials and protecting lenders from destruction of their real filings by their debtors. Concern was expressed by limiting the protections here to financing statements filed by an individual, and the bogus filer could easily circumvent that limitation by purporting to be a partnership, other entity, or even a sovereign state. On the other hand, such a limitation means that the rule would not apply to financing statements files by banks or other financial institutions, and therefore the risk of the debtor filing a fraudulent termination statement would be less.

The Committee decided not to incorporate this rule into Article 9 but to assist in drafting a hip-pocket amendment, that would not be part of Article 9.

35. Section 9-520 comment 2

[proposed by an advisor]

§ 9-520 comment 2 **Refusal to Accept Record for Filing.** In some States, filing offices considered themselves obligated by former Article 9 to review the form and

content of a financing statement and refuse to accept those that they determine are legally insufficient. Some filing offices imposed requirements for or conditions to filing that do not appear in the statute. Under this section, the filing office is not expected to make legal judgments and is not permitted to impose additional conditions or requirements.

This section also prohibits the filing office from imposing different or additional content requirements based on the method or medium of communication. For example, a filing office that accepts electronic records could not refuse to accept a record communicated electronically based upon contents of the name or collateral fields if it would accept the same information in a written record. Nor may the filing office refuse to accept a record for failure to provide information in the record in addition to the information otherwise required by this Part. * * *

The Committee considered this and the reporter will work on revising the comment to clarify what filing offices may do in rejecting electronic filings.

36. Foreign characters in debtor's name.

The Committee discussed this problem at some length. It asked the Joint Task Force on Filing Office Operations ans Search Logic to prepare a proposal on the subject.

Possible Additional Issues

The Committee will be seeking permission to address the following issues:

1. Providing guidance on how to determine whether the debtor is a trust or its trustee.

2. How to deal with the fact that in many states, upon conversion from entity type to another it is unclear whether the debtor is the same debtor or a new debtor. The uncertainty is important because if it is the same entity, the filer needs to file an amendment and if it is not the same entity, the filer should not file an amendment.

3. Preparation of a hip-pocket amendment on bogus filings.

4. Amending §§ 3-302(e) and 3-303(2) to change the references to "security interest" to a "security interest that secures an obligation" to exclude a security interest arising from the sale of a promissory note.

TO: Joint Review Committee on UCC Article 9

FROM: Kelly Kopyt, International Association of Commercial Administrators

RE: UCC Article 9 Revised Forms

DATE: March 2, 2009

In response to the Joint Review Committee's request at the February 6-8, 2009, meeting, the International Association of Commercial Administrators' (IACA) would like to propose the attached revisions to the National Forms, UCC1 and UCC3, as specified in 9-521. The IACA Secured Transaction Section's UCC Forms Committee initially planned to focus its recommendations on the concerns relayed to the Joint Review Committee on February 2, 2009. However, as our efforts progressed, the Committee took additional suggestions under advisement. IACA's new proposal, submitted herein to the Joint Review Committee for comment, intends to streamline the filing process, provide improved instructions that are more comprehensible for submitters and enhance the reliability of search results. These revisions aim to simplify the form, encourage ease of use and promote greater longevity of the revised forms. IACA's revised forms UCC1, UCC1Ad and UCC3 are attached for the Joint Review Committee's reference and comment. Additional form UCC1Ad is relevant to the revisions made to form UCC1.

IACA has also included a revised Form UCC5, the statement of claim concerning an inaccurate or wrongfully filed record for the Joint Review Committee's comment in conjunction with the 9-518 revisions.

A. <u>Form UCC1, UCC Financing Statement:</u>

i. Box 1d, requesting a tax identification, social security or employer identification number, is eliminated. This will accommodate the majority of filing offices enduring significant pressure to remove SSNs from the public record. Only North and South Dakota still require this number be set forth on a form promulgated by the Secretary of State. Their state form acts as a UCC1 financing statement and a Food Security Act notice, therefore a change to the national form will not have an additional affect the filing requirements in those states.

ii. The organizational identification number in box 1g is removed because it is inapplicable in many states. Additionally, IACA trusts that the information requested of an organizational debtor in boxes 1e and 1f is redundant. The filing office implicitly identifies the type of entity in other manners. Elimination of these fields would require corresponding amendments to Article 9; therefore if the Joint Review Committee decides to undertake the statutory revision, IACA would subsequently recommend the removal of boxes 1e, 1f, and 1g from the UCC1.

iii. IACA proposed a new box 1d to allow the debtor to be identified as a trust, trustee or decedent's estate. These check boxes were relocated from the addendum form based

upon their relevance to the debtor information on the face of the UCC1. In turn, this reduces the need for the addendum form, Form UCC1Ad.

iv. In turn, one of the most common uses of the addendum form, Form UCC1Ad, is to identify a debtor as a transmitting utility or its connection with a manufactured home transaction or a public finance transaction. IACA recommends the relocation of the addendum form box 18 to the UCC1 to encourage more one page filings.

v. IACA recommends that box 6, regarding real estate records, be moved to the addendum because it is more relevantly related to the additional information required on the addendum form.

vi. Box 7, the search report request check box, was eliminated because in many cases, it is not correctly accommodated by the filing office. Searchers were impartial to the search request on the UCC1; as a matter of fact, many searchers prefer to submit a separate Form UCC11 information request because it serves to double-check the filing office's data entry of the debtor name submitted on the UCC1.

vii. Finally, IACA recommends that the alternative designations for an agricultural lien or a non-UCC filing, as previously set forth in the alternative designation field, be relocated to the new box 5. These check boxes indicate whether the filing is a transmitting utility or filed in connection with a manufactured home transaction, public finance transaction, an agricultural lien or a non-UCC filing. IACA is of the opinion all the "filed in connection with" designations are more appropriately identified in the new box 5. Subsequently, the new box 6 identifies a lease, consignment, bailment or sale.

B. <u>Form UCC3, UCC Financing Statement Amendment:</u>

i. A great deal of confusion surrounds the instructions on the face of Form UCC3 in boxes 5, 6 and 7. In box 5, IACA proposed to amend the check boxes as follows:

   a) IACA recommends that "change" be replaced with "amend" in boxes 5 and 7. Changes imply that the filing office will replace old information with the new information. Some database information may be updated, however, the filing offices acts as an "open-drawer" with regard to filed records in which it adds new information and retains all of the old information.

   b) An additional check box was added to identify a name amendment separate from an address amendment. Subsequently, the directions on the face of the form have been revised to indicate the required fields for each amendment.

C. <u>Form UCC5, UCC Statement of Claim Concerning Inaccurate or Wrongfully Filed Record:</u>

i. In order to clarify effectiveness of the filing, IACA recommends adding the comment at the top providing that the filing of the statement does not affect the effectiveness of an initial financing statement or other filed record, as stated in 9-518(c).

ii. The name of the form has been changed to "Statement of Claim Concerning Inaccurate or Wrongfully Filed Record." Subsequently, each occurrence of the former "correction statement" throughout the form has been replaced with "statement of claim."

iii. Finally, IACA recommends that the initial financing statement file number be moved to box 1a in order to maintain consistency with the other UCC forms.

iv. In turn, box 1b shall request the record information to which this statement of claim relates so that submitters may indicate the record number as well as type of record or filing date of the record. If the submitter is able to provide the record number, it will serve to be more valuable than an indication of the type of record.

[redacted]

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME				
OR 1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME		SUFFIX
1c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

1d. Check only if applicable and check only one ☐ Debtor is a Trust ☐ Debtor is a Trustee acting with respect to property held in trust ☐ Debtor is a Decedent's Estate

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME				
OR 2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME		SUFFIX
2c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

2d. Check only if applicable and check only one ☐ Debtor is a Trust ☐ Debtor is a Trustee acting with respect to property held in trust ☐ Debtor is a Decedent's Estate

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME				
OR 3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME		SUFFIX
3c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. Check only if applicable and check only one box.

☐ A Debtor is a TRANSMITTING UTILITY ☐ Filed in connection with a Public-Finance Transaction ☐ Filed in connection with a Non-UCC Filing

☐ Filed in connection with a Manufactured-Home Transaction ☐ Filed in connection with an Agricultural Lien

6. ALTERNATIVE DESIGNATION [if applicable]: ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER

7. OPTIONAL FILER REFERENCE DATA

Instructions for UCC Financing Statement (Form UCC1)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1; correct Debtor name is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy; otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, you are encouraged to use either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP).

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1. **Debtor name**: Enter only one Debtor name in item 1, an organization's name (1a) or an individual's name (1b). Enter Debtor's exact full legal name. Don't abbreviate.

1a. Organization Debtor. "Organization" means an entity having a legal identity separate from its owner. A partnership is an organization; a sole proprietorship is not an organization, even if it does business under a trade name. If Debtor is a partnership, enter exact full legal name of partnership; you need not enter names of partners as additional Debtors. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed charter documents to determine Debtor's correct name.

1b. Individual Debtor. "Individual" means a natural person; this includes a sole proprietorship, whether or not operating under a trade name. Don't use prefixes (Mr., Mrs., Ms.). Use suffix box only for titles of lineage (Jr., Sr., III) and not for other suffixes or titles (e.g., M.D.). Use married woman's personal name (Mary Smith, not Mrs. John Smith). Enter individual Debtor's family name (surname) in Last Name box, first given name in First Name box, and all additional given names in Middle Name box.
For both organization and individual Debtors, don't use Debtor trade name, DBA, AKA, FKA, Division name, etc. in place of or combined with Debtor's legal name; you may add such other name as additional Debtors if you wish (but this is neither required nor recommended).

1c. An address is always required for the Debtor named in 1a or 1b.

1d. If Debtor is a Trust or a Trustee acting with respect to property held in trust or is a Decedent's Estate, check the appropriate box.

2. If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. To include further additional Debtors, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names.

3. Enter information for Secured Party or Total Assignee, determined and formatted per Instruction 1. To include further additional Secured Parties, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names. If there has been a total assignment of the Secured Party's interest prior to filing this form, you may (1) enter Assignor S/P's name and address in item 3 and file an Amendment (Form UCC3) [see item 5 of that form]; or (2) enter Total Assignee's name and address in item 3 and, if you wish, also attaching Addendum (Form UCC1Ad) giving Assignor S/P's name and address in item 1.

4. Use item 4 to indicate the collateral covered by this Financing Statement. If space in item 4 is insufficient, put the entire collateral description or continuation of the collateral description on either Addendum (Form UCC1Ad) or separately attached additional page(s).

Note: If this Financing Statement is filed as a fixture filing or if the collateral consists of timber to be cut or as-extracted collateral, attach Addendum (Form UCC1Ad) and complete the required information in items 12, 13, 14 and 15.

5. If Debtor is a Transmitting Utility or if the Financing Statement relates to a Manufactured-Home Transaction, Public-Finance Transaction, or Agricultural Lien (as defined in the applicable Commercial Code), check the appropriate box; also if this is not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box and attach any other items required under other law.

6. If filer desires (at filer's option) to use titles of lessee and lessor, or consignee and consignor, or seller and buyer (in the case of accounts or chattel paper), or bailee and bailor instead of Debtor and Secured Party, check the appropriate box.

7. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 7 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtor's name or other identification, state in which form is being filed, etc.) that filer may find useful.

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

8. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

8a. ORGANIZATION'S NAME

OR

8b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME,SUFFIX

9. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

10. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one name (10a or 10b) - do not abbreviate or combine names

10a. ORGANIZATION'S NAME

OR

10b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

10c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

10d. Check only if applicable and check only one ☐ Debtor is a Trust ☐ Debtor is a Trustee acting with respect to property held in trust ☐ Debtor is a Decedent's Estate

11. ☐ ADDITIONAL SECURED PARTY'S or ☐ ASSIGNOR S/P'S NAME - insert only one name (11a or 11b)

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

11c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

12. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. [if applicable]

13. This FINANCING STATEMENT covers ☐ timber to be cut or ☐ as-extracted collateral, or is filed as a ☐ fixture filing.

14. Description of real estate:

16. Additional collateral description:

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):

Instructions for UCC Financing Statement Addendum (Form UCC1Ad)

8. Insert name of first Debtor shown on Financing Statement to which this Addendum relates, exactly as shown in item 1 of Financing Statement.

9. Miscellaneous: Under certain circumstances, additional information not provided on Financing Statement may be required. Also, some states have non-uniform requirements. Use this space to provide such additional information or to comply with such requirements; otherwise, leave blank.

10. If this Addendum adds an additional Debtor, complete item 10 in accordance with Instruction 1 of Financing Statement. To include further additional Debtors, attach either an additional Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement for determining and formatting additional names.

11. If this Addendum adds an additional Secured Party, complete item 11 in accordance with Instruction 3 of Financing Statement. To include further additional Secured Parties, attach either an additional Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement for determining and formatting additional names. In the case of a total assignment of the Secured Party's interest before the filing of this Financing Statement, if filer has given the name and address of the Total Assignee in item 3 of Financing Statement, filer may give the Assignor S/P's name and address in item 11.

12-15. If this Financing Statement is fi[illegible]a fixture filing or if the collateral consists of timber to be cut or as-extracted collateral, complete items 1-4 of the Financing Statement (Form[illegible]), [illegible]ck the box in item 12, and complete the required information (items 13, 14 and/or 15). If collateral is timber to be cut or as-extracted[illegible]teral, o[illegible]is Financing Statement is filed as a fixture filing, check appropriate box in item 13; provide description of real estate in item 15; [illegible]f Debtor is n[illegible]record owner of the described real estate, also provide, in item 15, the name and address of a record owner. Description[illegible]al estate must be[illegible]fficient under the applicable law of the jurisdiction where the real estate is located.

16. Use this spac[illegible]rovide continued desc[illegible]on of collateral, if you cannot complete description in item 4 of Financing Statement.

[redacted]

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE #

1b. ☐ This FINANCING STATEMENT AMENDMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS.

2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.

3. ☐ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.

4. ☐ ASSIGNMENT (full or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 9.

5. AMENDMENT (PARTY INFORMATION): This Amendment affects ☐ Debtor or ☐ Secured Party of record. Check only one of these two boxes.

Also check one of the following three boxes:

☐ AMEND name: Complete item 7a or 7b, and also item 7c. ☐ CHANGE address: Complete item 6a or 6b, and also item 7c. ☐ DELETE name: Give record name to be deleted in item 6a or 6b. ☐ ADD name: Complete item 7a or 7b, and also item 7c.

6. CURRENT RECORD INFORMATION:

6a. ORGANIZATION'S NAME

OR

6b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7. AMENDED OR ADDED INFORMATION:

7a. ORGANIZATION'S NAME

OR

7b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

7c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY

8. AMENDMENT (COLLATERAL CHANGE): check only one box.

Describe collateral ☐ deleted or ☐ added, or give entire ☐ restated collateral description, or describe collateral ☐ assigned.

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment). If this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here ☐ and enter name of DEBTOR authorizing this Amendment.

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

10. OPTIONAL FILER REFERENCE DATA

Instructions for UCC Financing Statement Amendment (Form UCC3)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1a; correct file number of initial financing statement is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

An Amendment may relate to only one financing statement. Do not enter more than one file number in item 1a.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, you are encouraged to use either Amendment Addendum (Form UCC3Ad) or Amendment Additional Party (Form UCC3AP).

Always complete items 1a and 9.

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1a. **File number:** Enter file number of initial financing statement to which this Amendment relates. Enter only one file number. In some states, the file number is not unique; in those states, also enter in item 1a, after the file number, the date that the initial financing statement was filed.

1b. Only if this Amendment is to be filed or recorded in the real estate records, check box 1b and also, in item 13 of Amendment Addendum, enter Debtor's name, in proper format exactly identical to the format of item 1 of financing statement, and name of record owner if Debtor does not have a record interest.

Note: Show purpose of this Amendment by checking box 4, 5, or 8 (in item 5 you must check two boxes); also complete items 6, 7 and/or 8 as appropriate. Filer may use this Amendment form to simultaneously accomplish both data changes (items 4 or 5, and/or 8) and a Continuation (item 3), although in some states you may have to pay separate fee for each purpose.

2. To terminate the effectiveness of the identified financing statement with respect to security interest(s) of authorizing Secured Party, check box 2. See Instruction 9 below.

3. To continue the effectiveness of the identified financing statement with respect to security interest(s) of authorizing Secured Party, check box 3. See Instruction 9 below.

4. To assign (i) all of assignor's interest under the identified financing statement, (ii) partial interest in the security interest covered by the identified financing statement, or (iii) assignor's full interest in some (but not all) of the collateral covered by the identified financing statement: Check box in item 4 and enter name of assignee in item 7a if assignee is an organization, or in item 7b, formatted as indicated, if assignee is an individual. Complete 7a or 7b, but not both. Also enter assignee's address in item 7c. Also enter name of assignor in item 9. If partial Assignment affects only some (but not all) of the collateral covered by the identified financing statement, filer may check appropriate box in item 8 and indicate affected collateral in item 8.

5,6,7. To amend the name of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is a name change; also enter name of affected party (current record name) in items 6a or 6b as appropriate; and repeat or provide the new name in item 7a or 7b along with the address in item 7c.

5,6,7. To amend the address of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is an address change; also enter name of affected party (current record name) in items 6a or 6b as appropriate; and provide the new address in item 7c.

5,6. To delete a party: Check box in item 5 to indicate whether deleting a Debtor or a Secured Party; also check box in item 5 to indicate that this is a deletion of a party; and also enter name of deleted party in item 6a or 6b.

5,7. To add a party: Check box in item 5 to indicate whether adding a Debtor or Secured Party; also check box in item 5 to indicate that this is an addition of a party and enter the new name in item 7a or 7b along with the address in item 7c. To include further additional Debtors or Secured Parties, attach Amendment Additional Party (Form UCC3AP), using correct name format.

Note: The preferred method for filing against a new Debtor (an individual or organization not previously of record as a Debtor under this file number) is to file a new Financing Statement (UCC1) and not an Amendment (UCC3).

8. Collateral change. To change the collateral covered by the identified financing statement, describe the change in item 8. This may be accomplished either by describing the collateral to be added or deleted, or by setting forth in full the collateral description as it is to be effective after the filing of this Amendment, indicating clearly the method chosen (check the appropriate box). If the space in item 8 is insufficient, use item 13 of Amendment Addendum (Form UCC3Ad). A partial release of collateral is a deletion. If, due to a full release of all collateral, filer no longer claims a security interest under the identified financing statement, check box 2 (Termination) and not box 8 (Collateral Change). If a partial assignment consists of the assignment of some (but not all) of the collateral covered by the identified financing statement, filer may indicate the assigned collateral in item 8, check the appropriate box in item 8, and also comply with instruction 4 above.

9. Always enter name of party of record authorizing this Amendment; in most cases, this will be a Secured Party of record. If more than one authorizing Secured Party, give additional name(s), properly formatted, in item 13 of Amendment Addendum (Form UCC3Ad). If the indicated financing statement refers to the parties as lessee and lessor, or consignee and consignor, or seller and buyer, instead of Debtor and Secured Party, references in this Amendment shall be deemed likewise so to refer to the parties. If this is an assignment, enter assignor's name. If this is an Amendment authorized by a Debtor that adds collateral or adds a Debtor, or if this is a Termination authorized by a Debtor, check the box in item 9 and enter the name, properly formatted, of the Debtor authorizing this Amendment, and, if this Amendment or Termination is to be filed or recorded in the real estate records, also enter, in item 13 of Amendment Addendum, name of Secured Party of record.

10. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 10 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtor's name or other identification, state in which form is being filed, etc.) that filer may find useful.

[redacted]

The filing of this statement does not affect the effectiveness of an initial financing statement or other filed record. This statement of claim shall not amend any UCC record.

STATEMENT OF CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD
FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF PERSON FILING THIS STATEMENT [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. Identification of the RECORD [illegible] this STATEMENT [illegible] CLAIM relates.

1a. INITIAL FINANCING S[illegible]IENT FILE NUMBER	1b. RECORD INFORMATION TO WHICH THIS STATEMENT OF CLAIM RELATES

2a. ☐ RECORD is inaccur[illegible]
Provide the basis for th[illegible]ief of the per[illegible]ntified in [illegible] th[illegible] RECORD identified in item 1 is inaccurate and indicate the manner in which the person believes the RECORD shou[illegible]cure the i[illegible]acy.

2b. ☐ RECORD was wrongfully filed.
Provide the basis for the belief of the person identified in item 4 that the RECORD identifi[illegible]tem 1 was [illegible]gfully filed.

3. If this STATEMENT OF CLAIM relates to a RECORD filed [or recorded] in a filing office described in Section 9-501(a)(1) and this STATEMENT OF CLAIM is filed in such a filing office, provide the date [and time] on which the INITIAL FINANCING STATEMENT identified in item 1a above was filed [or recorded].

3a. DATE	3b. TIME

4. NAME OF PERSON AUTHORIZING THE FILING OF THIS STATEMENT OF CLAIM — The RECORD identified in item 1 must be indexed under this name.

4a. ORGANIZATION'S NAME

OR

4b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX

Instructions for Statement of Claim Concerning Inaccurate or Wrongfully Filed Record (Form UCC5)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instructions 1a and 1b; correct identification of the initial Record to which this Statement of Claim Concerning Inaccurate or Wrongfully Filed Record relates is crucial. Follow Instructions completely.

Fill in form very carefully. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

When properly completed, send Filing Office Copy to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy; otherwise detach. Always detach Debtor and Secured Party Copies.

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

General — You must always complete items 1 and 4 and either 2a or 2b. You may also be required to complete item 3.

1a. **File number:** Enter file number of initial financing statement to which the Record that is the object of this Statement of Claim relates. Enter only one file number.

1b. Enter Record information to wh[i]tement of Claim relates. Indicate the type of Record to which this Statement of Claim relates (e.g., Financing Statement or Amendment) o[r] may [e]nt additional information that you believe will assist in identifying the Record (e.g., the Record file number or the filing date of the R[e]).

2. If this Statement of [C]im is filed based on t[h]iler's belief that the Record identified in item 1 is inaccurate, check box 2a, provide the basis for that belief, and indica[te] manner in which the [R]ecord should be amended to cure the inaccuracy.

   If this Statement o[f] im is filed based o[n] filer's be[l]at the Record identified in item 1 was wrongfully filed, check box 2b and provide the basis for that belief.

3. If this Statement of Claim [re]a Record [F]or recorded] [a] filing office described in Section 9-501(a)(1) and this Statement of Claim is filed in such a filing office, provide the date [and [t]which the Init[i]financing Statement identified in item 1b above was filed [or recorded].

4. Always enter name of the person wh[o] orized th[e] of this [S]ement of Claim. This name must be the same as the name under which the Record is indexed.