THE NEW YORK STATE
LAW REVISION COMMISSION

2001
REPORT ON PROPOSED REVISED
ARTICLE 9

- SECURED TRANSACTIONS -

OF THE UNIFORM COMMERCIAL CODE

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TABLE OF CONTENTS

Part I. Introduction

Article 9 of the Uniform Commercial Code governing secured transactions was adopted by New York in 1962.[1] New York also adopted the uniform revisions made in 1972. New York's Article 9 follows the uniform text quite closely, with one major exception designed to ease the financing of cooperative apartments.[2]

New forms of borrowing, new markets for debt, and changes in technology over subsequent years led the Permanent Editorial Board for the UCC [3] to establish a study group in 1990 to consider revising Article 9. One reason for the study group was the increasing number of non-uniform amendments that had been made to one of the most nearly uniform acts. In 1992, this group published a lengthy report indicating that the statute was fundamentally sound but suggesting three principal areas of change: 1) increasing the scope of Article 9's coverage over certain types of tangible and intangible forms of property, 2) clarifying the rules for creation, enforcement, perfection and priority of a security interest, and 3) improving the public notice function of perfection.[4] In 1993 the Permanent Editorial Board appointed a Drafting Committee to implement the revisions proposed by the study group. The Drafting Committee met fifteen times from 1993 to 1998 in open sessions. Representatives of commercial and consumer interests participated in the discussions concerning the drafts. The drafts were posted on the Internet and summarized in mass mailings to members of the American Bar Association. The later drafts, in particular, were discussed at meetings of bar associations and trade associations. The final text was approved in the spring and summer of 1998 by the American Law Institute and NCCUSL, respectively. The American Bar Association approved the final text at its 1999 mid-year meeting.[5] The revised version of Article 9 has generated considerable commentary.[6]

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[1] In it's 1956 Report on the then new UCC, the Law Revision Commission reported that "Article 9 would accomplish a significant reform in the law of personal property security. The Commission believes that the approach taken by Article 9 as a whole is sound in theory and satisfactorily developed in most of its elements." 1956 Report of the New York State Law Revision Commission at 60. The Commission believes that statement equally applies to Revised Article 9.

[2] 1988 non-uniform amendments, 1988 Laws of New York c. 333.

[3] This organization has responsibility of studying the need for modernizing the UCC, C. Scott Pryor, *Revised Uniform Commercial Code, Article 9: Impact on Bankruptcy*, 7 Am. Bankr. Inst. L. Rev. 465 , 467 (1999).

[4] *Id.* at 467.

[5] The Official Text of Revised Article 9, dated 1999, contains minor technical corrections made in 1999 and January 2000. This Report will refer to this text as "Revised Article 9" or the "Uniform Text" or the "Official Text". It will refer to New York's current Article 9 and the official text on which it is based as "Current Article 9" or "Existing Article 9". Where the discussion concerns a non-uniform part of New York's Current Article 9 rather than differing official text, that fact will be signaled by the phrase "New York's Article 9".

[6] *See, e.g.,* C. Scott Pryor, *Revised Uniform Commercial Code Article 9: Impact in Bankruptcy*, 7 Am. Bankr. Inst. L.Rev. 465 (1999); Jean Braucher, *Deadlock: Consumer Transactions Under Revised Article 9,* 73 Am. Bankr. L.J. 83 (1999), Earl F. Leitess and Steven N. Leitess, *Inventory Financing Under Revised Article 9*, 73 Am. Bankr. L.J. 119 (1999), Edwin E. Smith, *Overview of Revised Article 9*, 73 Am. Bankr. L.J. 1 (1999), Donald J. Rapson *"Receivables" Financing Under Revised Article 9,* 73 Am. Bankr. L.J. 133 (1999), Linda J. Rusch, *Farm Financing Under Revised Article 9*, 73 Am. Bankr.

Mindful of the importance of Article 9 on the commercial landscape, particularly as it affects commercial transactions conducted in New York and the interests of uniformity of commercial transactions across the country, the Law Revision Commission undertook an analysis of Revised Article 9. It secured the services of Professor Paul Shupack, a member of the 1990 study group and a professor at the Benjamin N. Cardozo School of Law of Yeshiva University to review Revised Article 9. The Commission also solicited the views of law professors throughout New York State. The Commission is grateful for the advice of Professor Robert Bowmar of Albany Law School and Professor Neil Cohen of Brooklyn Law School. The Commission is also grateful to the assistance of many other attorneys in the private bar who specialize in secured transactions for their comments and suggestions.[7]

Article 9 of the Uniform Commercial Code currently governs a security interest in personal property, fixtures, including goods, documents, instruments, general intangibles, chattel paper or accounts and to any sale of accounts or chattel paper. The security interest is created by contract between a creditor and a debtor to secure the debtor's payment or other performance of an obligation. The property subject to the security interest is the collateral.[8] If payment is made or the obligation performed, the security interest in the collateral disappears; if the payment is not made or the obligation not performed, the security interest gives the creditor (the secured party) rights in the collateral to satisfy the debt.

The security interest is important for three reasons: (1) it gives the secured party specific rights in the specific collateral; (2) in many situations, it allows the secured party to seize the collateral without having to go to court, so-called self-help repossession; (3) the rights created by the security interest receive priority over other rights, including the rights of other creditors of the debtor, even in bankruptcy.

The security interest comes into existence when the creditor enters into a security agreement with the debtor, reduces the agreement to writing or obtains possession of the

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L.J. 211 (1999); Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 Am. Bankr. L.J. 167 (1999); Steven L. Schwarcz, Symposium, *The Impact on Securitization of Revised UCC Article 9*, 74 Chi.-Kent. L. Rev. 947 (1999); Bruce A. Markell, Symposium, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 Chi.-Kent. L. Rev. 963 (1999); Steven L. Harris & Charles W. Mooney, Jr., Symposium, *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 Chi.-Kent. L. Rev. 1357 (1999); Julian B. McDonnell, *Is Revised Article 9 a Little Greedy?,* 104 Com. L.J. 241 (1999). Larry T. Garvin, *The Changed (And Changing?) Uniform Commercial Code*, 26 Fla. St. U.L. Rev. 285 (1999).

[7] The efforts of the following contributors to this Report are gratefully acknowledged: William M. Burke, Esq. of Shearman & Sterling, Penelope L. Christophorou, Esq. of Cleary, Gottlieb, Steen & Hamilton, Lawrence A. Darby, III, Esq. of Kaye, Scholer, Fierman, Hays & Handler, LLP, Gary T. Holtzer, Esq. of Weil, Gotshal & Manges LLP, Kenneth C. Kettering, Esq. of New York Law School, Erik D. Lindauer, Esq. of Sullivan & Cromwell, Stephen G. Nordquist, Esq. of Nordquist & Stern PLLC, Ruth E. Olson, Esq. of Linklaters, Sandra M. Rocks, Esq. of Cleary, Gottlieb, Steen & Hamilton, Larry Safran, Esq. of Skadden, Arps, Slate, Meagher & Flom LLP, Glenn E. Siegel, Esq. of Dechert Price & Rhodes, Bradley Y. Smith, Esq. of Davis Polk & Wardwell, and Sandra Stern, Esq. of Nordquist & Stern PLLC.

[8] Prior to the creation of Current Article 9, lawyers had to work with a variety of security devices and the substantive law governing each. Article 9 created a single security device, the Article 9 security interest. James J. White and Robert S. Summers, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS 715 (4th ed.1995).

collateral pursuant to the agreement, the debtor has rights in the collateral[9], and the creditor gives value.[10] This creation of the security interest is called "attachment." Attachment has important consequences. The security interest becomes enforceable against a defaulting debtor and, generally, third parties. Perfection, the step of taking possession of the collateral or publicly filing a financing statement with a legally appropriate governmental body, provides "maximum protection against third parties."[11]

Part II. Recommendations

The Commission is of the view that adoption of a proposed uniform law should be considered in light of whether a uniform act demonstrably would improve existing New York law and whether the value of uniformity among the states merits the adoption of provisions that are not necessarily an improvement over New York law. Revised Article 9 satisfies the Commission's test. Where Revised Article 9 makes significant changes in the law governing security interests in personal property, it improves on current law by allowing the statute to fit new forms of commerce and to permit easy adaptation to electronic forms of commerce. Where the changes in the statute substitute one arbitrary time period for another, e.g., the 20 day grace period for a filing with respect to proceeds instead of the former 10 day grace period, the value of uniformity justifies the change. In between these two ends of the spectrum, there are numerous small changes in text and concept that clarify the law of secured transactions. Each of these changes taken separately might not satisfy the Commission's test, but they cannot be taken separately as they are part of a tightly drafted integrated text.

As detailed below, the Commission recommends that New York adopt Revised Article 9 with conforming amendments to relevant provisions of other articles of the Code[12] because Revised Article 9 is basically legally sound in substance and structure. The Commission also suggests the adoption of certain non-conforming amendments, including amendments to address security interests in cooperative apartments consistent with New York's previous adoption of non-conforming amendments for cooperative apartments. The Commission also recommends that Article 6, Uniform Commercial Code - Bulk Sales be repealed.

The Commission recommends that New York enact Revised Article 9 as promptly as practical, and in any case in time to become effective on the uniform effective date of July 1, 2001. The drafters of the New York enacting bill should take care to assure that the enacting bill includes all the official errata to Revised Article 9 issued through January 15, 2000. The Committee recommends that no non-uniform changes be made in the New York text of Revised Article 9 except as noted in this Report.

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[9] The debtor's rights in the collateral are determined by the common law, Articles 2 and 2A of the Uniform Commercial Code or other rules. White & Summers 762.

[10] *See* Section 1-201(44).

[11] White & Summers 756. In some instances, security interests are perfected upon their attachment. *Id.* at 764.

[12] Articles 1, 2, 2A, 4,5,7, and 8

Part III. Overview of Revised Article 9

Revised Article 9 makes significant changes to all five parts of Current Article 9.[13]. Part One, which deals with the scope of the article's coverage and provides definitions of relevant terms, expands the scope of Article 9 to include additional types of property that can serve as collateral - notably non-consumer deposit accounts, certain kinds of insurance claims, and payment intangibles (a newly defined type of property). Many of these changes correct technical problems that have arisen under the current statute or provide legal certainty to a large number of transactions that until now have suffered from legal ambiguity.

Part Two of Revised Article 9, which addresses the validity of the security agreement and the parties' rights to the agreement, clarifies the rules concerning purchase-money security interests. It also clarifies issues arising when one person becomes bound as a debtor to a security agreement entered into by another person. Current Article 9 provides for rules governing the rights and duties of a secured party in possession of collateral. Revised Article 9 refines the statement of those rights and duties and it creates, for the first time a parallel set of rights and duties of a secured party with control over intangible collateral.

Part Three of current Article 9 governs the rights of third parties, perfected security interests and the rules of priority. Revised Article 9 splits this complex subject into two parts. Revised Article 9's Part 3 deals only with perfection and priority. It integrates agricultural liens into Article 9, a provision with little importance to New York, but of great importance to many states. It provides for the first time, clear rules concerning perfection of security interests in credit card receivables, health-care insurance-receivables (another newly defined type of property) and letter-of-credit rights. It provides clear, but somewhat complex, rules for determining the location of the debtor. These changes are necessary because under Revised Article 9, as noted below, the choice of laws rules have been changed to make the location of the debtor, rather than the location of the collateral, the appropriate place in which to file a security interest. The rules concerning perfection of collateral have themselves been rewritten for clarity and to describe the methods of perfection appropriate to types of property that will be Article 9 collateral upon the adoption of Revised Article 9. In a significant restructuring within Article 9, Revised Article 9 separates the rules concerning perfection from the rules concerning priority. Those priority rules constitute subpart 3 of Part 3, and their complexity results in large part from allowing for differing priority rules depending on the type of property serving as collateral. Part 3 of Revised Article 9 closes with a set of special rules concerning the relationship between a bank and accounts held at the bank that serve as security for creditors other than the bank.

Part Four deals with the rights of third parties to property that serves as collateral. It clarifies the rules concerning the relationship between an account debtor, the creditor with whom the account debtor has dealt and the assignee to whom the creditor has assigned the account. Revised Article 9 enlarges substantially the types of intangibles that qualify as accounts. In consequence, the rules concerning the rights of the account debtor in the event the account debtor's account is transferred either outright in a sale or as security for a debt will affect many more account debtors. For the first time, certain governmental obligations qualify as accounts. Some governmental payments are made

[13] Detailed discussion of each affected section occurs in Part V.

non-assignable by statute. Revised Article 9 for the most part overrides anti-assignment provisions in both contracts and statutes. Some intangible assets are non-assignable. Typical examples are licenses issued by government agencies to specific persons, such as liquor licenses. These types of licenses often can be transferred with the consent of the licensing authority. Thus, it is possible to sell an ongoing business, such as a restaurant or bar, provided the agency consents to the transfer of the license. When this type of business entity pledges its assets in a secured transaction, the fact that the license cannot be assigned creates difficulties for a secured party when the debtor's assets are sold by a trustee in bankruptcy. Section 9-408 of Revised Article 9 provides an elaborate set of provisions that both permit a secured party to be able to have as its security an ongoing licensed business while at the same time preserving to the licensing authorities the benefit of their policies forbidding assignment of licenses.

Part Five of Revised Article 9, which deals with filing requirements, corresponds to Part 4 of current Article 9. It totally rewrites the rules concerning filing. It recommends central filing for non-real estate related collateral**,** and permits the use of electronic filings and electronic documents such as electronic chattel paper. It also clarifies the role of filing officers by relieving them of all but the most rudimentary responsibility to determine the facial validity of items presented for filing.

Part Six of Revised Article 9, which addresses the rights of respective parties when the debtor defaults, corresponds to Part 5 of current Article 9. The revised statute adds provisions that give somewhat greater protection than does current Article 9 to consumers in default. It also adopts an objective standard for good faith - "honesty in fact and the observance of reasonable commercial standards of fair dealing". This definition mirrors the higher standard to which merchants are held under current § 2-103(1)(b), and does expand the notion of good faith under Article 9.

Part Seven of Revised Article 9 contains the transition provisions. These are extremely complex, in large part because the place of filing for many existing secured transactions changes.

Bulk Sales - Article 6

Bulk sales legislation, of which Article 6 is the last version, was designed to protect a creditor who extended credit to a merchant relying on the existence of valuable extensive inventory. In 1990, the ALI and NCCUSL recommended that states repeal Article 6.[14] The Drafting Committee's Prefatory Note indicates that Article 6 impedes normal business transactions by imposing substantial costs on buyers in bulk to protect the interests of the seller's creditors, with whom they usually have no relationship. Even more striking is that Article 6 affords creditors a remedy against a good faith purchaser for full value without notice of any wrongdoing on the part of the seller. Over the last forty years Article 9 has shown that a creditor who in fact relies on the debtor's inventory for protection in the event of debtor default can protect itself easily by means of a security interest in the merchant's inventory. Because Article 9 offers a simple and effective means of protection to creditors, there is no benefit to retaining Article 6. The Commission recommends its repeal.

The remainder of this report is an analysis of areas where current New York Law

[14] Although many states have done so or adopted a revised Article 6, New York, until now, has done neither.

is affected by Revised Article 9 (Part IV.A), an analysis of certain non-conforming and localizing recommended amendments, (Part IV.B), a section-by-section analysis of how Revised Article 9 affects New York's law of secured transactions (Part V), and the proposed non-uniform amendments concerning cooperatives (Part VI).

Part IV. Summary of Major Changes Peculiarly Affecting New York and Recommendations for Non-Uniform and Amendments Affecting Only New York

A. Summary of Major Changes Peculiarly affecting New York

Part V of this report is a section-by-section analysis of Revised Article 9, detailing how the revision would change current law. This Part IV.A is intended to highlight certain major changes made by the revision that peculiarly affect New York.

1. Filing System

Revised Article 9 contemplates that each state will have the same scheme of filing offices. That scheme, set forth in Revised Section 9-501, is a simple and efficient one. The general rule is that all financing statements are filed with the state's central filing office (in New York, the Department of State). The only exception to this general rule is that a filing must be made with the county filing office (i.e., the county office in which mortgages and deeds are recorded) for so-called "real-estate-related filings" -- that is, financing statements in which the collateral is closely linked to particular real property. Examples include fixtures, timber to be cut, and minerals. Strictly speaking, a security interest in fixtures may be perfected by filing with the Department of State instead of the appropriate county filing office, but if the filing is made with the county filing office (a so-called "fixture filing") the secured party obtains the benefit of priority against certain competing claimants. In addition, New York's Current Section 9-401 includes non-uniform amendments that relate to cooperative apartments. Those are discussed separately in this report and are ignored for purposes of this discussion. In New York the county filing officers under Existing Article 9 are the county clerks, except in the counties of Bronx, Kings, New York and Queens, where the county filing officer is the city register in the county. (Existing Section 9-401). We assume that the same county clerks and the city register will be designated to serve under Revised Article 9, and we will refer to these county clerks and city registers collectively as the "county filing offices." Thus, under Revised Article 9, New York will have a simple pattern of UCC filing offices: the county filing offices to handle real-estate-related filings, and the Department of State to handle all the other filings (the vast bulk).

By contrast, under Existing Article 9 as is currently in force in New York, the identification of the proper filing office within New York is far more complex, and indeed it may be necessary or advisable to make duplicative filings with more than one New York filing office in many circumstances. New York is one of the ten states that chose the most elaborate of the three schemes, the "Third Alternative" set forth in Existing Section 9-401(1). Under Existing Section 9-401(1) as currently in force in New York, the rules that designate the appropriate filing offices in New York may be summarized as follows:

(i) The general rule, applicable unless paragraph (b) or (c) is relevant, requires a financing statement to be filed with the Department of State. In addition, if the debtor has a place of business in only one county of New York, a duplicative filing must also be made with the county filing office of that county.

(ii) For a few limited types of collateral, a filing is required to be made only with a county filing office and no duplicative filing is required to be made with the Department of State. This rule applies to certain farm-related collateral (such as equipment used in farming operations, farm products, receivables arising from sale of farm products by a farmer, and crops growing or to be grown). This rule also applies if the collateral is consumer goods. (Non-UCC law generally prohibits security interests in consumer goods that are not purchase-money security interests, however, and it is not necessary to file a financing statement in order to perfect a purchase-money security interest in consumer goods. Hence there should be few filings against consumer goods.)

(iii) Real-estate related filings are made with the appropriate county filing office, as under Revised Article 9. Most filings under current law are governed by the general rule stated in paragraph (a), and hence require a filing with the Department of State. Under that rule, it is commonly the case that for each such filing made with the Department of State a duplicative filing is made with at least one county filing office. According to the letter of the rule, no such duplicative filing is required if the debtor is a business enterprise having places of business in more than one county in New York, and it is never necessary to make duplicative filings with more than one county filing office. However, if the debtor has places of business in more than one county the secured party often will, as a precaution, make duplicative filings with the filing office of each of those counties. The reason can be seen from the following example:

> ***Example**:* In year 1, Debtor borrows on a secured basis from Secured Party. At that time, Debtor has two places of business, one in Bronx County and one in Nassau County. Under the rule in paragraph (a), Secured Party will be perfected if it files a financing statement only with the Department of State. In year 2, however, after the loan is made and Secured Party has filed its financing statements against Debtor, Debtor sells or shuts down its place of business in Bronx County. At that point Debtor has a place of business only in one county, and so under the rule of paragraph (a) it will be necessary for Secured Party to make a duplicative filing with the Nassau County filing office in order to remain perfected. If Secured Party does not promptly learn of the sale or shutdown, appreciate its significance, and file a financing statement with the Nassau County filing office, Secured Party will become unperfected.

Hence, a secured loan to a debtor having operations in more than one county often results in multiple duplicative filings with different county filing offices, in addition to the filing with the Department of State.

New York's dual filing system was defensible when adopted in 1962, but today it is archaic and wasteful. Given modern methods of communication, a single filing with the Department of State amply suffices to give notice to the world of a security interest. Indeed, the Commission understands that the Department of State is working strenuously to make records filed with it searchable by anyone with access to the Internet, and that the Department of State expects to begin to phase in this Internet search capability within the foreseeable future. Duplicative filings with county filing offices serve no purpose in today's world, and add significantly to the time and expense of making a filing and of conducting a comprehensive lien search. Most states never adopted, or have abandoned, the dual filing system. Ten states are dual filing jurisdictions: Arkansas, Massachusetts, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, Pennsylvania and Virginia. New Hampshire was a dual filing jurisdiction but is scheduled to become a central

filing jurisdiction on July 1, 2001. North Carolina, Oklahoma and Virginia have adopted Revised Article 9 and so will also abolish dual filing on July 1, 2001. As noted above, Revised Article 9 eliminates it as an alternative available to enacting states.

The abolition of local filings, other than real-estate-related filings, in New York gives rise to two practical problems. First, during the five-year transition period following the effectiveness of Revised Article 9, county filing offices will have to maintain their files of non-real-estate-related UCC filings and make them available for searches. Accordingly, during that period county filing offices will incur some expenses in connection with the maintenance of those records. However, because no further non-real-estate-related filings will be made at the county level after the effective date, county filing offices will no longer receive revenue from such filings to offset its maintenance expenses. Rather, during the transition period, the only revenue county filing offices will receive with respect to their files of non-real-estate-related filings will be search fees. More precisely, county filing offices will receive no revenue from new initial financing statements that are not real-estate-related. Depending on how New York chooses to phase out non-real-estate-related filings with the counties, it is possible that New York would allow a termination statement to be filed at a county filing office with respect to a non-real-estate-related financing statement on file at that office before the effective date. In that event, the filing offices would continue to receive revenue from such termination statements.

The second practical problem is that the county filing offices will suffer a permanent loss of revenue, as a result of the fact that the only further UCC filing fees they will receive will be for real-estate-related filings . Data gathered by the New York State Association of Counties permit the inference that the county filing offices collected total fees from UCC filings in 1999 of approximately $3.66 million. After the effective date, the only further UCC filing fees they will receive will be for real-estate-related filings. The proportion of real-estate related filings varies among the counties and from year to year. Nonetheless, holding aside for the moment the question of UCC filings with respect to cooperative apartments, the elimination of dual filings will cost county clerks as much as 75% of their UCC filing revenues. In the four counties served by the City Register, where the bulk of filings with respect to cooperative apartments are now made, those cooperative apartment filings make up around 25% of the UCC filings. Real-estate-related filings make up another 25% of the filings made in that office. The remaining filings, consisting of around 50% of the UCC related filings, would be eliminated by Revised Article 9. Should the Legislature choose to have filings against cooperative apartments made with the Secretary of State rather than county filing offices, then the City Register will lose the same roughly 75% of its UCC related income.

There is no guarantee that the reduction in the workload of county filing offices resulting from the abolition of dual filing will be in proportion to the revenues they will lose. It appears that in at least some county filing offices UCC filing fees have subsidized other work done in the office. Whether or to what extent these lost revenues need to be replaced is a question the Legislature needs to answer as it considers Revised Article 9.

These practical concerns do not, however, in any way affect the wisdom of eliminating dual filing in New York. If the Legislature concludes that lost revenues at the county level do need to be replaced at the county level, such replacement could be effected by (a) increasing the filing fee for real-estate-related filings, (b) increasing non-UCC fees charged by county filing offices, or (c) increasing the filing fee for filings with the Department of State and sharing the resulting revenue with the counties, either permanently or only during the five-year transition period. The Commission understands

that each of these techniques has or will be used to some extent in other states that presently have dual filing.

2. Creation of a security interest in a deposit account not consisting of "proceeds"

For deposit accounts not consisting of "proceeds", current New York law requires pledge of an "indispensable instrument" such as a passbook to create or perfect a security interest in a deposit account or a transfer of exclusive and irrevocable control over the deposit account to the secured party. *See Miller v. Wells Fargo International Bank, 540 F.2d 548 (2d Cir. 1976); In re Interstate Department Stores, Inc.*, 128 B.R. 703 (Bktcy Ct. N.D.N.Y. 1991). The *Miller* court quoted with approval the RESTATEMENT OF SECURITY definition that an "indispensable instrument" means the formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument. Merely crediting monies to debtors' account does not create a "magic moment" where control by secured party bank is irrevocably lost. *Banque Arabe et Internationale d'Investissement v. Bulk Oil (USA) Inc.*, 726 F. Supp. 1411 (S.D.N.Y. 1989).

While the *Miller* rules were sensible in an age when bank customers did, in fact, receive a passbook or a paper negotiable certificate, an "indispensable instrument," bank customers today receive a statement or view transactions electronically. A legal consequence of moving away from paper-based banking transactions is that there is no way to perfect a security interest in a deposit account. All parties may wish to do so, but the rules are known to no one.

Revised Article 9 substantially changes existing law by permitting the creation and perfection of a security interest in non-proceeds deposit accounts. This will be a significant advance in New York law. The problem it addresses is as follows: A is a borrower, he operates a small business and borrows from B, a nonbank lender. A's operating account is with bank C. B, as a condition of lending, requires a security interest in the account. B also needs to know under what circumstances its security interest can take precedence over the bank's right of set-off. No one knows these answers under current New York law.

The exclusion of transfers of interests in non-proceeds deposit accounts from coverage of Revised Article 9 is narrowed to the "assignment of a deposit account in a consumer transaction, except that Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds." The Drafting Committee believed that if it was possible to take a security interest in a consumer account, consumers might not understand the implications of this transaction. The definition of "deposit account" in Revised Section 9-102(29) excludes "an account evidenced by an instrument" and "investment property". The definition of "instrument" in Revised Section 9-102(47) includes, in addition to negotiable instruments, "any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment." Therefore, a security interest in an instrument may be perfected under Revised Article 9, but not by using the deposit account rules.

To create an enforceable security interest in a deposit account as original collateral,

the secured party must have "control" of the deposit account.[15] Revised Section 9-104(a) provides that 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 the bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing the disposition of the funds in the account without further consent by the debtor; or (3) the secured party becomes the bank's customer with respect to the deposit account. (This means having the account maintained in the secured party's name. However, the debtor can write checks on the account by being an authorized signatory.)

Revised Section 9-104(b) makes clear that Revised Article 9 rejects the strict *Miller* requirements governing creation of security interests in deposit accounts constituting original collateral by providing that the secured party that has satisfied the requirement of Revised Section 9-104(a) has control, even if the debtor retains the right to direct disposition of funds from the deposit account. Note that it appears control need not be exclusive. More than one secured party can have control of a deposit account and therefore there can be more than one consensual security interest in a deposit account comprising the original collateral. The control concept for deposit accounts is modeled after the control concept employed in Revised Article 8 and the conforming amendments to Revised Article 9.

3. Security Interest in a Trust

Revised Section 9-309, which governs security interests perfected upon attachment without filing, would effect a change in New York law by substantively modifying current Section 9-302 to delete coverage of security interests in beneficial interests in trusts. The Drafting Committee expressed the view that more frequent assignment of these interests as collateral now justifies requiring a filing to perfect such a security interest (which would be the result of adopting Revised Section 9-309(13) without reference to trusts).

4. Significant New York Case Law Changed by Revised Article 9 – Priority of Buyer in Ordinary Course Versus Secured Party in Possession of Goods

In *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 39 N.Y.2d 632, 350 N.E.2d 590, 385 N.Y.S.2d 260 (1976), the Court of Appeals decided that in a priority contest between a buyer of goods in the ordinary course of business from the debtor and a secured party who, prior to the sale, had perfected its security interest in the same goods by possession, the buyer in the ordinary course prevails. Revised Section 9-320(e), together with Revised Section 9-317(b), reject that result, and on the facts of *Tanbro*, the secured party would prevail under Revised Article 9. Revised Article 9 now gives a buyer of goods in the ordinary course of business priority over the holder of a perfected security interest only if the buyer receives delivery of the goods. The Court of Appeals in *Tanbro* based its decision on the literal language of Existing Article 9 rather than any fundamental commercial policy. Accordingly, adoption of Revised Article 9 would not offend any New York commercial policy.

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[15] *See* Revised Section 9-203(b)(3)(D).

5. Effect of Nonconforming Foreclosure on the Secured Party's Deficiency in Non-Consumer Transactions

In the event that a secured party forecloses on collateral and sues the debtor for a deficiency after the foreclosure, the debtor may seek to defend by claiming that the secured party failed to make a proper disposition of the collateral. If the secured party indeed did not comply with the requirements of Article 9 in the foreclosure, the question arises as to what effect, if any, that fact has on the secured party's right to pursue the debtor for a deficiency. As discussed in the analysis of Revised Section 9-626 in Part V of this report, New York's Appellate Divisions have given three distinct answers. Revised Article 9 would provide a single statutory answer for that question in non-consumer transactions. Revised Article 9 leaves the point for resolution by the courts, as under current law, in the case of consumer transactions.

B. Recommendations for Non-Uniform Changes and Amendments Affecting Only New York

1. Recommended Non-Uniform Changes Other than the Coop Amendments

a. An additional term in Section 9-109(d)(8)

Section 9-109 defines the scope of Revised Article 9. Subsection (d) excludes certain types of property and transactions from Article 9. Subsection (d)(8) excludes (with qualifications) transfers of an interest in or an assignment of a claim under an insurance policy. Under New York law, it is not certain a variable annuity is “insurance” within the meaning of this exclusion. The Commission, however, believes that payments under a variable annuity should be subject to the same limitations as those that apply to claims under an insurance policy. For that reason, it proposes that subsection (8) should read:

> (8) a transfer of an interest in or an assignment of a claim under a policy of insurance or contract for an annuity including a variable annuity other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds;

b. Addition of Subsection (j) to Section 9-334

Section 9-334 governs the priority of security interests in fixtures and crops. Under subsection (i), a holder of a perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the property. Some have expressed concern that the language of subjection (i) does not go far enough to guarantee the priority given to the secured party. In order to allay these concerns, the Secretary of State has proposed adding a subsection (j). While the Commission believes the language in the Official Text is sufficient to protect the priority of the secured party, it sees as harmless and therefore does not oppose the addition of a subsection (j) reading:

> (j) **Subsection (i) prevails.** Subsection (i) prevails over any inconsistent provisions within this article or any other chapter of law.

c. Deletion of New Requirement under Revised Section 9-516(b)(5)(C)(iii) that Debtor's "Organizational Identification Number" be set forth if debtor is an organization

Revised Section 9-516(b)(5) requires financing statements to contain certain information not required under Existing Article 9 or risk rejection by the filing office. In the case of a debtor that is an organization, subparagraph (C) requires three pieces of new information: clause (i) requires a statement of the debtor's "type of organization" (i.e., corporation, limited partnership, etc.); clause (ii) requires a statement of "a jurisdiction of organization for the debtor"; and clause (iii) requires "an organizational identification number for the debtor or [an] indicat[ion] that the debtor has none." The "organizational identification number" is not the debtor's taxpayer identification number. Instead, it is whatever identification number has been assigned to the debtor (organized under New York law) by New York. That state identification number of an organization (a corporation, for instance) is an obscure datum that appears only on such documents as the corporation's articles of incorporation as filed with the Department of State, and which (unlike the taxpayer identification number) is not likely to be frequently used or even known to any officer or employee of the debtor. The only reliable way to obtain this number likely would be to request a good-standing certificate for the debtor, on which that number should appear. The requirement that this number be unearthed and placed on the debtor's financing statement is a considerable nuisance for users of the filing system, and indeed might have the effect of rendering a secured party unable to file a financing statement on short notice, which conceivably might have serious consequences.

The Commission understands that the purpose of this requirement, as envisioned by the Drafting Committee, was to facilitate the cross-indexing of corporate records with UCC records in the state's central filing office. The notion is to allow the central filing office's records to be cross-indexed to the degree that each financing statement, as it is filed, would automatically be cross-checked against the corporate records, so that the filing office could immediately determine (and, one presumes, advise the person filing the financing statement) that, for instance, the official name of the debtor as shown in the corporate records differs from the name shown on the financing statement.

This goal has value. As far as the Commission knows, however, such a cross-indexing system is not a prospect in New York for the foreseeable future. The Commission believes that the substantial present burden of obtaining this obscure datum for each filing substantially outweighs the hypothetical benefits from a possible future cross-indexing system. Accordingly, the Commission recommends that New York should follow Delaware and delete clause (iii) from its enactment of Section 9-516(b)(5)(C).

d. Elimination of Subsection 9-520(d)

Section 9-520 provides limits to a filing office's discretion to accept or refuse a filing. Subsection (d) instructs filing offices to treat a record communicated to the filing office that "provides information that relates to more than one debtor" as if Part 5 applies "to each debtor separately". The Secretary of State has informed the Commission that it is unable to comply with this statutory obligation, and will never be able to do so. The Secretary of State has informed the Commission that states that have adopted the uniform version of Revised Article 9 have begun reconsidering their inclusion of subsection (d), and that the Maine Secretary of State is actively seeking its repeal. In light of the Secretary of State's position, the Commission recommends to the legislature that it not adopt subsection (d) when it adopts Revised Article 9.

e. Deletion of Section 9-521 and substitution of provisions that continue current New York Practice

Section 9-521 in the Official Text sets forth the forms for written financing statements. The purpose of having these in the uniform text has merit. If all states adopting Revised Article 9 adopt the forms set forth in this provision, then there will be a single nationally valid form for financing statements. In its current Article 9, New York does not follow the uniform text but instead gives the power to the Secretary of State to determine the shape and text of forms appropriate for filing. The Commission recommends that New York continue to give its Secretary of State this power. Whether the uniform form is appropriate for New York or will continue to be appropriate to New York is a determination best made by that person. In addition, because of its non-uniform coop amendments, New York must have a form for the coop addendum as well as its set of standard forms. Again, the Secretary of State can best determine the shape and text of these forms. For these reasons, the Commission recommends the adoption of the following provision in place of the uniform provision.

§ 9-521. Uniform Form of Written Financing Statement. Amendment, and Cooperative Addendum.

(a) **Initial financing statement form.** A filing office that accepts written records may not refuse to accept a written initial financing statement in the form promulgated by the Department of State except for a reason set forth in Section 9--516(b).

(b) **Amendment form.** A filing office that accepts written records may not refuse to accept a written financing statement amendment in the form promulgated by the Department of State except for a reason set forth in Section 9--516(b).

(c) **Cooperative addendum form.** A filing office that accepts written records may not refuse to accept a written cooperative addendum in the form promulgated by the Department of State except for a reason set forth in Section 9--516(b).

f. Elimination of Section 9-527

Section 9-527 imposes on the Secretary of State the obligation to report annually to either the Governor, the Legislature, or both the extent to which the “filing-office rules are not in harmony with the rules of filing offices in other jurisdictions” and the extent to which “the filing-office rules are not in harmony with the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators.” The Secretary of State has said, and the Commission agrees, that preparing this report will take a great deal of time and energy without much benefit. The Official Comment to this section states that the section “is designed to promote compliance with the standards of performance imposed upon the filing office”. The Secretary of State can be trusted to comply with these obligations without having the duty of telling annually exactly how it is complying. For that reason, the Commission recommends not adopting Section 9-527.

2. Changes to Address Federal Tax Liens

Under Section 632(f)(1) of the United States Internal Revenue Code (the "Tax Code"), notice of federal tax liens is established by filing in accordance with state law. New York's Lien Law Section 240 lays out filing requirements for federal liens, including those for the payment of federal taxes. Federal liens on personal property are to be filed, if against a corporation or partnership (as defined by the Tax Code) in the office of the Secretary of State, otherwise, in the office of the clerk of the county where the person

against whom the lien is to be filed resides. New York's Lien Law Section 241(1) provides that, upon the filing of notice of a federal lien with the Secretary of State, the secretary shall cause such notice to be "held and indexed in accordance with the provisions of subsection four of Section 9-403 of the uniform commercial code as if such notice were a financing statement within the meaning of the uniform commercial code." This reference in the Lien Law to Current Section 9-403(4) will need to be changed to Revised Section 9-519. Because federal liens filed with the Secretary of State are treated as financing statements, under Current Section 9-407(2) and under Revised Section 9-523, the Secretary of State is automatically required to disclose filed notices of federal liens to the same extent that it is required to disclose filed financing statements.

Federal tax liens which are filed locally are more problematic. The second sentence of Current New York U.C.C. Section 9-407(2) requires that a filing officer disclose any notice of a federal tax lien and appears to be a non-uniform change made by New York to Article 9. Since Section 241 of New York's Lien Law imposes no requirement upon county filing officers to treat federal liens as financing statements, the second sentence of Current Section 9-407(2) becomes necessary to ensure that federal tax lien filings made at the county level are disclosed. Similar language will be necessary in Revised Article 9 and a change to the Official Text of Section 523(c) is suggested below:

> (c) **Communication of requested information.** The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:
>
> ****
>
> (4) whether there is on file any notice of federal tax lien, or a certificate or notice affecting such lien, on the date and time specified in such record naming a particular debtor; and
>
> (5) the date and time of filing of each such notice or certificate of or affecting a federal tax lien.

Alternatively, New York's Lien Law Section 240(2) could be modified so that, like federal lien filings for corporations and partnerships, those for individuals would also be filed with the Secretary of State. The Commission makes no recommendation as between these two alternatives. If the Legislature were to decide in favor of central filing of all federal tax liens, transitional language to deal with federal tax liens currently on file at the county level will be necessary.

3. Optional Provisions Relating to Production Money Security Interests

Revised Article 9 is accompanied by optional provisions relating to "production money security interests," a concept that would give special priority to certain categories of financiers of agricultural collateral. The Commission recommends that these optional model provisions not be adopted in New York.

4. Open-Ended Provisions of Revised Article 9

Several provisions of the Official Text of Revised Article 9 are open-ended: that is, the Official Text of those provisions requires or invites tailoring by each enacting state. The purpose of the tailoring is either to conform Revised Article 9 to the non-UCC laws of the enacting state, or to permit the state to fine-tune the provisions of Revised Article 9 pertaining to the identity and operations of that state's filing offices. Some of these provisions contain blanks to be filled in by each enacting state; others set forth alternative versions of the text and require the enacting state to choose a particular version. Some of these provisions have parallels in Existing Article 9, but some do not. Many are purely

mechanical, but a few arguably call for policy choices.

Completion of these open-ended provisions in New York would benefit from the Revised UCC Article 9 Enactment Guide ("Enactment Guide"), a quasi-official supplement to Revised Article 9 prepared by the Joint Task Force on Revised Article 9 Enactment Process.[16] The Joint Task Force, which is sponsored by the Commercial Financial Services Committee and the Uniform Commercial Code Committee of the American Bar Association's Business Law Section and by the American College of Commercial Finance Lawyers, is comprised of members of the Drafting Committee that wrote Revised Article 9 and active observers of the national drafting process and is uniquely well qualified to offer advice to the drafters of the enacting bills in each state. The Joint Task Force was formed for the purpose of providing such advice and wrote the Enactment Guide as a primary reference for legislative drafters engaged in the task of crafting an enacting bill. The Enactment Guide has been made available through NCCUSL to the Commissioners of each state, and drafters of enacting bills in many other states have given great weight to the suggestions and recommendations in the Enactment Guide. The Commission recommends that the drafters of the New York enacting bill should do likewise. Many of the specific recommendations made in this Report implement suggestions made in the Enactment Guide.

The following discussion identifies each open-ended provision in Revised Article 9 and sets forth the Commission's recommendation on how each should be completed.

a. Revised Section 9-201(b) (Relating to Consumer Protection and Regulatory Laws)

Revised Section 9-201(b) generally subordinates Revised Article 9 to consumer protection laws and regulatory statutes pertaining to extensions of credit in force in the enacting jurisdiction. The Official Text invites each enacting state to enumerate each relevant statute. As noted in the section-by-section analysis herein, the predecessor provision in New York's enactment of Existing Article 9, Existing Section 9-203(4), does enumerate relevant statutes. But it is not clear that the statutes so enumerated are all those that ought to be enumerated. Nor is the Commission convinced that any enumeration would be properly amended in the future as New York's consumer protection and regulatory statutes are changed. The Enactment Guide suggests phrasing this provision to refer in general terms to New York laws of the types described in Revised Section 9-201(b), rather than enumerating those other laws. The Commission endorses that approach.

Accordingly, the Commission recommends that Revised Section 9-201(b) as enacted in New York read as follows:

> (b) **Applicable consumer laws and other law**. A transaction subject to this article is subject to:
>
> (1) any applicable rule of law which establishes a different rule for consumers;
>
> (2) any other statute, rule or regulation of this State which regulates the rates, charges, agreements and practices for loans, credit sales or other extensions of credit; and

[16] The Enactment Guide is available at www.abanet.org/buslaw/cfs-ucc/ucc/article9/home.html. The Enactment Guide referred to in this report is the second edition, dated February 28, 2000.

(3) any consumer-protection statute, rule or regulation of this State.

This statutory language guarantees that New York's existing consumer protection statutes, rules and regulations protecting consumers will not be affected by adoption of Revised Article 9.

The section-by-section analysis of Section 9-201(b) provides an indicative list of current New York statutes that would be protected by this non-Uniform version of Revised Section 9-2-1(b). The proposed language for Section 9-201(b) will, in the event of conflict, also protect any future consumer law, rule or regulation from the application of Revised Article 9.

b. Revised Section 9-311(a)(2) (Relating to Certificate of Title Statutes)

Revised Section 9-311(a)(2) provides, in effect, that compliance with a certificate of title statute for titled goods is equivalent to the filing of a financing statement if notation of the secured party's security interest on the certificate of title is a condition to or result of perfection of the secured party's security interest. The Official Text of Revised Section 9-311(a)(2) invites each enacting state to identify specifically all certificate of title laws in the state. As noted in the section-by-section analysis, the predecessor provision in New York's enactment of Existing Article 9, Existing Section 9-302(3)(b), does attempt to enumerate the relevant statutes, referring specifically to Article 46 of New York's vehicle and traffic law. The Commission has not in its research found any additional certificate of title statutes in New York. The Enactment Guide suggests phrasing this provision to refer in general terms to New York certificate of title laws rather than enumerating those laws in order to ensure that if any future certificate of title statute is enacted, its notation requirements are viewed as equivalent to the filing of a financing statement. The Commission endorses this approach.

Accordingly, the Commission recommends that Revised Section 9-311(a)(2) as enacted in New York read as follows:

(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:

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(2) a certificate-of-title statute of this state or regulations promulgated thereunder, to the extent such statute or regulations provide for a security interest to be indicated on the certificate as a condition or result of perfection; or . . .

c. Revised Section 9-334(i), (j) (Relating to Priority of Crop Financier Versus Real Estate Financier)

Revised Section 9-334(i) provides that a perfected security interest in crops growing on real property prevails over a conflicting real estate mortgage, other real estate encumbrance or other real estate interest. The Official Text of Revised Article 9 contains an additional provision, Revised Section 9-334(j), which invites the enacting state to identify inconsistent statutes of the enacting state that are overridden by subsection (I). To the knowledge of the Commission, no statute of New York is inconsistent with subsection (I). Hence, the Commission recommends that New York omit subsection (j).

d. Revised Section 9-406(j) and Revised Section 9-408(e) (Relating to Laws

Imposing Statutory Restrictions on Transfer or Validating Contractual Restrictions on Transfer)

These two provisions, left by the Official Text of Revised Article 9 to be completed by each enacting state, are conveniently discussed together. At the beginning of the 19th century, the common law had great hostility towards the assignability of intangible obligations. During the 19th and into the 20th century that hostility diminished and a creditor became capable of turning the debt due it into present money by means of an assignment for security or by means of an outright sale. This development was important to the growth of the modern economy. Intangible assets became liquid, thereby providing businesses with resources to improve, modernize and expand their businesses by investing in new assets.

Consistent with that diminution in hostility to assignments of intangible assets, there grew up a body of case law, hesitant and inconsistent, willing to construe private contract terms forbidding assignment of the contract to mean only that the performing party could not delegate performance, but that the performing party could assign its rights to payment under the contract. Current Section 9-318 embodies and solidifies both those developments. With respect to accounts and chattel paper, it makes ineffective any contractual restrictions on assignment and it contains provisions designed to prevent the original obligor's obligation from being changed in any way as a consequence of the assignment. These two sections are successors to Current Section 9-318.

(i) Revised Section 9-406

Revised Article 9 continues the policies embodied in Current 9-318 concerning nullification of non-assignment clauses in private contracts. Subsection (f) of Revised 9-406 goes well beyond current law by nullifying all case law, statutes, rules, and regulations (collectively sometimes in this discussion referred to as "law"), to the extent that such law restricts, limits or prohibits the transfer or assignment of, or the creation of a security interest in an account or chattel paper. This nullification is, of course, limited to transactions within the scope of Revised Article 9, namely secured transactions. Even allowing for this limitation, the Commission believes that subsection (f)'s total nullification of all existing law is not the appropriate drafting approach.

1. Revised Section 9-406(f) overriding existing statutes, rules, and regulations

Our analysis of Section 9-406 in Part V of this Report contains a partial list of those provisions of law that could be affected by the wholesale nullification sought to be accomplished by Section 9-406(f). These laws and others in the process of being identified reflect legislative and executive policy judgments that it is unwise to permit the assignment or transfer of certain kinds of personal property. To be sure, these judgments are not sacrosanct. Nonetheless a nullification process should include a careful consideration of each statute and not simply a wholesale repealer by the adoption of a uniform statute whose drafters never focused on New York law. Some of these statutes may be ripe for repeal or amendment in light of Revised Article 9's drafters' desire to increase the supply of money available for both business and personal purposes. Despite this desire, other laws, some old and some recent, reflect well-considered and quite sound legislative, executive, or judicial judgments that have continuing vitality.

2. Revised Section 9-406(f) overruling existing rules of law

A similar concern is present in Section 9-406(f)'s attempt to nullify all inconsistent rules of law. This wholesale repealer is particularly suspect in New York, which has had a policy generally favoring assignability, at least since 1909, when it enacted what is now General Obligations Law § 13-101. Although that statute states a policy that generally favors assignability, in its subdivision three it expressly removes its protection from, among other things, assignments that contravene public policy. *See, e.g., Weimer v. Bd. of Educ. of Smithtown Cent. Sch. Dist. No.1,* 52 N.Y.2d 148, 152, 418 N.E.2d 368, 370, 436 N.Y.S.2d. 853, 855 (1981) (holding invalid the assignment by a taxpayer to a non-taxpayer of the taxpayer's claim against a municipal board of education for illegally spending and wasting public funds).

The statute has common law roots. For example, in 1894, the Court of Appeals invalidated the assignment of an executor's commission, in part, as the court stated, because, "When the hope of compensation is gone, a strong incentive to diligence and zeal is wanting, and the temptation to be content with a lax or perfunctory administration of the trust becomes more persuasive." *In re Worthington,* 141 N.Y. 9, 12, 35 N.E. 929 (1894). Modern books on Surrogate's Court practice state that this prohibition on assignment continues. The executor's commission at issue in *Worthington* is likely to fit within Revised Article 9's expanded definition of an account. Revised Section 9-406(f) would overrule this long-standing and sound New York prohibition.

This kind of result causes the Commission considerable concern, especially because there may be other significant limitations on assignment of which we are unaware. We are particularly concerned that adoption of Revised Section 9-406(f) would nullify the continuing public policy exception in General Obligation Law § 13-101 as well as the common law principles encompassed within it. The public policy exception is very narrow, addressing only fundamental concerns, rarely present in the context of a secured transaction. But when fundamental policy concerns are present, they must be balanced against the public policy of increased liquidity reflected in Revised Section 9-406. Such a balance is uniquely a judicial function.

In light of all these issues we have commenced a comprehensive review of relevant New York law. At least some of these laws should not be nullified by Revised Section 9-406(f). We expect that this review should be completed in time for chapter amendments to Revised Article 9 before its effective date. Without such review, however, for the reasons set forth above, there should be no wholesale nullification of existing New York law.

3. Revised Section 9-406(f) and limits on future laws, rules, and regulations

The Commission understands the commercial impetus behind Revised Section 9-406(f). Generally free assignment of accounts adds to liquidity and thereby adds value both to the creditor and to the economy at large. The revisers of Article 9 had as one of their concerns the possibility that future laws, rules, and regulations could contain language restricting transfer of an account, but that the restriction would be placed in the statute, rule, or regulation without regard to its possible adverse effect on a secured transaction. This led the revisers of Article 9 to suggest that, before a future legal restriction on transfer

of an account would be effective, any new law must make express reference to Revised Section 9-406(f). Such a requirement is designed to insure that the legislature recognizes that a restriction on transfer of, or the creation of a security interest in, an account reduces the liquidity, and hence the value, of an account, and that the legislature has taken that reduction in value into account at the time it creates the restriction. Making Revised Section 9-406(f) have only prospective operation also has the effect of preserving existing law which then provides the opportunity for an in-depth examination of the law that affects assignability of accounts and chattel paper. For these reasons, the Commission recommends that Revised Section 9-406(f) be adopted with only prospective effect.

The proposed statute accompanying this Report, contains the following language for subsection (f):

> (f) **Future statutory and administrative restrictions on assignment ineffective absent express reference to this subsection.** Except as otherwise provided in Section 2A-303 and Section 9-407 of this Chapter, and subject to subsections (h) and (I), a statute, administrative rule, or regulation enacted or adopted on or after the effective date of this Article that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper, but does not refer expressly to this section and state that it prevails over this section, is ineffective to the extent that it:
>
> (1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; 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.

4. Revised Section 9-406(b)(3)

The Commission notes with approval one change in New York law brought about by Revised Section 9-406. Revised Section 9-406(b)(3), permitting an account debtor to decline to make a payment in accordance with a notification requesting that less than full payment be made to the assignee, reflects a departure from existing New York law which does not leave such decisions in the control of the account debtor.

According to the Official Comment to Revised Section 9-406, the drafters were concerned about "unnecessarily burdensome" notifications to account debtors to pay multiple assignees. Making partial assignments ineffective at the account debtor's option allows the account debtor to control the administrative burdens associated with split assignments. This is a salutary change in New York law. Assignors can, and do, reduce this burden by notifying account debtors to make payments into a single account, out of which assignees may withdraw the portion of the payments to which their assignment entities them. Such arrangements would not run afoul of the language of Revised Section 9-406(b)(3), which makes ineffective all notifications to the account debtor "to make less than the full amount of any installment or other periodic payment to the assignee," since the account debtor would still be paying the full amount of its payment to a single payee -- the bank account. Like Current Section 9-318(3), Revised Section 9-406(c) permits an account debtor to request that an assignee furnish reasonable proof that the assignment has been made. Until compliance, the account debtor may continue to discharge its obligations by paying the assignor even if it has received a notice of assignment.

5. Other issues concerning non-uniform proposals

The Commission has taken into account the Secretary of State's Revised Section 9-406 as it appears in the budget bill. It has noted the non-uniform subsection (i) it contains, and the Commission believes that the approach it has taken with respect to subsection (f), which continues all existing New York rules of law, statutes, rules, and regulations, deals with the concerns about workmen's compensation and special needs trusts contained in the non-uniform subsection (i) of the Secretary of State's bill. The prohibition on assignment of Workmen's Compensation payments, stated in Work. Comp. Law § 33, will remain in force without the need of being separately preserved, as it is in the Secretary of State's bill. For similar reasons, there is no need for an exemption for special needs trusts, as we are preserving all existing prohibitions on transfer and assignment found in E.P.T.L. § 7-1.12.

The Secretary of State's non-uniform subsection (i) also modifies the Official Text's language, which excludes health-care-insurance receivables altogether from Revised Section 9-406. In the Commission's view, the Secretary of State's language describing that same exclusion does not as clearly accomplish the exclusion of health-care-insurance receivables from Revised Section 9-406. The web of federal statutory and contractual provisions that constitute the legal framework within which a health-care-insurance receivable must be assigned make these accounts quite different from the accounts for which the anti-assignment-override provisions of Revised Section 9-406 were designed. For that reason health-care-insurance receivables are best dealt with within the rule system created by Revised Section 9-408, which, while allowing assignments of otherwise non-assignable assets for the purpose of security, effectively leaves untouched the rights and duties of the account debtor.

(ii) Section 9-408

Section 9-408 provides for a very narrow exception to existing anti-assignment provisions in rules of law, statues, rules or regulations affecting a promissory note, a health-care-insurance receivable, or a general intangible, including a contract, permit, license, or franchise. This narrow exception operates only in the context of a secured transaction. The exception provides that the legal restrictions created by these laws are ineffective only to the extent that these legal restrictions would impair the creation, attachment, or perfection of a security interest, or to the extent that these legal restrictions provide 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.

That limited scope is reinforced by the fact that Revised Section 9-408 does not override restrictions on the enforcement of a security interest. The secured party acquires no rights under the license or other property subject to this section, nor can the secured party foreclose on and sell the license or other property subject to this section to a third party. The security interest in this situation is all-but-nominal. As one commentator has stated, all the secured party can do with this security interest is "sit and admire it."

Hence, a secured party who takes a security interest in a type of non-assignable governmental or non-governmental property within the scope of this section has a completely passive and unenforceable interest in that property. The security interest permitted by Revised Section 9-408 has only one practical consequence: the secured

party can obtain a lien on any proceeds that are received on sale of the property. Thus, the effect of this section does not create conflicts with the policies or purposes that underlie either the statutory or contractual restrictions on assignment of these types of property.

The rights created by Revised Section 9-408 in general intangibles are limited, but they have commercial importance. Many businesses have as an important component a license or franchise, and these licenses and franchises are, by their terms or by law, often non-assignable. Franchises have become an important part of retail property with the rise of malls and fast-food restaurants. The licenses could be of software, licensed for use only to a particular business, or the licenses could be issued by a governmental agency for use only by the licensee. A secured party often wants to take a security interest in an entire business enterprise in order to have the opportunity to capture the value of a going concern in the event of a foreclosure sale. This current inability to capture the value of a going concern is also present in bankruptcy.

In a business enterprise where licenses or franchises constitute an important component of the going concern, unless the secured party can take a security interest in franchises or licenses, it will have no opportunity to capture the value of a going concern. For example, if the debtor business enterprise was a franchised restaurant with a liquor license, if a secured party foreclosed on the restaurant under current law and sold it as a going concern to a buyer who was approved as a transferee of the liquor license and the franchise, the secured party would not have rights superior to other creditors with respect to that part of the purchase price allocated to the liquor license and the franchise.

Health-care-insurance receivables have become a type of asset that is important in some financing transactions. Although these transactions follow the form of accounts financing, the complex web of contract and law that surrounds this type of receivable makes inappropriate the sort of strong modification of contract and statute created by Revised Section 9-406, which governs other types of accounts. Instead, the presence of health-care-insurance receivables in Revised Section 9-408 reflects the judgment of Revised Article 9's drafters that all that is needed to facilitate this type of financing is the bare removal of the absolute bar to assignment that appears in contracts, statutes, and regulations, leaving intact the practical consequences resulting from the prohibition on assignments contained in contracts, statute, and regulations. The Commission agrees with this judgment.

In the analysis of Revised Section 9-408 in Part V of this Report, the Commission has listed many of the statutes, rules and regulations it was able to locate that might be affected by Section 9-408. The Commission continues its search, and, as mentioned above with respect to Section 9-406, it will make a report to the Legislature concerning each of these statutes. The Commission recognizes that governmental agencies have an interest in the operation and effect of Section 9-408. For that reason it recommends that subsection (c), which overrides prohibitions on transfers, not become effective until one year after the rest of Revised Article 9 becomes effective, but only insofar as the override affects governmental bodies. That delay in the date of application will give agencies the opportunity to be heard and give the Commission an opportunity to hear them. We also believe that, consistent with its recommendations concerning Revised Section 9-406(f), the provisions of subsection (c) should apply, as of the effective date, to any new laws. Accordingly, we have drafted Revised Section 9-408(e) to read as follows:

(e) **Subsequent inconsistent statutes and administrative rules and regulations must refer to subsection (c); date of application of subsection (c).**

(1) Subsection (c) prevails over any inconsistent provision of a statute, administrative rule, or regulation of this state enacted or adopted on or after the effective date of this Article unless the provision refers expressly to this section and states that the provision prevails over this section.

(2) To the extent that subsection (c) applies to an inconsistent rule of law, statute, administrative rule, or regulation of this state enacted or adopted before the effective date of this Article that requires the consent of a government, governmental body, or official to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, subsection (c) shall not apply until one year after the effective date of this Article.

e. New York Adjustments in Part 5: Filing Office Operations

Part 5 of Revised Article 9 sets forth the details of the system for filing financing statements with public filing offices in order to perfect security interests. Of all the parts of Revised Article 9, Part 5 needs the most adjustments to deal with unique New York practices or issues. The Official Text of Part 5 contains many open-ended provisions, most of which relate to the details of the operations to be followed by the enacting state's central and county filing offices. The open-ended provisions, and provisions needing adjustments to conform to New York practices or preferences, in Part 5 are as follows:

(i) Revised Section 9-501. Revised Section 9-501(a) refers to “the local law of this State”. In New York law the term “local” refers to law of a New York jurisdiction inferior to New York State. Therefore, the Commission recommends that the word “local” be deleted from this Section. Subsections (a)(2) (central filing office) and (b) (filing office for transmitting utilities) of Revised Section 9-501 should be completed to specify the Department of State as the proper filing office in New York. This is, of course, consistent with current New York law. *See* Existing Section 9-401.

(ii) For real-estate-related filings; and for certain references in other State statutes. Revised Section 9-501(a)(1) does not contain a blank; rather, it states that the filing office is "the office designated for the filing or recording of a record of a mortgage on the related real property." The Official Text of the parallel provision in Existing Article 9, Existing Section 9-401(1)(b), contains similar generic language. New York currently has non-uniform language on this point. New York's Existing Section 9-401(7) specifically identifies the appropriate county filing offices to be "the county clerk of the county, except in the counties of Bronx, Kings, New York and Queens where it means the city register in the county." It is not clear that this specific identification adds anything to the Official Text. However, the Commission recommends carrying the substance of this language forward as a non-uniform change to Revised Section 9-501(a)(1) in order to emphasize the continuity of current law. Other New York statutes refer to “filing officer” or “recording officer” in connection with filings under the Uniform Commercial Code, since such terms are not elsewhere defined in Revised Article 9 the Commission recommends the addition of a new, non-uniform provision to Revised Section 9-501 to provide a solution to this problem.

For the reasons stated in subparagraphs (i) and (ii) above, the Commission proposes the following modifications to the Official Text of Section 9-501(a) and Section 9-501(b), and the addition of a new, non-uniform Section 9-501(c), to read as follows:

(a) **Filing offices.** Except as otherwise provided in subsection (b), if the law of this state governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) the office of the county clerk of the county, except in the counties of Bronx, Kings, New York and Queens, where it shall be the city register in the county, if:

(A) the collateral is as-extracted collateral or timber to be cut; or

(2) the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(C) the collateral is a cooperative interest; or

(2) the office of the secretary of state, in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(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 secretary of state. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

(c) **References to "filing officer" or "recording officer" in other state statutes.** References in other statutes of the state to the term "filing officer" or "recording officer" means the county clerk of the county, except in the counties of Bronx, Kings, New York, and Queens where it means the city register in the county; and the term "filing officer" includes the secretary of state where a filing is made in the department of state.

(iii) Revised Section 9-502(b)(2). The Official Text of Revised Section 9-502(b)(2) requires that a real-property-related financing statement must be filed "[for record]." The bracketed phrase is optional. That optional phrase should be omitted in the New York enactment of Revised Section 9-502(b)(2). Similar optional language in the Official Text of the predecessor provision, Existing Section 9-402(5), is omitted in New York's enactment of that provision, Existing Section 9-402(5).

(iv) Revised Section 9-502(b)(3). The Official Text of Revised Section 9-502(b)(3) states that a real-property-related financing statement must "provide a description of the real property to which the collateral is related [sufficient to give constructive notice of a mortgage under the law of this State if the description were contained in a record of the mortgage of the real property]." This language is optional and, as a legislative note in the Official Text indicates, may have to be adapted to local requirements. The parallel provision under current New York law, New York's Existing Section 9-402(1), states that the financing statement must contain "a brief description sufficient for the identification of the real estate concerned," and goes on to say "For the purposes of this section, the location of the real estate by reference to a book and page number in a deed or mortgage index maintained in the County Clerk's office in the county where the property is situated or by street and number and town or city or, if the real estate is in the City of New York, by county is a sufficient description, except that if the real estate is in the City of New York or counties of Nassau or Onondaga, where the block system of

recording or registering and indexing conveyances is in use, the statement must also specify the block in which the real estate is situated." It is not clear that the non-uniform language in current New York law leads to a different result than the bracketed language in the Official Text. However, the Commission would not oppose completion of subsection (b)(3) in a manner consistent with the language currently used in New York if that were thought desirable to emphasize the continuity of current law.

(v) Revised Section 9-502(c). The Official Text of Revised Section 9-502(c) states that a mortgage filed as a financing statement must be"[duly]" recorded. The bracketed word is optional, and should be included in the New York enactment of Revised Section 9-502(c). Similar optional language is included in the Official Text of the predecessor provision, Existing Section 9-402(6), and is included in New York's enactment of that provision, Existing Section 9-402(6).

Consistent with the discussion in subparagraphs (iii), (iv) and (v) above, the Commission proposes the following modifications to the Official Text of subsections (2) and (3) of Revised Section 9-502(b) and subsection (4) of Revised Section 9-502(c), to read as follows:

> (2) indicate that it is to be filed in the real property records;
>
> (3) provide a description of the real property to which the collateral is related, including the location of the real estate by reference to a book and page number in a deed or mortgage index maintained in the county clerk's office in the county where the property is situate or by street and number and town or city, or, if the real estate is in the City of New York, by county, except that if the real estate is in the City of New York or counties of Nassau or Onondaga, where the block system of recording or registering and indexing conveyances is in use, the statement must also specify the block in which the real estate is situated; and
>
> ****
>
> (4) the record is duly recorded.

(vi) Revised Sections 9-512(a), 9-518(b), 9-519(f), and 9-522(a). The Official Text of each of these provisions contains an alternative "Version A" and "Version B." The two versions differ in the degree of detail that must be stated in an amendment to an initial financing statement filed with a filing office for real-property-related financing statements (i.e., the county filing offices). Under Version A, the amendment may reference the initial financing statement by the debtor's name and the file number alone. Under Version B, the amendment must also include the date, or date and time, on which the initial financing statement was filed. The Commission understands that the Department of State prefers Version B, and the Commission defers to the Department of State on this point.

Consistent with the discussion in subparagraph (vi) above, after consultation with the Department of State, the Commission proposes the following versions of the Uniform text of Revised Sections 9-512(a), 9-518(b), 9-519(f), and 9-522(a), to read as follows:

§ 9-512. Amendment of Financing Statement.

(a) **Amendment of information in financing statement**. Subject to Section 9-509, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e), otherwise amend the information provided in, a financing statement by filing an amendment that:

(1) identifies, by its file number, the initial financing statement to which the amendment relates; and

(2) if the amendment relates to an initial financing statement filed in a filing office described in Section 9-501(a)(1), provides the date and time that the initial financing statement was filed and the information specified in Section 9-502(b).

§ 9-518. Claim Concerning Inaccurate or Wrongfully Filed Record.

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(b) **Sufficiency of correction statement.** A correction statement 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 in a filing office described in Section 9-501(a)(2), the date and time that the initial financing statement was filed and the information specified in Section 9-502(b);

(2) indicate that it is a correction statement; 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.

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§ 9-519. Numbering, Maintaining, and Indexing Records; Communicating Information Provided in Records.

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(f) **Retrieval and association capability**. The filing office shall maintain a capability:

(1) to retrieve a record by the name of the debtor and:

(A) if the filing office is described in Section 9-501(a)(1), by the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed or recorded; or

(B) if the filing office is described in Section 9-501(a)(2), by the file number assigned to the initial financing statement to which the record relates; and

(2) to associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement; and

(3) if the real estate is in the city of New York or in Nassau, Onondaga, or any other county where the block system of recording or registering and indexing conveyances is in use, to retrieve a record according to the block in which the real estate is situated.

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§ 9-522. Maintenance and Destruction of Records.

(a) **Post-lapse maintenance and retrieval of information.** The filing office shall maintain a record of the information provided in a filed financing statement for at least one year after the effectiveness of the financing statement has lapsed under Section 9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and:

(1) if the record was filed in the filing office described in Section 9-501(a)(1), by using:

(A) the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed; and

(B) in the case of collateral which is a cooperative interest, indicates the real property tax designation associated with the real property in which the cooperative unit is located as assigned by the local real property tax assessing authority; or

(2) if the record was filed in the filing office described in Section 9-501(a)(2), by using the file number assigned to the initial financing statement to which the record relates.

(vii) Revised Section 9-519(b). This provision requires the file number assigned by filing offices to each financing statement to contain a "check digit" commencing on a date to be specified. The Commission defers to the Department of State on the appropriate date for compliance with this requirement by the Department of State.

This "check digit" requirement will also apply to county filing offices unless this provision is written to exclude them. The Commission recommends that the Legislature follow the example of many states that have chosen not to subject their county filing offices to this requirement. A sufficient justification for so acting is that many of the county clerks lack both the hardware and the software to generate the “check digit”.

(viii) Revised Section 9-519(d). This provision pertains to the filing and indexing of real-property-related financing statements. The Official Text of this provision reads as follows:

(d) **Indexing: real-property-related financing statement.** If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, [it must be filed for record and] the filing office shall index it:

(1) under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) to the extent that the law of this state provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

The bracketed language "[it must be filed for record]" is optional. The New York enactment, Revised Section 9-519(d), should omit that optional language. The Official Text of the predecessor provision, Existing Section 9-403(7), contained similar optional language which is similarly omitted in the New York enactment, Existing Section 9-403(8).

Also germane to Revised Section 9-519(d) is a non-uniform provision in current New York law, New York's Existing Section 9-403(8). That

provision states that: "the filing officer shall index it according to the name of any owner of the real estate shown on the financing statement, and if the real estate is in the City of New York or in Nassau, Onondaga or any other county where the block system of recording or registering and indexing conveyances is in use, according to the block in which the real estate is situated; the filing officer may index such statements according to the names of the record owners of the real estate in a single consolidated index installed and maintained by him pursuant to [Section 529] of the county law." The reference in Existing New York Section 9-403(8) to indexing "according to the name of any owner of the real estate shown on the financing statement" is covered by Revised Section 9-519(d)(1) and accordingly need not be carried forward. The remainder of the current New York provision would seem to be covered by Revised Section 9-519(d)(2). However, the Commission would not oppose the carrying-forward of that portion of Existing Section 9-403(8) as a non-uniform addition to Revised Section 9-519(d) if that were thought desirable to emphasize the continuity with current law.

(ix) Revised Section 9-519(i). This provision permits each enacting state to specify whether county filing offices must (x) implement a check digit verification system in their file numbers in accordance with Revised Section 9-519(b), or (y) adhere to the performance standard set forth in Revised Section 9-519(h) for indexing, maintaining and retrieving filing information. The Commission recommends the county filing offices not be made subject to either of these requirements as the some of the county offices lack the equipment that would enable them to perform according to these standards.

Consistent with the discussion in subparagraphs (vii), (viii) and (ix) above, after consultation with the Department of State, the Commission proposes the following versions of the Official Text of subsections (b), (d) and (i) of Revised Sections 9-519, to read as follows:

§ 9-519. Numbering, Maintaining, and Indexing Records; Communicating Information Provided in Records.

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(b) **File number.** A file number must include a digit that:

(1) is mathematically derived from or related to the other digits of the file number; and

(2) aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.

****

(d) **Indexing: real-property-related financing statement.** If a financing statement is filed as a fixture filing or covers as-extracted collateral, or timber to be cut, or a cooperative interest, the filing office shall index it:

(1) under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) to the extent that the law of this state provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, and;

(3) if the real estate is in the City of New York or in Nassau, Onondaga, or any other county where the block system of recording or registering and indexing conveyances is in use, according to the block in which the real estate is situated; the filing officer may index such statements according to the names of the record owners of the real estate in a single consolidated index installed and maintained by him pursuant to section five hundred twenty-nine of the county law.

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(i) **Inapplicability to real-property-related filing office**. Subsections (b) and (h) do not apply to a filing office described in Section 9-501(a)(1).

(x) Revised Section 9-520(b). This provision permits each enacting state to specify whether county filing offices must adhere to the performance standard set forth in this subsection for refusing to accept a record for filing. The Commission recommends the county filing offices not be made subject to this requirement as many county offices lack the capacity to perform according to these standards.

In accordance with the discussion in subparagraph (x) above, the Commission proposes Revised Section 9-520(b) read as follows:

(b) **Communication concerning refusal**. If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing-office rule but, in the case of a filing office described in Section 9-501(a)(2), in no event more than two business days after the filing office receives the record.

(xi) Revised Section 9-523(c)(1)(A). This provision permits each enacting state to specify whether a filing office is required to honor search requests for a debtor limited to a particular address. The Commission defers to the Department of State on this point.

(xii) Revised Section 9-523(d). The written certificate issued by a filing officer can perform two distinct functions. The filing office can issue a certified copy of a particular document on file. The filing office can also certify that the specified documents constitute a complete filing record. This second function requires that the filing office do a search of its own records.

The Secretary of State's version of Article 9 contained in the Governor's budget bill would have certifications by local filing officers perform both these functions. The Secretary of State is willing to issue certified copies of particular documents filed with the department. It does not want to be required to conduct searches and have to certify that it has searched its records and that what it found constitutes a complete record of the filings with respect to a particular debtor. Instead, the Secretary of State will make all of its records available on the internet, thereby permitting anyone to conduct a search. A certification that a search constituted a complete record would be issued by non-public entity that conducts the search.

Whether the Secretary of State should be relieved of the search obligation involves consideration of fundamental public policy involving the nature of a public filing office. Moreover there are budgetary implications, both on the revenue and the expense side. Unfortunately we did not

become aware of the Secretary of State's proposals until late in the drafting of this Report, and thus were not in a position to make an informed recommendation. In any event, we believe the matter is best left to resolution by the Executive and Legislature.

The Secretary of State's bill also included a non-uniform amendment that would give a written certificate of a title insurance, abstract, or searching company "the same legal effect as" the written certificate of a filing officer. This provision is consistent with the Secretary of State no longer certifying the completeness of a search. If the Secretary of State is no longer in the search business, this type of search and certification needs to be done. This non-uniform amendment proposes that the certifying function be turned over to non-governmental entities. The Secretary of State's proposal parallels an existing law concerning certifications of records for real property, found in CPLR § 4323.

The Commission remains neutral concerning the search obligation of the Secretary of State. We do, however, believe that if the Secretary of State is relieved of its search obligations, Revised Article 9 should nonetheless contain a provision requiring the Secretary of State to issue written certifications that a particular document is in its file. The Commission also believes that some sort of non-governmental certification as to the completeness of a search would then have to be given legal effect.

We recognize that real property certifications can be made by non-public entities. (*See* CPLR § 4923). We have not had sufficient time to completely study the matter to determine whether the differences between real and personal property records affect the desirability in the propriety of non-public certification. Real property records are filed against the property, while personal property records are indexed against the name of the debtor, creating unique risks for the certifying searcher of personal property records. Ordinary individuals sometimes use middle initials, or formal or informal versions of their first name, and this leads to the possibility that records of liens against a single individual can be recorded under two or more names. Depending on the scope of their search, different searchers could produce certifications that differ in their content. This may cause some concern as each of the certifications would have "the same legal effect as" the written certificate of a filing office. The possibility of conflicting searches is one issue among others that should be resolved before giving legislative recognition to non-public certifications.

The Commission does recommend, however, that any provision concerning the legal effect of non-public certifications belongs in the CPLR and not in Revised Article 9.

The Commission has taken no position with respect to the Secretary of State continuing to be in the search business. In order to present the Legislature a complete statute, and only for that purpose, the draft statute that accompanies this Report follows the Official Text, containing language that leaves the Secretary of State in the search business.

If the Secretary of State is relieved of the search obligation, the

Commission recommends that the language specified below be substituted for the text of Section 9-523(d) that appears in the draft statute that accompanies this Report:

(xiii) Revised Section 9-523(e). This provision permits each enacting state to specify whether county filing offices must comply with the performance standard for search requests set forth in this section. The Commission offers no recommendation on this point, but observes that many states have chosen not to subject their county filing offices to this requirement.

(xiv) Revised Section 9-523(f). This provision permits each enacting state to specify whether county filing offices must offer to sell or license filing information on a nonexclusive basis to the public at least weekly. The Commission recommends that New York follow the example of many states and not subject their county filing offices to this requirement as it would impose substantial burdens on offices that lack the equipment and software to easily perform this obligation.

In accordance with the discussion in subparagraphs (xi), (xii), (xiii) and (xiv) above, after consultation with the Department of State, the Commission proposes the following versions of the Official Text of subsections (c)(1)(A), (d), (e) and (f) of Revised Sections 9-523, to read as follows:

§ 9-523. Information from Filing Office; Sale or License of Records.

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(c) **Communication of requested information**. The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that:

(A) designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request;

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(d) **Medium for communicating information**. In complying with its duty under subsection (c), the filing office specified in Section 9-501(a) may communicate information in any medium. However, if requested, the filing office specified in Section 9-501(a) shall communicate information by issuing its written certificate. The filing office specified in Section 9-501(b) shall, if requested, certify by a written certificate that a particular document is on file with that office.

(e) **Timeliness of filing office performance**. The filing office, except by a filing office described in Section 9-501(a)(1), shall perform the acts required by subsections (a) through (d) at the time and in the manner prescribed by filing-office rule, but not later than two business days after the filing office receives the request.

(f) **Public availability of records.** At least weekly, the secretary of state shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part, in every medium from time to time available to the filing office.

In addition, since the Secretary of State will be out of the search business, the Commission recommends the following provision be added to CPLR as § 4523 -A:

> A search of financing statements filed under article nine of the uniform commercial Code, when made and certified to by a title insurance, abstract or searching company organized under the laws of this state, may be used in place of, and with the same legal effect as an official search and certification

(xv) Revised Section 9-525. The Uniform Text of this provision sets forth filing and search fees to be charged by the filing offices. Under Current Article 9, New York adopted a non-uniform amendment providing that fees and fee structure is to be set by administrative rule. The Commission believes that this practice should be continued, and, as the current statute has worked well, it does not recommend following the Enactment Guide's model language as the basis for drafting the New York version of this statute.

By having a non-uniform statutory fee provision, New York does create a potential risk for filers. By far the most common reason for filings to be rejected by filing offices is tender of the incorrect fee. Adherence to a simple, transparent fee structure and one that matches the national structure set forth in Revised Section 9-525 may reduce that problem, to the great benefit of users and filing officers alike. Because Revised Article 9 makes the primary place of filing the state in which the debtor organization "is located", there is the likelihood that a substantial number of filings in New York will be made by out-of-state creditors. The chance of those persons offering incorrect fees is reduced if the structure of fees follows the national structure. For that reason, we suggest that in writing the regulations, the Secretary of State follow as closely as possible the structure of fees found in the Official Text.

The Commission notes that New York currently charges an additional fee for each person beyond the first person named as a debtor in the financing statement. We note that this practice complicates the fee structure and leads to fee payment errors and rejections. As filing offices move to electronic filing, this additional fee becomes more difficult to justify. We recommend that the Secretary of State consider eliminating this complication to this state's fee structure.

The Official Text, in Section 9-525(e), makes clear that when a filed mortgage performs the function of a financing statement, the appropriate fee for this filing is the mortgage filing fee and not the Article 9 fee. This rule prevents confusion as to which fee structure applies to this type of filing. The Commission suggests to the Secretary of State that its regulations contain a similar rule.

In accordance with the discussion in subparagraph (xv) above, after consulting with the Department of State, the Commission proposes the following version of Revised Sections 9-525, to read as follows:

> **§ 9-525. Fees.**
>
> Fees for filing and services under this chapter shall be determined in accordance with section ninety-six-a of the executive law.

(xvi) Revised Section 9-526(a). This provision requires each enacting state to specify the entity that is empowered to issue filing-office rules in that state. In New York, that entity should be the Department of State.

Accordingly, the Commission recommends that Revised Section 9-526(a) as enacted in New York read as follows:

§ 9-526. Filing-Office Rules.

(a) **Adoption of filing-office rules.** The secretary of state shall adopt and publish rules to implement this article. The filing-office rules must be consistent with this article.

(xvii) Revised Section 9-527. The Official Text of this provision contemplates that an appropriate governmental official or agency (in New York, the Department of State) will report annually to the governor and/or legislature of the enacting state as to the operations of the state's filing system. The Commission offers no recommendation as to the appropriate recipient(s) of the report. The Commission also notes that if the Department of State believes annual reports would be burdensome, biennial reports would be almost as useful as annual reports.

In accordance with the discussion in subparagraph (xvii) above, after consultation with the Department of State, the Commission proposes that New York not enact Revised Section 9-527.

f. Revised Section 9-617 (Relating to Exceptions to the Rule that Foreclosure Sale Discharges Subordinate Liens)

Revised Section 9-617 sets forth the rights of transferees of collateral when the collateral is disposed of by the secured party following a default by the debtor. Generally all subordinate security interests and liens are discharged by the secured party's disposition. The Official Text invites enacting states to refer in Revised Section 9-617(a)(3) to any statutory lien in the state that should survive a foreclosure disposition by a secured party, even though the lien is subordinate to the secured party's security interest. The Commission is not aware of any statutory lien in New York that should survive a foreclosure disposition even though subordinate to the secured party's security interest.

Because the Commission has not been able to find any statutes of this type, but because the Commission cannot be certain that no such statutes exist, the Commission suggests that subsection(a)(3) of Revised Section 9-617 be rewritten to read:

(3) discharges any subordinate security interest or other subordinate lien other than liens created under any law of this state which provides that such liens are not to be discharged.

g. Part 7: Transition Rules

Part 7 of the Official Text is dedicated to the complex transition from Existing Article 9 to Revised Article 9. The Official Text of Part 7 repeatedly uses two bracketed phrases, in the expectation that each enacting jurisdiction will replace them with terminology appropriate in that jurisdiction. First, the Official Text throughout uses the phrase "this [Act]." The intended referent of that phrase, however, is not the bill enacting Revised Article 9, but rather the New York UCC as revised by the enacting bill. Second, at several places the Official Text refers to specific sections of Existing Article 9, in brackets. Thus,

for example, the Official Text of Revised Section 9-705(c) provides for the survival of a pre-effective date financing statement which "is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [former Section 9-103]."

The Commission recommends that in the New York enactment these bracketed phrases in Part 7 should be completed as follows.

(i) New York should add a new Section 9-700 defining two new terms,"Former Article 9" and "Revised Article 9", which (paraphrased) are defined to mean the New York UCC before and after giving effect to the Act, respectively. These terms are defined to include the whole of the UCC, not merely Article 9, in order to include the conforming changes which the Revised Article 9 revision package makes to UCC provisions outside of Article 9:

§ 9-700. Definitions. The following words and terms when used in this part 7 shall have the following meanings:

"Former Article 9." The provisions of the Uniform Commercial Code of this State as in effect before the effective date of Revised Article 9.

"Revised Article 9." The provisions of the Uniform Commercial Code of this State, as amended by the [insert name of the bill enacting Revised Article 9] and as they may be further amended.

(ii) Bracketed references in the Official Text to provisions of Existing Article 9 should be completed with the defined term "Former Article 9". Thus, for example, in the New York enactment of Revised Section 9-705(c), the passage quoted above reads as follows: "is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in Section 9-103 of Former Article 9."

(iii) References in the Official Text to "this [Act]" should be completed by referring to "Revised Article 9".

(iv) Filing Issues During Transition: Dealing with the Consequences of the Abolition of New York's Dual Filing System

1. Maintenance After the Effective Date of Revised Article 9 of Non-Real-Estate-Related Records Filed at County Filing Offices under Existing Article 9

In view of the small number of states that have dual filing requirements, the Official Text of Revised Article 9 does not include official provisions governing the operations of county filing offices in dual filing states during the five-year transition period after Revised Article 9. Revised Article 9 does however assume that county filing offices will continue to maintain those financing statements and the related indexes and keep them available for search. The Commission recommends that New York adopt a non-uniform provision to address this point. The Enactment Guide contains a model provision which the Commission believes is an appropriate basis for such a New York provision, which might be added as a non-uniform addition to Part 7 of the New York's Revised Article 9.

2. Termination and Amendment after the Effective Date of Non-Real-Estate Related Records Filed at County Filing Offices under Existing Article 9

Revised Section 9-707 deals with the ways in which a financing statement filed before the effective date of Revised Article 9 may be amended (which term includes termination) after the effective date. This provision was a late addition to the Official Text of Revised Article 9, having been added in a January 2000 erratum. The Official Text of this provision seemingly would give effect to a termination statement filed after the effective date at a county filing office with respect to a non-real-estate-related financing statement filed with the county filing office before the effective date. This appears to follow from Revised Section 9-707(e), which states in effect that whether or not the law of New York governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in New York generally may be terminated after the effective date "by filing a termination statement in the office in which the pre-effective date financing statement is filed." This appears to apply to a pre-effective-date filing made at a county filing office. The county filing office is, of course, not the proper filing office under Revised Article 9 for filings with respect to non-real-estate-related collateral, but that seems irrelevant to application of Revised Section 9-707(e): that section uses the simple term "office", not a term such as "office specified in Revised 9-501." However, it would seem that effect would not be given to an amendment of any other type filed at a county filing office after the effective date with respect to a non-real-estate-related financing statement filed with the office before the effective date. Revised Section 9-707(c)(1) states in effect that, if New York law governs perfection of a security interest, a pre-effective-date financing statement may be amended after the effective date if "the pre-effective-date financing statement and an amendment are filed in the office specified in Section 9-501 of Revised Article 9." New York's county filing offices will continue to be filing offices under Section 9-501 for real-estate-related collateral, and so at first glance a county filing office might appear to qualify as an "office specified in Section 9-501". However, that argument fails for two reasons. First, the phrase is "the office specified in Section 9-501," and taken in context (and as used elsewhere in Revised Section 9-707), that phrase evidently must be construed as referring to "the proper filing office for collateral of that type specified in Section 9-501." Under that construction, a county filing office will not qualify as "the office specified in Section 9-501," and hence Revised Section 9-707(c)(1) does not authorize filing of an amendment in that office.

Second, Revised Section 9-707(c)(1) in any event applies only if New York law governs perfection of the security interest under Revised Article 9, and that would be purely fortuitous. Some states appear to have taken the position that it is better to make a clean break, and require county filing offices to cease to accept any further non-real-estate-related filings after the effective date.

If county filing offices are prohibited from accepting any further non-real-estate-related filings after the effective date, the question arises as to how such filings may be terminated or amended. One answer is that it is always possible to effect such a termination or amendment through the filing of a new initial financing statement in lieu of continuation in the filing office that is the proper filing office under Revised Article 9, and then terminate or amend that filing. (Revised Section 9-707(c)(2), (3)). Another answer is that it will rarely be necessary to terminate a non-real-estate related financing statement filed before the effective date at a county filing office, as most such financing statements will have been filed under the dual filing requirement, and termination of the central filing will suffice to terminate the secured party's perfection. However, it should be

kept in mind that under current New York law some limited types of non-real-estate related filings made at county filing offices do not duplicate a filing made with the central filing office. To amend such a filing after the effective date it would be necessary in any event to file a new initial financing statement in lieu of continuation statement at the proper filing office under Revised Article 9, and then amend that.

Whether county filing offices in New York should continue to accept after the effective date, with respect to non-real-estate-related financing statements filed with them before the effective date, (a) terminations but not amendments, as the Official Text appears to provide, or (b) neither terminations nor amendments, depends largely on operational and political matters. Accordingly, the Commission makes no recommendation on that point. However, this is a point the Legislature must consider when adopting Revised Article 9.

> 3. Should the Legislature choose to provide for central filing with respect to coops, then the same problem discussed above would apply to termination and amendments of coop filings that until now, have been treated as real-estate-related collateral.
>
> 4. Particularly if a clean break is made and New York provides that county filing offices are not to accept any terminations or amendments with respect to non-real-estate-related financing statements, the Commission believes that it would be desirable to add a non-uniform provision to Revised Article 9 stating in effect that, if a dual filing was made before the effective date, termination of the central filing automatically terminates all dual filings made at the county level. This would provide further assurance that there is no need for users to go through the cumbersome procedure of filing a new initial financing statement in lieu of continuation statement in the proper filing office under Revised Article 9 with respect to duplicative county filings, and then immediately terminate that new initial financing statement, merely in order to terminate those duplicative county filings.

h. Miscellaneous Conforming Changes.

(i) Existing New York UCC Section 1-209(39) (Relating to the Definition of "Signed")

New York's enactment of Existing Section 1-201(39), which defines the term "signed" contains the following non-uniform sentence:"Without limiting the generality of the preceding sentence, any financing or other statement or security agreement filed pursuant to Part 4 of Article 9 which contains a copy, however made, of the signature of a secured party or his representative, or of a debtor or his representative, is 'signed' by the secured party or the debtor, as the case may be." The Commission recommends that this sentence should not be carried forward into Revised Article 9. This sentence appears to reflect concern about the validity of copied signatures. It is not clear that such a concern was ever well founded, but this sentence is definitely obsolete under Revised Article 9, which replaces the concept of "signed" with the concept of "authenticated."

(ii) Conforming Changes to Agricultural Lien Statutes

Revised Section 9-302 includes agricultural liens within Article 9, which are liens on

personal property in favor of a person that "in the ordinary course of its business furnished goods or services" to a debtor "in connection with a debtor's farming operations." The lien must be one that does not depend on the person's possession of the personal property. As discussed in the section-by-section analysis of Revised Section 9-302, there appear to be only three New York statutes that provide for agricultural liens.

(1) The Commission recommends repeal of the railway lien on transported animals (N.Y. Agric. & Mkts. Law Section 359 (Consol. 1998)). This provision is almost certainly obsolete; but in any case, the lien it provides is redundant because of the lien provided for by UCC Section 7-307. Section 359(2) of the Agriculture and Markets law should be amended to omit its last sentence so as to read:

> 2. . . . ~~If the owner, agent, consignee or other person in charge of any such animals refuses or neglects upon demand to pay for the care or feed to the animals what so unloaded or rested, the railway company, or other carriers thereof, may charge the expense thereof to the owner or consignee and shall have a lien thereon for such expenses.~~

(2) The Commission recommends that the lien on stray animals (Town Law1310-322) be amended to make that lien a possessory lien (i.e., a lien that applies only while the beneficiary is in possession of the animal). It is difficult to envision any realistic situation in which someone should have the power to file such a lien against a stray animal not in that person's possession. If the stray animal lien is so limited, it will no longer be an "agricultural lien" as defined in Revised Article 9 and so will not be subject to Revised Article 9. Section 310 of the Town Law should be amended by making the priority of this lien explicit (*See* Conklin v. Long, 18 A.D.2d 246, 239 N.Y.2d 193(1963) and by inserting the phrase “for so long as such person shall retain possession of such beasts” so as to read:

> Whenever any person shall have any strayed horses, cattle sheep, swine or other beast upon his inclosed land, or shall find any such beast on land owned or occupied by him doing damage, and such beast shall not have come upon such lands from adjoining lands, where they are lawfully kept, by reason of his refusal or neglect to make or maintain a division fence required of him by law, such person may have a lien **with priority over all other liens** upon such beasts, **for so long as such person shall retain possession of such beasts,** for damage sustained . . .

(3) The third lien, pertaining to service of stallions or bulls (N.Y. Lien Law Section 160 (McKinney 1999)), appears to be commercially reasonable and worth preserving as a non-possessory lien. The incorporation of this lien into Revised Article 9 means that filing an Article 9 financing statement will be the only means of perfecting this lien. N.Y. Lien Law Section 160 currently requires a filing of such a lien with a county filing office, on a form that contains certain information about the animals in addition to the type of information that would be found on a normal financing statement. There is no apparent benefit to having two different filing requirements for such a lien, and so the Commission recommends that the Lien Law be amended to delete the county filing requirement. Assuming that is done, the question arises as to whether, in order for the financing statement filed with the Department of State to perfect such a lien to be effective, the financing statement should have to contain all of the additional information that current law requires to be contained in the county filing under current law. The

Commission has no informed view on that point, but tends to believe that it is unnecessary for the financing statement to require such information. There is no apparent reason why the same "notice filing" philosophy that undergirds the Article 9 filing system should not apply to filings to perfect liens of this type.

(4) There is one more lien that relates to agriculture that currently uses the UCC Filing system. It, however, is not an agricultural lien as that term is defined in Revised Article 9. Section 250-a of the Agricultural and Markets Law provides for a lien in favor of a “producer”, which is defined as "any person who grows farm products or sells livestock within New York." This lien attaches when a producer does not receive payment within the time limits set by Article 20 of the Agriculture and Markets Law and remains in effect for 30 days. This lien has priority "over all other liens or security interests upon farm products, inventory and accounts receivable". If during the 30 day period of the lien's effectiveness, the producer files a notice of lien, then the lien continues after the 30 days, and has priority over all other liens. If a notice is not filed, the lien becomes subordinate to perfected security interests at the expiration of the 30 day period. The notice of lien is to be filed "in the office of the filing officer designated according to the provisions of Article 9 of the uniform commercial code in the county where the dealer has facilities for receiving handling or processing farm products after payment from the dealer remains due and unpaid." Subsection 250-a (1)(b) sets forth the content of the notice of lien which differs materially from the content of a standard financing statement. The Legislature should consider whether filing in the county where the processor has facilities remains an appropriate place for such a filing when all other UCC filings against the processor will be made in the office of the Secretary of State. The Legislature should also consider whether the special content requirements for a notice of filing for this lien are necessary.

i. Certain Recommendations Relating to the Form of the Enacting Bill

1. Incorporation by Reference of the Safe-Harbor Forms of Financing Statement and Amendment in Revised Section 9-521

The Official Text of Revised Section 9-521 sets forth "safe-harbor" forms of financing statement and amendment that filing offices are required to accept. The Commission strongly recommends adoption of these provisions without substantive change. However, as a matter of form, the Commission recommends that, rather than reproduce those forms in the enacting bill, the enacting bill instead should simply refer to the forms in the Official Text of Revised Article 9 as promulgated by NCCUSL-ALI (in the forms existing on the present date). Experience in other states teaches that incorporation by reference would save considerable time and expense on the part of the legislative drafters and printers, who otherwise would have to add to the enacting bill exact copies of the two intricately-formatted standard forms. Incorporation by reference would also be much kinder to users of the statute, who will find it far simpler to be told that the standard forms apply in New York than to compare lengthy forms printed in the New York statute book with the standard form. The Enactment Guide endorses such incorporation by reference. Accordingly, the Commission recommends the following version of Revised Section 9-521:

§ 9-521. Uniform Form of Written Financing Statement and Amendment.

(a) **Initial financing statement form**. A filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format set forth in the final official text of the 1999 revisions to Article 9 of the Uniform Commercial Code promulgated by The American Law Institute and the National Conference of Commissioners on Uniform State Laws, except for a reason set forth in Section 9-516(b).

(b) **Amendment form**. A filing office that accepts written records may not refuse to accept a written record in the form and format set forth in the final official text of the 1999 revisions to Article 9 of the Uniform Commercial Code promulgated by The American Law Institute and the National Conference of Commissioners on Uniform State Laws, except for a reason set forth in Section 9-516(b).

The Commission notes that should the Legislature adopt the non-uniform coop amendments that the Commission recommends, one part of those amendments includes a coop addendum form. That form would have to be included in the New York statutes, as there is no equivalent non-legislative body to which reference can be made.

2. Subsection Headings; Conforming Amendment to UCC Section 1-109.

As with all previous versions of the UCC, the Official Text of Revised Article 9 includes a caption for each sections. The Official Text of UCC Section 1-109 states that sections captions in the UCC are part of the law. As an innovation in UCC drafting style, Revised Article 9 comes equipped with optional headings to each subsection, as well as captions to each section. Unlike section captions, the drafters intend that subsection headings are not part of the Official Text. See Revised Section 9-101, Official Comment 3. The Commission believes that subsection headings are a desirable guide for persons reading this exceptionally complex statute, and recommends that the New York enacting bill include them. These headings should not be considered part of the law, however, and as suggested by both the foregoing Official Comment 3 and the Enactment Guide, the Commission recommends that New York's version of UCC Section 1-109 be amended to make this clear. The Commission endorses the suggestion made in the Enactment Guide that this may be achieved by adding the following sentence to New York's UCC Section1-109:

"The subsection headings in the Article on Secured Transactions are not parts of this Act."

j. Official New York Comments.

The Commission will prepare official New York comments to certain sections of Revised Article 9. We plan to request that these comments be printed in McKinney's along with the Official Comments to each statutory section commented upon.

Consistent with the approach taken by other states, New York comments would not be prepared for each section of the statute for the purpose of explaining the operation of that section generally. Nor should such New York comments be prepared for the purpose of describing the differences between prior law and the revised law, as such. The extensive Official Comments to Revised Article 9 abundantly satisfy both of those goals. Rather, New York comments would be added only to offer permanent guidance on construction and application of statutory provisions on points to which the Official Comments do not speak. New York comments thus could be used to identify non-uniform features of New York law and, where appropriate, offer guidance on the construction of

those non-uniform provisions. Thus, New York comments to the extensive non-uniform New York provisions on cooperative apartment finance could greatly aid practitioners and courts in construing those provisions.

New York comments could also be used to clarify the intended operation of the uniform text on matters not addressed by the Official Comments and as to which a change to the uniform text is not the best solution. An excellent example is Revised Section 9-706(c)(1), which states one of the formal requirements for an initial financing statement filed in lieu of a continuation statement and with respect to which a proposed official comment is set out below. Revised Section 9-706(c)(1) states that such an initial financing statement must "satisfy the requirements of Part 5 for an initial financing statement." Read literally, this could be argued to mean that such a financing statement cannot be effective unless it contains not only the information required for a sufficient financing statement under Revised Section 9-502, but also all the additional information which filing offices are supposed to require under Revised Section 9-516. Such an argument would be contrary to the intention of the drafters and would defy common sense: it would be absurd to single out initial financing statements filed in lieu of a continuation statement from the universe of all financing statements and make them ineffective even though they contain all the information required by Revised Section 9-502. A non-uniform New York change to this provision would be of limited practical value, as it would address only in New York an interpretative problem that is inherently nationwide in scope. Indeed a non-uniform New York change might even be counterproductive, as it might raise an undesirable negative inference in other states ("if the official text was intended to mean what New York changed it to say, then why did New York change the official text at all"?) A New York comment can provide assurance as to the intended application of this rule without raising such a negative inference.

In its report on Revised Article 9, The Association of the Bar of the City of New York suggested to the Commission that three particularly difficult sections – Revised Sections 9-307, 9-705 and 9-706 would be aided by this type of New York commentary. The preliminary text to each of these comments appears as part of the discussion of each of these sections in Part V of this Report of the Commission.

k. Repeal of UCC Article 6.

As a UCC revision project entirely separate from Revised Article 9, NCCUSL and ALI in 1989 completed a project to revise Article 6 of the UCC, which deals with bulk sales (that is, sales outside the ordinary course of business of all or a major part of the inventory of an enterprise whose main business is the sale of inventory from stock). NCCUSL-ALI concluded that bulk sales statutes of this type are obsolete and recommended that states simply repeal existing Article 6 without replacing it. As a disfavored recommended alternative, NCCUSL-ALI promulgated a complete revision of Article 6. As of early October 2000, 38 states followed NCCUSL-ALI's primary recommendation and repealed Article 6 without replacing it; 4 other states likewise have bills pending to repeal it without replacement; and 4 states and the District of Columbia have adopted the revised version. New York is one of the four remaining states that have not yet taken action.

The Commission recommends that New York should take advantage of the introduction of the Article 9 bill to resolve this bit of unfinished business and so should add to that bill provisions that would repeal Article 6 without replacing it.

l. Articles 3 and 4 of the Uniform Commercial Code

Because Revised Article 9 assumes adoption of the uniform version of Article 3 of the UCC (with conforming and miscellaneous amendments to Articles 1 and 4) approved for state adoption by the Uniform Law Commissioners and the American Law Institute in 1990 ("Revised Article 3"),' the cross-references to Article 3 in Revised Section 9-403 will have to be changed unless New York adopts Revised Article 3 prior to the effective date of Revised Article 9. The reference in Revised Section 9-403(a) to "Section 3-303(a)" for the definition of "value" should be changed to "Section 3-303," which is the provision in New York's version of Article 3 ("New York's Article 3") where "value" is defined. The reference in Revised Section 9-403(b)(4) to "Section 3-305(a)" of Revised Article 3 (which lists defenses to which the right to enforce a payment obligation on an instrument is subject) has no specific counterpart in New York's Article 3. Current Sections 3-305(2) and 3-306 of New York's Article 3 are Revised Section 3-305(a)'s predecessors but differ enough that they cannot simply be cross-referenced. Accordingly, the text of Revised Section 9-403(b)(4) should be deleted in its entirety and the full text of subsections (a)(1),(a)(2) and (a)(3) of Revised Section 3-305 should be substituted. The reference in Revised Section 9-403(c) to "Section 3-305(b)" of Revised Article 3 (which describes the defenses which can be raised against a holder in due course) will need to be changed as well. The simplest approach would be to cross-reference the portion of the text of Revised Section 3-305(a) that will be added to Revised Section 9-403(b)(4) that will list the defenses against a holder in due course.

In addition Revised Article 9 relies on two terms found in Revised Article 3, but not in New York's Article 3, "prove" and "check". The Commission recommends that the text of these definitions be added to the list of Article 9 defined terms in Section 9-102(a) and should read as follows:

(11a) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or a teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order". An instrument that (i) meets all of the requirements stated in Article 3 of this chapter to be a negotiable instrument other than stating that it is payable to order or bearer and (ii) otherwise qualifies as a check is a negotiable instrument and a check.

(66a) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 1-201(8).

Part V. Section-by-Section Analysis

A. Section-by-Section Analysis of Part 1: General Provisions

1. Section 9-102: Definitions and Index of Definitions

Revised Article 9 deals with a wide variety of consensual security interests in personal property and fixtures. Revised Article 9 retains the basic structure of Current Article 9. Revised Article 9 defines a much larger number of terms to be used in its provisions than does the Current Article 9 and the definitions which appear in both sections have almost invariably been reworded or refocused. Section 9-102 (Definitions) contains the vast majority of the definitions used in Revised Article 9. For ease of comparison with Current Article 9, the new definitions in Revised Article 9 will be discussed separately from the amended and unchanged definitions.

a. New Definitions

"Accounting" (Revised Section 9-102(a)(4)) means a record which is authenticated by a secured party, which indicates 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 which identifies the components of the obligations in reasonable detail.

"Agricultural lien" (Revised Section 9-102(a)(5)) means an interest, other than a security interest, in farm products which secures payment or performance of an obligation for goods or services furnished in connection with a debtor's farming operation or an obligation for rent on real property leased by a debtor in connection with its farming operation. This interest is created by statute in favor of a person that in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation or leased real property to a debtor in connection with the debtor's farming operation. The interest's effectiveness does not depend on the person's possession of the personal property.

"As-extracted collateral" (Revised Section 9-102(a)(6)) means either: (i) oil, gas, or other minerals that are subject to a security interest that is created by a debtor having an interest in the minerals before extraction and attaches to the minerals as extracted; or (ii) accounts arising out of the sale at the wellhead or minehead of oil, gas or other minerals in which the debtor had an interest before extraction.

"Authenticate" (Revised Section 9-102(a)(7)) means signing, executing or adopting a symbol, or encrypting a record in whole or in part. The authenticating party must have a present intent to identify itself as well as an intent to adopt, accept or establish the authenticity of a record or term. The replacement of the term "signed" with "authentication" is intended to allow for authentication of non-written records. This is consistent with New York courts' broad interpretation of the New York UCC that stresses a common sense approach and largely examines intent to authenticate a document. *See Kam Kuo Seafood Corp. v. Hong Kong & Shanghai Banking Corp. (In re Kam Kuo Seafood Corp.)*, 76 B.R. 297, 301 (Bankr. S.D.N.Y. 1987) (holding that "Section 1-201(39) by its language makes the intent of the parties a central concern in determining whether the instrument was signed" and thus that inadvertent failure to include debtor's name on face of document did not irreparably flaw its authentication where the document was signed with "present intent to authenticate" it); *Cherno v. Bank of Babylon*, 57 Misc.2d 801, 802, 293 N.Y.S.2d 577, 579 (Sup. Ct. Nassau Co. 1968) (using identical language to current UCC § 1-201, comment 39, that "[n]o catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with the present intention to authenticate the writing."). Note that Revised Article 9 includes a number of definitions such as "electronic chattel paper" "send" and "record," which also express a greater tolerance for electronic documents and agreements. This reflects a change in the law and is broader than New York's Electronic Signatures and Records Act (New York State Technology Law Section 101 *et. seq*.)

"Certificate of title" (Revised Section 9-102(a)(10)) 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.

"Commercial tort claim" (Revised Section 9-102(a)(13)) means a claim in tort if the claimant is an organization. The claimant can also be an individual, if the claim arose in the course of the claimant's business or profession and does not include damages arising out of personal injury to or the death of an individual.

"Communicate" (Revised Section 9-102(a)(18)) means to send a written or other tangible record, to transmit a record by any means agreed upon by the persons sending and receiving the record or (in the case of transmission of a record to or by a filing office) to transmit a record by any means prescribed by filing-office rule.

"Consignee" (Revised Section 9-102(a)(19)) means a merchant to which goods are delivered in a consignment.

"Consignor" (Revised Section 9-102(a)(21)) means a person who delivers goods to a consignee in a consignment.

"Consumer debtor" (Revised Section 9-102(a)(22)) means a debtor in a consumer transaction.

"Consumer-goods transaction" (Revised Section 9-102(a)(24)) means a transaction in which an individual incurs an obligation primarily for personal, family, or household purposes, which obligation is secured by a security interest in consumer goods (or in consumer goods and software) that are used, licensed, or bought for use primarily for personal, family, or household purposes.

"Consumer obligor" (Revised Section 9-102(a)(25)) means an obligor who is an individual and who incurred an obligation as part of a transaction entered into primarily for personal, family, or household purposes.

"Consumer transaction" (Revised Section 9-102(a)(26)) means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes; (ii) a security interest secures the obligation; and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes a consumer-goods transaction.

"Electronic chattel paper" (Revised Section 9-102(a)(31)) means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

"Farming operation" (Revised Section 9-102(a)(35)) means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock or aquacultural operation.

"File number" (Revised Section 9-102(a)(36)) means the number assigned to an initial financing statement pursuant to Section 9-519(a).

"Filing office" (Revised Section 9-102(a)(37)) means an office designated in Section 9-501 as the place to file a financing statement.

"Filing-office rule" (Revised Section 9-102(a)(38)) means a rule adopted pursuant to Section 9-526.

"Governmental unit" (Revised Section 9-102(a)(45)) means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United

States, a State, or a foreign country. The term includes an organization with a separate corporate existence only if the organization is eligible to issue debt obligations on which interest is exempt from income taxation under the laws of the United States.

"Health-care-insurance receivable" (Revised Section 9-102(a)(46)) means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided.

"Jurisdiction of organization" (Revised Section 9-102(a)(50)) means, with respect to a registered organization, the jurisdiction under whose law the organization is organized.

"Letter-of-credit right" (Revised Section 9-102(a)(51)) means a right to payment and performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit (transfer of a beneficiary's right to demand payment or performance to a transferee beneficiary is still governed by Article 5 of the Uniform Commercial Code).

"Manufactured home" (Revised Section 9-102(a)(53)) means a structure, transportable in one or more sections, which in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.

"Manufactured-home transactions" (Revised Section 9-102(a)(54)) means a secured transaction that creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or a secured transaction in which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

"New debtor" (Revised Section 9-102(a)(56)) means a person that becomes bound as debtor under Section 9-203(d) by a security agreement previously entered into by another person.

"New value" (Revised Section 9-102(a)(57)) means (i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation. The definition of "new value" was derived directly from Section 547(a) of the United States Bankruptcy Code, and just like its antecedent term in the Bankruptcy Code, the Revised Article 9 term does not include an obligation substituted for another obligation.

"Obligor" (Revised Section 9-102(a)(59)) means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, owes payment or other performance of the obligation, has provided property other than the collateral to secure payment or other performance of the obligation or is otherwise

accountable in whole or in part for payment or other performance of the obligation. The term does not include an issuer or a nominated person under a letter of credit.

"Original debtor" (Revised Section 9-102(a)(59)) means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under Section 9-203(d).

"Payment intangible" (Revised Section 9-102(a)(61)) means a general intangible under which the account debtor's principal obligation is a monetary obligation.

"Person related to" (Revised Section 9-102(a)(62)) means, with respect to an individual, the spouse of the individual, a brother, brother-in-law, sister, or sister-in law of the individual or an ancestor or lineal descendant of the individual or the individual's spouse. The term also includes any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.

"Person related to" (Revised Section 9-102(a)(63)) means, with respect to an organization: (i) a person directly or indirectly controlling, controlled by, or under common control with the organization; (ii) an officer or director of, or a person performing similar functions with respect to, the organization; (iii) an officer or director of, or a person performing similar functions with respect to, a person described in item (i); (iv) the spouse of an individual described in the first three items in this list; or (v) an individual who is related by blood or marriage to an individual described in the other items in this list and shares the same home with the individual.

"Promissory note" (Revised Section 9-102(a)(65)) means an instrument that (i) evidences a promise to pay a monetary obligation, (ii) does not evidence an order to pay, and (iii) does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

"Proposal" (Revised Section 9-102(a)(66)) means a record authenticated by a secured party and including the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to Sections 9-620, 9-621, and 9-622.

"Public-finance transaction" (Revised Section 9-102(a)(67)) means a secured transaction in connection with which bonds, debentures, certificates of participation, or similar debt securities are issued. All or a portion of the securities issued must have an initial stated maturity of at least 20 years and the debtor, the obligor, the secured party, the account debtor or other person obligated on collateral, the assignor or assignee of a secured obligation, or the assignor or assignee of a security interest is a State or governmental unit of a State.

Except as used in "for record," "of record," "record or legal title," and "record owner," "record," as defined in Revised Section 9-102(a)(69), means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

"Registered organization" (Revised Section 9-102(a)(70)) means an organization organized solely under the law of one 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.

"Secondary obligor" (Revised Section 9-102(a)(71)) means an obligor to the extent that the obligor's obligation is secondary; or the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either. One must consult the law of suretyship to determine whether an obligation is secondary. The Restatement (3d), Suretyship and Guaranty Section 1 (1996), contains a useful explanation of the concept.

"Software" (Revised Section 9-102(a)(75)) means a computer program, any informational content included in the program, and any supporting information provided in connection with a transaction relating to the computer program or informational content. The term does not include a computer program that is contained in goods unless the goods are a computer or computer peripheral.

"State" (Revised Section 9-102(a)(76)) means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

"Supporting obligation" (Revised Section 9-102(a)(77))means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property.

"Tangible chattel paper," (Revised Section 9-102(a)(78)) means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

b. Amended Definitions

"Accession" (Revised Section 9-102(a)(1)) means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost. Current Section 9-314 defined accession as goods which are installed in or affixed to other goods that retain the security interests associated with them over the claims of all persons to the whole.

"Account" (Revised Section 9-102(a)(2)) means a right to repayment of a monetary obligation, whether or not earned by performance, in eight situations. The eight situations include (i) property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed to operate the game by a State or governmental unit of a State. This revised definition expands greatly upon the definition of "account" found in Current Section 9-106 by enumerating the things that can create a right for payment that the current section more vaguely describes as "goods sold or leased or services rendered" and would likely to have been classified as general intangibles under Current Article 9, such as, credit card receivables or payment obligations arising out of the sale, lease, or license of all kinds of tangible and intangible property. The term also includes health-care-insurance receivables but specifically does not include (in addition to rights to payment evidenced by chattel paper or an instrument), commercial tort claims, deposit accounts, investment property, letter-of-credit rights or

letters of credit, or rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit card or information contained on or for use with the card.

"Account debtor" (Revised Section 9-102(a)(3)) means a person obligated on an account, chattel paper or general intangible. This definition draws on Current Section 9-105(l)(a), and adds a second sentence which excludes a person obligated to pay a negotiable instrument, even if that instrument is part of chattel paper.

"Bank" (Revised Section 9-102(a)(8)) means an organization that is engaged in the business of banking. The Revised definition alters Current Section 1-201(4)'s definition of "bank" by changing the phrase "any person" to "any organization." Additionally, the new section specifically includes a savings bank, savings and loan association, credit union and trust company in its definition.

"Chattel paper" (Revised Section 9-102(a)(11)) means a record or records that evidence both a monetary obligation and a security interest in or a lease of specific goods, while excluding vessel charters. Record (Revised Section 9-102(69)) is a new definition in Article 9. Revised Section 9-102(a)(11) also goes on to say that if a transaction is evidenced by both instruments and a security agreement or lease, then the group of records taken together constitutes chattel paper. Revised Section 9-102(a)(11) changes Current Section 9-105(l)(b)'s use of the terms "writing or writings" to "record or records," and replaces "[w]hen a transaction is evidenced" with "[i]f a transaction is evidenced." The new definition also adds the possibility that the security interest applies to software used in the goods and covers a lease of goods "and license of software used in the goods."

"Collateral" (Revised Section 9-102(a)(12)) means the property subject to a security interest. This section draws from Current Section 9-105(l)(c) while making a number of additions. The revised section encompasses property subject to an agricultural lien as well as property subject to a security interest. Revised Section 9-102(a)(12) also goes on to include specifically proceeds to which a security interest attaches under Revised Section 9-315, payment intangibles and promissory notes that have been sold, and goods that are the subject of consignment.

"Consignment" (Revised Section 9-102(a)(20)) means a transaction where goods that have an aggregate value of over $1,000 are delivered by a person to a merchant for the purpose of their sale. Current Section 9-114 and the comments thereto, while not specifically defining the term, do outline the general restrictions surrounding a consignment arrangement. However, the revised section adds some new requirements to the operational definition found in the current section. These include the minimum value mentioned above, provisions that the merchant must be one that deals in goods of that kind and must not be known by its creditors to be substantially engaged in selling the goods of others and a requirement that the transaction not create a security interest that secures an obligation. In addition, Comment 14 to Revised Section 9-102 states that "if a merchant-processor-bailee will not be selling the goods itself but will be delivering to buyers to which the owner-bailor agreed to sell the goods, the transaction would not be a consignment." That sentence suggests that a critical fact in determining whether a consignment arrangement exists will be whether the original owner selects the ultimate buyers. *Cf. In re Mincow Bag Co.* 24 N.Y. 2d 776; 248 N.E. 2d 26 (1969) (where merchant was found not to be a consignee because it never took possession of the goods subject to the alleged consignment but instead had the goods shipped directly to stores that it itself selected to purchase the goods).

"Debtor" (Revised Section 9-102(a)(28)) means a person having a property interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor. The revised definition also includes a consignee, as well as a seller of accounts, chattel paper, payment intangibles or promissory notes. This definition represents a wholesale change from Current Section 9-105(l)(d)'s definition of debtor. Revised Section 9-102(a)(28) eliminates the prior section's emphasis on whether the person in question was an obligor. This difference would change the outcome of a small number of cases. In *Marine Midland Bank N.A. v. Kristin Int'l Ltd.*, 141 A.D.2d 259, 534 N.Y.S.2d 612 (4th Dep't 1988), the court held that a guarantor should be considered a debtor for the purposes of Article 9 based on the above definition. The court in that case based its reasoning on the fact that "the guarantor becomes liable for the principal obligation upon default," a conclusion which was "buttressed by the fact that [Current Section 9-105(1)(d)] does not require the debtor to own or have any rights to the collateral." Id. 141 A.D.2d at 261, 534 N.Y.S.2d at 614. Furthermore, at least two cases since *Kristin* have echoed its reasoning and cited it directly. *See Marine Midland Bank, N.A. v. CMR Indus., Inc.,* 159 A.D.2d 94, 105, 559 N.Y.S.2d 892, 899 (2d Dep't 1990); *First Am. Bank of N.Y. v. Wassel*, 601 N.Y.S.2d 994, 995 (N.Y. Sup. Ct. 1993). These cases would not survive the new definition of debtor; even though the guarantor has an obligation to pay, its status as a debtor would be moot because of his or her lack of property rights in the collateral. A guarantor would, however, be within the new defined term "Obligor."

"Deposit account" (Revised Section 9-102(a)(29)) means limited to those demand, time, savings, passbook or similar accounts maintained with a bank as that term is defined in Revised Section 9-102(a)(8). The new section also specifically excludes investment property and an account evidenced by an instrument rather than the accounts evidenced by a certificate of deposit which are excluded in the current section.

"Equipment" (Revised Section 9-102(a)(33)) means goods other than inventory, farm products or consumer goods. This definition draws upon and simplifies Current Section 9-109(2).

"Farm products" (Revised Section 9-102(a)(34)) means goods, other than standing timber, with respect to which a debtor is engaged in a farming operation. Farm products also includes crops, livestock, supplies used or produced in a farming operation, or products of crops or livestock in their unmanufactured states. The revised section deletes the current section's (Section 9-109(3)) explanation that farm products are neither equipment nor inventory (which at any rate is redundant in light of Revised Article 9's definitions of inventory and equipment). The new section also specifically includes aquatic goods produced in aquacultural operations as well as products that grow on trees, vines or bushes.

"Fixture filing" (Revised Section 9-102(a)(40)) means the filing of a financing statement covering goods that are or are to be become fixtures which also meet the requirements of Revised Section 9-502(a) and (b). The revised definition modifies the prior one (Section 9-313(i)(b)) by specifically including the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

"General intangible" (Revised Section 9-102(a)(42)) means any personal property, including things in action, with the exception of the other specific Article 9 categories of collateral. The revised definition adds commercial tort claims, deposit accounts, letters of credit (not just the rights to proceeds under letters of credit) and oil, gas or minerals before extraction to the list of types of collateral excluded under Current Section 9-106's definition

of general intangible. Revised Article 9's expansion of the definition of "account" has reduced the scope of the definition of "general intangible". Perfection of interests in letters of credit are governed by Article 5 of the Uniform Commercial Code, not Revised Article 9. Revised Section 9-102(a)(42) also specifically includes a payment intangible and software in the definition of general intangible.

"Good faith" (Revised Section 9-102(a)(43)) means honesty in fact and the observance of reasonable commercial standards of fair dealing. Courts sitting in New York have applied the general definition of good faith delineated by Current Section 1-201(19) which creates a subjective standard that focuses on "honesty in fact in the conduct or transaction concerned." *See, e.g., First City Fed. Sav. Bank v. Dennis*, 690 F. Supp. 221, 225-26 (S.D.N.Y. 1988) (dealing with an Article 3 issue). No New York court has applied this definition to an Article 9 situation. Revised Section 9-102(a)(43) uses an objective measuring stick that looks to "reasonable commercial standards of fair dealing" in deciding whether a party has used good faith. This definition mirrors the higher standard to which merchants are held under Current Section 2-103(1)(b), and changes the meaning of good faith under Article 9.

"Goods" (Revised Section 9-102(a)(44)) means all things that are movable when a security interest attaches. The revised section continues on to add specific categories to the current definition of goods found in Current Section 9-105(1)(h). The revised definition of goods now specifically include crops to be grown and manufactured homes. Revised Section 9-102(a)(44) also includes computer programs integrated with goods, any informational content included in such a program, and any supporting information relating to the program or informational content (all of this assuming that the program is customarily considered part of the goods or that by becoming the owner of the goods a person would acquire the right to use the program in connection with the goods). The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The revised definition also retains the current definition's exclusions from the definition of goods and adds to the exclusions commercial tort claims, deposit accounts, letters of credit and letter-of-credit rights.

"Instrument" (Revised Section 9-102(a)(47)) means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. Like Current Section 9-105(1)(i), this definition excludes investment property. However, the revised section goes on to exclude letters of credit and writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card from its definition of instrument.

"Inventory" (Revised Section 9-102(a)(48)) means goods that are leased by a person to others or held by a person for sale or lease, goods that are held by a person for sale, goods furnished or to be furnished by a person under a contract of service, or goods that consist of raw materials, work in process, or materials used or consumed in a business. The revised section draws upon but reformulates the material provisions of Current Section 9-109(4)'s definition of inventory.

"Lien creditor" (Revised Section 9-102(a)(52)) means a creditor that has acquired a lien on the property involved by attachment or levy, an assignee for benefit of creditors from the time of assignment, a trustee in bankruptcy from the date of filing of the petition, or a receiver in equity from the time of appointment. This definition represents a small

wording change from Current Section 9-301(3).

"Mortgage" (Revised Section 9-102(a)(55))means a consensual interest in real property created by a mortgage, trust deed, or similar transaction. The revised section adds fixtures to the interest in real property contemplated by Current Section 9-105(1)(j)'s definition.

"Proceeds" (Revised Section 9-102(a)(64)) means whatever is acquired on the disposition of collateral, whatever is collected on, or distributed on account of, collateral (including supporting obligations), rights arising out of collateral, certain claims arising with respect to the collateral, and insurance payable in connection with certain of such claims. The revision's addition to the definition, as compared to current Section 9-306(1), lies specifically in the inclusion of claims arising out of the loss, nonconformity or interference with the use of, defects or infringement of rights in, or damage to the collateral.

"Pursuant to commitment" (Revised Section 9-102(a)(68)) means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation. This revised section draws upon and minimally alters the wording of Current Section 9-105(1)(k).

"Secured party" (Revised Section 9-102(a)(72)) means a person for whom a security interest is created under a security agreement, a holder of an agricultural lien, a consignor, a person to whom accounts, chattel paper, payment intangibles or promissory notes have been sold, or a trustee or other representative in whose favor a security interest has been created. Compared to Current Section 9-105(1)(m), this definition includes persons with additional types of interests as secured parties.

"Send" (Revised Section 9-102(a)(74)), in connection with a record or notification, means to deposit in the mail, deliver for transmission or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances. The term also encompasses causing the record to be received within the time that it would have been received if properly sent. This term contemplates the possibility of transmission of non-written material.

"Transmitting utility" (Revised Section 9-102(a)(80)) means a person primarily engaged in the business of operating a railroad or bus or transmitting electricity, goods by pipeline, or electronic communications. This revised section specifically adds subway operators to the definition found in Current Section 9-105(1)(n).

c. Additional Definitions

These terms have been moved intact or in a refined form from various sections of Current Article 9 to Revised Section 9-102 or have been included for clarification.

"Cash proceeds" (Revised Section 9-102(a)(9)) means proceeds that are money, checks, deposit accounts, or the like.

"Commodity account" (Revised Section 9-102(a)(14)) means an account in which a commodity contract is carried for a commodity customer. A commodity intermediary must maintain the account.

"Commodity contract" (Revised Section 9-102(a)(15)) means a commodity futures contract, an option on a commodity futures contract, or a commodity option. Also included in this definition is a contract traded on or subject to the rules of a board of trade that has been designated as a contract market.

"Commodity customer" (Revised Section 9-102(a)(16)) means a person for which a commodity intermediary carries a commodity contract on its books.

"Commodity intermediary" (Revised Section 9-102(a)(17)) means a person that is either registered as a futures commission merchant under federal commodities law or in the ordinary course of business provides settlement services for a board of trade designated as a contract market.

"Consumer goods" (Revised Section 9-102(a)(23)) means goods that are used or bought for use primarily for personal, family or household purposes.

"Continuation statement" (Revised Section 9-102(a)(27)) means an amendment of a financing statement which: (i) identifies, by its file number, the initial financing statement to which it relates; and (ii) indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement. While this term is not specifically defined in the prior article, Current Section 9-403(3) outlines the filing of a continuation statement and contains similar language describing the contents of the statement.

"Document" (Revised Section 9-102(a)(30)) means a document of title or a receipt as described in Section 7-201(2).

"Encumbrance" (Revised Section 9-102(a)(32)) means a right in real property other than an ownership interest.

"Financing statement" (Revised Section 9-102(a)(39)) means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement. This reflects a change, in that Current Article 9-402(4) defines "financing statement" as "the original financing statement and any amendments."

"Fixtures" (Revised Section 9-102(a)(41)) means goods that have become so related to particular real property that an interest in them arises under real property law.

"Investment property" (Revised Section 9-102(a)(49)) means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

"Noncash proceeds" (Revised Section 9-102(a)(58)) means proceeds other than cash proceeds.

"Security agreement" (Revised Section 9-102(a)(73)) means an agreement that creates or provides for a security interest.

"Termination statement" (Revised Section 9-102(a)(79)) means an amendment of a financing statement which: (i) identifies, by its file number, the initial financing statement to which it relates; and (ii) indicates either that it is a termination statement or that the identified financing statement is no longer effective. While not specifically defined by the

prior article, Current Section 9-404 outlines the filing of a termination statement and contains similar language describing the contents of the statement.

2. Definitions Found Outside Section 9-102

Defined terms contained in provisions other than Revised Section 9-102 include "purchase-money collateral" (Revised Section 9-103(a)(1)); "purchase-money obligation" (Revised Section 9-103(a)(2)); "purchase-money security interest" (Revised Section 9-103(b)); "request" (Revised Section 9-210(a)(1)); "request for an accounting" (Revised Section 9-210(a)(2)); "request regarding a statement of account" (Revised Section 9-210(a)(3)); "place of business" (Revised Section 9-307(a)); "licensee in ordinary course of business" (Revised Section 9-321(b)); "possessory lien" (Revised Section 9-333(a)); "construction mortgage" (Revised Section 9-334(h)); "commingled goods" (Revised Section 9-336); "value" (Revised Section 9-403(a)); "notification date" (Revised Section 9-611(a)); "explanation" (Revised Section 9-616(a)(1)); "request" (Revised Section 9-616(a)(2)); and "transfer statement" (Revised Section 9-619(a)). These other defined terms are discussed, where appropriate, in the analysis of the sections where they arise.

a. Section 9-103: Purchase-Money Security Interest; Application of Payments; Burden of Establishing

A purchase-money security interest (often called a "PMSI") is an interest in collateral which is either taken by a supplier of that collateral to finance the purchase price, or is taken by a lender in order to enable the borrower to purchase the collateral. A purchase-money security interest may exist in goods or in software sold or licensed with goods which are themselves purchase-money collateral, if the software is acquired principally for use with the goods (as in the case of a computer that is pre-loaded with software). A "purchase-money security interest," if the applicable perfection steps are taken, primes prior perfected security interests. Also, under Revised Section 9-324, the holder of a purchase-money security interest in goods (other than inventory) has a grace period of 20 days after the debtor receives possession of the collateral in which to file.

Revised Article 9 states that, in a commercial transaction, a secured party claiming that it has a purchase-money security interest has the burden of establishing that interest. Several subsidiary rules help to determine whether this interest exists in specified circumstances:

(i) The security interest of a consignor is a purchase-money security interest.

(ii) Cross-collateralization of purchase-money advances is permitted, with the result that the total of the purchase-money inventory advances from the same supplier or lender may be secured by successive shipments of the purchase-money inventory collateral from the same supplier or financed by the same lender.

(iii) In a commercial transaction, where there is an obligation secured by a purchase-money security interest and another obligation not so secured, and where the debtor makes a payment, the parties are free to determine the method of application (*i.e.*, whether the payment reduces the secured or unsecured obligation) as long as the method is reasonable. If there is no agreement and the debtor does not specify which obligation

should be paid first, the unsecured obligation is paid first.

(iv) In a commercial transaction, cross-collateralization between purchase money and non-purchase-money collateral, refinancings, and the like do not destroy the purchase-money security interest status.

Current Article 9 is not as explicit in defining a purchase-money security interest. It does not deal with purchase-money security interests in software and does not provide the rules set forth above.

These rules are an improvement over current law. Note that several rules only apply to commercial and not to consumer transactions. Revised Article 9-103(h) states that no inference can be drawn from any commercial rule as to the proper consumer rule. Courts are left free to make their own determination as to the proper rule in consumer cases. This "no inference" rule was part of a global accord between consumer creditors and consumer advocates. The benefits of preserving that accord outweigh any benefit to be achieved from a nonuniform amendment.

b. Section 9-104: Control of Deposit Account

Revised Article 9 permits a security interest in a commercial deposit account. The security interest is perfected by control. This section states that control is achieved:

(i) If the secured party is the depository bank;

(ii) if there is a "control agreement" between the debtor, the secured party and the depository bank providing that the secured party can give instructions to the depository bank regarding disposition of the funds without the debtor's consent providing; or

(iii) if the account is in the name of the secured party.

Deposit accounts are excluded from the current version of Article 9. Hence, liens on deposit accounts would fall under the purview of the common law, which in the State of New York is not clear on the requisites for creation and perfection of a lien on a deposit account.

As in the case of the current rule, in Section 8-106(d)(2), for control over investment property collateral consisting of security entitlements, a secured party satisfies the requirements for control even if the debtor retains the right to direct dispositions of funds from the deposit account. As in the changes to the commentary to Section 8-106 made by Revised Article 9, the Official Comment to Revised Section 9-109 clarifies that a control agreement is sufficient even if the bank's agreement is subject to specified conditions such as a requirement that the secured party certify that the debtor is in default.

Revised Section 9-104 is an improvement on current law, which left parties uncertain as to the rules for perfecting security interests in deposit accounts. Parties were left to speculate as to what non-code law might be on the subject, *e.g.*, can one perfect by using a pledge agreement? Can/should one "certificate" the account by creating a paper token especially for the secured transaction, even though the paper token would not otherwise be issued to the customer? Can a depository bank which is a creditor of the customer claim a security interest in the customer's deposit or only a right of set-off?

Revised Section 9-104 (and the related rules discussed later in this Report) add clarification.

c. Section 9-105: Control of Electronic Chattel Paper

Revised Section 9-105 anticipates the evolution of systems that will immobilize electronic chattel paper, perhaps through use of a custodian (similar, perhaps, to the manner in which the Depository Trust Company functions for book-entry securities). It provides that one can "control" (and thus perfect an interest in) electronic chattel paper if certain requirements are met:

(i) there is only one unique authoritative electronic version of that chattel paper;

(ii) the authoritative copy identifies the secured party as the assignee;

(iii) the authoritative copy is maintained by the secured party or its custodian;

(iv) assignment can be made only by the secured party;

(v) copies and revisions are clearly identified as such; and

(vi) any revision is "readily identifiable" as an authorized or unauthorized version.

Although Current Article 9 does not provide for electronic chattel paper, the requirements set forth point in the same direction as the requirements in the Electronic Signatures and Records Act (State Technology Law Section 101 *et. seq.*) for electronic negotiable instruments. They are also essentially the same requirements set forth for electronic notes in the Uniform Electronic Transactions Act, an act recently approved by the National Conference of Commissioners on Uniform State Laws, which is rapidly gaining in state enactments.

d. Section 9-106: Control of Investment Property

Revised Section 9-106 provides that one has "control" over a commodity contract if:

(i) The secured party is the commodity intermediary with whom the commodity contract is carried; or

(ii) there is a "control agreement" similar to that provided for in Article 8 for securities accounts.

Revised Section 9-106 is based upon Current Section 9-115. Revised Section 9-106 parallels for commodity accounts the method of achieving control over security entitlements set forth in UCC Section 8-106.

e. Section 9-107: Control of Letter-of-Credit Right

Revised Section 9-107 parallels the other "control" provisions by stating when a secured party has control over a letter-of-credit right. Control exists when there is consent by the issuing bank to an assignment of proceeds of the letter of credit, as stated in Section 5-114(c), or otherwise applicable law or practice. Current Article 9 does not provide for control over a letter-of-credit right.

f. Section 9-108: Sufficiency of Description

Revised Section 9-108 states the general rule that a description of collateral is sufficient if it reasonably identifies what is described. It then provides specific illustrations of how collateral may be described in order to meet this requirement. It further provides that a "supergeneric" description (such as "all assets") is not sufficient in a security agreement (although it is in a financing statement). Finally, it provides that a description by type of UCC collateral is not sufficient if the collateral is a commercial tort claim. This prevents an after-acquired collateral clause from picking up the later-arising commercial tort claim upon which the secured party did not originally rely. Nor is a description by type of UCC collateral sufficient if the collateral is, in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account. These must be reasonably identified in order to prevent consumer debtors from inadvertently encumbering such assets. The Official Comments provide guidance as to what constitutes an adequate description of such assets.

Revised Section 9-108 elaborates upon the basic rule of Current Article 9 providing that a description is sufficient if it reasonably identifies what is described. It provides a "road map" for a sufficient description.

Revised Section 9-108 contains protections for secured parties and for debtors. For secured parties, it contains specific provisions that will enable secured parties to determine if a description will withstand challenge.

This Section contains benefits for debtors, in that an "all assets" description is not sufficient in a security agreement. Secured parties must describe the collateral with enough particularity so that it is clear to the debtor what is being granted to the secured party.

g. Section 9-109: Scope

The coverage of Revised Article 9 extends to:

> (i) A transaction, regardless of form, that creates a security interest in personal property or fixtures by contract;
>
> (ii) an agricultural lien;
>
> (iii) a sale of accounts, chattel paper, payment intangibles, or promissory notes;
>
> (iv) a consignment;

(v) an assignment to or by a health-care provider of a health-care-insurance receivable and only a subsequent assignment of the right to payment;

(vi) a commercial tort claim; and

(vii) a commercial deposit account.

Revised Section 9-109 expands upon the scope of Current Article 9. Agricultural liens are not covered by Current Article 9. With respect to consignments, the combined effect of Article 2-316 and Current Article 9-114 would, in most instances, require that the consignor file in order to protect itself. Revised Article 9 brings most consignments (except for goods below the aggregate amount of $1,000 and goods that were consumer goods immediately before the delivery) directly within Revised Article 9. Therefore, all of the rules pertaining to attachment of a security interest, perfection, and priority apply to such transactions. Additionally, Revised Article 9 applies for the first time to the sale of payment intangibles (a general intangible under which the debtor's principal obligation is the payment of money, as in a commercial loan) and to the sales of promissory notes.

Revised Article 9 covers three new types of collateral. Commercial tort claims may now be financed by a bank or other lender. A commercial deposit account may, under Revised Article 9, serve as original collateral (under current law, it can only be proceeds of other collateral). Finally, doctors, hospitals, and other health-care providers may grant security interests in their rights to reimbursement from insurers.

Each of these changes serves a different purpose. Inclusion of agricultural liens and most consignments within Revised Article 9 protects other secured creditors, who will now be alerted to the existence of such liens.

Inclusion of commercial tort claims means that such claims may be financed by a bank or finance company, and thus may be brought whether or not a lawyer can be located who is willing to work on a contingency fee basis. This provision may assist the small business that has a meritorious claim against a "Goliath." Even if a firm can be found that is willing to take on a Goliath on a contingency basis, that firm may require the plaintiff to pay for the expenses on a current basis, payments that may be beyond the reach of a small company. This provision is likely to improve access to justice and to enable attorneys to serve clients who could not otherwise afford legal services.

Inclusion of commercial deposit accounts is helpful to borrowers because there are many instances in which a lender will finance a company only if it can acquire (in addition to other security interests) a security interest in the borrower's deposit account. There are now no clear rules that tell the parties how that may be done, even if all three parties - the borrower, the lender, and the depository bank - agree that it should be done. Rules governing rights of recoupment or set-off against deposit accounts have been added to enhance clarity with respect to commercial deposit accounts.

With respect to health-care-insurance receivables, expansion of the scope of Revised Article 9 to cover such assets provides the parties financing such receivables clear direction as to the rules governing perfection and priority.

Payment intangibles and promissory notes are included because they are frequently transferred by the lenders who originated them. It is important to the purchasers to know

that, in the event of the insolvency of a transferor, the purchaser's interest has been perfected under state law. Under Revised Article 9, that goal is accomplished because the "security interest" arising from the sale of a payment intangible or promissory note is perfected upon attachment (that is, at the closing) without further action on the part of the purchaser.

It is important to note that the term "security interest," when used in this context, is an Article 9 drafting convention. It does not characterize or recharacterize these transactions (which are generally intended to be "true sales" for other purposes). Further elaboration of this general rule is provided in Permanent Editorial Board Commentary No. 14.

Revised Section 9-109(c)(1) provides that a transaction is excluded from Article 9 to the extent that federal law "preempts" Article 9. Current Section 9-104(a) excluded from Article 9 "a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." The Official Comment 8 to Revised Section 9-109 states that Current Section 9-104(a) had been erroneously read (but not in any reported cases by a New York court) to require deferral even where federal law did not preempt Article 9. The change made in Revised Article 9 is intended to clarify in the statutory text that preemption is required.

Revised Section 9-109(c)(2) excludes from Article 9's applicability any security interest created by New York State or one of its governmental units where another statute of New York State expressly governs such security interest. This is consistent with New York's current and nonuniform Section 9-104(e) and therefore represents no change from current New York law. Revised Section 9-109(c)(2) will bring the law of other states in line with current New York law, as states that had adopted the Official Text of Current Section 9-104(e), rather than New York's nonuniform version, had a more general exclusion from Article 9 applicable to transfers by a government or governmental agency.

Revised Section 9-109(c)(3) is new and will limit Article 9's applicability where a statute (other than one generally applicable to security interests) of another state, foreign country or a governmental unit of any such state or foreign country expressly governs a security interest created by the state, country or governmental unit.

Revised Section 9-109(d)(8) states explicitly that Article 9 does not apply to a transfer of a claim under an insurance policy. Revised Article 9 does narrow the insurance exclusion under Current Article 9 by including health-care-insurance receivables (a defined term) within the scope of Article 9 and specifically within the definition of the term "account." This scope change does not, however, alter the reasoning of or result in *Badillo v. Tower Ins. Co.*, 92 N.Y. 2d 790, 709 N.E. 2d 104 (1999) which held that where collateral was insured, the collateral was destroyed and the secured party was not a named payee of the insurance policy, the insurance company could pay the insurance proceeds to the insured, rather than the secured party. The secured party in that case had given no direct notice to the insurance company of its interest and the UCC filing made by the secured party did not of itself create notice. The court in that case held that the insurance company had no obligation to search the UCC files to discover the secured party's interest.

Except as described above and except for certain more minor clarifications, the exclusions from Article 9's coverage set forth in Current Section 9-104 have been carried forward into Revised Article 9.

h. Section 9-110: Security Interests Arising Under Article 2 or 2A

Revised Section 9-110 provides that a security interest arising under the UCC Articles governing the sale of goods and leases is subject to Revised Article 9. (For example, a buyer or lessee that rightfully rejects goods retains a security interest in such goods.) Unlike other Article 9 security interests, however (and only until the debtor obtains possession of the goods):

(i) No security agreement is necessary; and

(ii) no filing is required.

Revised Section 9-110 carries forward the rule of Current Section 9-113, with some clarification and expansion. First, it specifies the precise sections in Articles 2 and 2A which create such security interests. Second, it provides that such security interests have priority over conflicting security interests created by the debtor.

As Official Comment 4 notes, the priority result is fair, since the payments that give rise to the debt secured by the Article 2 or 2A security interest are likely to be included among the lender's proceeds.

B. Section-by-Section Analysis of Part 2: Security Agreements

1. Introduction

Part 2 addresses the parties against whom a security agreement is effective, the relationship between Article 9 and other law, how a security interest may be created and the rights and duties of the parties to a security agreement.

2. Section 9-201: General Effectiveness of Security Agreement

Revised Section 9-201(a) mirrors its predecessor Current Section 9-201 in providing that a security agreement is effective between the parties, against purchasers of the collateral and against creditors, except to the extent that the UCC states otherwise. The term "security agreement" is defined narrowly in Section 9-102 to refer only to an agreement that "creates or provides for a security interest." Thus, Revised Section 9-201(a) does not render effective every provision of a written security agreement but only those provisions specifically relating to the grant of the security interest.

A number of UCC provisions alter the general rule in Revised Section 9-201(a) on the effectiveness of a security agreement against third parties. These include Revised Section 9-317 (rights of persons to which an unperfected security interest or agricultural lien is subordinate), Revised Section 9-320 (rights of buyers of goods); Revised Section 9-321 (rights of licensee of general intangible and lessee of goods), Revised Section 9-322 (general priority rule), Section 8-303 (rights of a protected purchaser) and Section 8-502 (assertion of an adverse claim of an entitlement holder).

Revised Sections 9-201(b) and (c) provide generally that if a conflict exists with respect to a transaction subject to both Article 9 and other law establishing a different rule for consumers, such other law would control.

Revised Sections 9-201(b) and (c) provide generally that if a conflict exists with respect to a transaction subject to both Article 9 and other law establishing a different rule for consumers, such other law would control. Revised Section 9-201(b) goes on to require, in a manner similar to Current Section 9-203(4), that specific reference be made to statutes or regulations relating to consumer protection or regulating the rates, charges, agreements and practices for loans, credit sales and other extensions of credit that will supersede Article 9 in the event of a conflict. Part IV.B.4.a above provides alternative and more general language to include in Revised Section 9-201(b) which will ensure that no relevant statute or regulation is inadvertently omitted and that Revised Section 9-201(b) flexibly will encompass new laws enacted in the future. The statutes set forth below, some of which are specified in Current Section 9-203(4), are indicative of what would have been listed were specific reference to statutes or regulations to have been made and will be encompassed by the alternative proposed language. A failure to comply with any such statute or regulation has only the effect the statute or regulation specifies.

Laws Covered by Revised Section 9-201(b)

Motor Vehicle Retail Installment Sales Act
N.Y. Personal Property Law Sec. 301 et seq. (McKinney 1992 and Supp. 1999))

Retail Installment Sales Act
N.Y. Personal Property Law Sec. 401 et seq. (McKinney 1992 and Supp. 1999)

Licensed Lenders Legislation
N.Y. Banking Law Sec. 340 et seq. (McKinney 1990 and Supp. 1999)

Sales Finance Company Legislation
N.Y. Banking Law Sec. 491 et seq. (McKinney 1990 and Supp. 1999)

Insurance Premium Finance Agency Legislation
N.Y. Banking Law Sec. 554 et seq. (McKinney 1990 and Supp. 1999)

Collateral Loan Broker Legislation
N.Y. General Business Law Sec. 40 et seq. (McKinney 1988 and Supp. 1999)

Interest and Usury Legislation
N.Y. General Obligations Law Sec. 5-501 et seq. (McKinney 1989 and Supp. 1999)

Unauthorized or Improper Use of Credit Cards and Debit Cards
N.Y. General Business Law Sec. 511 et seq. (McKinney 1996 and Supp. 1999)

Motor Vehicle Retail Leasing Act
N.Y. Personal Property Law Sec. 330 et seq. (McKinney Supp. 1999)

Bank and Trust Companies Legislation
(Rates of interest; installment obligations; personal loan departments)
N.Y. Banking Law Sec. 108 (McKinney 1999 and Supp. 1999)

Discharge of Surety Legislation
(Surety disclosure)
N.Y. General Obligations Law Sec. 15-701 and 15-702 (McKinney 1989 and Supp. 1999)

Registration and Possession Legislation
(Repossession of motor vehicle or motorcycle; garageman's lien; notice to police)
N.Y. Vehicle and Traffic Law Sec. 425 (McKinney 1996)

Assignment of Earnings
Personal Property Law Sec. 46 et seq. (McKinney 1992)

Like Current Sections 9-201 and 9-203(4), Revised Section 9-201(d) clarifies that Article 9 is not intended to extend the application of any rule of law, statute or regulation to a transaction not subject to it and does not validate any transaction in conflict with such rule, statute or regulation.

3. Section 9-202: Title to Collateral Immaterial

Revised Section 9-202 provides that Article 9 applies with regard to the rights and obligations of the parties to a security agreement regardless of whether title to collateral is in the secured party or the debtor. The only change from Current Section 9-202 is that Revised Section 9-202 explicitly notes that special Article 9 rules may be applicable in the case of consignments and sales of accounts, chattel paper, payment intangibles and promissory notes. *See, e.g.*, Revised Sections 9-207(d) (limiting the secured party's duties in respect of collateral where the secured party is a buyer of such assets or a consignor), 9-210(b) (limiting a secured party's obligation to respond to requests for accounting where the secured party is a buyer of such assets or a consignor), 9-615(e) (limiting the debtor's right to a surplus and the secured party's right to a deficiency where the secured party is a buyer of such assets) and 9-601(g) (limiting the Part Six duties of a secured party that is a buyer of such assets or a consignor).

4. Section 9-203: Attachment and Enforceability of Security Interest; Proceeds; Supporting Obligations; Formal Requisites

Revised Section 9-203 sets forth the prerequisites for attachment of a security interest. Like Current Section 9-203, Revised Section 9-203(b) provides that a security interest is enforceable against the debtor and third parties only if three requirements are met. First, the secured party must have given value. Second, the debtor must have rights in the collateral or, in a clarification to Current Section 9-203, have the power to transfer rights in the collateral (whether or not the debtor in fact has rights therein). Third, the debtor must have authenticated a security agreement providing a description of the collateral. The term "authenticated" is used to permit the possibility for a security agreement to be represented by electronic means. As in Current Section 9-203, a verbal agreement granting a security interest is sufficient where (x) the collateral is in the possession of the secured party, (y) the collateral consists of certificated securities in registered form delivered to the secured party or (z) the secured party has control over collateral consisting of investment property. Revised Section 9-203 also allows a verbal agreement in cases where the secured party has control pursuant to Revised Sections 9-104, 9-105 and 9-107 over collateral consisting of deposit accounts, electronic chattel paper or letter-of-credit rights, respectively.

Revised Section 9-203(c) provides that Revised Section 9-203(b)'s requirements for enforceability of a security interest are subject to certain other rules. One such rule addresses the security interest of a collecting bank. Since New York has not yet adopted the uniform version of Article 3 of the UCC (with conforming and miscellaneous amendments to Articles 1 and 4) approved for state adoption by the Uniform Law

Commissioners and the American Law Institute in 1990 ("Revised Article 3"),[17] and currently in effect in 48 states and the District of Columbia and Puerto Rico, the section reference in Revised Section 9-203(c) will need to be changed from "Section 4-210" to "Section 4-208" and a conforming cross-reference to Section 9-203(b)(3)(A) should be added to Section 4-208(3)(a). The effect of these changes is to make the security interest of the collecting bank automatically enforceable even in the absence of a security agreement that would otherwise have been required under Revised Section 9-203(b).

Section 5-118, which provides for a security interest in favor of a letter-of credit issuer or nominated person in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the document's presentation, is another instance where a security interest is automatically enforceable without the need for a security agreement. The Official Comment 2 to Section 5-118 states that the new provision is intended to protect in issuer or nominated person from claims of a beneficiary's creditors. It is a fallback rule that will be helpful where the issuer or nominated person has not otherwise obtained security interests under Article 9's usual rules or does not own the documents in question. The intent was to give a letter-of-credit issuer or nominated person a security interest parallel to that provided for under Section 4-208 in favor of a collecting bank where the collecting bank has extended credit in respect of an item (defined in Section 4-104 as an instrument).

Revised Section 9-203(b) also does not have to be satisfied where a security interest arises under Article 2 or 2A of the UCC and the debtor does not yet have possession of the goods in question. *See* Revised Section 9-110 (noting that security interests arising under Article 2 of the UCC are subject to Article 9, with some variation in the period prior to the debtor' possession of the goods). The automatic security interest deemed to exist in the purchase or delivery of certain investment property under Revised Section 9-206 constitutes the last exception to Revised Section 9-203(b) requirements.

Revised Section 9-203(d) describes the circumstances under which a person may become bound as debtor by a security agreement entered into by another person. Such circumstances include where the person becomes generally obligated for the obligations of the other person and acquires or succeeds to all or substantially all of the assets of the other person. The Official Comment to Revised Section 9-203 provides that secondary obligors such as guarantors and parties liable as a result of veil piercing doctrines will not usually fall under Revised Section 9-203(d)'s ambit since they are unlikely to meet the requirement of acquiring or succeeding to substantially all of the assets of the original debtor. No additional security agreement is necessary for the security interest that is granted to extend to existing or after-acquired property of the new debtor as long as the property was described in the original agreement. *See* Revised Section 9-203(e).

Revised Section 9-203(f) provides that a security interest in a supporting obligation (defined in Revised Section 9-102 to include letter-of-credit rights and secondary obligations supporting the payment or performance of an account, chattel paper, document, general intangible, instrument or investment property) automatically follow from a security interest in the underlying supported collateral. The Official Comment states that this result was implicit under Current Article 9. The Official Comment goes on to note that issues relating to competing claims to a supporting obligation are left to the law of suretyship and the agreements of the parties.

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[17] South Carolina is the only other state in addition to New York that has not adopted Revised Article 3.

Revised Section 9-203(g) codifies the common-law rule that a security interest in an obligation secured by a pledge of, or mortgage on, personal or real property carries with it a security interest in such pledge or mortgage. *See* Official Comment to Revised Section 9-203(g) (citing Restatement (Third) of Property (Mortgages) Section 5.4(a) (1997)).

Revised Sections 9-203(h) and (i) are identical to provisions in Current Section 9-115 and provide that attachment of a security interest in a securities account or a commodity account is also attachment of the security entitlements or commodity contracts carried in any such account.

5. Section 9-204: After-acquired Property; Future Advances

Revised Section 9-204 (After-Acquired Property; Future Advances) has no material changes from Current Section 9-204 or other New York law. *See Public Loan Co. v. Hyde*, 47 N.Y. 2d 182; 390 N.E. 2d 1162. The Official Comment 5 indicates that whether a security interest secures a future obligation is to be determined by examining the parties' intentions as reflected in any authenticated security agreement into which they entered and not by reference to whether the future obligation is of a similar type or class to any earlier obligations secured under the same security agreement. The Official Comment 5 appears to be consistent with existing New York law. *See, e.g.*, *Riss Tanning Corp. v. U.S. (In re Riss Trading Corp.)*, 468 F.2d 1211, 1213 (2d Cir.1972); *In re Linda E. Wetzel*, 134 B.R. 718, 718 (Bankr. W.D.N.Y. 1992).

6. Section 9-205: Use or Disposition of Collateral Permissible

Revised Section 9-205 (Use or Disposition of Collateral Permissible) has no material changes from Current Section 9-205, except that Revised Section 9-205 gives the debtor the broader right to "enforce" (in addition to the existing rights to "collect" and "compromise") interest in the collateral it has pledged. The debtor now also has the right to collect and compromise any collateral; under Current Section 9-205, this right was limited to collateral consisting of accounts and chattel paper.

7. Section 9-206: Security Interest Arising in Purchase or Delivery of Financial Asset

Revised Section 9-206 (Security Interest Arising in Purchase or Delivery of Financial Asset) has no material changes from Current Section 9-116.

8. Section 9-207: Rights and Duties of Secured Party Having Possession or Control of Collateral

Except as discussed below, most of Revised Sections 9-207(a), (b) and (c), which specify the rights and duties of a secured party having possession or control of collateral, are substantially identical to Current Section 9-207.

Pursuant to Revised Section 9-207(c), a secured party having possession or control of collateral under Revised Section 9-104 (deposit accounts), Revised Section 9-105 (electronic chattel paper), Revised Section 9-106 (investment property) or Revised Section 9-107 (letter-of-credit rights) may create a security interest in the collateral. This provision clarifies that the secured party has a right to "repledge" collateral without having to obtain explicit permission from the debtor.

Revised Section 9-207(c) eliminates the reference to the "debtor's right to redeem" in Current Section 9-207. This represents a change in current New York law, because the force of the deleted language is that, under current law, the secured party may not, without the explicit permission of the debtor, repledge collateral to secure a larger debt than that owed by the debtor, or repledge collateral to secure a debt with a larger maturity than that owed by the debtor. The practical effect of this change in law is likely to be minimal, as parties to a secured transaction in which repledge is contemplated typically deal with the subject explicitly in the security documentation. Official Comment 5 to Revised Section 9-207 states that the debtor continues to enjoy the right of redemption under Revised Section 9-621 without a need to refer explicitly to the right in Revised Section 9-207. The Official Comment notes that the debtor's right to redeem as against its secured party, however, may not be enforceable against the repledgee, as a result of the debtor's consent to the repledge or applicable rules that would make the repledgee immune from the debtor's claims (*e.g.*, Revised Section 9-331 (holder in due course), Revised Section 8-303 (protected purchaser), Revised Section 8-502 (acquisition of a security entitlement), Revised Section 8-503(e) (limitations on action by entitlement holder)).

Revised Section 9-207(c) also expands the rights of a secured party to create a security interest in collateral under the secured party's "control" as well as collateral in the secured party's actual possession. The clear statement in Revised Section 9-207(c) regarding a secured party's right to create a security interest in collateral in its control remedies a glitch caused by the deletion in the uniform version of Article 8 of the UCC enacted by New York in October 1997 of Section 8-321(3)(b) of the 1978 version of Article 8. Former Section 8-321(3)(b) had been the provision which confirmed the right of a secured party to repledge securities under Section 9-207, whether or not they were in the secured party's physical possession.

The rights and duties of a secured party in Revised Sections 9-207(b) and (c) do not apply to a buyer of accounts, chattel paper, payment intangibles or promissory notes or to a consignee. Neither does the secured party's duty of reasonable care in respect of collateral in its possession or custody set forth in Revised Section 9-207(a) apply to a buyer or to a consignee unless such buyer or consignee is entitled to charge back to the debtor uncollected collateral or has limited or full recourse against the debtor or a secondary obligor in the event of nonpayment or other default on the part of the account debtor or other obligor on the collateral.

9. Section 9-208: Additional Duties of Secured Party Having Control of Collateral

Revised Section 9-208 is a new provision requiring, at the debtor's request, a secured party with control over a deposit account, electronic chattel paper, investment property or a letter of credit right to terminate such control upon satisfaction of the obligations secured by such collateral, provided that the secured party does not remain committed to make advances or otherwise give value. The provisions of Revised Section 9-208 may be altered by agreement. The secured party's duty under Revised Section 9-208 is analogous to the secured party's duty to file a termination statement under Revised Section 9-513. The debtor's remedies for the secured party's failure to comply are set forth in Revised Section 9-625(e) and are identical to those for the Secured Party's failure to file a termination statement. The debtor's remedies include the right to receive statutory damages in the amount of $500 and damages for related losses, including losses associated with the debtor's inability to obtain, or the increased costs of, alternative financing.

Revised Section 9-208 intentionally omits reference to collateral in the secured party's possession. According to the Official Comment 4, the drafters did not think it necessary to impose a statutory duty on a secured party to relinquish collateral in its possession because the duty to do so under the common law appears to suffice.

10. Section 9-209: Duties of Secured Party If Account Debtor Has Been Notified of Assignment

Revised Section 9-209 specifies the duties of a secured party in cases where the account debtor has been notified of an assignment of an account, chattel paper or a general intangible, the obligations being secured have been satisfied and no further commitment by the secured party exists. This provision is analogous to Revised Section 9-208, but requires, instead of relinquishment of control, the sending of notice to the account debtor releasing the account debtor from further obligation to the secured party. Again, the debtor must have requested the action. The provision applies to the pledge, but not the sale, of accounts, chattel paper or payment intangibles. The remedies for failing to comply are the same as are applicable under Revised Section 9-208.

11. Section 9-210: Request for Accounting; Request Regarding List of Collateral or Statement of Account

Under Revised Section 9-210, as under Current Section 9-208, a secured party is required to disclose information upon the debtors request about the secured obligations and the collateral in which the secured party claims an interest. According to the Official Comment 2 to Revised Section 9-210, this provision represents an effort to resolve some of the issues raised by Current Section 9-208. Revised Section 9-210 provides clearer guidance on the types of requests that may be made (by defining "request," "request for an accounting," "request regarding a list of collateral", and "request regarding a statement of account"), the types of secured obligations for which requests can be made and the secured party's time to respond.

Revised Section 9-210 applies both before and after default and to secured transactions, including agricultural liens, but not to sales of accounts, chattel paper, payment intangibles or promissory notes or to consignments. *See* Revised Section 9-602(2). A debtor has the option of three types of requests for information, and a secured party is obligated to respond within 14 days of receipt of any request. As under Current Section 9-208, a recipient is also obligated to notify a debtor if the recipient has received a request at a time when it no longer claims an interest in the obligations referred to in the request and the recipient must provide the name and address of any assignee or successor to the extent the recipient has such information. A debtor is entitled to make only one free request during any six-month period and may be charged an amount not exceeding $25 for each additional request.

The provisions of Revised Section 9-210 may not be varied or waived. The remedies for noncompliance by a secured party are set forth in Revised Section 9-625(e).

C. Section-by-Section Analysis of Part 3: Perfection And Priority

1. Law Governing Perfection and Priority: General Overview

Subpart 1 of Part 3 sets forth rules for determining the law which governs perfection,

the effect of perfection or nonperfection, and the priority of a security interest. Subpart 1 does not address other choice of law issues. The law governing such issues as attachment, validity, characterization (*e.g.*, true lease or security interest) and enforcement is determined under Section 1-105; typically, the security agreement will specify that governing law. Also, another jurisdiction's law may govern rights of third parties such as account debtors on collateral.

The subject matter of Subpart 1 of Part 3 is governed generally in Current Article 9 by Section 9-103. Beyond the specific choice of law rules discussed below, this subpart effects two broad changes to the choice of law rules in Current Section 9-103. First, in designating the jurisdiction whose law governs, this subpart directs the court to apply only the substantive or local law of a specified jurisdiction and not its choice of law rules. Second, while Current Section 9-103 specifies the law of a single jurisdiction to govern "perfection and the effect of perfection or non-perfection" of security interests in particular collateral, this subpart frequently specifies separate jurisdictions whose law is to govern perfection, on the one hand, and the effect of perfection or nonperfection, and the priority, of a security interest, on the other-hand.

The referral to local law is consistent with the approach to the choice of law rules most recently adopted in connection with the Article 8 amendments in both the uniform and New York versions, and is a desirable simplification. Given the substantial uniformity, at least within the United States, of the priority rules themselves, the principal practical importance of the choice of law rules for many situations is to identify the appropriate filing jurisdiction, and this change makes that a one-step process rather than a two-step (or three-or more-step) process. Likewise, the bifurcation of governing law for perfection and priority facilitates a simplification of this process as reflected in Section 9-301.

2. Section 9-301: Law Governing Perfection and Priority of Security Interests

Subsection (1) of Section 9-301 states the general rule of this Subpart 1 of Part 3: Except as otherwise provided in this section or another section of Subpart 1, the local law of the jurisdiction of the debtor's location, determined in accordance with Revised Section 9-307, governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in tangible or intangible collateral. Subsection (2) states the first exception to the general rule: the local law of the jurisdiction where the collateral is located governs perfection, the effect of perfection or nonperfection and the priority of a possessory security interest in collateral. Subsections (3) and (4) state further exceptions to the general effect that the local law of the jurisdiction where the collateral is located governs perfection of a security interest in minerals and related accounts, in timber to be cut and in goods covered by a fixture filing and also governs the effect of perfection or nonperfection and the priority (but not perfection) of a nonpossessory security interest in that and most other tangible collateral.

The principal change from current law effected by Revised Section 9-301 is its specification of the law of the jurisdiction in which the debtor is located to govern perfection of a nonpossessory security interest in tangible collateral. In other respects, this section applies the law of the jurisdiction in which tangible collateral is located substantially consistently with Current Section 9-103. Three noteworthy drafting changes, however, are the elimination of the problematic "last event" test of Current Section 9-103(1)(b), the elimination of the category of "mobile goods" (and, therefore, the need to distinguish between mobile goods and ordinary goods) and the elimination of the special choice of law rule for foreign debtors contained in Current Section 9-103(3)(c).

The general rule established by this section, making the law of a single jurisdiction govern perfection for most types of collateral, will greatly simplify the identification of the appropriate jurisdiction. Furthermore, this rule should mean that in the future secured parties will normally need to file and search only in a single jurisdiction. These consequences will contribute to greater legal certainty and reduce transaction costs in secured transactions. At the same time, the bifurcated approach to choice of law, and the provision that the law of the situs of collateral governs priority as to most types of tangible collateral irrespective of the mode of perfection, eliminates certain hypothetical conflicts of law that could result under Current Section 9-103 (*e.g.*, conflicting priority rules in jurisdictions where competing security interests in the same chattel paper are perfected respectively by filing and possession).

3. Section 9-302: Law Governing Perfection and Priority of Agricultural Liens

Section 9-302 provides that the local law of the jurisdiction in which farm products are located governs perfection, the effect of perfection or nonperfection and the priority of an agricultural lien on the farm products.

As agricultural liens are not covered by Current Article 9, there is no corresponding provision under current law. In general, this provision does, however, specify the same jurisdiction as would apply under current law in the case of a security interest in farm products.

Revised Article 9, by including agricultural liens within its scope, makes a change in the law of secured transactions. By incorporating these liens within Article 9, two corresponding issues raised by such liens raises are resolved. The first is how to perfect the lien so that it is effective against some class of competing claimants. The other question is the priority of that lien against other perfected liens. Bringing agricultural liens into Article 9 allows both questions to be answered easily and consistently with Article 9.

The inclusion of agricultural liens within Article 9 has little significance for the law of New York. Revised Section 9-102(a)(5) constitutes an extended definition of this type of lien, but for the purposes of this discussion it is enough to note that an agricultural lien is a lien on personal property in favor of a person that "in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation." The lien must be one whose effectiveness "does not depend on the person's possession of the personal property."

In our research under New York law, three liens have come to our attention as qualifying as agricultural liens under Revised Article 9. They are: (i) a railway corporation lien on transported animals (N.Y. Agric. & Mkts Law Section 359 (Consol. 1998)), (ii) a lien for the service of stallions or bulls (N.Y. Lien Law Section 160 (McKinney 1999)) and (iii) a lien on stray animals (Town Law 1310-322). These liens and their treatment under Revised Article 9 are discussed in Part IV.B.2.h(ii).

4. Section 9-303: Law Governing Perfection and Priority of Security Interests in Goods Covered by a Certificate of Title

Revised Section 9-303 calls for the local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection and the priority of a security interest in goods covered by that certificate of

title for so long as they are so covered, irrespective of whether any other relationship exists between the issuing jurisdiction and the debtor or the goods. For this purpose, goods become covered by a certificate of title when a valid application therefor is made and the applicable fee is delivered to the appropriate authority, and goods cease to be covered by a certificate of title when the certificate of title ceases to be effective under the law of the issuing jurisdiction or when the goods become covered by a certificate of title issued by another jurisdiction.

Revised Section 9-303 is substantively consistent with Current Sections 9-103(2)(a) and (b), although the language is substantially revised and rectifies certain ambiguities in the current statute. The express provision that the jurisdiction issuing the certificate of title need have no other contacts with the goods or the debtor is consistent with the majority of the reported cases addressing this issue. The subject matter of this section has been the subject of litigation in circumstances where multiple certificates of title have been issued in multiple jurisdictions covering the same goods. Note that pursuant to Revised Section 9-311(d), as under current law, security interests in inventory do not fall under this Section.

5. Section 9-304: Law Governing Perfection and Priority of Security Interests in Deposit Accounts

Revised Section 9-304 calls for the local law of a bank's jurisdiction to govern perfection, the effect of perfection or nonperfection and the priority of a security interest in a deposit account maintained with that bank. The bank's jurisdiction is determined by agreement between the bank and its customer, or failing such agreement based on specified alternative factors.

Because deposit accounts as original collateral are not within the scope of Current Article 9, there is no corresponding provision under current law. The substance and language of this provision, however, are consistent with the treatment of security interests in securities accounts under current law.

Given the legitimate interest of a bank in being subject to a single set of rules governing these issues, the choice of law rule stated in this section seems more appropriate than the general rule referring to the law of the jurisdiction in which the debtor is located.

6. Section 9-305: Law Governing Perfection and Priority of Security Interests in Investment Property

Perfection, the effect of perfection or nonperfection and the priority of a security interest in the types of investment property collateral indicated below are governed by the local law of the indicated jurisdiction: (i) in the case of a certificated security, the jurisdiction in which the security certificate is located; (ii) in the case of an uncertificated security, the issuer's jurisdiction as defined in UCC Section 8-110(d); (iii) in the case of a security entitlement or securities account, the securities intermediary's jurisdiction; and (iv) in the case of a commodity contract or commodity account, the commodity intermediary's jurisdiction; provided that the local law of the jurisdiction in which the debtor is located governs perfection of the security interest in investment property by filing as well as automatic perfection of the security interest in investment property created by a broker or securities intermediary and automatic perfection of the security interest in a commodity contract or commodity account created by a commodity intermediary. The jurisdiction of a securities intermediary or commodity intermediary is determined by agreement with its

customer or, failing such agreement, on the basis of specified alternative factors.

This section restates current law with only a minor change: The new provisions for determining the jurisdiction of a securities intermediary or a commodity intermediary permit the parties to choose the law of one jurisdiction to govern perfection and priority of security interests and a different governing law for other purposes, without regard to any relationship between the jurisdiction whose law is chosen and the parties or the transaction.

There is a conforming change in Section 8-110(e)(1) to reflect the modification described above.

7. Section 9-306: Law Governing Perfection and Priority of Security Interests in Letter-of-Credit Rights

The local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection and the priority of a security interest in a letter-of-credit right so long that jurisdiction is part of or subject to the jurisdiction of the United States. For this purpose, the issuer's or nominated person's jurisdiction is the jurisdiction whose law governs its liability with respect to the letter-of-credit right in accordance with Section 5-116. This section does not, however, apply to a security interest in a letter of credit which is a supporting obligation for other primary collateral and in which the security interest is perfected only by virtue of the automatic perfection in supporting obligations afforded by Section 9-308(d) of Revised Article 9.

There is no provision in Current Article 9 which expressly governs choice of law with respect to letters of credit or letter-of-credit rights (a term created by Revised Article 9). Under the uniform version of Current Section 9-103, a security interest in rights to proceeds of a written letter of credit would be governed by the jurisdiction where the letter of credit is located. New York law would likely, although not necessarily, be construed to reach the same conclusion.

The rules for determining the jurisdiction of the issuer or nominated person under the uniform version of Section 5-116 are similar to those for determining the jurisdiction of a bank, securities intermediary or commodity intermediary. Unlike Revised Sections 9-304 and 9-305, Revised Section 9-306 applies only if the indicated jurisdiction is subject to United States law. Thus, if the issuer's or nominated person's jurisdiction is outside the United States, the general rule of Revised Section 9-301 would apply and the governing law would be the local law of the debtor's jurisdiction. The purpose is to reduce the likelihood that perfection and priority would be governed by the law of a foreign jurisdiction in a transaction that is essentially domestic from the standpoint of the debtor-beneficiary, its creditors and a domestic nominated person (*i.e.*, advising or confirming bank).

8. Section 9-307: Location of Debtor

Subject to the exceptions noted below, a debtor is located for purposes of Revised Article 9: (i) in the case of an individual, at her principal residence, (ii) in the case of an organization having only one place of business, at that place of business and (iii) in the case of an organization having more than one place of business, at its chief executive office. Some of the exceptions to this general rule are as follows: (a) if the debtor's location is a jurisdiction that does not have a filing or registration system comparable to the Article 9 filing system, the debtor is deemed located in the District of Columbia; (b) if the

debtor is a domestic corporation or other organization whose creation is a matter of public record, it is located in the state under whose law it is organized; (c) the United States is located in the District of Columbia. There are special rules for determining the location of registered organizations organized under federal law, branches or agencies of foreign banks and foreign air carriers. In general, the jurisdiction determined as specified in this section continues to be the location of the debtor notwithstanding that the debtor may cease to exist or to have a residence or place of business.

The general rule of Revised Section 9-307 is substantively consistent with the general rule governing location of the debtor under Current Section 9-103; the exceptions, however, include some material changes from current law. First, in the case of foreign debtors located in a jurisdiction that does not have an Article 9-type filing system, the District of Columbia is mandated as the filing jurisdiction, rather than the location of the foreign debtor's "major executive office in the United States" as specified under Current Section 9-103(3)(c), and the alternative of perfection by notification to account debtors is eliminated. Registered organizations under current law are located in the jurisdiction of their chief executive office rather than the jurisdiction under whose law they are organized. With the exception of foreign air carriers, whose treatment under Revised Section 9-307 is the same as under current law, there are no other categories of debtors for which Revised Section 9-307 specifies special rules.

Revised Section 9-307 will bring added clarity, simplicity and certainty to the task of identifying the applicable filing jurisdiction under Revised Article 9. In its treatment of foreign debtors, it eliminates the need to determine whether a given debtor has a "major executive office" in the United States and if so where. It also provides a filing jurisdiction for foreign debtors having assets but no major executive office in the United States, which current law fails to do.

In specifying the jurisdiction of organization of a domestic registered organization as its location, Revised Section 9-307 substitutes an objective and readily determinable test for the more difficult task of identifying the debtor's chief executive office. As reported cases on this issue illustrate, the location of the chief executive office is not always clear even when all the facts are known, and it is not unusual for that location to change over time without notice to the secured party. It is believed that over time UCC filings with the Secretary of State of a given state might be coordinated with other filings in the same office with respect to a registered organization so as to provide enhanced protection to the secured party in the case of, for instance, a corporate merger or dissolution. The Drafting Committee considered that this rule for registered organizations might direct a disproportionate number of filings to favored corporate domiciles such as Delaware. Such empirical study as has been done, however, suggests this is not likely to be the case to any material extent. Professor LoPucki's study found that 93% of filings against registered organizations in 1993 were made in the jurisdiction under whose law they were organized, and while Delaware was disproportionately represented among the out-of-state domiciliary jurisdictions, the study estimated that the aggregate shift of UCC filing fees from all other states to Delaware under this rule would be approximately $2.5 million annually. *See* Lynn M. LoPucki, *Why the Debtor's State of Incorporation Should Be The Proper Place for Article 9 Filing: A System Analysis*, 79 MINN. L. REV. 577 (1995).

The general virtues of 9-307 do not, however apply to subsection (f). To remove confusion the Law Revision Commission proposes that the following commentary be recommended by it for publication as a comment to the New York annotated Revised Article 9:

Law Revision Commission Comment (2001). Not all federal laws that designate a state of location, or that authorize a debtor to designate a state of location, do so using terminology identical to that of subsection (f). Federal statutes and regulations may use other terminology to identify the state with which a debtor is uniquely identified. *See, e.g.*, 12 U.S.C. Section 30(b) (2000) ("main office"); 12 U.S.C. Section 3103 (2000) ("home state"). Such terms, and any other terms that uniquely identify a debtor to a state, identify a "state of location" for purposes of subsection (f).

Subsection (f) sets forth special rules that will apply to determine the location of most foreign banks (that is, banks that are not organized under the law of the United States or a state) that have substantial United States business. The references to "branch" or "agency" in subsection (f) refer to the bank that has a branch or agency, not merely the branch or agency itself. Accordingly, the rules in subsection (f) determine the location of the bank, not merely its branch or agency.

Subsection (f) by its terms applies to a foreign bank only if the foreign bank has a branch or agency in the United States. If a foreign bank does not have a branch or agency in the United States, subsection (f) does not apply to it and its location will be determined by the general rules of subsections (b) and (c) of this section. The terms "branch" and "agency" are terms of art in banking law, and representative offices are neither branches nor agencies. See 12 U.S.C. Sections 3101, 3107 (2000).

If a foreign bank has branches or agencies in the United States and all of those branches and agencies are licensed in only one state, then subsection (i) prescribes that they, and the foreign bank itself, are located in that state. Under current federal law, a foreign bank that has branches and agencies licensed in only one state is deemed to have its home state in that state, so the rule of subsection (i) prescribes the same result that would be reached under the rule of subsection (f).

9. Section 9-308: When Security Interest or Agricultural Lien is Perfected; Continuity of Perfection

Subsection (a) is generally consistent with Current Section 9-303(1) and establishes a general rule that subject to the exceptions elsewhere in this section or in Revised Section 9-309, a security interest will be perfected on attachment and satisfaction of procedural requirements set forth in Revised Sections 9-310 through 316.

Subsection (b) is new, and is required to address perfection of the newly created Revised Article 9 category of an “agricultural lien,” which is perfected when the requirements of Revised Section 9-310 are met.

Subsection (c) adopts the existing rule of Current Section 9-303(2) to assure that perfection of a security interest is deemed continuous even if the method of perfection changes, as long as perfection is continuous.

Subsections (d) and (e) are new, but as noted in Official Comment 5, they do not appear to effect any change in existing law which would generally reach the same result.

Subsections (f) and (g) reflect the treatment of security entitlements and commodity accounts incorporated in 1997 in Current Section 9-115(2) without additional substantive change.

10. Section 9-309: Security Interest Perfected Upon Attachment

This section describes certain security interests that will be perfected automatically upon attachment (and without further need to file or obtain possession of collateral).

Subsection (1) reflects existing New York law providing for automatic perfection of liens in consumer goods under Current Section 9-302(1)(d), although the cross reference to Revised Section 9-311(a) to require any filing required by other statute or treaty is a more general cross reference than the existing cross reference in Current Section 9-302(l)(d) specifically to Article forty-six of the vehicle and traffic law. The uniform approach is recommended, as it will eliminate any future need to amend this section if the titling rules are moved to some other article of the Vehicle and Traffic Law.

Subsection (2) reflects existing New York law on the "occasional" assignment of individual accounts reflected in Current Section 9-302(1)(e), but is revised to adopt the same rule for the new collateral category of payment intangibles.

Subsections (3), (4) and (5) are new, and are included to assure automatic perfection of sales of payment intangibles and promissory notes, which were transactions outside the scope of Current Article 9, as well as the assignment of a new category of collateral identified as a health-care-insurance receivable.

Subsection (6) is new, and is intended to clarify the perfected status of seller's liens created under the cited provisions of current Articles 2 and 2A prior to the purchaser/lessor (debtors) receipt of the goods.

Subsection (7) corresponds to Current Section 9-302(1)(f) with respect to security interests of collecting banks.

Subsection (8) is new and is intended to ensure that a security interest of an issuer or nominated person in a document presented under a letter of credit is perfected automatically (conforming to Section 5-118). These provisions are new and are useful in that issuers do not typically file in such circumstances.

Subsection (9) corresponds to the last clause of Current Section 9-116(2). Subsection (10) corresponds to Current Section 9-115(4)(c).

Subsection (11) corresponds to Current Section 9-115(4)(d).

Subsection (12) corresponds to Current Section 9-302(1)(g).

Subsection (13) would effect a change in New York law by substantively modifying Current Section 9-302(c) to delete coverage of security interests in beneficial interests in trusts. The Official Comment 7 to Revised Section 9-309 notes that the more frequent assignment of these interests as collateral now justifies requiring a filing to perfect such a security interest (which would be the result of adopting subsection (13) without a reference to trusts).

11. Section 9-310: When Filing Required to Perfect Security Interest or Agricultural Lien; Security Interests and Agricultural Liens to Which Filing Provisions Do Not Apply

Subsection (a) restates the existing general rule contained in Current Section 9-302(1) that the filing of a financing statement is required to perfect a security interest or agricultural lien unless an exception is provided in the statute. The reference to agricultural liens is new, and necessary to accommodate the distinction drawn under Revised Article 9 between such liens and security interests.

Subsection (b)(1) cross references new Revised Sections 9-308(d), (e), (f) and (g) each of which provides for automatic perfection the security interests specified therein without filing. Subsection (d) and (e) are new (see comment above), while (f) and (g) correspond to Current Section 9-115(2).

Subsection (b)(2) is a clarifying cross reference intended to confirm the general rule that the security interests and agricultural liens described in Revised Section 9-309 are perfected upon attachment without filing.

Subsection (b)(3) clarifies existing law by confirming that a security interest in property subject statute, regulation or treaty described in Revised Section 9-311(a) does not require filing a financing statement to be perfected. Revised Section 9-311 clarifies Current Section 9-302(3)(a), by making clear that Revised Article 9 is preempted only to the extent the other statute, regulation or treaty provides a mechanism for establishing priority rights.

Subsection (b)(4) substantively corresponds to Current Sections 9-302(l)(a), 9-304(3) and 9-305, while the cross reference of Revised Section 9-312(d)(1) corresponds to Current Section 9-305 and the cross reference of Revised Section 9-312(d)(2) is new.

Subsection (b)(5) substantively corresponds to Current Section 9-302(1)(b).

Subsection (b)(6) substantively corresponds to Current Section 9-302(1)(a) and confirms existing law on physical pledge of tangible personal property.

Subsection (b)(7) substantively corresponds to Current Section 9-302(1)(j).

Subsection (b)(8) is substantially new. It cross references the provisions of Revised Section 9-314 that provide for perfection by control. Article 9 currently provides for perfection of security interests in investment property by control; this procedure is now extended to perfection of security interests in electronic chattel paper, deposit accounts, and letter-of-credit rights.

Subsection (b)(9) corresponds to, but is somewhat broader than, Current Section 9-302(1)(a), although both the current and the revised text cross reference the section of Article 9 relating to perfection of security interests in proceeds.

Subsection (c) corresponds to Current Section 9-302(2) but extends the existing rule to the new category of agricultural liens (in addition to security interests).

12. Section 9-311: Perfection of Security Interests in Property Subject to Certain Statutes, Regulations and Treaties

This section generally corresponds to Current Section 9-302, and is intended to specify circumstances in which the provisions of Revised Article 9 may be superceded or modified by other lien statutes.

Subsection 9-311(a)(1) corresponds to Current Section 9-302(3)(a), but is drafted somewhat more narrowly to assure the preemptive effect of federal law is limited to situations in which the relevant Federal law provides a mechanism for achieving priority over a lien creditor.

Subsection 9-311(a)(2) corresponds to Current Section 9-302(3)(b), and is intended to be a "placeholder" to reference New York's certificate of title requirements and which is discussed in Part IV.B.4.b.

Subsection 9-311(a)(3) corresponds to Current Section 9-302(3)(c), and is necessary to give effect to certificate-of-title statutes of other states.

Subsection 9-311(b) corresponds to Current Section 9-302(4).

Subsection 9-311(c) corresponds to Current Section 9-302(4).

Subsection 9-311(d) is new, and is intended to change or clarify Current Section 9-302(3), principally to avoid imposition of a burden on vehicle dealers of a requirement to note the lien of floor plan lenders on certificates of title. This clarification will ease an administrative burden, but should not adversely affect the title of retail purchasers from a dealer's inventory, who will acquire vehicles free of any floor plan lien pursuant to Revised Section 9-320.

13. Section 9-312: Perfection of Security Interests in Chattel Paper, Deposit Accounts, Documents, Goods Covered by Documents, Instruments, Investment Property, Letter of Credit Rights, and Money; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession

Subsection (a) identifies collateral categories in which security interests may be perfected by filing. This subsection corresponds to Current Section 9-304(1), but is expanded to include security interests in instruments which, under existing law, may be not be perfected by filing. Accordingly, provided that a secured party's financing statement included instruments, its filing would become sufficient to perfect a security interest in a note. *Cf. Berkowitz v. Chavo Int'l., Inc.*, 74 N.Y.2d 144, 542 N.E. 2d 1086 (1989) (The court in that case held that possession of a note was necessary for priority in the proceeds resulting from the payment of the note, regardless of whether the secured party had filed a financing statement covering the debtor's receivables. Since the receivables were evidenced by a non-negotiable note, the only way to perfect was by possession of the note and perfection in the note was necessary to have a perfected security interest in the proceeds).

Subsection (b) identifies categories of collateral in which security interests may be perfected by possession or control. Subsection (b)(1) is new, and references the ability to perfect a security interest in deposit accounts (a type of property excluded from Current Article 9) only by control under Revised Section 9-314. Subsection (b)(2) is new, and references the ability to perfect a lien on letter-of-credit rights only by control under Revised Section 9-314. Subsection (b)(3) incorporates Current Section 9-304(1) without substantive change, providing that security interests in money may only be perfected by possession.

Subsection (c) clarifies the perfection and priority rules in Current Section 9-304(2). Although generally carrying forward existing New York law, subsection (c)(2) clarifies the relative priority of a security interest in a document over a security interest in goods created by any other method during the period the property is covered by the document.

Subsection (d) incorporates Current Section 9-304(3) without substantive change.

Subsection (e) would make a technical change to existing New York law. This subsection creates a period of "temporary perfection" in certificated securities, negotiable documents or instruments that lasts for a 20-day period from the time of attachment to the extent it arises "for new value given." This subsection is intended to be the successor to Current Section 9-304(4) which makes reference to a similar 21-day perfection period. The 21-day period has been shortened to 20 days in order to conform it to similar periods found elsewhere in Revised Article 9 to provide for consistent "grace periods" throughout the Article.

Subsection (f) and (g) incorporate Current Section 9-304(5) but shorten the existing temporary perfection period from 21 days to 20 to achieve general consistency in time periods throughout Revised Article 9.

Subsection (h) incorporates Current Section 9-304(6).

14. Section 9-313: When Possession by or Delivery to Secured Party Perfects Security Interest Without Filing

Subsection (a) states the general rule authorizing perfection by possession of negotiable documents, goods, instruments, money or tangible chattel paper and certificated securities. *See* Current Sections 9-115(6), 8-301, 9-305.

Subsection (b) is new and needed to effect the change in choice of law rules in Revised Section 9-316(d) for goods which become covered by a certificate of title. Section 9-316(d) has the effect of continuing perfection by possession of goods that become subject to New York certificate of title rules when brought into this state for so long as possession would continue perfection under the laws of another jurisdiction had the goods not become subject to the certificate of title rules. Section 9-313(b) states that perfection by possession of goods covered by a certificate of title will continue to the extent specified in Section 9-316(d).

Subsection (c) describes when perfection is obtained through possession by a person other than the debtor, the secured party, or a lessee of collateral from the debtor in the ordinary course of the debtor's business. It is derived from Current Section 9-305, but effects a change by specifying that mere notice to a third person (other than a bailee holding goods covered by a document of title) that possesses the collateral will not itself suffice to perfect. Perfection requires an authenticated acknowledgment by the third person that it holds for the benefit of the secured party. This rule also contrasts with the rule in Revised Section 9-312(d) applicable to a bailee holding goods covered by a non-negotiable certificate of title, which provides that notice to the bailee is sufficient to perfect, even if the bailee does not acknowledge the notice.

Subsection (d) conforms with existing law by stating that perfection by possession is deemed effective only from the time possession is taken, and for the duration that perfection is retained, thus making clear that there is no concept of perfection of a security interest "relating back" to an earlier period. Note, however, that Revised Section 9-312(e), (f) and (g) establish an independent, brief 20-day period of perfection in which a debtor may take possession of specified collateral.

Subsection (e) is new, and analogous to Revised Section 9-314(c) relating to investment property. Note that this subsection does not require continuous possession of the security certificate in light of customary market practices involving frequent

rehypothecation of securities collateral. Subsection (e) clarifies existing law by stating that the security interest remains perfected even if possession is surrendered to any person other than the debtor.

Subsection (f) is new and is intended to clarify uncertainty under existing law by assuring that there is no obligation for a person to acknowledge that it holds possession of property for a secured party's benefit. Without this acknowledgment, under Subsection (c) a security interest in the property is not perfected by possession.

Subsection (g) is new and addresses matters not previously expressly covered by Article 9. It makes clear that a third party acknowledgment is effective to perfect a security interest even if it violates rights of the debtor. It also makes clear that no duty is created by the giving of the acknowledgment itself (including any duty to confirm the acknowledgment to third persons) unless such a duty is created by agreement between the parties, or is imposed by law other than Revised Article 9.

Subsection (h) is new, and is necessary to eliminate the requirement of an acknowledgment in certain transactions where it would be burdensome and of relatively little benefit to require the secured party to obtain the acknowledgment, such as mortgage warehouse lending. Under this subsection, a secured party may relinquish possession of collateral to a third person other than the debtor if prior to or contemporaneously with the delivery the recipient is instructed to hold the collateral for the secured party's benefit or to redeliver the collateral to the secured party. In such circumstances the security interest will remain perfected even without acknowledgment of the instructions from the third person.

Subsection (i) is new, and is analogous to the rule in Subsection (g) applicable to third persons that give an acknowledgment. Thus, where a secured party has delivered collateral to a third person other that the debtor, such person does not owe any duties to the secured party and is not required to confirm delivery to any other person (in the absence of such a requirement imposed by other law).

15. Section 9-314: Perfection by Control

Subsection (a) reflects existing law under Current Section 9-115(4)(a) applicable to investment property. It changes existing law by permitting perfection of a security interest in deposit accounts, letter-of-credit rights or electronic chattel paper by control. Under existing law, perfection of a security interest in a deposit account is excluded from the scope of Current Article 9 under Current Section 9-104(l), in effect leaving perfection as a common law question. Under New York common law, a secured party generally must establish dominion and control over the deposit to perfect its security interest. The legal standard for "control" under Revised Article 9 differs from common law "dominion and control" concepts by permitting access to the collateral to be shared with the debtor, or among secured parties, and for the first time by establishing a statutory definition of control applicable to uninvested deposits. See Revised Section 9-104 *See* Revised Sections 9-104, 9-105, 9-106 and 9-107. Letter-of-credit rights and electronic chattel paper are a newly terms for collateral, for which adoption of perfection by control will eliminate significant confusion that exists under current New York law. For instance, the treatment of rights in letters of credit as collateral has been subject of confusion, as it is sometimes perfected only as "proceeds" of other collateral, sometimes it is deemed to be perfected to the extent that it effectively guarantees another obligation in which a security interest has been perfected on a "supporting obligation" theory under existing law. Additionally,

secured parties sometimes obtain a full assignment of the letter of credit (including the right to draw), or take possession of the letter of credit to perfect by possession.

Subsection (b) is analogous to the timing rule of Revised Section 9-313(d), and clarifies that perfection only continues while control is maintained.

Subsection (c) clarifies Current Sections 9-115(4) and 8-106 by expressly stating the circumstances under which a security interest in investment property perfected by the secured party's control will no longer be deemed perfected. Once perfected the rule is necessary to permit normal commercial transactions in investment property that require the secured party to surrender its control without intending to release its security interest (*e.g.*, rehypothecation), the security interest will remain perfected even after the secured party no longer has control (for example, because it has been rehypothecated) until the debtor reacquires possession of a certificated security, becomes the registered owner of an uncertificated security or becomes the entitlement holder of a security entitlement.

16. Section 9-315: Secured Party's Rights on Disposition of Collateral and in Proceeds

Subsection (a) restates current law under Current Section 9-306(2).

Subsection (b) is new. Clause (1) is a cross reference to a new rule in Revised Section 9-336 commingled goods. Clause (2) is new and expressly defers to other applicable law for determination of tracing the tracing of security interests in on-good proceeds.

Subsection (c) restates, with greater clarity, a rule of Current Section 9-306(3).

Subsection (d) alters existing law by extending the ten day period referenced in Current Section 9-306 to twenty days to take action to continue the perfected status of a security interest in proceeds. Clause (d)(2) also modifies Current Section 9-306(3)(b) by permitting a continuation of a perfected lien in identifiable cash proceeds beyond the twentieth day even if the security interest in the original collateral was perfected by means other than the filing of a financing statement. In other respects, while adopting modified text, this subsection substantively incorporates existing law.

The text of subsection (e) is new, but merely makes explicit what was implicit under the existing New York law rule.

17. Section 9-316: Continued Perfection of Security Interest Following Change in Governing Law

Subsection (a) is derived from Current Sections 9-103(1)(d), (2)(b), (3)(e). Clause (1) restates the existing principle that even in circumstances where the law of another jurisdiction no longer applies to the perfection of a security interest, where the security interest would have become unperfected under the law of that jurisdiction prior to the time periods referred to in this subsection, the security interest will become unperfected under New York law. Clause (2) incorporates the four month time period currently contained in Current Section 9-103(3)(e). Clause (3) is new, and provides a longer one year period in which to take steps to continue perfection in circumstances where a transfer of collateral to another person "located" in another jurisdiction. Since the location of many debtors will now be determined by their jurisdiction of organization, rather than their actual places of

business, a longer period for discovery of the type of change referred to in clause (3) has been provided.

Subsection (b) is intended to clarify existing New York law. If a security interest is not perfected under the law of the new jurisdiction within the time periods prescribed in Subsection (a), once the period lapses, with respect to the rights of purchasers for value (who include both buyers and secured parties), the security interest is treated as having never been perfected. As noted in the Official Comment 3 to Section 9-316, to avoid possible bankruptcy preference risks the security interest is not stated to be retroactively unperfected against lien creditors.

Subsection (c) is new text, but does not materially alter the existing rule of Current Section 9-103 with respect to possessory security interests.

Subsections (d) and (e) are new, and clarify the previous rules under Current Section 9-103(2) with respect to goods covered by a certificate of title. Even after goods become subject to a New York certificate of title requirement, a security interest that was perfected prior to that time under the law of another jurisdiction will remain perfected until it would otherwise lapse under the laws of that jurisdiction. However, it will become unperfected against a purchaser of the goods for value (and is deemed never to have been perfected against such a purchaser) if the existing security interest holder does not record its lien on the applicable New York certificate of title within four months after the goods become subject to the certificate. The four month deadline for perfection against purchasers for value is substantively consistent with existing New York law, while the potentially longer perfection period against other persons is new.

Although analogous to subsections (a) and (b), and the general principles of Current Section 9-103, the provisions of subsections (f) and (g) relating to changes in a bank's jurisdiction, an issuer's jurisdiction, a nominated person's jurisdiction, a securities intermediary's jurisdiction or a commodity intermediary's jurisdiction are new.

18. Section 9-317: Interests That Take Priority Over or Take Free of Unperfected Security Interest or Agricultural Lien

Subsection (a) is derived from Current Sections 9-301 (a) and (b) and 2A-307(2) and sets forth the general principle that unperfected security interests and agricultural liens are subordinate to those that are perfected, as well as being subordinate to the rights of a lien creditor. Clause (2) revises Current Section 9-301(1)(b) by treating the first and subsequent advances by a secured party identically. Previously, a special rule in Current Section 9-301(4) afforded priority to a discretionary advance made by a secured party within 45 days after the lien creditor's rights arose as long as the secured party was "perfected" when the lien creditor's lien arose (i.e., as long as the advance was not the first one and an earlier advance had been made — since to be perfected the security interest had to attach, and it could not attach until value had been given.) As revised, clause (2) focuses on (x) perfection of a security interest or (y) the time that a financing statement covering the collateral has been filed and any of the steps set forth in Section 9-203(b)(3) (including the authentication of a security agreement) have been taken (even though the security interest may not attach until value is given).

Subsection (b), (c) and (d) are derived from Sections 9-301(1)(c), (d) and 2A-307(2), and effect similar priority treatment of buyers and lessees who receive delivery of physical collateral or otherwise gives value without knowledge of an existing security interest and

before it is perfected. The official comment notes that the buyers and lessees referred to therein are said to "take free" of the unperfected lien, rather than to describe the unperfected lien as "subordinate" to the interest of the buyers and lessees as stated in Current Section 9-301, the language revised in Rev. Section 9-317 to avoid any possible misinterpretation. Revised Section 9-317(b) and (d) expressly apply to "a buyer, other than a secured party." The analogous provisions under Current Section 9-301(1)(c) and (d) refers to "a person who is not a secured party and who is a transferee in bulk or other buyer not in the ordinary course of business. . ." The revised subsection appears to cover a wider spectrum of buyers. The substantive impact of this provision is limited, however.

Subsection (e) extends the rule under which a financing statement with respect to a purchase-money security interest can be filed from up to 10 days under Section 9-301(2) to up to 20 days -- Current Section 9-301(2) gives only 10 days after the debtor receives delivery of the collateral, and if filed within this period, the perfected security interest would take priority over the interest of a lien creditor that arose in the "gap."

19. Section 9-318: No Interest Retained in Right to Payment That is Sold; Rights and Title of Seller of Account or Chattel Paper with Respect to Creditors and Purchasers

This section is entirely new, but is intended merely to state existing law explicitly. Thus, Section 9-318 states that when an account, chattel paper, payment intangible or promissory note is sold, the seller retains no property interest in the asset sold. The logical corollary is also stated: if the sale in such property, governed by Revised Article 9 is not perfected under the rules of Revised Article 9, then a property interest identical to the property which was "sold" by the debtor is considered to remain with the debtor.

20. Section 9-319: Rights and Title of Consignee with Respect to Creditors and Purchasers

This section is new, but as noted in Official Comment 2, Revised Article 9 is a substantial reformulation of former law, which appears in Current Sections 2-326 and 9-114, without changing the results.

For purposes of determining the rights of creditors and purchasers for value from the consignee, subsection (a) deems a consignee to have rights and title to consigned goods identical to those of the consignor while the goods are in the possession of the consignee.

Subsection (b) contains a special rule for consignments perfected by the consignor. It states that where a consignor has perfected its security interest in the consigned goods and consequently has priority over the rights of a consignee's creditor, other law determines the rights of the consignee in the consigned goods in its possession.

21. Section 9-320: Buyer of Goods

Subsection (a) applies to buyers in the ordinary course of business and is derived from Current Section 9-307(1) again stating that such buyers will normally take free of perfected security interests. It is modified only to the extent that it clarifies (by cross reference to Subsection (e)) that this subsection will not affect a possessory security interest under Revised Section 9-313.

Subsection (b) is derived substantially from Current Section 9-307(2), and is

intended to assure that purchasers of goods from consumers, even though such goods may be subject to a purchase-money security interest that has been perfected without filing under Revised Section 9-309(1) prior to the purchaser buying such goods, will take free of those interests.

Subsection (c) is derived from Current Section 9-103(1)(d)(iii) and provides guidance on the continued effectiveness of a filing after the debtor/seller of the goods moves by adopting the rules of Revised Sections 9-316(a) and (b) (discussed above).

Subsection (d) is new, providing that a buyer in the ordinary course of business buying oil, gas or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance (defined in Revised Section 9-102 as a right, other than an ownership interest, in real property).

Subsection (e) is new and, together with Revised Section 9-317(b), rejects the holding of *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 39 N.Y.2d 632, 350 N.E.2d 590, 385 N.Y.S.2d 260 (1976) and prevents a buyer of goods under subsections (a) and (b) from taking free of a security interest in such goods which are in the possession of the secured party. Revised Section 9-313 determines whether a secured party is in possession.

22. Section 9-321: Licensee of General Intangible and Lessee of Goods In the Ordinary Course of Business

This entire section is new, but derived from Current Sections 2A-103(1)(o) and 2A-307(3), and is intended to be analogous to the rules in Revised Section 9-320(a) with respect to buyers of goods in the ordinary course of business. The basic rule, contained in Subsection (b), generally provides that licensees in the ordinary course of business will take rights under a non-exclusive license free of perfected security interests in the licensed rights.

Subsection (c) reflects the rule found in Current Section 2A-307(3), generally providing that lessees in the ordinary course of business will take such leasehold interest free of a security interest in the leased goods.

23. Section 9-322: Priorities Among Conflicting Security Interests in and Agricultural Liens on Same Collateral

This section is generally derived from Current Section 9-312(5) and (6) but with incorporation of agricultural liens to the applicability of such rules.

Subsection (a) outlines the three basic priority rules applicable to competing perfected and unperfected security interests and agricultural liens. Subsection (a)(1) states that conflicting perfected security interests and agricultural liens rank in priority according to time of filing or perfection. It thus restates the substance of Current Section 9-312(5)(a) but adds a reference to agricultural liens. Subsection (a)(1) also reiterates the remaining substance of the Current Section 9-312(5)(a) rule that priority will date 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. Subsection (a)(2) is new text which states that a perfected security interest has priority over an unperfected one. While the text is new, it is for clarity only and does not change the existing priority rule in the same situation. Subsection (g) restates the essence

of current Section 9-312(5)(b) by stating that the first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

Subsection (b)(1) follows Current Section 9-312(6), and assures that when a security interest in proceeds attaches, the time of filing or perfection of the security in the original collateral, and not time of attachment in the proceeds themselves, governs the priority established under subsection (a).

Subsection (b)(2) is new, addressing the new concept of "supporting obligations" defined in Revised Section 9-102(77) as a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument or investment property. Subsection (b)(2) states that 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. This priority is subject, however, to a special rule in Revised Section 9-329 governing priority of security interests in a letter-of-credit right, which will give priority to another creditor that obtains control.

Subsection (c) is substantially new text, although it does not significantly change the likely priorities as they would be determined under Current law. It assigns special "non-temporal" priority to categories of proceeds and supporting obligation collateral in which perfection is obtained by control (*i.e.*, deposit accounts, investment property, letter-of-credit rights, purchasers of chattel paper or instruments, financial assets and security entitlements under UCC Article 8).

Subsections (d) and (e) replace Current Section 9-307(3) and in some situations may act to change the existing "first to file or perfect" rule and the "control" priority rule under Current New York law. Under Subsection (d) security interests in collateral that can be perfected by means other than filing will not retain priority over proceeds that are not of such a collateral category without filing.

Subsection (f) clarifies existing law by expressly deferring the priority rules in subsections (a) through (e) to other special law applicable to particular kinds of collateral: agricultural collateral (which is subject to Subsection (g) and other Revised Article 9 provisions), and security interests of collecting banks under UCC Article 4, letter of credit issuers or nominated persons under UCC Article 5 goods under Revised Section 9-110 and arising under UCC Article 2 or 2A. Subsection (g) clarifies current law to the extent that there may be conflicts between statutory agricultural liens and agricultural liens established under Revised Article 9 by deferring to any priority established under a specific statute outside the UCC providing for a prior agricultural lien.

24. Section 9-323: Future Advances

This section is substantially new text, and is intended to collect in one place all special rules dealing with the priority of advances made by a secured party after a third party acquires an interest in the collateral.

Subsection (a) applies when the third party is a competing secured party, replacing and clarifying Current Section 9-312(7). It provides an exception to the general priority rule of Revised Section 9-322(a)(1) that the secured party who is the first to perfect and maintains continuous perfection or filing. Subsection (a)(1) provides that, except with

respect to buyers of receivables, for purposes of determining the priority of a perfected security interest, perfection of a security interest will date only from the time an advance is made to the extent that the security interest secured an advance that is made when the security interest is perfected only by automatic or temporary perfection provisions and that is not made pursuant to a commitment entered into before or while the security interest is perfected by another method. Thus, subsection (a) applies only in the rare case in which an advance is made without a commitment and while the security interest is perfected automatically under Revised Section 9-309 or only temporarily under certain provisions of Revised Section 9-312. It is intended to eliminate ambiguity existing under Current Section 9-312(7) while not changing the expected result.

Subsection (b) deals with lien creditors, replaces Current Section 9-301(4) and supplements the general rule of Section 9-317(a). It removes an ambiguity under that section and assures that all secured obligations are subordinated only to the extent that the security interest secures an advance made more than 45 days after a person becomes a lien creditor unless such advance was made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

Subsection (c) makes clear that the special future advances rules in Subsections (a) and (b) do not apply to the security interests of buyers of accounts, chattel paper, payment intangibles or promissory notes, or a consignor. This text is new, and is necessitated by the expanded coverage of these classes of collateral under Revised Article 9.

Subsections (d) and (e) replace Current Section 9-307(3), and eliminate the priority of a secured party over a non-ordinary course goods buyer to the extent the security interest secures advances made 45 days after the sale (or the secured party's earlier knowledge of the sale). No substantive change is intended.

Subsection (f) and (g) replace Current Section 2A-307(4), providing similar benefits to a goods lessee as subsections (d) and (e) provide a buyer of goods. No substantive change is intended.

25. Section 9-324: Priority of Purchase-Money Security Interests

Subsection (a) follows Current Section 9-312(4), but excludes livestock as well as inventory from the rule providing purchase money security interests in goods priority over other security interests in the same goods if it is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

Subsection (b) generally follows Current Section 9-312(3). It provides that, generally, a perfected purchase-money security interest in inventory will have priority over a conflicting security interest in the same inventory, in any chattel paper or instruments constituting proceeds of such inventory and any proceeds of such chattel paper (if so provided in Revised Section 9-330) and generally also in identifiable cash proceeds of inventory if the cash proceeds are received on or before the delivery of the inventory to a buyer, if four requirements are met: (1) the purchase-money security interest is perfected when the debtor receives possession of the inventory (no 20-day grade period as with non-inventory or non-livestock collateral); (2) the purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest; (3) the holder of the conflicting security interests receives the notification within five years before the debtor receives possession of the inventory; and (4) the notification states that the person sending

the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory. The priority provided therein to identifiable cash proceeds of inventory is expressly subject to new rules applicable to deposit accounts under Revised Section 9-327 and to purchasers of chattel paper which constitute proceeds of inventory under Revised Section 9-330. The requirement of written notification has been modified to require an authenticated notification rather than a "written" notification.

Subsection (c) is also derived from Current Section 9-312(3)(b), providing that notification to the conflicting inventory secured party (required in subsection (b)) needs to be given if such conflicting secured party filed before the purchase-money secured party or before the purchase money security interest temporary perfection period.

Subsections (d) and (e) are new, and establish purchase-money security interest priority rules for farm-products livestock collateral along the lines of that provided for purchase-money security interests in inventory under subsections (b) and (c). The priority differs from the purchase-money inventory priority rules by giving the purchase money livestock lender priority in all proceeds of livestock (in contrast to the purchase-money inventory lender, who may achieve priority in only certain kinds of proceeds) and in certain products of the livestock. As noted in Official Comment 10, this rule will allow the purchase-money livestock lender to take priority in accounts over an earlier-filed accounts financier. These sections may also govern aquatic goods produced on "fish farms" to the extent that courts determine that such goods are properly categorized as "livestock" farm products and not "crops" (to which Revised Section 9-324A would apply).

Subsection (f) is new and governs purchase-money security interests in software. It supplements the rule of Revised Section 9-103(c), which states that a purchase-money security interest in software can exist only to the extent that the secured party also has a purchase-money security interest in the goods containing the software or which the debtor acquired to use the software. Subsection (f) provides that such a security interest in software generally will have priority over a conflicting security interest in the same software collateral and in the identifiable proceeds of such software has priority to the extent that the purchase-money security interest in the related goods and the proceeds of the goods has priority. The intent is to permit a purchase-money security interest in the "embedded" software to follow the goods.

Subsection (g) is new and establishes relative priorities between conflicting purchase-money security interests. In such cases, "enabling" purchase-money loans will be subject to security interests that actually secure the price of collateral (*i.e.*, the seller of the collateral will have priority over the debtor's lender). As noted in Official Comment 13, this rule follows the Restatement (Third) of the Law of Property (Mortgages) Section 7.2(c) (1997) with respect to real property. Where there are conflicting "enabling" purchase-money secured parties, the general "first to file or perfect" priority rule of Revised Section 9-322(a) will apply.

26. Section 9-325: Priority of Security Interest In Transferred Collateral

This section addresses the "double debtor" problem created when a debtor acquires property that is subject to a security created by another debtor. The problem arises in the following typical fact pattern: D-1 grants a security interest in property to SP-1. D-1 then transfers the property to D-2 who grants a security interest in the property to SP-2. If SP-1's security interest in the transferred property was perfected when the property was transferred to D-2 and remains perfected, and if SP-1's security interest survives the

transfer, this section provides that SP-1's security interest will have priority over the security interest of SP-2. Typically, SP-1's security interest will survive the transfer unless SP-1 authorized the transfer free and clear of its security interest or the transfer was to, for instance, certain buyers, lessees or licensees. *See* Revised Section 9-315.

Current Article 9 does not specifically address this problem. This priority rule reaches the fair result since SP-1 has done everything possible to protect its security interest in the property. SP-2 could have protected itself by investigating the chain of ownership of the property and searching under D-2's name and the name of all prior owners, including D-1. This search would have revealed the security interest in the property granted by D-1 to SP-1.

27. Section 9-326: Priority of Security Interest Created by New Debtor

This section is new and addresses the priority contest that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor. The problem arises in the following fact pattern: D-1 grants a security interest in its present and after acquired property to SP-1 and the security interest is perfected. D-1 transfers the collateral to D-2 who assumes all obligations under the security agreement signed by D-1. Prior to the transfer, D-2 had granted a security interest in all of its present and after acquired property to SP-2 and SP-2 had perfected its security interest. After the transfer, D-2 acquires new property. Both SP-1 and SP-2 assert a security interest in the new property pursuant to their security agreements. Both security interests are perfected: SP-1's security interest is perfected under Revised Section 9-508 of the Revised Article 9 as a result of its filing against D-1, and SP-2's security interest is perfected as a result of its filing against D-2. This Section provides that, to the extent SP-1 is relying on its filing against D-1 to perfect its security interest in the new property acquired by D-2, SP-2's security interest will have priority over the security interest of SP-1.

Subsection (b) also addresses the priority contest that results if both competing secured parties are relying on Revised Section 9-508 to claim their security interests are perfected. In this instance, the priority contest is resolved under the normal priority rules of Revised Article 9 unless the competing security interests for which the new debtor is bound were not entered into by the same original debtor. In such a case, priority is determined according to the order in which the new debtor became bound.

The Section reaches the correct result since SP-2 has done everything possible to protect its secured position. SP-2 may have no way of knowing of SP-1's claim as to after-acquired property of D-2. SP-1, on the other hand, could have filed a new financing statement against D-2, searched as to D-2 and discovered the filing by SP-2, and entered into a subordination agreement with SP-2.

28. Section 9-327: Priority of Security Interest in Deposit Accounts

Current Article 9 does not apply to creation of a consensual security interest in a "deposit account" as original collateral. Current Section 9-104(l). Revised Article 9 limits this exclusion to deposit accounts in consumer transactions. Thus, deposit accounts may serve as collateral in commercial financing transactions. *See* discussion of Revised Section 9-109 above. The new rule governing the priority of conflicting security interests in deposit accounts is contained in Revised Section 9-327. It provides that a security interest held by a secured party having control of a deposit account will have priority over a conflicting security interest held by a secured party without control (such as a secured

party which has a perfected security interest in the deposit account as proceeds of other collateral). Generally, security interests in deposit accounts perfected by control will rank according to priority in time of obtaining control. However, a security interest held by the bank with which the deposit account is maintained will have priority over a conflicting security interest held by another secured party. But a secured party who obtains control by becoming the bank's customer (Revised Section 9-104(a)(3)) will have priority over a security interest held by the bank with which the deposit account is maintained.

29. Section 9-328: Priority of Security Interests in Investment Property

Revised Section 9-328 replaces Current Section 9-115 in determining the priority of conflicting security interests in investment property. It first provides that a security interest in investment property perfected by control will have priority over such a security interest that is not perfected by control. If both security interests are perfected by control, in general priority will be determined as follows: (i) if the collateral is a security, priority is determined by the time of obtaining control, (ii) if the collateral is a securities entitlement carried in a securities account, priority is determined by the time at which the secured party obtained a specified critical element for acquiring control under the methods available in Section 8-106, and (iii) if the collateral is a commodity contract carried by a commodity intermediary, priority is determined by the time of satisfying the requirements for control specified by Revised Section 9-106(b)(2).

Subsections (3) and (4) provide that a security interest held by a securities intermediary in a securities entitlement or a securities account maintained with such securities intermediary by a commodity intermediary in a commodity contract or commodity account maintained with such commodity intermediary will have priority over a conflicting security interest held by another secured party. Under subsection (5), a security interest in a certificated security in registered form which is perfected by taking delivery of the securities certificate, and not by control, has priority over a security interest that is not perfected by control. Pursuant to subsection (6), conflicting security interests created by a broker, securities intermediary or commodity intermediary which are perfected without control rank equally. Subsection (7) states that in all other cases, the priority of security interests in investment property will be determined by the normal priority rules of Revised Article 9.

This Section largely restates existing New York law relating to the priority of security interests in investment property with the exception of the new rules setting priorities as to conflicting security interests in investment property which are perfected by control. Current Article 9 ranks these security interests equally. In these circumstances, under Revised Section 9-328, priority is instead generally based on temporal rules.

30. Section 9-329: Priority of Security Interests in Letter-of-Credit Rights

Under Revised Article 9, a security interest in a letter-of-credit right is perfected by control as defined in Revised Section 9-107. Revised Section 9-329 provides that a security interest held by a secured party having control of the letter-of-credit right has priority over a security interest held by a secured party that does not have control (for example a security interest in a letter-of-credit right that is perfected automatically without control as a result of the letter of credit right being treated as a supporting obligation). *See* Revised Section 9-308(d). If both security interests are perfected by control, Subsection (2) provides that they will rank according to priority in time of obtaining control.

Current Article 9 does not permit the perfection of a security interest in a letter-of-credit right by control, so the priority rules of Section 9-329 are new.

31. Section 9-330: Priority of Purchaser of Chattel Paper or Instrument

Revised Article 9 permits a security interest in chattel paper or instruments to be perfected either by filing or by the secured party's taking possession of the chattel paper or instrument. Revised Section 9-330 permits secured parties and other purchasers of chattel paper and instruments to obtain priority over earlier-perfected security interests.

Under subsection (a), a purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory if (i) in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper, or obtains control of electronic chattel paper under Revised Section 9-105, and (ii) the chattel paper does not indicate on its face that it has been assigned to an identified assignee other than the purchaser. If the competing security interest is not claimed merely as proceeds of inventory collateral, the purchaser of chattel paper will have priority if it gives new value and takes possession of the chattel paper, or obtains control over electronic chattel paper, in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party. Subsection (c) also states that the chattel paper purchaser will have priority as to proceeds of the chatter paper if the purchaser has priority as to the chattel paper under this Section when Revised Section 9-322 provides for priority or the proceeds consist of the goods covered by the chattel paper or cash proceeds of the goods.

With respect to instruments, subsection (d) provides that, except as provided in Revised Section 9-331(a) (discussed in the next section of this Report), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession (*e.g.*, filing) if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

This Section is based on Section 9-308 of Current Article 9. Unlike Current Section 9-308, this Section makes explicit a "good faith" requirement and provides that a legend on the chattel paper, indicating that it has been assigned to an identified secured party other than the purchaser, will disqualify the purchaser from relying on this priority rule. The term "new value" is redefined from Current Section 9-108 in Revised Article 9 and Section 9-330(e) makes it clear that the holder of a purchase-money security interest in inventory is deemed to give new value for chattel paper constituting proceeds of the inventory. In addition, this Section deletes the reference in Current Section 9-308(b) to the knowledge of the purchaser of the chattel paper in the case in which the competing secured claim is asserted as proceeds of inventory collateral. This Section also deletes the requirement in Current Section 9-308(a) that the purchaser take without knowledge that the specific paper is subject to the security interest if the security interest is not asserted in the chattel paper merely as proceeds of other collateral. Instead, the purchaser must take without knowledge that the purchase violates the rights of the secured party.

This Section was the result of extensive deliberations by the Drafting Committee and provides much needed clarification concerning the priority of purchasers of chattel paper. The changes from current law are not dramatic and are intended to comport with the expectations of both inventory and chattel paper financiers.

32. Section 9-331: Priority Rights of Purchasers of Instruments, Documents and Securities Under Other Articles; Priority of Interests In Financial Assets and Security Entitlements Under Article 8

Revised Section 9-331 makes clear that the Revised Article 9: (i) does not limit the rights of a holder in due course of a negotiable instrument, the holder to which a negotiable document of title has been negotiated or a protected purchaser of a security, who have priority to the extent provided in UCC Articles 3, 7 and 8, respectively and (ii) does not limit the rights or impose liability on a person who is protected against the assertion of an adverse claim under UCC Article 8. Subsection (c) states explicitly that UCC filings will not constitute notice of a claim or defense that could derogate the rights of any of such parties.

This Section is based upon, is consistent with, and augments Current Section 9-309. Official Comment 5 to this Section explains that, under this Section, the holder of a junior security interest in receivables may collect and retain the proceeds of the receivables free of the claim of a senior secured party if the junior secured party is a holder in due course of the proceeds, meaning that the junior secured party takes the proceeds "in good faith." Good faith, defined in Revised Section 9-102(a)(43), requires the junior secured party to act with "honesty" and observe "reasonable commercial standards of fair dealing." Examples of the application of this Section to such collections are provided in the Official Comment.

Official Comment 5 was controversial and the subject of extended debate on the Drafting Committee. The final formulation in Official Comment 5 was supported by industry observers and the Drafting Committee.

33. Section 9-332: Transfer of Money; Transfer of Funds from Deposit Account

Revised Section 9-332 is new and provides that a transferee of money or funds from a deposit account takes free of a security interest in the money or funds unless the transferee acts in collusion with the debtor to violate the rights of the secured party. This Section is supported by strong policy considerations calling for the free flow of funds and finality in funds transfers, except as against bad actors.

34. Section 9-333: Priority of Certain Liens Arising by Operation of Law

Revised Section 9-333 gives priority to common law and non-Article 9 statutory liens in goods perfected by possession over liens created under Revised Article 9. This priority applies if the statute or rule of law provides for such priority or is silent as to such priority. This Section is based upon, and consistent with, Section 9-310 of Current Article 9. This Section does not change Current New York law.

35. Section 9-334: Priority of Security Interests in Fixtures and Crops

Revised Section 9-334 sets forth rules governing the priority of security interests in fixtures and crops as against persons who claim an interest in the real property. The fixture priority rules are consistent with the priority rules in Current Article 9. *See* Current Section 9-313.

The crop priority rules in subsection (i) are new. Because crops are "goods" subject to Revised Article 9, the holder of a mortgage on real property covering crops must follow the Revised Article 9 rules in order to assert priority in the crops. Subsection (i) states that

a perfected Article 9 security interest in crops has priority over a conflicting interest of an encumbrancer or owner of the related real property if the debtor has an interest of record in the real property or is in possession of the real property.

Subsection (j) states that subsection (i) will prevail over inconsistent state statutes to be listed. The Committee is not aware of any inconsistent New York statute and, consistent with the recommendation set forth in Part IV.B.2.c, subsection (j) should be deleted.

36. Section 9-335: Accessions

Revised Section 9-335 applies to the following priority contest: SP-1 has a perfected security interests in goods. SP-2 has a perfected security interest in an accession (defined in Revised Section 9-102(a)(1)). The accession becomes part of the goods. Revised Section 9-335 preserves SP-2's perfected security interest in the accession after it has been attached to the goods. With one exception, the resulting priority contest is determined by the normal priority rules of Revised Article 9 (*e.g.*, first to file or perfect or purchase-money priority). The one exception concerns goods covered by a certificate of title statute (such as a motor vehicle), in which case, Revised Section 9-335 affords priority to SP-1, the holder of the perfected security interest in the goods.

Subsection (e) also sets forth the rules applicable to removal of the accession from the goods if the holder of the security interest in the accession has priority over every person having a claim in the whole good and is entitled to repossess the accession because of a default by the debtor. Removal is permitted, but the holder of the accession security interest must reimburse the holder of the security interest in the goods for the cost of repair or physical injury to the goods resulting from the removal.

The priority rule exception for certificate-of-title goods is new and does not exist in Current Section 9-314. The super-priority given by Revised Section 9-335 to the holder of a perfected security interest in goods covered by a certificate of title is intended to permit these secured parties to rely solely on the certificate of title without having to do a UCC filing search to determine whether component parts of the goods may have been subject to a security interest perfected by a filing under Revised Article 9.

37. Section 9-336: Commingled Goods

Revised Section 9-336 applies to goods that have become "commingled goods," defined in subsection (a) as goods whose identity is lost when they are physically united with other goods and become part of a product or mass. It provides that a security interest in goods that is perfected when such goods become commingled goods no longer exists in the commingled goods as such but instead attaches to the resulting product or mass and is perfected. Priority is determined by the normal priority rules of Revised Article 9 (first to file or perfect and purchase-money priority) with one exception: where more than one security interest in commingled goods attaches to the product or mass, a perfected security interest has priority over an unperfected security interest. If both security interests are perfected, the security interests rank equally in proportion to value of the collateral at the time it became commingled goods.

This Section is based on and is consistent with Current Section 9-315. Revised Section 9-336 resolves two additional commingled goods issues: (i) priority where one of the commingled goods security interests is perfected and one is unperfected (pursuant to

subsection (f)(1) the perfected security interest has priority) and (ii) priority where one of the security interests is a perfected security interest in commingled goods and one of the security interests is a perfected security interest in the product or mass (pursuant to subsection (e), priority is determined by the normal priority rules of Revised Article 9). Revised Section 9-336 also eliminates the requirement of Current Section 9-315(b) that, in order for a secured party in the original goods to remain perfected in the resulting product or mass, the original financing statement must cover such product or mass.

38. Section 9-337: Priority of Security Interests in Goods Covered by a Certificate of Title

Revised Section 9-337 resolves the following priority issues: SP-1 has a perfected security interest in goods owned by D-1 and covered by a certificate of title (*e.g.*, an automobile) issued by State A. D-1 takes the goods to State B and causes State B to issue a "clean" certificate of title applicable to the goods (*i.e.*, a certificate of title that does not reflect SP-1's security interest in the goods). Thereafter, D-1 sells the goods to a buyer or D-1 grants a security interest in the goods to SP-2 who properly perfects its security interest by having its lien noted on the clean certificate of title. Revised Section 9-337 awards priority to the buyer as long as the buyer (I) is not in the business of selling goods of that kind, (ii) gives value, (iii) takes delivery of the goods after the clean certificate of title has been issued, and (iv) does not have knowledge of SP-1's security interest. SP-2 likewise has priority over SP-1 as long as SP-2's security interest is perfected under State B's certificate of title statute and SP-2 does not have knowledge of SP-1s security interest in the goods.

Revised Section 9-337 is based upon, and consistent with, Current Section 9-103(2)(d). The comparable protection afforded to secured parties (SP-2 in the above example) is new.

39. Section 9-338: Priority of Security Interest or Agricultural Lien Perfected by Filed Financing Statement Providing Certain Incorrect Information

Revised Section 9-338 is new, providing a priority rule for conflicting security interests where one of the security interests was perfected by the filing of a financing statement with certain incorrect information. Revised Section 9-516(b)(5) requires a filing officer to reject financing statements that do not contain certain information about the debtor (*e.g.*, the debtor's mailing address and whether the debtor is an individual or an organization). If the information required by Revised Section 9-516(b)(5) is incorrect in the filed financing statement at the time it is filed, Revised Section 9-338 subordinates the security interest to a limited class of competing holders of security interests and purchasers who can prove they gave value in reasonable reliance on the incorrect information.

Revised Section 9-338 strikes a fair balance since the security interest of the filing secured party is subordinated only to a narrow class of secured parties and purchasers who must prove reasonable reliance on the incorrect information. The subordination risk to the filing secured party is thus very small.

40. Section 9-339: Priority Subject to Subordination

Revised Section 9-339 restates Current Section 9-316 by providing that persons entitled to priority under Revised Article 9 may by agreement subordinate their security interest to another interest in the collateral.

41. Section 9-340: Effectiveness of Right of Recoupment or Set-Off Against Deposit Account

Revised Section 9-340 deals with the right of a bank with which a deposit account is maintained to assert recoupment or set-off rights with respect to the account where another secured party holds a security interest in the account as original collateral or as proceeds of other collateral. It is new because deposit accounts are excluded as original collateral from the scope and coverage of Current Article 9. *See Gillman v. Chase Manhattan Bank*, 73 N.Y.2d, 534 N.E.2d 824 (1989) (holding that a security interest created by contract in a deposit account was a common law and not an Article 9 security interest and that the creation of such a security interest was not unconscionable).

The Section preserves the bank's recoupment and set-off rights, except that its right of set-off based on a claim against the debtor is ineffective against a secured party that perfects its security interest by control under Revised Section 9-104(a)(3) where the secured party becomes the bank's customer with respect to the deposit account. Subsection (b) also makes clear that the depositary bank may assert recoupment and set-off rights even if it holds a security interest in the account under Revised Article 9.

The decision of the Drafting Committee to afford special protection to banks holding deposit accounts was a necessary compromise in order to bring deposit accounts into Revised Article 9. Additionally, this treatment affords deposit account banks protection similar to the protection enjoyed by account debtors under Revised Article 9.

42. Section 9-341: Bank's Rights and Duties with Respect to Deposit Account

Revised Section 9-341 is new, relating to the inclusion of deposit accounts within Revised Article 9. It serves as an explicit statement that the rights and duties of a bank maintaining a deposit account are not terminated, suspended or modified by the existence of a security interest on the deposit account, the bank's knowledge of the security interest or the bank's receipt of instructions from the secured party. Thus, the bank's rights and duties are unaffected by the existence of, or its knowledge of the security interest. In addition, bank is free to ignore the instructions of the secured party unless it has agreed to comply with them or other law provides to the contrary.

The exception to this general rule of Revised Section 9-341 is that of the situation addressed in Revised Section 9-340(c), whereby a bank's right of set-off against a deposit account based on a claim against the debtor is ineffective against a secured party which has perfected its security interest in the deposit account under Revised Section 9-104(a)(3) by becoming the bank's customer.

43. Section 9-342: Bank's Right to Refuse to Enter into or Disclose Existence of Control Agreement

Revised Section 9-342 is new, also relating to Revised Article 9's inclusion of deposit account within its scope. The section is derived, however, from Section 8-106(g) which explicitly disavows any duty on the part of an issuer of uncertificated securities or a securities intermediary to enter into control agreements concerning such securities or security entitlements, despite the request of owners or customers, or to confirm the existence of such agreements to non-owners and non-customers. Revised Section 9-342

provides the same protection for banks maintaining deposit accounts which could otherwise be perfected by control agreements under Revised Section 9-104(a)(2).

D. Section-by-Section Analysis of Part 4: Rights of Third Parties

1. Introduction

Part 4 of Revised Article 9 addresses the rights and duties of parties obligated to perform in respect of assets constituting collateral for a secured transaction. While a number of the provisions in Part 4 of Revised Article 9 are new, others were dispersed throughout Current Article 9 and have been brought together and clarified in Part 4.

2. Section 9-401: Alienability of Debtor's Rights

Revised Section 9-401(a) states that, subject to exceptions in Part 4 of Revised Article 9, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than Revised Article 9. This may seem a departure from Current Section 9-311, which provided that the debtor's rights in collateral "may be voluntarily or involuntarily transferred . . . notwithstanding a provision in a security agreement prohibiting any transfer or making the transfer constitute a default." The Official Comment to Revised Section 9-401 states that any implication in Current Section 9-311 that property otherwise unassignable becomes assignable simply by virtue of its status as collateral under Current Article 9 was unintended. Rather, Current Section 9-311 was intended to establish that a prohibition on transfer contained in a security agreement was not determinative of whether or not collateral can be transferred.

Current Article 9 spoke clearly only on the question of the debtor's assignability of property in two cases. Current Section 9-311 allowed property subject to a security interest that was otherwise assignable to be assigned by the pledgor notwithstanding a secured party's attempt to restrict transfer. Current Section 9-318(4) allowed the sale or pledge of accounts and the pledge of general intangibles for money due or to become due notwithstanding a restriction on their transfer in a contract between the account debtor and the assignor. The scope of property which Revised Article 9 makes assignable notwithstanding restriction has been expanded to include the sale or pledge of accounts, payment intangibles, chattel paper and promissory notes and the pledge of rights under leases, healthcare-insurance receivables, general intangibles and letter-of-credit rights. *See* Revised Sections 9-406, 9-407, 9-408 and 9-409.

Revised Section 9-401(b), one of the exceptions to Revised Section 9401(a)'s rule that other law governs whether a debtor's rights in collateral may be transferred, states what had been intended by Current Section 9-311, read properly: that an agreement between a debtor and secured party prohibiting transfer of the debtor's rights in collateral or making such transfer a default, does not prevent the transfer from taking effect. Accordingly, a debtor retains the power to pledge assets to more than one party. *See Marine Midland Bank-Eastern Nat'l Ass'n v. Conerty Pontiac-Buick, Inc.*, 77 Misc.2d 311, 316, 352 N.Y.S.2d 953, 960 (Sup. Ct. Albany County 1974).

Even though Revised Section 9-401(b) allows an asset to be pledged twice, the second pledge could constitute a breach of contract. According to the Official Comment to Revised Section 9-401(b), unlike other provisions in Revised Part 4, Revised Section 9-401(b) purposely does not make ineffective an agreement between a debtor and a secured party restricting transfer or rendering transfer a breach of contract. This was

intended to allow a debtor's wrongful transfer of collateral to constitute a breach of its security agreement with the secured party. This does not appear to be inconsistent with Current law in New York. Like Revised Section 9-401(b), Current Section 9-311 did not on its face prevent a wrongful transfer from constituting a breach under an agreement with a secured party. Moreover, although there is limited New York case law on the topic, one New York court has acknowledged the possibility that a debtor's transfer of collateral under Current Section 9-311 may still result in a default; "[s]ection 9-311 . . . makes it clear that the debtor may create junior liens in the same collateral, even though the creation of the junior lien may amount to a default under the agreement with the earlier secured creditor." *Marine Midland*, 77 Misc.2d at 318, 352 N.Y.S.2d at 961.

Revised Article 9 does not provide choice of law rules for determining the law that will govern the transferability of a debtor's rights in collateral or the applicability of the rules set forth in Revised Sections 9-406, 9-407, 9-408 and 9-409. The choice of law provisions in Part 3 of Revised Article 9 relate only to issues of perfection and priority. Moreover, in the case of a transfer of the debtor's rights in collateral, the Official Comment to Revised Section 9-401 notes that it would be inappropriate, in any event, for the parties to a security agreement to be able to determine the law applicable to the debtor's rights in collateral consisting of an independent obligation with a third party.

The Official Comment to Revised Section 9-401(b) makes clear that, even though the term "debtor" in Revised Section 9-401(b) technically includes a seller of accounts, chattel paper, payment intangibles or promissory notes, Revised Section 9-401(b) does not undercut the new rule in Revised Section 9-318. Revised Section 9-318 provides that if a debtor sells an account, chattel paper, payment intangible or promissory note, and if the purchaser fails to perfect its interest, the debtor could convey rights and title to a subsequent purchaser. This risk is not as serious as it may appear, since sales of payment intangibles and promissory notes are perfected upon attachment.

3. Section 9-402: Secured Party Not Obligated On Contract of Debtor or In Tort

Revised Section 9-402 provides that a secured party is not liable in contract or tort for the debtor's acts or omissions merely by having a security interest or agricultural lien in collateral or by giving the debtor authority to dispose of or use collateral. The only material change from Current Section 9-317 is the inclusion of agricultural liens.

4. Section 9-403: Agreement Not to Assert Defenses Against Assignee

Revised Section 9-403 is the first of a series of rules in Revised Part 4 that discusses the ability of an account debtor (defined in Revised Section 9-102(a)(3)) to assert claims that the account debtor may have in respect of an obligation against a third party assignee. Revised Section 9-403 is similar to its predecessor, Current Section 9-206, except that, because Revised Section 9-403 covers not only account debtors that have bought or leased goods but any account debtor obligated on accounts, chattel paper and general intangibles, Revised Section 9-403 applies to a broader scope of transactions. Because the definition of account debtor explicitly carves out persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper, only UCC Article 3 applies to the assertions of claims and defenses associated with negotiable instruments.

Revised Section 9-403(b) addresses the circumstance in which the account debtor has agreed with the assignor in advance not to assert claims against an assignee that the

account debtor may have against the assignor. Revised Section 9-403(b) allows an assignee to benefit from this promise as long as the assignee has taken the assignment: (i) for value, (ii) in good faith, (iii) without notice of a claim of a property or possessory right to the assigned property and (iv) without notice of a defense or claim in recoupment of a type that may be asserted against a person entitled to enforce a negotiable instrument under Revised Section 3-305(a). The intent of this section is to put the assignee in a position that is no better or worse than that of a holder in due course of a negotiable instrument under UCC Article 3. The term "value" in Revised Section 9-403(b), therefore, is stated to have the meaning specified in UCC Article 3, a result consistent with New York case law, which has referred to UCC Article 3's definition of value in determining whether an assignee can enforce an account debtor's agreement pursuant to Current Section 9-206. *See Apple Bank for Sav. v. Charles Offset Co.*, 149 A.D.2d 641, 642, 540 N.Y.S.2d 299, 300 (2d Dep't 1989); *see also Chase Manhattan Bank v. Finger Lakes Motors, Inc.*, 102 Misc.2d 48, 54, 423 N.Y.S.2d 128, 131 (Sup. Ct. Ontario County 1979). Defenses of the type assertable against a holder in due course under UCC Article 3 are assertable against the assignee. *See* Revised Section 9-403(c).

Because Revised Article 9 assumes adoption of Revised Article 3, the cross-references to UCC Article 3 in Revised Section 9-403 will have to be changed unless New York adopts Revised Article 3 prior to the effective date of Revised Article 9. The reference in Revised Section 9-403(a) to "Section 3-303(a)" for the definition of "value" should be changed to "Section 3-303," which is the provision in New York's version of UCC Article 3 ("New York's Article 3") where "value" is defined.

The reference in Revised Section 9-403(b)(4) to "Section 3-305(a)" of Revised Article 3 (which lists defenses to which the right to enforce a payment obligation on an instrument is subject) has no specific counterpart in New York's Article 3. Current Sections 3-305(2) and 3-306 of New York's Article 3 are Revised Section 3-305(a)'s predecessors but differ enough that they cannot simply be cross-referenced. Accordingly, the text of Revised Section 9-403(b)(4) should be deleted in its entirety and the full text of subsections (a)(1), (a)(2) and (a)(3) of Revised Section 3-305 should be substituted.

The reference in Revised Section 9-403(c) to "Section 3-305(b)" of Revised Article 3 (which describes the defenses that can be raised against a holder in due course) will need to be changed as well. The simplest approach would be to cross-reference the portion of the text of Revised Section 3-305(a) that will be added to Revised Section 9-403(b)(4) that will list the defenses against a holder in due course.

Revised Section 9-403 is subject to any other law that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. *See* Revised Section 9-403(e). Current Section 9-206 had a similar provision that referred to laws, statutes and decisions, thereby inadvertently excluding administrative regulations. Revised Section 9-403(d) renders ineffective any waiver of defenses made by a consumer account debtor where the record relating to a sale or lease of goods or services on credit was required, but failed, to include the notice required under Federal Trade Commission ("FTC") Rule 433, 16 C.F.R. Section 433.2 (1999) (an "FTC Notice") stating that the consumer account debtor retains all claims and defenses against an assignee that the consumer account debtor could have asserted against the original seller or lessor of the goods and services.

Revised Section 9-403 eliminates as unnecessary the rule in Current Section 9-206(2) that stated that Article 2 of the UCC governed issues relating to warranties and

the sale of goods where the seller retained a purchase-money security interest in the goods. Revised Article 9 does not regulate the terms of any account, chattel paper, or general intangible that is assigned unless the account, chattel paper, or general intangible itself creates a security interest. Accordingly, no conflict with UCC Article 2 needs to be resolved.

Except in the case of a consumer transaction requiring an FTC Notice, Revised Section 9-403 does not displace other law that would give effect to an agreement by an account debtor not to assert a claim or defense against an assignee. Nor does Revised Section 9-403 displace other law that would give effect to a "hell-or-high-water" clause pursuant to which an account debtor undertakes to pay an assignor, notwithstanding any defenses the account debtor may have, and would give an assignee the right to enforce such an undertaking. An assignee's right to claim estoppel or waiver against an account debtor is likewise retained.

5. Section 9-404: Rights Acquired by Assignee; Claims and Defenses Against Assignee

Revised Section 9-404 is very similar to Current Section 9-318(1). Unless an account debtor has made an enforceable agreement not to assert defenses or claims against an assignor or assignee, the rights of an assignee are subject to all terms of the agreement between the account debtor and the assignor and any defenses and claims in recoupment arising from the transaction to which the agreement relates. Until the account debtor receives notice of an assignment authenticated by either the assignor or the assignee, the assignee's rights are also subject to any other defense or claim that the account debtor has against the assignor. *See Bank Leumi Trust Co. of N.Y. v. Collins Sales Serv., Inc.*, 47 N.Y.2d 888, 889, 393 N.E.2d 468,469, 419 N.Y.S.2d 474, 475 (1979) (finding that an agreement between an account debtor and an assignor entitling the account debtor to set off payments that the account debtor owed the assignor against amounts owed by the assignor to the account debtor's affiliate did not give rise to the type of claim or defense that an account debtor could assert under Current Section 9-318(1)(b) against an assignee because the account debtor had not assumed its affiliate's claims against the assignor, and thus had no direct claim or defense against the assignor).

Revised Section 9-404(b) clarifies that any claim or defense that can be asserted by an account debtor (including any defense based on a breach of contract by the assignor) may only be used to reduce the amount owing to the assignee and not to claim affirmative recovery above and beyond the amount owed to the assignee. This is consistent with the limited New York law on the subject. *See James Talcott, Inc. v. M. Lowenstein & Sons, Inc.*, 39 A.D.2d 846, 847, 333 N.Y.S.2d 1, 2-3 (1st Dep't 1972) ("The factor stands in the seller's shoes not alone to press its assigned claim, but to be held amenable to defenses and cross-claims in respect thereof, but only to the extent of the dollar amount of the assignment, and, to that limit, but not beyond it, these defenses and cross-claims may properly be asserted . . . ."), *appeal granted*, 31 N.Y.2d 647, 294 N.E.2d 208, 341 N.Y.S.2d 1027, *aff'd*, 33 N.Y.2d 924, 309 N.E.2d 124, 353 N.Y.S.2d 721 (1973). *See also Ford Motor Credit Co. v. Sofia*, 147 Misc.2d 651, 654, 559 N.Y.S.2d 109, 111-12 (Civ. Ct. Kings County 1990) ("[A] defendant may interpose [a claim related to the transaction out of which the assignment arose] against the assignee *to the extent of an offset*" (emphasis added)), *aff'd as modified*, 151 Misc.2d 567, 581 N.Y.S.2d 520 (Sup. Ct. App. Term 1992).

Revised Section 9-404 does not apply to assignments of health-care-insurance

receivables. Like Revised Section 9-403(e), Revised Section 9-404 is subject to any other law that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

Revised Section 9-404(d) provides that even if the record documenting a transaction entered into by a consumer account debtor was required but failed to include an FTC notice, the consumer account debtor is limited in seeking affirmative recovery against an assignee to the same extent as if the record had contained the FTC Notice.

6. Section 9-405: Modification of Assigned Contract

Revised Section 9-405 provides that good-faith modifications of assigned contracts are binding against an assignee to the extent that (i) the right to payment has not been fully earned or (ii) the right to payment has been earned but notification of the assignment has not yet been given to the account debtor. Current Section 9-318(2) did not permit modifications of fully-performed contracts, whether or not notification of the assignment had been given to the account debtor. Because modifications must be made in good faith in order to be effective, assignees will be protected even with this expansion of the right to modify a contract. Moreover, the assignee is given the rights of the assignor under the modified contract. Revised Section 9-405(a) also permits the assignee to specify in its agreement with the assignor that a modification of the contract with the account debtor will be considered a breach of the assignor's agreement with the assignee, thus allowing the assignee the ability to protect itself contractually.

New York's Current Section 9-318(2) not only required a modification to be in good faith but also in accordance with reasonable commercial standards and without material adverse effect upon the assignee's rights under, or the assignor's ability to perform, the contract. The new definition of "good faith" in Revised Section 9-102(43) subsumes the requirement that reasonable commercial standards of fair dealing be observed. As a result, the standard of commercial reasonableness remains applicable in this context.

The requirement that the modification not have a material adverse effect was, however, a New York modification to the uniform version of Current Section 9-318(2) and has not been included in Revised Section 9-405. At the time New York added the requirement, the Permanent Editorial Board for the Uniform Commercial Code disapproved the change on the ground that it "is necessarily implied from the applicable requirements of good faith and observance of reasonable commercial standards." *See* Report No. 2 of the Permanent Editorial Board for the Uniform Commercial Code 225 (1964). As there have been no published New York cases relying on this additional language and in light of the benefit of achieving a uniform national text of Revised Section 9-405, it is recommended that the uniform version of Revised Section 9-405 (*i.e.,* without the "material adverse effect" language) be adopted.

Like Revised Sections 9-403 and 9-404, Revised Section 9-405 is subject to any other law that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. Revised Section 9-405 does not apply to an assignment of a health-care insurance receivable.

7. 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 Note Ineffective

Revised Section 9-406(a), like Current Section 9-318(3), provides that an account debtor with respect to an account, chattel paper, or payment intangible may pay the assignor until, but not after, the account debtor receives an authenticated notification from the assignee or the assignor that the amount due or to become due has been assigned and that payment is to be made to the assignee.

As under Current Section 9-318(3), Revised Section 9-406(a) does not address the question of whether perfection of a security interest or other assignment by filing a financing statement constitutes "notice" to the account debtor or obligor of the security interest or other assignment. The law in the State of New York is, however, clear "[T]he prior law, which the Official Comment [to the UCC] advises has not been substantially changed, required actual notice to the account debtor. . . . [T]he terminology 'receives notification' [in Section 9-318(3)] makes no sense except as a reference to actual notice rather than constructive notice." *Chase Manhattan Bank v. State of N.Y.*, 40 N.Y.2d 590, 594, 357 N.E.2d 366, 369, 388 N.Y. S.2d 896, 899 (1976) (citing *Continental Purchasing Co., Inc. v. Van Raalte Co.*, 251 A.D. 151, 152, 295 N.Y.S. 867, 868 (4th Dep't 1937)). This view accords with the plain language of Section 1-201(26) of the UCC which states that a person "receives" a notification when it "comes to his attention . . . or is duly delivered." Accordingly, an assignee's filing of a financing statement does not constitute adequate notification to an account debtor.

Revised Section 9-406(b) renders ineffective any notification that does not reasonably identify the rights assigned. The Official Comment 3 to Revised Section 9-406 emphasizes that a reasonable identification does not need to identify the right to payment with specificity. Moreover, what is reasonable is not left to the account debtor's whim. An account debtor may not be safe in disregarding a notice that it considers inadequate if it does not first notify the assignee as to what it considers problematic in the notice. *See* Official Comment 4 to Revised Section 9-406; *King v. Tuxedo Enters., Inc.*, 975 F. Supp. 448, 453 (E.D.N.Y. 1997) (citing Official Comment to Current Section 9-318).

In the case of a payment intangible, if other law would give effect to an agreement between an account debtor and a seller of the payment intangible limiting the account debtor's duty to pay another person, the notice to the account debtor attempting to redirect payments is ineffective. Revised Section 9-406(b)(2). This is a new provision, which was added, according to the Official Comment 3 to Revised Section 9-406, to address the concern that payment intangibles are less fungible than accounts and chattel paper. The Official Comment 3 provides commercial bank loans as an example in which account debtors customarily expect that they will not be required to pay any person other than the financial institution that advanced funds unless the assigning parties comply with built-in assignment provisions.

Revised Section 9-406(b)(3) makes a notice of partial assignment ineffective at the option of an account debtor if the notice requires the account debtor to make less than the full amount of any installment or other periodic payment to the assignee. Article 9 has not previously addressed the validity of a notice of partial assignment to the account debtor requiring the account debtor to pay to an assignee a portion of the amount owed. The revision responds to the concern that a notification of several partial assignments requiring an account debtor to pay multiple assignees would be burdensome for the account debtor.

Revised Section 9-406(b)(3) allows the account debtor to treat the notification as effective or to ignore it and discharge the assigned obligation by paying the assignor. Revised Section 9-406(g) does not permit the account debtor to waive or vary this rule on partial assignments.

Revised Section 9-406(b)(3), permitting an account debtor to decline to make a payment in accordance with a notification requesting that less than full payment be made to the assignee, reflects a departure from existing New York law that does not leave such decisions in the control of the account debtor. It is well-settled New York law that the account debtor is bound to accept the assignment after receiving notice. *Brill v. Tuttle*, 81 N.Y. 454, 457 (1880); *Field v. City of N.Y.*, 6 N.Y. 179 (1852); *Terino v. LeClair*, 26 A.D.2d 28, 270 N.Y.S.2d 51 (4th Dept 1966); *Continental*, 251 A.D. at 152, 295 N.Y.S. at 867; 6A N.Y. Jur.2d of Agency Section 56 (1997 & Supp. 1999). Notice creates this obligation irrespective of the account debtor's acceptance of the partial assignment. *See Brill*, 81 N.Y. at 457; *Terino*, 26 A.D.2d at 31-32, 270 N.Y.S.2d at 55. The only limit on a partial assignee's right to compel payment by the account debtor is that all of the partial assignee's co-owners must be joined in the action, thereby protecting the account debtor from a multiplicity of suits. *Blake v. Weiden*, 291 N.Y. 134, 139-40, 51 N.E.2d 677, 680 (1943) (*cited in Hauser v. Western Group Nurseries, Inc.*, 767 F. Supp. 475, 485 n.17 (S.D.N.Y. 1991)); *see also Rosenberg v. Paul Tishman Co.*, 118 N.Y.S.2d 337, 338 (Sup. Ct. Kings County 1952); *New York Trust Co. v. Island Oil & Transp. Corp.*, 34 F.2d 649, 652 (2d Cir. 1929) (allowing partial assignments without the account debtor's consent, provided that an assignee can only bring an action against the account debtor when "all persons interested are joined"), *cert. denied*, 281 U.S. 724 (1930); 6A N.Y. Jur.2d of Agency Section 85 (1997 & Supp. 1999).

New York's joinder rule does address the greater litigation risk imposed on account debtors as a result of partial assignments; however, more than litigation risk motivated the drafters of Revised Section 9-406(b)(3) to make partial assignments ineffective at the account debtor's option. According to the Official Comment 3 to Revised Section 9-406, the drafters were also concerned about "unnecessarily burdensome" notifications to account debtors to pay multiple assignees. Making partial assignments ineffective at the account debtor's option allows the account debtor to control the administrative burdens associated with split assignments. This is a salutary change in New York law.

Assignors can, and do, reduce this burden by notifying account debtors to make payments into a single account, out of which assignees may withdraw the portion of the payments to which their assignment entitles them. Such arrangements would not run afoul of the language of Revised Section 9-406(b)(3), which makes ineffective all notifications to the account debtor "to make less than the full amount of any installment or other periodic payment to the assignee," since the account debtor would still be paying the full amount of its payment to a single payee — the bank account.

Like Current Section 9-318(3), Revised Section 9-406(c) permits an account debtor to request that an assignee furnish reasonable proof that the assignment has been made. Until compliance, the account debtor may continue to discharge its obligations by paying the assignor even if it has received a notice of assignment.

Revised Section 9-406(d) renders ineffective all contractual clauses that prohibit, restrict or require consent of the assignment or transfer of, or the creation, attachment, perfection or enforcement of a security interest in, an account, chattel paper, a payment intangible, or a promissory note. Except for the addition of chattel paper and promissory

notes, this was the rule in Current Section 9-318(4). Unlike Current Section 9-318(4), however, Revised Section 9-406(d) goes on to render ineffective any provision of any agreement that makes the creation, attachment, perfection or enforcement of a security interest a default or breach of such agreement. The Official Comment 5 to Revised Section 9-406(d) provides that the provision would not override clauses that do not directly restrict or prohibit or require consent for an assignment but that impair the assignment so long as the clauses have a plausible business purpose. The Official Comment to Revised Section 9-406(d) does not state, as did the Official Comment to Current Section 9-318(4), that anti-assignment clauses are ineffective whether or not the assignee took with full knowledge that the account debtor had sought to prohibit or restrict assignment. Official Comment 5 to Revised Section 9-406(d) does state, however, that "[s]ubsection (d) essentially follows former Section 9-318(4) . . ." *See also Aetna Cas. and Sur. Co. v. Bedford-Stuyvesant Restoration Constr. Corp.*, 90 A.D.2d 474, 475, 455 N.Y.S.2d 265, 266 (1st Dep't 1982) (allowed an assignment to take place notwithstanding an anti-assignment clause even where the assignee took with knowledge of the prohibition on assignment).

Revised Section 9-406(e) states specifically that the provisions of Revised Section 9-406(d) do not apply to the sale of a payment intangible or a promissory note. Revised Section 9-408 addresses assignability in those circumstances.

Revised Section 9-406(d) changes Current law to the extent that Current Section 9-318 made the anti-assignment clause ineffective but left open the possibility that a pledge could constitute a breach of contract. In what appears to be the only published case under Current Section 9-318 to have addressed the question directly, the court in *Hasse Contracting Co. v. KBK Fin., Inc.*, 956 P.2d 816, 821-22 (N.M. 1997), *cert. granted*, 953 P.2d 1087 (N.M. 1998), found that a violation of a non-assignment clause was a breach of contract, despite the ineffectiveness of such a clause under the UCC. The breach, however, was considered to be only technical, since it caused no damage. In a similar case, which arose under a state statute other than Article 9 that provided for free assignability, the court held that an assignment in violation of an anti-assignment clause did not constitute a breach of contract, in part because non-enforcement of the clause "does not infringe on any substantive right of" the obligor. *See First Nationwide Bank v. Florida Software Servs., Inc.*, 770 F. Supp. 1537, 164-1 (M.D. Fla. 1991) (*cited in Volges v. Resolution Trust Corp.*, 844 F. Supp. 921, 924 n.1 (E.D.N.Y. 1994)); *see also Carte Blanche (Singapore) Pte. Ltd. v. Carte Blanche Int'l. Ltd.*, 683 F. Supp. 945, 950 (S.D.N.Y. 1988) (affirming arbitrator's interpretation of California law guaranteeing free assignment of equity shares; arbitrator had concluded that anti-assignment clause was invalid, and that assignment was only a "technical," not "material," breach), *aff'd*, 888 F.2d 260 (2d Cir. 1989).

Where there is not a statutory prohibition on assignment restrictions, New York courts have held non-assignment clauses to be enforceable, and assignments in violation of such clauses have been found either to be void, in cases where the anti-assignment provision uses critical words such as "void," *see, e.g., Allhusen v. Caristo Constr. Corp.*, 303 N.Y. 446, 451-52, 103 N.E.2d 891, 893 (1952), or a breach of contract, in cases where the contract prohibits assignment but fails to include the requisite "void" language, *see, e.g., Macklowe v. 42nd Street Dev. Corp.*, 170 A.D.2d 388, 566 N.Y.S.2d 606, 606-07 (1st Dep't 1991); *Belge v. Aetna Cas. and Sur. Co.*, 39 A.D.2d 295, 297, 334 N.Y.S.2d 185, 187 (4th Dep't 1972); *Citibank v. Tele/Resources, Inc.*, 724 F.2d 266, 268 (2d Cir. 1983); *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 922-23 (2d Cir. 1977). Since there is no New York case clearly addressing whether an assignment effective under Current Section 9-318 could nevertheless clearly constitute a breach of contract, Revised

Section 9-406(d) does not appear to constitute a substantive revision of New York law.

Revised Section 9-406(d) would appear to conflict, as did Current Section 9-318(4), with Section 2-210(2) of the UCC, which provides that "[u]nless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party or increase materially the burden or risk imposed on performance." *See* New York Law Revision Commission Report (1955) (noting contradiction). There are no New York cases interpreting the interplay of Section 2-210(2) with Current Section 9-318(4). Revised Article 9 makes a conforming revision to Section 2-210(2) to change "unless otherwise agreed" to "[e]xcept as otherwise provided in Section 9-406, unless otherwise agreed." In this way, assignment of rights to payment for goods sold will be governed by Revised Article 9-406(d) whereas assignment of other rights relating to the purchase and sale of goods will continue to be governed by Section 2-210.

Revised Section 9-406(f) renders ineffective any rule of law, statute or regulation to the extent that it prohibits, restricts or requires consent of a government official or account debtor for the assignment or transfer of, or the creation, attachment, perfection or enforcement of a security interest in, an account or chattel paper. Revised Section 9-406(f) also renders ineffective any such rule of law, statute or regulation to the extent that it causes the creation, attachment, perfection or enforcement of a security interest in violation thereof to constitute a breach of contract or default under the underlying documentation relating to the account or chattel paper. *See infra*, discussion of Section 9-406).

Revised Section 9-406 is subject to any other law that establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes. Revised Section 9-406 does not apply to an assignment of a health-care-insurance receivable.

Revised Section 9-406, like its predecessor Current Section 9-318, does not purport to be a complete codification of the account debtor's rights and duties where an assignor has made multiple assignments. The Official Comment to Revised Section 9-406 explicitly notes that common law rules concerning the party that should prevail where the assignor has made multiple assignments of the same rights to several parties (B assigns the rights it has to A's performance to C_2, and C_3) are left in place. The common law will also continue to provide guidance regarding the account debtor's responsibilities where the same rights are assigned in succession (B assigns its rights to A's performance to C and C then assigns those rights to D).

Where an assignor has made multiple assignments of the same right and an assignee has notified the account debtor to make payment to the assignee, the common law rule, as set forth in the Restatement (Second) of Contracts Section 338(3) (1982) (the "Second Restatement"), appears to be that even if an assignee's rights are defective, the assignee has the same power that the assignor had to discharge the account debtor to the extent that the account debtor gave value or otherwise changed its position in good faith and without knowledge or reason to know of the defect in the assignee's rights. Accordingly, once the account debtor has received an authenticated and effective notice to pay an assignee under Revised Section 9-406(a) and satisfies the good faith and knowledge requirements of Section 338(3) of the Second Restatement, the account debtor would be discharged upon paying the assignee giving it notice, notwithstanding that another assignee claimed the same right to payment. *See State Factors Corp. v. Sales Factors Corp.*, 257 A.D. 101, 102-03, 12 N.Y.S.2d 12, 14 (1st Dep't 1939) (noting that the

account debtors in that case were protected from double liability because they made payment to the only assignee that gave notice to the account debtors and the account debtors did not appear to have been aware of the double assignment). If the account debtor knows of the conflicting claims, Section 339 of the Second Restatement on Contracts appears to provide that the account debtor is excused until it has a reasonable time to ascertain the validity of the adverse claims or to compel the claimants to interplead.

Where successive assignments (B assigns to C who assigns to D) have been made and one or more of the assignees have notified the account debtor, Revised Sections 9-406(a), (b) and (c) appear to work together to allow the account debtor to pay the most recent assignor that gave the account debtor notice until the account debtor has received a notice of a subsequent assignment reasonably identifying the rights assigned and until such assignor or its assignee furnishes reasonable proof that the subsequent assignment has been made. Revised Section 9-404, together with the common law, as restated in Section 336 of the Second Restatement, renders a successive assignee subject to defenses and claims accruing between the earlier assignee and the account debtor before the account debtor receives notice of the successive assignment. Accordingly, where A owes a debt of $100 to B, B assigns the debt to C and then C reassigns to D, the account debtor may assert defenses and set-off rights arising in respect of earlier assignees (*e.g.*, C) against successive assignees (*e.g.*, D), if the defense or set-off right arose before the account debtor receives notification of the assignment. For example, assume that C owed a debt of $30 to A and that the debt came due *before D notified A* that A's debt of $100 had been assigned from C to D. In this case, A could set off $30 against the $100 that A owed to C, and the set-off would also be valid against D. Thus, A would only owe $70 to D. *See* Second Restatement Section 336, cmt. e, illus. 8.

In the Uniform version, Revised Section 9-406(j) permits each adopting jurisdiction to list statutes, rules and regulations that are inconsistent with the provisions of Revised Section 9-406 and over which Revised Section 9-406 will be stated to prevail. Listed below are New York statutes, rules and regulations that contain anti-assignment provisions that appear to be inconsistent with Revised Section 9-406. It cannot be said with certainty that every relevant statute and regulation has been found. As previously discussed in Part IV.B, we suggest that the Legislature choose between the approach of the Uniform text and the approach suggested by the Enactment Guide. In either case, the Commission will have to make recommendations to the Legislature, suggesting with respect to each of the listed statutes that its prohibition on assignment be overridden or preserved.

New York Statutes and Rules of Law Affected by Revised Section 9-406

1. N.Y. Gen. Oblig. Law Section 13-101 (McKinney 1999) (A claim or demand can be transferred except where it is to recover damages for a personal injury, where it is founded upon a grant that is made void by another New York statute, where it is founded upon a claim to or interest in real property a grant of which would be void be statute, or where a transfer of the claim or demand is expressly forbidden by statute or would contravene public policy.)[19]

[19] The longstanding view in New York courts has been that an assignment by a public officer of his or her unearned salary is contrary to public policy and void. *See Bowery Nat. Bank of N.Y. v. Wilson,* 122 N.Y. 478, 482, 25 N.E. 855, 855 (1890) (citation omitted); *Bliss v. Lawrence*, 58 N.Y. 442 (1874); *Tenny v. Rockefeller*, 71 Misc.2d 643, 645, 336 N.Y.S.2d 312, 314 (Sup. Ct., Spec. Term, Albany County 1972). This prohibition, however, is not being overruled by Revised Section 9-406 because Revised Section 9-109(d)(3) provides that Article 9 does not apply to an assignment of a claim for wages, salary or other compensation of an employee.

2. N.Y. Agric. & Mkts. Law Section 190-a (Consol. 1998) (A seller may not transfer or assign any note or evidence of indebtedness issued in connection with a home food service plan sale prior to the expiration of a time period specified in the statute.)

3. N.Y. C.P.L.R. Section 1320 (Consol. 1998) (Levy upon personal property. A garnishee is prohibited from transferring or assigning personal property to any person other than the claiming agent (*i.e.*, a police officer or a sheriff, undersheriff, or deputy sheriff of a county within the City of New York), except upon the direction of the claiming agent or pursuant to a court order.)

4. N.Y. Lab. Law Section 595 (Consol. 1998) (Unemployment benefits may not be assigned, pledged, or encumbered and shall be free from all creditors' claims. This exemption may not be waived.)[20]

5. N.Y. Lien Law Section 16 (McKinney 1999) (No assignment of a contract for public improvement is valid unless such assignment is filed within the appropriate time period and with the head of the department or bureau having charge of such construction and with the financial officer of the public corporation charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement.)

6. N.Y. Jud. Law Section 488 (McKinney 1999) (A person may not take assignment of a claim with the intent and for the purpose of bringing a proceeding thereon. This is New York's champerty statute.)

7. N.Y. Ltd. Liab. Co. Law Section 602 (McKinney 1999) (Except as provided in the operating agreement, a membership interest in a limited liability company is assignable in whole or in part.)[21]

The only other New York case found in which a court has struck down an assignment on the grounds of public policy involved the transfer to a nontaxpayer of a taxpayer's action against, among others, a municipal board of education for illegally expending and wasting school district funds. *See Weimer v. Bd. of Educ. of Smithtown Cent. Sch. Dist. No. 1*, 52 N.Y.2d 148, 152, 418 N.E.2d 368, 370, 436 N.Y.S.2d 853, 855 (1981) In that case the effect of the assignment was to assign the right to bring the action and not simply the assignment of rights to receive payments from the judgment. The outright assignment of the cause of action would, at best, be an assignment of a general intangible, and not the assignment of an account, making the provisions permitting assignments of accounts contained in Revised Section 9-406 irrelevant. To the extent that the interest assigned in Weimer could be viewed as an account, the case would then raise the relationship between Revised Section 9-406's override of anti-assignment provisions created by law and the provisions of § 13-101 of General Obligations Law (the basis of the court's opinion) which do not validate a transfer that contravenes public policy.

[20] Revised Section 9-406 may not apply to this anti-assignment law if unemployment benefits are considered insurance or claims for wages and therefore not within the scope of Revised Article 9.

[21] We mention this provision and the one following relating to assignment of limited partnership interests because practitioners in other states preparing reports on Revised Article 9 have, at least initially, thought parallel provisions in their state's legislation to be relevant. We think these provisions can be deleted from the list because the agreements pursuant to which the limited partnership interest and membership interest are established (the operating agreements of a limited liability company or a limited partnership) are not agreements that have account debtors (defined in Revised Section 9-102(a)(3) as a "person obligated on an account, chattel paper, or general intangible"). These operating agreements are usually among the members of the limited liability company or among the limited partners and general partners of the limited partnership. Revised Section 9-406(f) and Official Comments 5 and 6 to Revised Section 9-406 seem to require that there be an account debtor with respect to any payment

8. N.Y. Partnership Law Section 121-702 (McKinney 1999) (Except as provided in the limited partnership agreement, a limited partnership interest is assignable in whole or in part.)

9. N.Y. State Fin. Law Section138 (McKinney 1999) (All state contracts made or awarded by the state shall include a clause prohibiting any contractor from assigning or transferring the contract to any other person, company or corporation, without the prior written consent of the department or official awarding the same. If the contract is assigned without such consent, the state shall revoke and annul it and be relieved of any liability and obligations under the contract, and the contractor and assignee shall forfeit and lose all moneys earned under the contract except as required to pay employees. The statute is not intended to hinder, prevent or affect an assignment for the benefit of creditors made pursuant to another statute.)[22]

10. N.Y. Gen. Mun. Law Section 109 (McKinney 1999) (All contracts made or awarded by an office, board or agency of a political subdivision or of any district therein shall include a clause prohibiting any contractor from assigning or transferring the contract to any other person or corporation without the prior written consent of the officer, board or agency awarding the same. If the contract is assigned without such consent, the officer, board or agency shall revoke and annul it and be relieved of any liability and obligations under the contract, and the contractor and assignee shall forfeit and lose all moneys earned under the contract except as required to pay employees. The statute is not intended to hinder, prevent or affect an assignment for the benefit of creditors made pursuant to another statute.)[23]

11. N.Y. Soc. Serv. Law Section 367-a (McKinney 1999 and Supp. 2000) (No assignment of the claim of any supplier of medical assistance shall be valid and enforceable against any social services district or the department, except as otherwise permitted or required by applicable federal and state provisions, including the regulations of the department.

12. N.Y. Pub. Auth. Law Section 1210(4) (McKinney 1999) (No assignment of any part of the salary or earnings by an officer or employee of New York City Transit Authority shall operate to prevent the payment of such salary or earnings directly to such officer or employee unless approved in writing by a person duly designated by the authority for such purpose.)[24]

13. N.Y. Personal Prop. Law Section 431 (McKinney 1992) (A door-to-door salesman shall not negotiate, sell, transfer or assign a note or other evidence of

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intangible the transfer of which may not be restricted by a rule of law. Accordingly, Revised Section 9-406 appears irrelevant to an assignment of a limited liability company membership interest or a limited partnership interest.

22 *See W.E. Peets Motors v. State*, 147 Misc. 218, 222, 263 N.Y.S. 762, 766 (Sup. Ct. Franklin County 1933) (providing that "upon examination" the consent referred to in the predecessor to this law was "to an assignment of the contract itself and not to an assignment of moneys due thereunder").

23 *See id*.

24 Revised Section 9-406 is not likely to apply to this anti-assignment law since assignment of a claim for wages is not within the scope of Revised Article 9.

indebtedness to a finance company or other third party within 5 days of the time the door-to-door sales contract was signed or the goods or services were purchased.)

14. N.Y. Work. Comp. Law Section 33 (McKinney 1993) (Worker's compensation shall not be assigned and shall be paid only to employees or their dependents, except as provided in the same article.)[25]

15. N.Y. Work. Comp. Law Section 218 (McKinney 1994) (Disability benefits payable under state compensation law shall not be assigned, except as provided in the same article.)

16. N.Y. Work. Comp. Law Section 313 (McKinney 1994) (Worker's compensation to civil defense volunteers shall not be assignable.

17. N.Y. Retire. and Soc. Sec. Section 110 (McKinney 1999) (The rights of a person to a pension or other allowance or right under the state employees' retirement plan shall be unassignable except as otherwise specifically provided elsewhere in same chapter.)[26]

18. N.Y. Exec. Law Section 632 (McKinney 1990) (A crime victim compensation award of New York's Crime Victims Board cannot be "subject to execution or attachment other than for expenses resulting from the injury which is the basis for the claim.")

19. 21 N.Y.C.R.R. Section 2803.11 (No right to a lottery prize is assignable unless it is to a deceased prize winner's estate or it is made pursuant to a judicial order.)

20. Section 317 of the Restatement (Second) or Contracts (1982) (A contractual right cannot be assigned if it would materially change the obligor's duties, materially increases the obligor's risk, materially impair the obligor's chance of obtaining return performance or materially reduce the contract's value to the obligor. *See also Cedar Brook Serv. Station, Inc. v. Chevron U.S.A., Inc.*, 746 F. Supp. 278 (E.D.N.Y. 1990), *aff'd*, 930 F.2d 908 (2d Cir.), *cert. denied*, 502 U.S. 819 (1991); *Penn. Exch. Bank v. Max Lasko, Doing Bus. As 125th St. Ferry Auto Sales Co.*, 4 A.D.2d 206, 208, 163 N.Y.S.2d 864, 866 (1st Dep't 1957).)[27]

8. Section 9-407: Restrictions on Creation or Enforcement of Security Interest in Leasehold Interest or in Lessor's Residual Interest

Revised Section 9-407(a)(1) renders ineffective a term in a lease agreement to the extent that it prohibits, restricts or requires consent of a party for the creation, attachment, perfection or enforcement of a security interest in an interest under the lease contract or

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[25] Revised Section 9-406 may not apply to this and other anti-assignment provisions of the workers' compensation law if worker's compensation benefits are considered insurance or claims for wages and therefore not within the scope of Revised Article 9.

[26] Revised Section 9-406 may not apply to this anti-assignment law if the pension or retirement plan is considered insurance and therefore not within the scope of Revised Article 9.

[27] Note that Revised Section 9-406(b)(3) will protect account debtors from the potential burden posed by partial assignments.

in the lessor's residual interest in the goods. Revised Section 9−407(a)(2) also provides that such a lease term is ineffective to the extent that its violation would give rise to a default under the lease. Revised Section 9-407(a)(1) replaces Current Section 2A-303(3) and the provisions of Section 2A-303 have been renumbered accordingly.

Revised Section 9-407(b) contains two exceptions to these ineffectiveness provisions. A lessee may continue to be restricted from transferring its right of possession or use. Moreover, a term restricting delegation of material performance by either party to the lease is allowed to stand.

To coordinate with Revised Section 2A-303(4) (which is nearly identical to Current Section 2A-303(5)), Revised Section 9-407(c) provides, as its predecessor Current Section 2A-303(3) (which is being deleted) did, that the creation, attachment, perfection or enforcement of a security interest in the lessor's interest in the lease contract or in the lessor's residual rights in the goods is not to be considered a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duties of, or increases the burden or risk imposed on, the lessee under Revised Section 2A-303(4) unless, and only to the extent that, enforcement actually results in a delegation of material performance from the lessor. Under Revised Section 2A-303(4), as under Current Section 2A-303(5), a grant of a security interest causing such problems for the lessee (even without actual delegation of material performance upon enforcement) would have otherwise given rise to a claim for damage on the part of the lessee.

9. Section 9-408: Restrictions on Assignment of Promissory Notes, Health-Care-Insurance Receivables, and Certain Intangibles Ineffective

Revised Sections 9-408(a) and 9-408(c) render ineffective, to the extent set forth below, any term in a promissory note, general intangible (including a contract, permit, license or franchise), or agreement between an account debtor and a debtor that relates to a health-care-insurance receivable or any rule of law, statute or regulation, which prohibits, restricts, or requires consent for the assignment or transfer of, or creation, attachment, or perfection of a security interest in such promissory note, general intangible, or health-care-insurance receivable. The ineffectiveness of such a term or rule of law, statute or regulation is only, however, to the extent that the creation, attachment or perfection of the security interest would be impaired or would give rise to a default, claim, or remedy under the promissory note, general intangible or health-care-insurance receivable. Only sales of payment intangibles and promissory notes are covered by this section since pledges of such assets are covered by Revised Section 9-406. Revised Sections 9-408(a) and 9-408(c) do not override covenants that may affect an account debtor's ability to assign but are not terms that actually restrict or prohibit assignment, *e.g.*, confidentiality provisions in license agreements.

Revised Section 9-408(d) proceeds to protect an account debtor, such as a licensor, in respect of a general intangible, an account debtor in respect of a healthcare-insurance receivable, or a person obligated on a promissory note from the adverse effects arising from a security interest (which is defined in a conforming change made to Section 1-201(37) to include a sale of payment intangibles or promissory notes) now permitted under Revised Section 9-408. Accordingly, where the restriction rendered ineffective by Revised Section 9-408 would be effective under law other than Revised Article 9, Revised Section 9-408(d) provides that the creation, attachment or perfection of a security interest in a promissory note, healthcare-insurance receivable or general intangible is not enforceable against, and does not impose a duty or obligation (including any payment or

performance obligation to the secured party) on, the person obligated on the promissory note or the account debtor. Nor is the secured party entitled to use or assign the debtor's rights, to enforce its security interest or to use or have access to trade secrets and other confidential information of the account debtor or the person obligated on the promissory note.

Even though Revised Section 9-408 circumscribes the effects of assignment, to the extent that a secured creditor ascribes value to the collateral being assigned to it, a debtor's ability to obtain financing will be enhanced. In particular, even without the ability to foreclose, the secured party's interest in the payments arising from the general intangibles, health-care insurance receivables or promissory notes could be protected from the effects of Section 552 of the United States Bankruptcy Code because such payments could constitute proceeds of pre-petition collateral.

Thus, although Revised Section 9-408 nominally permits assignment, it circumscribes the effect of such a nominal assignment so drastically that the secured party cannot do anything with the collateral contrary to the wishes of the third party involved. Thus, for instance, Revised Section 9-408 would permit a security interest to be taken in a governmental permit (*e.g.*, a liquor license) notwithstanding that such permit is not assignable without the consent of the government. The secured party could not, however, exercise any of the rights under the permit (*e.g.*, it could not itself sell liquor) or have the power to foreclose and sell the permit to a third party. The secured party's rights in such a situation would be entirely passive. The only practical consequence of such a security interest is that if the holder of the permit went bankrupt and the permit was sold in the bankruptcy proceeding, the secured party would be entitled to the proceeds of sale, as proceeds of its collateral.

Revised Section 9-408(e) permits each adopting jurisdiction to list statutes, rules and regulations inconsistent with the provisions of Revised Section 9-408 over which Revised Section 9-408 will be stated to prevail. Listed below are New York statutes, rules and regulations that contain anti-assignment provisions that appear to be inconsistent with Revised Section 9-408. The Commission cannot say with certainty that every relevant statute and regulation has been found. As previously discussed in Part IV.B, the Commission recommends that Section 9-408(e) be rewritten to provide more generally that Revised Section 9-408 will prevail over any inconsistent provision of any existing or future statute, rule or regulation (including those set forth in the list below) unless such provision expressly refers to Section 9-408 and states that it prevails over Section 9-408 or unless such statute is specifically listed in Section 9-408(e) as being preserved from being overridden.

New York Statutes Affected by Revised Section 9-408

1. N.Y. Gen. Obl. Law Section13-101 (McKinney 1999) (A claim or demand can be transferred except where it is to recover damages for a personal injury, where it is founded upon a grant that is made void by another New York statute, where it is founded upon a claim to or interest in real property a grant of which would be void be statute, or where a transfer of the claim or demand is expressly forbidden by statute or would contravene public policy.)[28]

[28] The longstanding view in New York courts has been that an assignment by a public officer of his or her unearned salary is contrary to public policy and void. *See Bowery*, 122 N.Y. at 482, 25 N.E. at 855 (citations omitted); *Bliss*, 58 N.Y. 442; *Tenny*, 71 Misc. 2d at 645, 336 N.Y.S.2d at 314, This prohibition, however, is not being overruled by Revised Section 9-408 because Revised Section 9-

2. N.Y. Agric & Mkts. Law Section190-a (Consol. 1998) (A seller may not transfer or assign any note or evidence of indebtedness, issued in connection with a home food service plan sale, prior to the expiration of a time period specified in the statute.)

3. Alco. Bev. Cont. Section 111 (McKinney 1999) (A liquor license issued to any person for any licensed premises is not transferable to any other person or to any other premises or to any other part of the building containing the licensed premises except in the discretion of the authority.)

4. N.Y. Arts & Cult. Aff. Law Section 25.13 (McKinney 1999) (A license for ticket reselling is not to be transferred or assigned except by permission of the commissioner of licenses.)

5. N.Y. Gen. Bus. Law Section 32(7) (Consol. 1998) (A person transferring or assigning a peddlers license granted to veterans of the armed forces will be guilty of a misdemeanor.)

6. N.Y. Lab. Law Section 595 (Consol. 1998) (Unemployment benefits may not be assigned, pledged or encumbered and shall be free from all creditors' claims. This exemption may not be waived.)[29]

7. N.Y. Lien Law Section 16 (McKinney 1999) (No assignment of a contract for public improvement is valid unless such assignment is filed within the appropriate time period and with the head of the department or bureau having charge of such construction and with the financial officer of the public corporation charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement.)

8. N.Y. Pub. Health Law Section 575 (McKinney 1999) (A laboratory or blood bank permit becomes void if there is a change in the director, owner or location of the laboratory or blood bank. There is a 60-day grace period.)

9. N.Y. Pub. Serv. Law Section 70 (Consol. 1998) (No gas or electric corporation may transfer or lease its franchise to any other person without written consent of the commission.)

10. N.Y. Pub. Serv. Law Section 83 (Consol. 1998) (No steam corporation may transfer or lease its franchise to any other person without written consent of the commission.)

109(d)(3) provides that Article 9 does not apply to an assignment of a claim for wages, salary or other compensation of an employee.

The only other New York case that we have been able to find in which a court has struck down an assignment on the grounds of public policy involved the transfer to a nontaxpayer of a taxpayer's action against, among others, a municipal board of education for illegally expending and wasting school district funds. *See Weimer*, 52 N.Y.2d at 152, 418 N.E.2d at 370, 436 N.Y.S.2d at 855. This assignment of a claim does not appear to be outside the scope of Current Article 9 or Revised Article 9 and therefore such an assignment would now be permitted to stand under the new rules in Part 4 of Revised Article 9.

[29] Revised Section 9-408 may not apply to this anti-assignment law if unemployment benefits are considered insurance or claims for wages and therefore not within the scope of Revised Article 9.

11. N.Y. Pub. Serv. Law Section 89-h (Consol. 1998) (No water-works corporation may transfer or lease its franchise to any other person without written consent of the commission.)

12. N.Y. Transp. Law Section 128 (Consol. 1998) (No railroad franchise may be assigned, transferred or leased without the approval of the commissioner.)

13. N.Y. Ltd. Liab. Co. Law Section 602 (McKinney 1999) (Except as provided in the operating agreement, a membership interest in a limited liability company is assignable in whole or in part.)[30]

14. N.Y. Partnership Law Section 121-702 (McKinney 1999) (Except as provided in the limited partnership agreement, a limited partnership interest is assignable in whole or in part.)

15. N.Y. Jud. Law Section 488 (McKinney 1999) (A person may not take assignment of a claim with the intent and for the purpose of bringing a proceeding thereon. This is New York's champerty statute.)

16. N.Y. State Fin. Law Section 138 (McKinney 1999) (All state contracts made or awarded by the state shall include a clause prohibiting any contractor from assigning or transferring the contract to any other person, company or corporation without the prior written consent of the department or official awarding the same. If the contract is assigned without such consent, the state shall revoke and annul it and be relieved of any liability and obligations under the contract, and the contractor and assignee shall forfeit and lose all moneys earned under the contract except as required to pay employees. The statute is not intended to hinder, prevent, or affect an assignment for the benefit of creditors made pursuant to another statute.)[31]

17. N.Y. Gen. Mun. Law Section 109 (McKinney 1999) (All contracts made or awarded by an office, board or agency of a political subdivision or of any district therein shall include a clause prohibiting any contractor from assigning or transferring the contract to any other person or corporation without the prior written consent of the office, board or agency awarding the same. If the contract is assigned without such consent, the officer, board or agency shall revoke and annul it and be relieved of any liability and obligations under the contract, and the contractor and assignee shall forfeit and lose all moneys earned under the contract

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30 We mention this provision and the one following relating to assignment of limited partnership interests because practitioners in other states preparing reports on Revised Article 9 have, at least initially, thought parallel provisions in their state's legislation to be relevant. We think these provisions can be deleted from the list because the agreements pursuant to which the limited partnership interest and membership interest are established (the operating agreements of a limited liability company or a limited partnership) are not agreements that have account debtors (defined in Revised Section 9-102(3) as a "person obligated on an account, chattel paper, or general intangible"). These operating agreements are usually among the members of the limited liability company or among the limited partners and general partners of the limited partnership. Revised Section 9-408(c) and Official Comment 2 to Revised Section 9-408 seem to require that there be an account debtor with respect to any general intangible the transfer of which may not be restricted by a rule of law. Accordingly, Revised Section 9-408 appears irrelevant to an assignment of a limited liability company membership interest or a limited partnership interest.

31 *See W.E. Peets Motors v. State*, 147 Misc. 218, 222, 263 N.Y.S. 762, 766 (Sup. Ct. Franklin County 1933) (providing that "upon examination" the consent referred to in the predecessor to this law was "to an assignment of the contract itself and not to an assignment of moneys due thereunder").

except as required to pay employees. The statute is not intended to hinder, prevent, or affect an assignment for the benefit of creditors made pursuant to another statute.)[32]

18. N.Y. Gen. Bus. Law Section 394-c (McKinney 1996 and Supp. 2000) (Every contract for social referral service (any service for a fee providing matching of members of the opposite sex, by use of computer or any other means, for the purpose of dating and general social contact) shall provide that the seller will not, without the prior written consent of purchaser, sell, assign or otherwise transfer any information and material of a personal or private nature acquired from the purchaser directly or indirectly, including but not limited to, answers to tests and questionnaires, photographs or background information.)

19. N.Y. Gen. Bus. Law Section 408 (McKinney 1996 and Supp. 2000) (No license to exploit an appearance enhancement business (hair styling, esthetics, nail specialty, or cosmetology) shall be assignable or transferable except as provided in the same chapter (which requires, among other things, endorsement on face of license by the regulating department and separate application by purchaser within a specified period of time after the sale for an appearance enhancement business license).)

20. N.Y. Gen. Bus. Law Section 439 (McKinney 1996) (No barber shop license shall be assignable or transferable except as provided in the same chapter (which requires, among other things, endorsement on face of license by the regulating department and separate application by purchaser within a specified period of time after the sale for an barber shop license).)

21. N.Y. Gen. Bus. Law Section 176 (McKinney 1988) (An employment agency license shall not be valid for any person other than the person to whom it is issued and shall not be assigned or transferred without the consent of the commissioner.)

22. N.Y. Gen. Bus. Law Section 69-q (McKinney Supp. 2000) (No license to engage in the business of installing, servicing or maintaining security or fire alarm systems shall be assignable or transferable except as provided in the same chapter (which requires, among other things, endorsement on face of license by the regulating department and separate application by purchaser within a specified period of time after the sale for a license to install, service or maintain security or fire alarm systems).)

23. N.Y. Gen. Bus. Law Section 750-f (McKinney 1996) (No license to exploit a pet cemetery shall be assignable or transferable except as provided in the same chapter (which requires, among other things, endorsement on face of license by the regulating department and separate application by purchaser within a specified period of time after the sale for a license to operate a pet cemetery).)

24. N.Y. Transp. Law Sections 195, 192 (McKinney 1994) (Permits or certificates to operate as a common carrier of household goods by motor vehicle shall not be assigned, transferred or leased in any manner without prior approval of the commissioner and only if it is in the public interest to do so. A probationary certificate with respect to the same may not be assigned, transferred or leased in

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32 *See id.*

any manner.)

25. N.Y. Transp. Law Section 156 (McKinney 1994) (Passenger carrier certificates and permits shall not be assigned or transferred in any manner without prior approval of the commissioner and only if it is in the public interest to do so.)

26. N.Y. Transp. Law Section 177 (McKinney 1994) (Property carrier certificates and permits shall not be assigned, transferred or leased in any manner without prior approval of the commissioner.)

27. N.Y. Envtl. Conserv. Law Section 15-1737 (McKinney 1997) (No voluntary sale, assignment, or transfer of any water power production license or of the rights thereby granted shall be made without the written approval of the department.)

28. N.Y. Pub. Serv. Law Section 99 (McKinney 2000) (No franchise or any right to or under any franchise to own or operate a telegraph line or telephone line shall be assigned or transferred without approval by the commission.)

29. N.Y. Ltd. Liab. Cos. Law Section 1211 (McKinney 2000) (No member of a professional service limited liability company may sell or assign his, her or its membership interest in such company except to another professional eligible to become a member of such limited liability company.)

30. N.Y. Vol. Fire. Ben. Law Section 23 (McKinney 1988) (Volunteer firefighters' benefits shall not be assigned and shall be exempt from all claims of creditors and from levy, execution, attachment or other remedy, which exemption may not be waived. Benefits shall be paid only to volunteer firemen or their dependents, except as otherwise provided in same chapter.)

31. N.Y. Vol. Ambulance Work. Ben. Law Section 23 (McKinney 2000) (Volunteer ambulance workers' benefits shall not be assigned and shall be exempt from all claims of creditors and from levy, execution, attachment or other remedy, which exemption may not be waived. Benefits shall be paid only to volunteer ambulance workers or their dependents, except as otherwise provided in same chapter.)

32. N.Y. Soc. Servs. Law Section 137 (McKinney 1992) (All money and orders granted to persons as public assistance or care under this chapter shall be inalienable by any assignment or transfer and shall be exempt from levy and execution.)

33. N.Y. Soc. Servs. Law Section 137-a (McKinney 1992) (All wages of a person while he is in receipt of public assistance or care pursuant to provisions of same chapter, or while he would otherwise need such assistance or care, shall be exempt from assignment, but only so long as such public assistance or care shall continue or would be needed if the assignment were enforced.)

34. N.Y. Unconsolidated Laws Section 9704 (McKinney 1974) (Any pledge, mortgage, sale, assignment or transfer of any right, claim or interest in a World War II veteran's bonus shall be void.)

35. N.Y. C.P.L.R. Sections 5038 and 5048 (McKinney) (An assignment of or an

agreement to assign any right to periodic installments for future damages contained in a judgment in medical and dental malpractice actions or personal injury, injury to property and wrongful death actions is enforceable only as to amounts: (a) to secure payment of alimony, maintenance, or child support; (b) for the costs of health or dental care provided by the assignee; or (c) for expenses of litigation incurred in securing the judgment.)[33]

36. N.Y. Work. Comp. Law Section 33 (McKinney 1993) (Worker's compensation shall not be assigned and shall be paid only to employees or their dependents, except as provided in the same article.)[34]

37. N.Y. Work. Comp. Law Section 218 (McKinney 1994) (Disability benefits payable under state compensation law shall not be assigned, except as provided in the same article.)

38. N.Y. Work. Comp. Law Section 313 (McKinney 1994) (Worker's compensation to civil defense volunteers shall not be assignable.)

39. N.Y. Retire. and Soc. Sec. Section 110 (McKinney 1999) (The rights of a person to a pension or other allowance or right under the state employees' retirement plan shall be unassignable except as otherwise specifically provided elsewhere in same chapter.)[35]

40. N.Y. C.P.L.R. Section 1320 (Consol. 1998) (Levy upon personal property. A garnishee is prohibited from transferring or assigning personal property to any person other than the claiming agent (*i.e.*, a police officer, or a sheriff, undersheriff or deputy sheriff of a county within the City of New York), except upon the direction of the claiming agent or pursuant to a court order.)

41. N.Y. Banking Law Section 201-a (McKinney 1990) (A license to conduct the business of banking (as defined in Section 201) issued by the superintendent of banking to a foreign banking corporation (a banking institution with less than $500 million in assets and not organized in the United States) is not assignable or transferable.)

42. N.Y. Banking Law Section 221-e (McKinney 1990) (A license issued by the superintendent of banking to permit a foreign banking corporation to maintain a representative, acting on behalf of the foreign banking corporation, is not assignable or transferable.)

43. N.Y. Banking Law Section 343 & 344 (McKinney 1990 & Supp. 2000) (A

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[33] Revised Section 9-408 may not apply to this anti-assignment law since assignment of rights represented by a judgment are not within the scope of Revised Article 9.

[34] Revised Section 9-408 may not apply to this and other anti-assignment provisions of the workers' compensation law if worker's compensation benefits are considered insurance or claims for wages and therefore not within the scope of Revised Article 9.

[35] Revised Section 9-408 may not apply to this anti-assignment law if the pension or retirement plan is considered insurance and therefore not within the scope of Revised Article 9.

master or supplemental license issued by the superintendent of banking to permit a licensed lender to make "loans of money, credit, goods or things in action" is not transferable or assignable.)

44. N.Y. Banking Law Section 354 (McKinney Supp. 2000) (A licensed lender cannot take an assignment of unearned wages or other earnings unless the assignment is revocable by its terms at the will of the borrower or the assignment is a payroll deduction plan. "No assignment of wages or other earnings given to secure any loan hereunder shall be valid unless the amount of such loan is paid to the borrower simultaneously with its execution.")

45. N.Y. Banking Law Section 369(3) (McKinney 1990 & Supp. 2000) (A license issued by the superintendent of banking to a casher of checks to conduct the business of cashing checks, drafts or money orders is not transferable or assignable.)

46. N.Y. Banking Law Section 493(1) (McKinney 1990) (A license to conduct the business of sales finance issued by the superintendent of banking to a sales finance company (a company in the "business of purchasing or otherwise acquiring retail installment (*sic)* contracts, obligations, or credit agreements made by and between other parties, or any interest therein") is not transferable or assignable.)

47. N.Y. Banking Law Section 557 (McKinney 1990) (A license issued by the superintendent of banking to a premium finance agency to conduct the business of a premium finance agency, entering and/or acquiring premium finance agreements, is not transferable or assignable.)

48. N.Y. Banking Law Section 582 (McKinney 1990) (A license to conduct the business of budget planning (defined in N.Y. Gen. Bus. Law Section 455) issued by the superintendent of banking to a budget planner is not transferable or assignable.)

49. N.Y. Banking Law Section 593 (McKinney 1990) (A license to conduct the business of making mortgage loans issued by the superintendent of banking to a mortgage banker is not transferable or assignable.)

50. N.Y. Exec. Law Section 632 (McKinney 1990) (A crime victim compensation award of New York's Crime Victims Board cannot be "subject to execution or attachment other than for expenses resulting from the injury which is the basis for the claim.")

51. 21 N.Y. C.R.R. Section 2803.11 (No right to a lottery prize is assignable unless it is to a deceased prize winner's estate or it is made pursuant to a judicial order.)

10. Section 9-409: Restrictions on Assignment of Letter-of-Credit Rights Ineffective

Revised Section 9-409 limits the effectiveness of a term in a letter of credit or a rule of law, statute, regulation, custom or practice that attempts to impair the creation, attachment or perfection of a security interest in letter-of-credit rights or to provide that any such creation, attachment or perfection of a security interest would give rise to a default under a letter-of-credit right. Like Revised Section 9-408(d), however, Revised Section 9-409(b) provides that, where letter-of-credit law, custom, or practice would otherwise

make the anti-assignment provision effective, the security interest now permitted by 9-409(b) would not be enforceable against any applicant, issuer, nominated person or transferee beneficiary under a letter-of-credit. In this manner, Revised Section 9-409(b) ensures that letter-of-credit practice will be unimpeded by the provisions of Revised Section 9-409.

E. Section-by-Section Analysis of Part 5: Filing

1. Introduction

Part 5 of Revised Article 9 makes significant changes to the filing provisions of Current Article 9. In general, the changes of Part 5 are directed at accomplishing certain primary objectives. First, Revised Article 9 attempts to simplify the filing process by requiring filings in only one central filing office. Thus, Revised Article 9 eliminates the need for dual filings at both the central and local filing offices, as has been required under Current Article 9. Second, Revised Article 9 aims to make the filing provisions "medium-neutral" such that the statute does not require financing statements to be submitted by paper, but rather allows submission in any medium for which the filing office has the capability to receive and index the filed information, including electronically. Accomplishing this objective required, however, the elimination of the requirement under Current Article 9 that financing statements contain the signature of the debtor or, in some cases, the secured party. Third, the changes to the filing provisions are directed at more clearly defining the role of filing offices and removing discretion from filing officers. For instance, Revised Article 9 delineates an exclusive list of reasons for which a filing office may reject a financing statement and also provides specific requirements for retention of filing records. Finally, Part 5 aims to clarify issues concerning financing statements which were ambiguous under Current Article 9.

2. Section 9-501: Filing Office

Revised Section 9-501 begins the filing rules in the same manner as Current Section 9-401: by indicating the proper filing offices in which to file to perfect security interests in personal property and fixtures when the law of the state governs perfection. Under the expanded scope of Revised Article 9, Revised Section 9-501 also addresses agricultural liens.

Under Current Section 9-401, to perfect a security interest by filing for most kinds of personal property collateral, filings were required to be made in the Department of State, and, when the debtor's place of business in New York was in only one county, then also in the office of the filing officer of such county. For certain types of collateral, filing in the county of the debtor's residence was required, including for farming equipment, farm products, accounts and general intangibles arising from the sale of farm products by a farmer, and consumer goods. Where the collateral was crops, Current Section 9-401 also required filing in the office of the county containing the land on which the crops were grown. For other types of collateral viewed as tied closely to real estate, filings were to be made "in the office where a mortgage on the real estate concerned would be filed, recorded or registered." Such collateral included timber to be cut, minerals or the like (including oil and gas) a security interest in which attaches upon extraction, accounts resulting from the sale of minerals at the well head or mine head, fixtures or, pursuant to New York's non-uniform provision, a security interest in a cooperative ownership of real estate. Pursuant to Current Section 9-401(5), filings to perfect security interests against transmitting utilities need only be made in the Department of State, including to perfect an

interest in fixtures owned by the transmitting utility.

The general rule of Revised Section 9-501 is that filing is required in only one filing office as designated by the enacting jurisdiction. This rule applies to both perfection of a security interest and of an agricultural lien. The local filing rule concerning farm-related goods, farm-related intangible property and consumer goods is eliminated. Filing in the office where a mortgage on the related real property would be recorded continues to be required under Subsection (a)(1)(A) for perfecting a security interest in (1) timber to be cut and (2) "as-extracted collateral," now defined in Revised Section 9-102(a)(6) as oil, gas and other minerals for which a security interest attaches as the minerals are extracted and accounts arising out of the sale of the same at the wellhead or minehead where the debtor had an interest in such property before extraction. Under Revised Section 9-501(b), as under Current Section 9-401(5), filing to perfect a security interest against transmitting utilities, including fixtures of a transmitting utility, is in one office designated by the enacting jurisdiction.

Revised Section 9-501(a)(2) makes clear that, as in the case under Current Article 9, financing statement with respect to fixtures that is not to be filed as a "fixture filing" may be filed in the central filing office where one would file to perfect against all other goods. In addition, fixtures may perfected as under current law by a fixture filing, defined in Revised Section 9-102(40) as a filing covering goods that are or are to become fixtures and which complies with the additional requirements for fixture filings under Revised Section 9-502 (the same requirements as under Current Section 9-402(5)(b)(f)). Namely, a fixture filing must indicate that it covers fixtures, indicate that it is to be filed in the real property records, provide a description of the real property to which the collateral is related, must be filed in the office designated for the filing or recording of a mortgage on the related real property and, in certain cases provide the name of the record owner.

3. Section 9-502: Contents of Financing Statement; Record of Mortgage as Financing Statement; Time of Filing Financing Statement

Under Current Section 9-402(1), a financing statement is sufficient if it gives the names and addresses of the debtor and secured party, is signed by the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement covering crops, timber to be cut, or minerals or the like a security interest in which attaches upon extraction and accounts arising from the sale of the same at the wellhead or minehead, or a fixture filing must, pursuant to Current Section 9-402(5), show that it covers that type of collateral, recite that it is to be indexed in the real estate records, contain a description of the real estate sufficient for its identification and indicate the record owner of the real estate. Under Current Section 9-402(6), a mortgage was effective as a fixture filing if it met most of these same requirements.

Revised Section 9-502 alters these rules to a large degree. In general under Revised Section 9-502, a financing statement is sufficient if it provides the name of the debtor, the name of the secured party or the representative of the secured party (the sufficiency of which is further addressed in Revised Section 9-503), and indicates the collateral covered by the financing statement (the sufficiency of such indication is further addressed in Revised Section 9-504). Thus, certain requirements of current law have been eliminated. Instead of giving addresses for each party to the financing statement to which a third party may make inquiries, Revised Article 9 (in Section 9-210) provides a procedure under which the secured party is required to make disclosure to the debtor of certain information concerning the filing, although resort to the formalities of Revised Section 9-

210 will not be necessary when information is more forthcoming. The signature of the debtor is no longer required, but the filing must be "authorized" by the debtor, as outlined in Revised Sections 9-509 and 9-510.

Other than the requirements set forth above, however, Revised Section 9-502 keeps intact the substance of requirements for financing statements related directly to real property, including those covering as-extracted collateral, timber to be cut, and fixtures covered by fixture filings. Revised Section 9-502 has eliminated coverage of "crops growing or to be grown" from these real-property-related financing statements. The requirements for filing a record of a mortgage as a financing statement have also remained intact, with the difference from Current Article 9 being that such a filing may be effective against as-extracted collateral and timber to be cut as well as fixtures. The definition of "mortgage" is revised by Revised Section 9-102(a)(55), which covers consensual interests in real property, as before, but only those which "secure payment or performance of an obligation." Thus a mortgage is no longer defined by the documents that create or evidence the mortgage interest.

Revised Section 9-502 also retains the explicit statement of Current Section 9-402(1) that a financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

4. Section 9-503: Name of Debtor and Secured Party

Under Current Section 9-402(7), a debtor's name on a financing statement was sufficient if it showed the individual, partnership or corporate name of the debtor whether or not it showed other trade names or the names of partners. Revised Section 9-503 follows the same concept, but lays out the rules for providing a debtor's name more specifically. For instance, if the debtor is a "registered organization" (defined in Revised Section 9-102(a)(70) as an organization organized solely under the law of a single state or the United States for which a public record must be maintained showing it to have been organized), its name will be shown sufficiently only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization. If the debtor is a decedent's estate, the financing statement must show the name of the decedent and indicate that the debtor is an estate. If the debtor is a trust or trustee acting with respect to property held in trust, the financing statement must show the name of the trust as stated in its organic documents, or if there is no name, the name of the settlor with additional information sufficient to distinguish the trust from any other trust having the same settlor, and also indicate that the debtor is a trust or that the trustee is acting with respect to property held in trust. In the case of any other kind of debtor, the financing statement must show the individual or organizational name of the debtor, or if the debtor does not have a name, the names of the partners or other persons comprising the debtor.

Revised Section 9-503(b) retains the statement of Current Section 9-402(7) that a statement is not rendered ineffective by the absence of a trade name or other names of the debtor or the names of partners or other persons comprising the debtor (unless such names are required where there is no other name of the debtor). Revised Section 9-503(c) goes on to clarify, however, that showing a debtor's trade name alone on a financing statement does not sufficiently provide the name of the debtor, an issue which was in question under Current Article 9. Revised Section 9-503 further addresses other issues which were unclear under Current Article 9, namely that a failure to indicate the representative capacity of a secured party or a secured party's representative will not affect

the sufficiency of the financing statement and that a financing statement may provide the names of more than one debtor or secured party.

5. Section 9-504: Indication of Collateral

Current Section 9-402(1) called for a financing statement to contain a statement indicating "the types, or describing the items, of collateral." Under Revised Section 9-504, a financing statement sufficiently indicates the collateral if it meets the requirements of Revised Section 9-108, which addresses the sufficiency of the description of collateral in a security agreement so that the security interest will attach. Under the general rule of Revised Section 9-108, a description of personal or real property is sufficient, whether or not it is specific, if it "reasonably identifies" the property. That Section then outlines certain kinds of collateral descriptions which will constitute reasonable identification of collateral (by specific listing, category, most types of collateral defined by the UCC, quantity, computational or allocational formulas or procedures, and most other descriptions of the collateral which are "objectively determinable"), along with certain descriptions which will be insufficient. Although insufficient under Revised Section 9-108 for purposes of security agreements, Revised Section 9-504 permits a description of collateral on a financing statement to state that it covers "all assets" or "all personal property."

6. Section 9-505: Filing and Compliance with Other Statutes and Treaties for Consignments, Leases, Other Bailments, and Other Transactions

Current Section 9-408 permitted the use of terms in a financing statement other than "debtor" and "secured party," such as "consignor," "consignee," "lessor" and "lessee," while also stating that the filing of a financing statement which used such terms could not of itself be used as a factor in determining whether or not the transaction covered was "intended as security." However, if a transaction covered by such a financing statement was found to be a secured transaction, the use of terms other than "debtor" and "secured party" to designate the parties on the financing statement did not affect whether the security interest would be perfected.

Revised Section 9-505 continues this rule and adds specific references to other persons which may rely on the rule, namely bailors of goods, licensors, or a buyer of a "payment intangible" (as defined in Revised Section 9-102(a)(61)) or a promissory note. The Section also notes that a variety of words, including "bailor", "bailee," "licensor," "licensee," "owner," "registered owner," "buyer," "seller," or "words of similar import" may be used in addition to "consignor" and "lessor." As with Current Section 9-408, the filing of a financing statement using such terms will not be a factor in determining whether the collateral described "secures an obligation," but if it is so determined, the use of such terms will not prevent a party from having a perfected security interest if attachment has occurred. In addition, Revised Section 9-505 permits the use of such terms under Revised Section 9-311(b) in compliance with certain statutes, regulations and treaties when such compliance is equivalent to filing a financing statement.

7. Section 9-506: Effect of Errors or Omissions

Under Current Section 9-402(8), a "financing statement substantially complying with the requirements of Current Section 9-402 is effective even though it contains minor errors which are not seriously misleading." Revised Section 9-506 retains this rule and adds a reference to "omissions" as well as "errors." Section 9-506(b) provides, however, that failing to "sufficiently provide the name of the debtor in accordance with Section 9-503(a)" is

seriously misleading unless, under Subsection (c), "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" such a financing statement. In a case in which a new debtor has become bound by a security agreement, as addressed in Revised Section 9-508(b), Subsection (d) of Revised Section 9-506 specifies that the correct name of the debtor for purposes of Subsection (c) will be that of the new debtor.

8. Section 9-507: Effect of Certain Events on Effectiveness of Financing Statement

Under Current Section 9-402(7), when the debtor's "name, identity, or corporate structure" had changed to the extent that a filed financing statement became "seriously misleading," the filing would become ineffective to perfect a security interest in collateral acquired by the debtor more than four months after the change "unless a new appropriate financing statement was filed" within that time. The questions raised by this language were: (i) whether a financing statement which became seriously misleading for reasons other than the debtor's name, identity or corporate structure was then ineffective and (ii) whether an amendment to the existing filed financing statement was sufficient as a "new appropriate financing statement" or if a new initial financing statement was required, which might have the effect of dating the secured party's priority from the date of filing of the subsequent financing statement instead of from the date of the original statement.

Revised Section 9-507 provides a new general rule that 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" (which provides generally that although minor errors or omissions will not make a financing statement ineffective, failing to sufficiently provide the name of the debtor will). Thus, the rule of Current Section 9-402(7) continues to apply if the debtor has so changed its name that "a filed financing statement becomes seriously misleading under Section 9-506." In such a case, the filed financing statement remains effective to perfect a security interest in collateral acquired by the debtor before or within four months after the change, but will not be effective with respect to collateral acquired by the debtor after that time "unless an amendment which renders the financing statement not seriously misleading is filed within four months after the change."

In *Fleet Factors Corp, v. Bandolene Indus. Corp.* 86 N.Y.2d 519, 658 N.E.2d 202 (1995), the court noted that in a battle between a secured party taking a security interest after a name change by the debtor and the original secured party with a security interest in collateral arising prior to or within four months of the name change, the original secured party had acted in good faith because it had no knowledge of the name change by its debtor. The court in that case did not reach the question of whether good faith would have required filing a name change where the secured party knew of the name change. Revised Article 9 changes the definition of good faith from honesty in fact to honesty in fact and the observance of reasonable commercial standards of fair dealing. That change in definition would make a holding concerning good faith in the context of continued perfection after a debtor name changes a closer question. The issue of good faith is, however, fact-specific so any prediction concerning such a factual analysis is made with caution. The fact that in *Fleet* the original lender had no actual knowledge of the change in name would remain the basis of the claim that as a matter of law, the original secured party was in good faith. Whether a secured party that has knowledge of a change of name on these facts and reason to know (as did the original secured party in *Fleet*) that a subsequent secured party could become part of the financing pattern would acquire a duty to refile under the changed name cannot be determined from the text of Revised Article 9.

Under the last sentence of Current Section 9-402(7), the financing statement filed before the change would remain effective "with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer." This rule, which continues the perfected interest of the secured party even if the public record created by the financing statement is not corrected, continues in Revised Section 9-507 with clarification. The Current Section 9-402(7) reference to "transferred" is substituted in Revised Section 9-507(a) with "sold, exchanged, leased, licensed, or otherwise disposed of." Revised Section 9-507(a) also clarifies that the financing statement will remain effective only if a Revised Article 9 lien otherwise continue to exist on the property.

9. Section 9-508: Effectiveness of Financing Statement if New Debtor Becomes Bound by Security Agreement

Current Article 9 had no specific rule addressing whether a financing statement filed against an original debtor remained effective with respect to the after-acquired property of a new debtor which became bound by the original debtor's grant of security interest, such as in the case of a corporation which is the surviving entity in a merger with the original debtor by which the surviving corporation has succeeded to the assets and liabilities of the original debtor. Revised Section 9-508(a) states that such a financing statement will be "effective to perfect a security interest against collateral in which the new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral."

If, however, the difference in names between the original debtor and the new debtor cause the filed financing statement to be "seriously misleading under Section 9-506," that financing statement will not be effective to perfect a security interest in collateral acquired by the new debtor four months or more after the new debtor becomes bound under the security agreement (determined pursuant to the standards of Revised Section 9-203(d)). To perfect its security interest in property acquired by the new debtor after that time, a new "initial financing statement" (as opposed to an amendment to a financing statement) showing the name of the new debtor must be filed before the expiration of the four month period. Revised Section 9-508(c) states that these rules do not apply when a filed financing statement remains effective against the new debtor under Revised Section 9-507(a), which addresses existing property disposed of by the original debtor.

10. Section 9-509: Persons Entitled to File a Record

Current Section 9-402(1) called for a financing statement to be "signed by the debtor" in order to be sufficient. Current Section 9-402(2) outlined when a financing statement could be signed by the secured party instead of the debtor. Revised Article 9 has dispensed with the requirement of a signature on a financing statement, perhaps the most significant change of those aimed at making the rules governing the filing of financing statements medium-neutral. Instead, the filing of a financing statement must be "authorized" to be effective.

Under Revised Section 9-509, in the case of an initial financing statement, an amendment which adds collateral covered by the financing statement or an amendment which adds a debtor to the statement, a debtor must authorize the filing "in an authenticated record." "Record" is defined in Revised Section 9-102(a)(69) as "information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form." "Authenticate" is defined in Revised Section 9-

102(a)(7) as "to sign" or "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." In the case of an effective agricultural lien, the secured party may file a financing statement without the debtor's authorization if the financing statement covers only collateral in which the secured party has an agricultural lien. Revised Section 9-509(b) and (c) defines certain actions as constituting the debtor's authorization: the debtor becoming bound under a security agreement describing the collateral or the debtor acquiring property in which a security interest or agricultural lien has existed and continues.

The secured party's authorization is required in circumstances where the debtor's authorization is not required: the filing of amendments other than adding debtors or collateral and the filing of termination statements. Official Comment 8 to Revised Section 9-509 notes that a person may succeed an original secured party by operation of law and thereby become the party which has the power to authorize filings. Though not explicitly addressed, such a succession to the power to authorize filings should also apply to debtors. In the case in which a secured party has not filed a termination statement when required by Revised Section 9-513, the debtor may authorize the filing but must indicate that it has so authorized on the termination statement.

Finally, Revised Section 9-509 states that where there is more than one secured party of record on a financing statement, any one of them may authorize the filing of an amendment. The effect of such an amendment is limited, however, by Revised Section 9-510 to only the secured party which authorized the amendment and any other secured party of record which consented to the amendment.

Although the authorization for the filing of "correction statements" is not addressed in Revised Section 9-509, Revised Section 9-518 states who is entitled to make such a filings.

11. Section 9-510: Effectiveness of Filed Record

Revised Section 9-510 addresses additional requirements for a "filed record" to be effective. As will be seen later in this Part 5, the Section also operates to define certain situations in which financing statements will not be effective. Current Article 9 had no equivalent provision.

First, Revised Section 9-510 states that it will be effective only to the extent that it was filed by a person entitled to authorize it under Revised Section 9-509. Second, it states that "a record" authorized by one secured party of record does not affect the "financing statement" (which may, presumably, consist of a number of filed records) with respect to another secured party of record. Lastly, it reiterates the rule which has existed under Current Section 9-403(3) that a continuation statement may be filed only within the six-month period prior to its expiration, as further prescribed in Revised Article 9 by Section 9-515(d).

12. Section 9-511: Secured Party of Record

Revised Section 9-511 provides rules for determining who is a "secured party of record," a section for which there was no equivalent under Current Article 9. In general, the name of the secured party or the representative of the secured party which appears on the financing statement is the secured party of record. Where an assignee is named on the

initial financing statement, the assignee is the secured party of record. The secured party named on an amendment of a financing statement is added to the secured parties of record, as is the assignee named in an amendment of a financing statement in which a secured party of record assigns at least part of its "power to authorize an amendment" to such assignee under Revised Section 9-514. A secured party of record remains so until an amendment to the financing statement is filed in which their status as such "is deleted." Official Comment 3 to Revised Section 9-511 also notes the possibility of becoming a secured party of record under other law, such as the surviving entity in a merger with the original secured party or as the agent of the secured party of record.

13. Section 9-512: Amendment of Financing Statement

Under Current Section 9-402(4), a financing statement was amended by filing a writing signed by both the debtor and the secured party. Current Article 9 explicitly stated that the filing of an amendment did not extend the effective period of the financing statement. In addition, when an amendment added collateral to be covered by the financing statement, the financing statement was effective as to such collateral only from the filing date of the amendment.

Under Revised Section 9-512, when authorized, a person may file an amendment to a financing statement by identifying the file number of the initial financing statement and, if it was a financing statement filed or recorded in the office where a mortgage would have been recorded on the related real property, by complying with the requirements of Revised Section 9-502(b) for real-property-related filings. Alternatives in the uniform version of the statute allow a state to choose the information required for such later filings according to the requirements of its mortgage recording offices. An amendment may be filed to add or delete collateral, to continue or terminate a financing statement, or to otherwise amend the information provided in a financing statement. An amendment is ineffective under Revised Section 9-512(e), however, if it purports to delete all debtors or all secured parties without naming a debtor or secured party of record, respectively.

Revised Section 9-512 restates the rules of Current Section 9-402(4), which prevented an amendment, except for a continuation statement, from extending the effective period of a financing statement or a financing statement from being effective as to collateral added or a debtor added by an amendment before the filing date of the amendment.

14. Section 9-513: Termination Statement

Under Current Section 9-404, a secured party was required to file a termination statement, upon written demand by the debtor (or within one month in the case of consumer transactions), whenever there was "no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value." If the secured party failed to file a termination statement in such a situation within ten days of a demand by the debtor, such secured party was liable to the debtor for one hundred dollars and for any loss caused to the debtor by such failure. Current Section 9-404(2) went on to prescribe the actions required of the filing officer upon submission of a termination statement. Current Section 9-404 did not address a secured party's obligation to file a termination financing statement in the case of sales of accounts or chattel paper, also governed by Current Article 9, even if the underlying obligor of the accounts or chattel paper had discharged its payment obligations.

Revised Section 9-513 retains most of these rules with certain additions. It calls for the "secured party" to "cause the secured party of record" to file a termination statement, in the case of financing statements covering consumer goods, within one month after there is no longer an obligation secured or a commitment to create an obligation or the debtor did not authorize the filing of the initial financing statement, or within twenty days of receiving an authenticated demand from the debtor.

In non-consumer transactions, the secured party must similarly cause a termination statement to be filed within twenty days of an authenticated demand from the debtor if there is no obligation or possibility of an obligation remaining (unless the financing statement covers accounts or chattel paper that have been sold or goods that are the subject of a consignment), if the financing statement covers sold accounts or chattel paper for which the underlying obligor has discharged its obligation, if the financing statement covers goods on consignment no longer in the debtor's possession, or if the debtor did not authorize the filing of the initial financing statement.

Revised Section 9-513 states specifically that a financing statement ceases to be effective upon the filing of a termination statement, except as otherwise provided in Revised Section 9-510 (which limits the effectiveness of filed records to those filed by an authorized person, as outlined in Revised Section 9-509, and where a secured party must authorize a record, only to the secured party of record which authorized the record).

15. Section 9-514: Assignment of Powers of Secured Party of Record

Under Current Article 9, rules governing assignments of financing statements were found in Current Section 9-405, which addressed, as did Current Section 9-404 with respect to terminations, the requirements for the assignment filing as well as the duties of the filing officer when an assignment was filed. Under Current Section 9-405(2), a "secured party may assign of record all or a part of his/her rights under a financing statement by filing in the place where the original financing statement was filed a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record, the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned."

Revised Section 9-514 refers to an assignment filing as "an assignment of all of the secured party's power to authorize an amendment to the financing statement" instead of as the assignment of rights under the financing statement. Official Comment 2 refers to the fact that filing an assignment will make the assignee the "secured party of record."

Under Revised Section 9-514(a), "an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party." Subsection (b) calls for an amendment to effectuate a whole or partial assignment by identifying the filing number of the initial financing statement and providing the name of the assignor as well as the name and mailing address of the assignee. Thus Revised Section 9-514 has fewer requirements than Current Section 9-405(2). Revised Section 9-514(c) makes clear that when a mortgage has been filed as a fixture financing statement, an assignment must comply with other state law to effectuate an assignment of record of the mortgage, as has been required under Current Section 9-405(2).

16. Section 9-515: Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement

Current Section 9-403(2) specifies that a financing statement is effective for five years from the date of filing (except as provided in Current Section 9-403(6), no doubt meant in New York to refer to Subsection (7), which reflected an amendment of the statute concerning financing statements filed against transmitting utilities, limiting the effectiveness of such financing statements to five years) and that a mortgage effective as a fixture filing remained effective until the mortgage was released or satisfied of record or otherwise terminated under other law. If a continuation statement was not filed within the six-month period prior to the lapse of the financing statement, the security interest would be unperfected to the extent it was perfected by filing.

Current Section 9-403(9) in New York contains a non-uniform provision addressing interests in cooperatively-owned real estate, providing that financing statements covering such interests are effective until terminated.

Revised Section 9-515(a) and (d) preserves the five-year effectiveness of most financing statements and the six-month window for filing a continuation statement immediately before the expiration date. Revised Section 9-515(b) makes initial financing statements filed in connection with a "public-housing transaction" or "manufactured-home transaction" effective for 30 years if the statement indicates it is filed in connection with such a transaction. When a debtor is a transmitting utility and the financing statement so indicates, under Revised Section 9-515(f) the statement is effective until a termination statement is filed. Mortgages filed as fixture filings are effective for the same term as under Current Section 9-403. Revised Section 9-515(c) makes explicit, as did Current Section 9-403, that the lapse of a filed financing statement causes it to be ineffective with the result of the security interest becoming unperfected unless perfected in another manner.

The uniform version of Revised Section 9-515 does not have a specific provision addressing the effective term of financing statements covering the cooperative ownership of real estate. New York will likely wish to enact a non-uniform provision mirroring Current Section 9-403(9). *See* Part II of this Report.

17. Section 9-516: What Constitutes Filing; Effectiveness of Filing

Under Current Section 9-403(1), presentation of a financing statement for filing and tender of the filing fee, or acceptance by the filing officer, constituted filing. Revised Section 9-516(a) retains this rule for determining the filing of a "record" (referred to in Official Comment 2 as the filing of an initial financing statement and amendments of all kinds), substituting the language "communication of a record" for "presentation of a financing statement."

Revised Section 9-516(b) goes on, however, to list circumstances in which filing will not have occurred. The provision actually operates as an exclusive list of reasons for which a filing office may reject a record. A record will not be filed if: (i) it is not communicated by a method or medium authorized by the filing office, (ii) the full filing fee is not tendered, (iii) the record cannot be indexed because, in the case of an initial financing statement, there is no debtor name, or in the case of an amendment, there is no reference to the initial financing statement or the initial financing statement has lapsed; in the case of an

individual debtor, the record does not provide the individual's last name, or in the case of real-property-related filing, there is not a sufficient description of the real estate, (iv) there is no name and address of a secured party of record, (v) the record does not provide a mailing address for the debtor, indicate whether the debtor is an individual or an organization, or if it is an organization, does not provide the type of organization, the jurisdiction of organization or an organizational identification number; (vi) in the case of an assignment, does not provide a name and mailing address for the assignee or (vii) in the case of a continuation statement, the record is not filed within the six months preceding the expiration date. In addition, Revised Section 9-516(c) states that the information required by Subsection (b) is not provided if the record cannot be read or deciphered by the filing office. It also provides that a record which does not indicate if it is an amendment or identify an initial financing statement will be treated as an initial financing statement, and thus would need to meet the requirements of such to be accepted for filing.

Revised Section 9-516(d) addresses the effect of the wrongfully rejected financing statement. If a record is properly communicated with the appropriate filing fee but rejected for a reason not listed in Revised Section 9-516(b), such a record will be "effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files." Thus, though a filing has occurred when a record is wrongfully rejected that is effective against most creditors (it is for this purpose that Revised Section 9-520(b) requires a filing office to notify the filer of the date and time the record would have been filed, if accepted), the secured party will nevertheless typically want to refile with the filing office so that the record may be indexed in the filing offices files and will be provided to future searchers of those files.

18. Section 9-517: Effect of Indexing Errors

Revised Section 9-517 states that the failure of the filing office to index a record correctly will not affect the effectiveness of the financing statement. Current Article 9 did not explicitly address this issue. The Official Comment 2 explains that Revised Section 9-517 will the have the effect of imposing the "risk of filing-office error on those who search the files rather than on those who file," an effect which was implicit under Current Section 9-401. As a result, Revised Section 9-517 does not provide the protection afforded by Revised Section 9-516 to the collateral purchaser who relies on the absence of search results.

19. Section 9-518: Claim Concerning Inaccurate or Wrongfully Filed Record

Under Current Article 9, financing statements could be amended by the filing of an amendment complying with the requirements of Current Section 9-402(4). In reaction to the problem of "bogus" financing statement filings, Revised Section 9-518 provides for a person under whose name a financing statement has been indexed to file a "correction statement" if the person believes the record is inaccurate or was wrongfully filed. Official Comment 2 states that the provision is meant to afford a "nonjudicial means for a debtor to correct a financing statement or other record that was inaccurate or wrongfully filed" that was not available under Current Article 9.

Pursuant to Revised Section 9-518(b), a correction statement must identify the record to which it relates (Revised Section 9-518 provides alternative language for the information necessary to identify the correct record), indicate that it is a correction statement, provide the basis for the person's belief that the record is inaccurate or wrongfully filed and indicate the manner in which the person believes the record should be

amended.

Revised Section 9-518(c) states that a correction statement will not affect the effectiveness of an initial financing statement or other filed record. Thus, as stated in Official Comment 2, a correction statement will not permit an aggrieved person to change the legal effect of the public record.

It should be noted, however, that Revised Article 9 does provide a mechanism whereby an aggrieved debtor may efficiently terminate a bogus financing statement without recourse to expensive judicial proceedings. *See* Revised Sections 9-509(d), 9-510(c) and 9-513.

20. Section 9-519: Numbering, Maintaining, and Indexing Records; Communicating Information Provided in Records

Current Article 9 sprinkled rules outlining the duties of filing officers throughout Part 4. In general, Revised Section 9-519 requires a filing office to assign a unique number to a filed record, to maintain the record for public inspection, to index the records according to the debtor's name, to maintain a capability to retrieve a record by the name of the debtor and the file number, including all records filed subsequently to an initial financing statement, and to perform all of these requirements within two days of receiving the record for filing.

In addition, Subsection (b) requires that a filing number assigned to a record include a "digit" that is "mathematically derived from or related to the other digits of the file number" which will aid the filing office in determining whether a file number communicated by a record contains an error. The drafters of Revised Article 9 were informed that the generation of such numbers is mathematically possible and would allow filing officers to become immediately aware of filing number inaccuracies.

Revised Section 9-519 also adds the rule that a filing office may not dispose of a financing statement until one year after its effectiveness lapses with respect to all secured parties of record, a provision which had no equivalent under Current Article 9.

21. Section 9-520: Acceptance and Refusal to Accept Record

Revised Section 9-520 provides rules governing a filing office's rejection of a financing statement. Current Article 9 had no such rules. Revised Section 9-520 states that a record may be refused by a filing office only for a reason set forth in Revised Section 9-516(b), those reasons which prevent a record presented for filing from being effective. Subsection (d) also states that a record communicated for filing which has multiple debtors may be rejected for each debtor separately, thereby raising the possibility of partial rejection of a financing statement.

Revised Section 9-520(b) requires a filing office to communicate to the person that presented the record for filing of the fact of and reason for rejection. In addition, the filing office must provide the filer with the date and time the record would have been filed had the filing office accepted it. This communication must be made within two days after the filing office receives the record.

However, a financing statement which has been presented to the filing office consistent with Revised Section 9-516(a), and which was sufficient under Revised Section

9-502(a) and (b), will be effective despite that it was rejected by the filing office. This rule is also laid out in Revised Section 9-516(d). Revised Section 9-338, concerning the priority of a security interest or agricultural lien perfected by a filed financing statement containing incorrect information about the debtor, will apply to a financing statement providing information concerning a mailing address and certain other information for the debtor, which is incorrect at the time of filing.

22. Section 9-521: Uniform Form of Written Financing Statement and Amendment

Revised Section 9-521 provides a sample printed form of initial financing statement and form of an amendment to a financing statement which a filing office may not refuse to accept except for a reason under Revised Section 9-516(b). The Official Comment 2 explains that these forms are meant to provide a "safe harbor" to a filer, thus giving assurance that a financing statement cannot be rejected for the form or format in which it is presented if the form provided by Revised Section 9-521 is used.

23. Section 9-522: Maintenance and Destruction of Records

Under Current Section 9-403(3), unless prohibited by other statutes, a filing officer could remove a lapsed statement from the files and destroy it or inactivate the computerized index record immediately if the filing officer retained a microfilm, other photographic record or computerized image of the record. If not, records concerning the financing statement could be destroyed one year after the statement lapsed. The filing officer was obligated to maintain the financing statements in such a way that upon destroying old statements, continued statements would be retained.

Revised Section 9-522 requires the filing office to maintain a record of the information provided in a "filed financing statement for at least one year after the effectiveness of the financing statement has lapsed with respect to all secured parties of record." The record must be retrievable by using the name of the debtor and generally, depending upon alternatives to be chosen from the statute, the file number assigned to the initial financing statement. This rule was also set out in Revised Section 9-519(g), which addresses the indexing of currently effective financing statements. Unless prohibited by other law, Revised Section 9-522 also provides that a filing office may destroy immediately after filing any written record evidencing a financing statement, but if it does so, it must "maintain another record of the financing statement which complies with subsection (a)" of Revised Section 9-522. This reference appears to be the second sentence of subsection (a), which requires records to be retrievable by using the name of the debtor and the file number assigned to the initial financing statement. According to the Official Comment 2, these revisions to Current Article 9 were made in part to allow a filing office to maintain information in any medium.

24. Section 9-523: Information from Filing Office; Sale or License of Records

Under Current Section 9-407, the filing officer was obligated, upon request, to provide an acknowledgment copy of a financing statement, showing the file number and date of the filing, to the person who filed it. Also upon request, the filing officer was obligated to issue a certificate "showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor or naming a particular debtor at an address supplied by the person making such request and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein." Current

Article 9 imposed no requirements defining the time by which a filing officer was to comply with requests for searches or how current the search results must be against the filings recently received by the filing office.

Under Revised Section 9-523, acknowledgment copies must continue to be issued by the filing office to those persons filing written records who request such copies, either in the form of an image of the record showing the filing number and the date and time of filing or by noting the same upon a copy of the statement furnished to the filing office. For those who file a record by means other than a written record, the filing office "shall communicate" an acknowledgment that provides the information in the record, the number assigned to the record and the date and time of filing.

Filing offices must also continue to respond to search requests by communicating or otherwise making available, in any medium (though upon request it must provide a written record), information concerning any financing statement that designates a particular debtor, including if so requested, any lapsed statement for which the filing office continues to maintain records. The search must be performed no later than two business days after the filing office receives the request and must be current within three business days prior to receiving the request.

In addition, under Revised Section 9-523(f), "at least weekly the filing office or appropriate official or agency shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it pursuant to Article 9 in every medium from time to time available to the filing office."

25. Section 9-524: Delay by Filing Office

Current Article 9 does not impose specific time limits by which filing offices are required to perform their prescribed duties. Thus, there is no provision under current New York law outlining permissible reasons for which an office might be delayed in performing its duties. Because Revised Section 9-523 places requirements on the timeliness of a filing office's response to a search request as well as the maximum amount of lag time permitted for an office's records to be retrievable upon a search, Revised Section 9-524 addresses such excusable delays. Delays caused by "interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office" are excused if the "filing office exercise reasonable diligence under the circumstances."

26. Section 9-525: Fees

Current Article 9 sprinkles provisions concerning fees required for different types of filings throughout the Part 4 filing provisions. Revised Section 9-525 is designed, according to the Official Comment 2, to provide a uniform fee structure that will make it easier for filers to tender the correct fee, without actually designating the fee amounts. Revised Section 9-525 calls for setting out fees for different kinds of statements and for the different means by which statements are communicated to the filing office. Fees for search requests are also to be laid out in the statute (although there is no provision for setting fees to be charged by the filing office when providing searchers with copies of retrieved records). Fees concerning mortgages filed as fixtures filings or as another real estate-related filing are left to those rules that apply to the recording of a mortgage.

27. Section 9-526: Filing-Office Rules

Revised Section 9-526 calls for an appropriate government official or agency to adopt and publish rules to implement the provisions of Revised Article 9 which are consistent with Revised Article 9 and are in accordance with applicable state administrative procedure laws. Subsection (b) requires that efforts be made to keep the practices of different filing offices in harmony. Filing offices must consult with each other and with the Model Rules to be promulgated by the International Association of Corporate Administrators ("IACA") and must take into consideration the rules, practices and technology used by filing offices in other jurisdictions that enact Part 5 of Revised Article 9.

28. Section 9-527: Duty to Report

Revised Section 9-527 calls for the appropriate government official or agency to report annually to the state's governor and legislature on the operation of the filing office. The report must contain a statement of the extent to which the filing office rules are not in harmony with the rules of filing offices in other jurisdictions or with the most recent version of the IACA Model Rules and the reasons for the variations.

F. Section-by-Section Analysis of Part 6: Default

1. Section 9-601: Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles or Promissory Notes

Revised Section 9-601 provides the basic rights of debtors and obligors and the basic rights and duties of secured parties upon default. Revised Subsections 9-601(a) through (c), which set forth the rights of a secured party after default, are composed primarily of Current Section 9-501(1) with certain additional language.

Revised Subsection (a)(1) broadens the language of the corresponding Current Section 9-501(1) by allowing a secured party to enforce a claim, security interest or agricultural lien, rather than simply a security interest under Current Section 9-501(1).

Revised Subsection (b) provides that a secured party in possession or control of collateral has the rights and duties provided in Revised Section 9-207. The Official Comment to Revised Section 9-601 notes that revised Subsection (b) has been conformed to Revised Section 9-207, which now applies to secured creditors having control of collateral.

Revised Subsection (c) expressly allows a secured party to exercise the rights contained in Revised Subsections (a) and (b) cumulatively and simultaneously. Current Section 9-501(1) contained a reference only to the cumulative exercise of rights.

Revised Subsection (d), taken primarily from Current Section 9-501(2), outlines the rights of a debtor after default. Obligors are now granted the same rights. The rights and duties of debtors and obligors are limited by Revised Subsection (g) (discussed below) and Revised Section 9-605 which relieves a secured party from duties owed to a debtor or obligor where the secured party does not know about a debtor or obligor.

Revised Subsection (e), which modifies a portion of Current Section 9-501(5), sets the relate-back date of a secured party's lien where the secured party has reduced its claim to judgment. Revised Subsection (e) modifies the relate-back date by adding Revised Subsections (e)(2) and (e)(3). The new Revised Subsections make the relate-back date

the earlier of the date of perfection, the date a financing statement is filed or the date specified in a statute that created an agricultural lien on the collateral. The Official Comment notes that this provides a secured party who enforces a security interest by judicial process with the benefit of the "first-to-file-or-perfect" priority rule of Revised Section 9-322(a)(1).

Revised Subsection (f) follows Current Section 9-501(5). It provides that where a secured party sells collateral pursuant to an execution, the sale constitutes a foreclosure of the security interest by judicial procedure for purposes of the statute. Revised Subsection (f) further allows the secured party to purchase the collateral at the execution sale and to take the collateral free of any other Revised Article 9 requirements.

Revised Subsection (g) reflects the general rule that the enforcement provisions contained in Revised Part 6 do not apply to true consignors or to the purchasers of accounts, chattel paper, payment intangibles or promissory notes, although Revised Sections 9-607(c) and 9-615, in certain situations, affect the treatment of true consignors.

2. Section 9-602: Waiver and Variance of Rights and Duties

Revised Section 9-602, which revises Current Section 9-501(3), governs the ability of a debtor or obligor to waive or vary the requirements of certain sections of Revised Article 9. As the Official Comment 2 to Revised Section 9-602 indicates, "our legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties." To this end, Revised Section 9-602 increases the number of requirements that may not be waived or varied from the prior codification. The Official Comment 3 also notes that the ability of parties to settle or compromise claims for past conduct that may have violated their rights and duties under Revised Article 9 is not restricted, even if the settlement involves an express waiver. The Official Comment 4 also notes that Revised Section 9-602 resolves a question under Current Article 9 by expressly including obligors in this restriction.

3. Section 9-603: Agreement on Standards Concerning Rights and Duties

Revised Section 9-603 is virtually a restatement of Current Section 9-501(3). It allows the parties to a secured transaction to agree on the standards that will govern their actions, provided the standards are not "manifestly unreasonable."

Revised Subsection (b), which has no analogue in Current Part 5, provides that the duty of a secured party not to breach the peace when taking possession of collateral after default may not be altered by the agreement of the parties even if not "manifestly unreasonable."

4. Section 9-604: Procedures If Security Agreement Covers Real Property or Fixtures

Revised Section 9-604 essentially serves as a choice of law provision for secured parties after default. The choice depends on the nature of the collateral. Revised Section 9-604 encompasses Current Section 9-501(4) and also incorporates Current Section 9-313(8).

Revised Subsections (a)(1) and (a)(2) restate Current Section 9-501(4), permitting a secured party under a security agreement that secures both personal and real property

to proceed under Revised Part 6 as to the personal property without prejudicing rights and remedies as to the real property or to proceed as to both the personal and real property under real property law. The Official Comment 2 to Revised Section 9-604 notes that Revised Subsection (a) alters Current Section 9-501(4) to expressly provide that a secured party that exercises rights under Revised Part 6 with respect to personal property does not prejudice rights under real property law.

Revised Subsection (b) is new. It provides that if a security interest is in a fixture, the secured party may enforce its rights under Revised Article 9 or applicable real property law. The Official Comment 3 to Revised Section 9-604 notes that Revised Subsection (b) rejects cases holding that the sole remedy for a secured party with a security interest in fixtures is to remove the fixtures from the real property.

Revised Subsections (c) and (d), which apply where the collateral is a fixture, are a restatement of Current Section 9-313(8). Revised Subsection (c) allows the secured party with the senior priority security interest to remove the fixtures upon default. Revised Subsection (d) fixes liability of a secured party for damage caused when removing fixtures. Note that under Revised Subsection (d), the property holder may demand adequate assurance from the secured party of the secured party's ability to reimburse it for such damage before it permits the secured party to remove the collateral.

5. Section 9-605: Unknown Debtor or Secondary Obligor

Revised Section 9-605, which has no analogue in Current Part 5, provides that a secured party does not owe a duty to a debtor, secondary obligor, or secured party that has filed a financing statement against the debtor, if the secured party does not know about the debtor or obligor. The Official Comment 2 to Revised Section 9-605 notes that the Revised Section relieves a secured party from its duties under Revised Article 9 and from duties stemming from the secured party's status as such under other law. The Official Comment 2 also notes that Revised Section 9-605 should be read in conjunction with the exculpatory provisions of Revised Section 9-628.

6. Section 9-606: Time of Default for Agricultural Lien

Revised Section 9-606 is a new section which accommodates the specific inclusion of agricultural liens in Revised Part 6. Revised Section 9-606 sets the event of default for agricultural liens as the date the secured party is entitled to enforce the lien under the statute that created the lien.

7. Section 9-607: Collection and Enforcement by Secured Party

Revised Section 9-607 significantly broadens the scope of Current Sections 9-502(l) and (2).

Revised Subsection (a), which greatly expands Current Section 9-502(l), allows a secured party to collect payments and/or demand performance directly from an account debtor or other person obligated on collateral. The Official Comment 6 to Revised Section 9-607 notes that while a secured party is entitled to collect and enforce obligations included in its collateral, it does not have to become the owner of the collateral to do so. Revised Subsection (a)(1) broadens Current Section 9-502(l) by granting a secured party the right to demand payment/performance from any person obligated on the collateral. Under the Current formulation, a secured party can make this demand of an account debtor or an

obligor on an instrument, a narrower definition. Revised Subsection(a)(2) continues a secured party's right to take proceeds due the debtor. Revised Subsection(a)(3) is an important new provision allowing a secured party to step into the shoes of the debtor in enforcing rights against account debtors or obligors, including rights against an account debtor's collateral. Revised Subsections (a)(4) and (a)(5) provide a self-help remedy with regard to deposit accounts, allowing a secured party to apply funds in a deposit account over which it has control to the secured debt. This is in keeping with Revised Article 9's inclusion of deposit accounts as original collateral.

Revised Subsection (b) is a new provision that aids a secured party seeking to exercise a debtor's right to enforce a mortgage nonjudicially by becoming the assignee of record. To become the assignee of record, a secured party must record the security agreement and an affidavit indicating default in the real property records. The Official Comment 8 to Revised Section 9-607 indicates that Revised Subsection (b) does not entitle a secured party to foreclose on collateral unless the mortgagor were also in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.

Revised Subsection (c), which is little changed from Current Section 9-502(2), provides that where a secured creditor has recourse against the debtor, an account debtor or obligor, the secured creditor must proceed in a commercially reasonable manner. Failure to comply creates liability under Revised Section 9-625 or the potential inability to collect a deficiency under Revised Section 9-626.

Revised Subsection (d) continues from Current Section 9-502(2) a secured party's right to recover expenses, though it is expanded to expressly include legal expenses. The Official Comment 10 to Revised Section 9-607 states that reasonable attorney's fees under Revised Subsection (d) includes fees and expenses incurred in proceeding against account debtors or other third parties. Recovery of other legal fees depends on whether the debtor or obligor agreed to pay them.

Revised Subsection (e) expressly states that Revised Article 9 does not regulate the duties of an account debtor or other person obligated on collateral.

8. Section 9-608: Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus

Revised Section 9-608 sets the order of distribution of proceeds where a security interest or agricultural lien secures payment or performance of an obligation. The order of distribution echoes the rules for application of proceeds after disposition under Revised Section 9-615, which was adopted from Current Section 9-504(1).

Revised Subsection (a)(1) adopts the order of distribution of proceeds from Current Section 9-504(1). Revised Subsection (a)(2) adopts from Current Section 9-504(1) a secured party's right to request proof of interest from the holder of a subordinate security interest before the secured party is obligated to turn over proceeds of disposition. The Official Comment 5 notes, however, that the application of proceeds required by Revised Subsection (a) does not affect the priority of a security interest in collateral which is senior to the interest of the secured party enforcing collateral. The bonding requirement of Current Section 9-504(1) has been eliminated.

Revised Subsection (a)(3), which has no analogue in Current Article 9, provides that a secured party does not have to apply or pay over for application noncash proceeds of

collection and enforcement, unless it is commercially unreasonable not to do so. If a secured party chooses or is required to pay over such noncash proceeds, it must be done in a commercially reasonable manner. The Official Comment 4 to Revised Section 9-608 notes that "[t]he parties may provide for the method of application of noncash proceeds by agreement." Additionally, if the secured party chooses not to apply or pay over for application noncash proceeds under this Revised Section 9-608, such proceeds remain collateral subject to Revised Article 9.

Revised Subsection (a)(4) adopts from Current Section 9-502(2) the obligations of a secured party to pay over any surplus and the obligor to meet any deficiency. Revised Subsection (b) provides that where the underlying transaction is a sale of accounts, chattel paper, payment intangibles or promissory notes, the debtor does not receive a surplus and the obligor is not liable for a deficiency.

9. Section 9-609: Secured Party's Right to Take Possession After Default

Revised Section 9-609 is adopted from Current Section 9-503 with little variation of a secured party's right to take possession after default. The Official Comment 8 notes, however, that "a secured party's right to disable equipment and dispose of collateral on a debtor's premises are likely topics for agreement on standards as contemplated by Section 9-603."

10. Section 9-610: Disposition of Collateral After Default

Revised Section 9-610, composed primarily of language from Current Sections 9-504(1) and 9-504(3), governs the right of a secured party to dispose of collateral after default. The overarching theme of Revised Section 9-610 is that actions taken by a secured party in disposing of collateral must be commercially reasonable.

Revised Subsection (a) adds the right to dispose of collateral by license to rights adopted from Current Section 9-504(1).

Revised Subsection (b), taken from Current Section 9-504(3), requires that a secured party's disposition of collateral be commercially reasonable. The Official Comment 3 to Revised Section 9-610 notes that while the Revised Section does not provide a specific time period for disposition, time of disposition can be a factor in determining whether or not the disposition was commercially reasonable.

Revised Subsection (c) allows a secured party to purchase the collateral at either a public or private sale, depending on the type of collateral. The Revised Section does not alter the purchase rights of a secured party provided under Current Section 9-504(3).

Revised Subsections (d) through (f) provide new rules regarding warranties and like rights where a secured party disposes of collateral. Revised Subsection (d) provides that where a secured party disposes of collateral pursuant to contract, such disposition includes those warranties which operate according to non-Article 9 law. Revised Subsection (e) allows the secured party to disclaim or modify any warranties transferred under Revised Subsection (d) in a manner effective under other applicable law or by communicating to the purchaser a record containing an express disclaimer. The Official Comment 11 to Revised Section 9-610 indicates that an oral communication would not be sufficient. Revised Subsection (f) provides language sufficient to effectively communicate a record as required by Revised Subsection (e).

11. Section 9-611: Notification Before Disposition of Collateral

Revised Section 9-611 formalizes and significantly expands a secured party's notification obligation before disposition of collateral compared to Current Section 9-504(3). Notice sent by a secured party must be reasonable in the manner in which it was sent, its timeliness and its content.

Revised Subsection (a) defines "notification date."

Revised Subsection (b) states a secured party's obligation to provide reasonable notice of disposition of collateral. The Official Comment 5 to Revised Section 9-611 notes that both Revised Subsection (b) and Revised Subsection (c) require authenticated notice, rejecting the interpretation that oral notice was proper under Current Section 9-504(3).

Revised Subsection (c) lists the parties to which a secured party must send notification of disposition. The list is expanded from Current Section 9-504(3) to include secondary obligors and secured parties with security interests perfected by statute or the filing of a financing statement. The requirement that a secured party provide other secured parties with notice upon a disposition reflects a revision to the pre-1972 UCC enforcement provisions. The Official Comment 3 also notes that "Subsections (b) and (c) resolve an uncertainty under former Article 9 by providing that secondary obligors (sureties) are entitled to receive notification of an intended disposition of collateral, regardless of who created the security interest in the collateral."

Revised Subsection (d) expressly establishes that a secured party does not need to give notification of disposition of collateral that is perishable or subject to speedy decline in value. The Official Comment 7 to Revised Section 9-611 indicates that Current Section 9-504(3) could have been misinterpreted to require notice of disposition of perishable collateral to other secured parties.

Revised Subsection (e), which has no analogue in Current Part 5, is a safe harbor provision that provides a secured party protection from potential delays where the secured party acts in a commercially reasonable manner to determine if there are other parties to which it must provide notice of disposition. If a secured party complies with the requirements of Revised Subsection (e), the notice provided is per se reasonable.

12. Section 9-612: Timeliness of Notification Before Disposition of Collateral

Revised Section 9-612 which has no parallel in Current Part 5, creates a safe harbor period for a secured party in a commercial transaction to comply with the requirements of Revised Section 9-611. A secured party must provide proper notice at least 10 days prior to the earliest date of disposition provided in the notice to be per se reasonable. If the notice of disposition does not satisfy the safe harbor, the reasonableness of the notice is left to a trier of fact.

13. Section 9-613: Contents and Form of Notification Before Disposition of Collateral: General

Revised Section 9-613, a new provision only applicable to commercial transactions, continues Revised Article 9's concentration on providing increased detail regarding notification requirements and procedures.

Revised Subsection (1) describes the information a reasonable notice of disposition should contain.

Revised Subsection (2) requires that the issue of whether sufficient information was provided under Revised Subsection (1) be determined by a trier of fact.

Revised Subsection (3) provides that additional information or minor errors do not prevent a notice from meeting the Revised Subsection (1) requirements, while Revised Subsection (4) provides that no specific phrasing is required to constitute reasonable notice.

Revised Subsection (5) provides a form of a reasonable notice.

14. Section 9-614: Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transaction

Revised Section 9-614 establishes in consumer goods transactions what information a reasonable notice of disposition should contain. Consumers must be given more information than required in commercial transactions, including a description of any liability for a deficiency.

Revised Subsection (1) requires that a secured party provide the information required under Revised Section 9-613(1), and certain additional information regarding any deficiency owed by the debtor and phone numbers the debtor may use to investigate and potentially redeem the collateral. The Official Comment 2 to Revised Section 9-614 states that a notification that lacks any of the information set forth in Revised Subsection (1) is insufficient as a matter of law.

Revised Subsection (2) provides that no specific phrasing is required to constitute reasonable notice while Revised Subsection (3) provides a form of reasonable notice. Revised Subsections (4) and (5) contain special rules with respect to additional information and erroneous information contained in a notification in the form suggested in Revised Subsection (3). Revised Subsection (6) states that for notifications in a form other than that contained in Revised Subsection (3), non-Article 9 law applies.

15. Section 9-615: Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus

Revised Section 9-615 is adopted from Current Subsections 9-504(1) and (2), with certain additional language and new requirements.

Revised Subsection (a) retains the order of application of proceeds of Current Section 9-504(1) with little variation, other than new language dealing with consignors in Revised Subsections (a)(3)(B) requiring a subordinate secured creditor not be subordinate to a consignor in order to receive a distribution, and (a)(4) adding consignors to the bottom of the distribution list. The Official Comment 2 to Revised Section 9-615 notes that "[i]n as much as a consignor is the owner of the collateral, secured parties and lienholders whose interests are junior to the consignor's interest will not be entitled to any proceeds."

Revised Subsection (b) continues from Current Section 9-504(1)(c) a secured party's right to request reasonable proof of interest from the holder of a subordinate

security interest before the secured party is obligated to turn over proceeds of a disposition. Revised Subsection (b) eliminates the secured party's right to impose "reasonable" requirements on a subordinate interest holder and its right, set forth in a nonuniform New York addition to Section 9-504(1)(c), to demand a bond from a subordinate interest holder. As no clear reason exists for New York's nonuniformity to continue, this nonuniform provision is not being carried forward into New York's version of Revised Article 9.

Revised Subsection (c) is new to Revised Article 9. It provides that in the course of making distributions, a secured party does not have to distribute noncash proceeds from the disposition of property unless it is commercially unreasonable. If the secured party decides to or is required to pay over such noncash proceeds, it must be done in a reasonable manner.

Revised Subsections (d) and (e) have been expanded from Current Section 9-504(2) to integrate the new requirements of Revised Section 9-615. Revised Subsection (d) modifies the rule of Current Section 9-504(2), requiring that where a secured party completes the distribution of proceeds from a disposition of collateral securing payment or performance of an obligation, the secured party must account for and now pay to the debtor any surplus and the obligor (rather than the debtor as under Current Section 9-504(2)) is liable for the deficiency.

Revised Subsection (e) substantially alters Current Section 9-504(2). Under Current Section 9-504(2), if the underlying transaction is a sale of accounts or chattel paper, the secured party is obligated to pay any surplus of disposition to the debtor and the debtor is liable for any deficiency only if so provided in the security agreement. Revised Subsection (e) expands the definition of the underlying transaction to include payment intangibles and promissory notes, eliminates the control of the security agreement, and provides that where the secured party disposes of collateral in a sale of accounts, chattel paper, payment intangibles or promissory notes, the debtor is not entitled to the surplus and the obligor (rather than the debtor under Current Section 9-504(2)) is not liable for the deficiency.

Revised Subsection (f), which has no analogue in Current Article 9, provides a mechanism for calculating a proper surplus or deficiency if the secured party has disposed of the collateral to either itself, an affiliated party or a secondary obligor and has received "significantly" less than it would have in an arms-length transaction.

Revised Subsection (g), which is new, provides that a subordinate secured party that receives the cash proceeds of a disposition in good faith and without knowledge of like or senior interests takes the cash free and clear, without further obligation to the more senior interests.

16. Section 9-616: Explanation of Calculation of Surplus or Deficiency

Revised Section 9-616 is a new section obligating a secured party in a consumer goods transaction that is entitled to the receipt of a deficiency or required to pay a surplus to provide an 'explanation' to the debtor at such time as such secured party accounts for or pays a surplus or attempts to collect the deficiency. A secured party that fails to provide an explanation under this Revised Section is subject to a fine under Revised Section 9-625.

Revised Subsection (a) defines “explanation” and “request.”

Revised Subsection (b) governs a secured party’s explanation and notice requirements after disposition in a consumer-goods transaction. Revised Subsection (b)(1) requires the notice be provided no later than the time the secured party accounts for and pays a surplus or attempts in writing to collect a deficiency and within 14 days after receipt of a request. Revised Subsection (b)(2) requires a secured party to send the consumer obligor a record waiving the secured party’s right to a deficiency within 14 days after receipt of a request.

Revised Subsection (c) provides the information that must be contained in an explanation.

Revised Subsection (d) provides that no specific phrasing is required to constitute a reasonable explanation and permits “substantial compliance” with Revised Subsection (a) to be sufficient.

Revised Subsection (e) provides that, as long as a secured party has not waived its rights to a deficiency, a debtor is entitled to a free explanation every 6 months and additional explanations at a charge.

17. Section 9-617: Rights of Transferee of Collateral

Revised Section 9-617, taken primarily from Current Section 9-504(4), discusses the rights of a transferee that receives collateral pursuant to a disposition. Section 9-617 continues the general rule that a good faith disposition by a secured party discharges all subordinate interests in the collateral.

Revised Subsection (a) continues with little variation the rights of a transferee. The Official Comment 2 to Revised Section 9-617 indicates that Revised Subsection (a), combined with the expanded definition of ‘debtor’ in Revised Section 9-102, makes clear that the ownership interest of a party that purchased collateral subject to a security interest is terminated by a subsequent disposition under Revised Part 6.

Revised Subsection (b), which combines the requirements of Current Subsections 9-504(4)(a) and (b), creating a unitary standard that applies to transferees in public and private dispositions, discusses the rights of any transferee that takes collateral in good faith.

Revised Subsection (c), which does not have an analogue in Current Section 9-504, codifies the rights of a transferee that has not taken collateral in good faith.

18. Section 9-618: Rights and Duties of Certain Secondary Obligors

Revised Section 9-618, based on Current Section 9-504(5), provides that a secondary obligor assumes the rights and becomes obligated to perform the duties of a secured party where the secondary obligor receives certain transfers from the secured party.

Revised Subsection (a)(1) is new. It provides that the secondary obligor acquires rights and duties upon assignment to it of the secured obligation.

Revised Subsection (a)(2) creates a new requirement that a secondary obligor

agree to accept the rights and assume the duties of a secured party upon receipt of a transfer of collateral. Under Current Section 9-504(5), a secondary obligor was assumed to accept and assume such duties upon transfer.

Revised Subsection (a)(3) is unchanged.

Revised Subsection (b)(1) is virtually unchanged.

Revised Subsection (b)(2) adds new language providing that a secured party has no further obligations under Revised Article 9 once a transfer has been made to a secondary obligor.

19. Section 9-619: Transfer of Record or Legal Title

Revised Section 9-619 is a new section governing the mechanics of transferring title to a purchaser of collateral. The Official Comment 2 to Revised Section 9-619 notes that a potential buyer of collateral covered by a certificate of title or subject to a registration system (*i.e.* a copyright) typically requires as a condition of its purchase that the certificate or registry reflect its ownership.

Revised Subsection (a) defines "transfer statement."

Revised Subsection (b) provides the mechanism for obtaining record or legal title. The Official Comment 2 to Revised Section 9-619 indicates that the mechanism is intended for use primarily when a mechanism is not available under other law.

Revised Subsection (c) provides that the transfer of a record or legal title to collateral to a secured party, by itself, does not constitute a disposition and therefore does not relieve a secured party of its duties under Revised Article 9.

20. Section 9-620: Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral

Revised Section 9-620, provides the framework for determining whether a secured party may accept collateral in satisfaction of an obligation. Revised Section 9-620 is based on Current Section 9-505 with certain significant additions, the most notable being that, in a commercial transaction, a secured party may retain the collateral in partial satisfaction of the underlying debt. The Official Comment to Revised Section 9-620 notes that the Revised Section has been reorganized to reflect the belief that strict foreclosures should be encouraged and often produce better results than a disposition of collateral.

Revised Subsection (a), which must be read in conjunction with Revised Subsection (g), allows a secured party to accept collateral in full or partial satisfaction of the underlying debt in a commercial transaction or in full satisfaction of the underlying debt in a consumer transaction. Revised Subsections (a)(1) and (2) continue from Current Section 9-505(1) with little variation the ability of certain parties, including the debtor, to object to a secured party's acceptance of the collateral and to force a sale. Revised Subsection (a)(3) provides that in a consumer transaction, a secured party may not accept collateral in possession of the debtor, though it should be noted that under the prior codification, a secured party was required to be in possession before being able to accept collateral. This language has been eliminated.

Revised Subsection (b), which is new, governs when a purported acceptance of collateral is effective. Purported acceptance requires the satisfaction of Revised Subsection (a) and the secured party's consent in an authenticated record or the secured party having sent the proposal to the debtor. This ensures that a debtor cannot unilaterally cause acceptance of collateral (no "constructive" strict foreclosures).

Revised Subsection (c) adds significant new provisions dealing with consent to a partial acceptance. Revised Subsection (c)(1) provides that a debtor must consent to the partial acceptance of collateral in an authenticated record. Revised Subsection (c)(2) continues with little variation the requirement that a debtor consent to the acceptance of collateral in full satisfaction of the obligation that it secures. The debtor may send an authenticated notice agreeing to the acceptance or tacitly consents by failing to object to the acceptance within 20 days (reduced from 21).

Revised Subsection (d) sets forth the date by which a secured party must receive a notice of objection in order for it to be effective.

Revised Subsection (e) is taken with little variation from Current Section 9-505(1).

Revised Subsection (f), taken from Current Section 9-505(1), sets forth the date by which a secured party must dispose of property under Revised Subsection (e). Revised Subsection (f) retains the 90 day period from Current Section 9-505(1) and adds Revised Subsection (f)(2) allowing the extension of that period as agreed in an authenticated record by all secondary obligors.

21. Section 9-621: Notification of Proposal to Accept Collateral

Revised Section 9-621 replaces Current Section 9-505(2) in dealing with the notice that a secured party must provide in the event that it desires to accept collateral in satisfaction of an underlying debt. Revised Section 9-621 eliminates any distinction between the notice required to be given by a secured party in commercial and consumer transactions.

Revised Subsection (a) provides three classes of parties to which a secured party must send the proposal to accept the collateral. Revised Subsection (a) continues a secured party's obligation to notify parties from which it has received a notification of interest. Revised Subsection (a)(2), which is new, requires a secured party to send the proposal to other secured parties that have properly filed a financing statement. Revised Subsection (a)(3) is new and requires a secured party to provide notice to any secured party that held a security interest in the collateral perfected by compliance with a statute, regulation or treaty.

Revised Subsection (b) adds the requirement that where a secured party intends to keep the collateral in partial satisfaction of the underlying debt, the proposal be sent to any secondary obligor in addition to the parties required under Subsection (a).

22. Section 9-622: Effect of Acceptance of Collateral

Revised Section 9-622 codifies the rights of a secured party that has accepted collateral in satisfaction of the underlying debt.

Revised Subsection (a) establishes a secured party's rights on acceptance and

expresses the fundamental concept that upon acceptance the obligation is discharged to the extent consented to by the debtor.

Revised Subsection (b) provides that subordinate interests are discharged after acceptance regardless of whether they have received a proposal from the secured party. Revised Subsection (b) also provides a remedy under Section 9-625(b) if the secured party fails to send notice to a required party.

23. Section 9-623: Right to Redeem Collateral

Revised Section 9-623, which only slightly modifies Current Section 9-506, allows a debtor to redeem collateral prior to a secured party's disposing or contracting to dispose of the collateral.

Revised Subsection (a) continues the rights of certain parties to redeem collateral and extends the right to holders of nonconsensual liens and secondary obligors.

Revised Subsection (b) provides requirements for redemption without material change from Current Section 9-506.

Revised Subsection (c) adds Revised Subsections (c)(1) and (c)(3) to Revised Subsection (c)(2), which is taken from Current Section 9-506.

24. Section 9-624: Waiver

Revised Section 9-624, taken partially from Current Section 9-504(3), is a limited exception to Revised Section 9-602 which generally prohibits waiver by debtors and obligors. Revised Section 9-624 provides that the following rights may be waived by a debtor and/or secondary obligor by agreements entered into after a default: Revised Subsection (a) - the right to notification of disposition; Revised Subsection (b) - the right to require disposition of collateral under Revised Section 9-620(e) and Revised Subsection (c) - in commercial transactions only, the right to redeem collateral under Revised Section 9-623.

25. Section 9-625: Remedies for Secured Party's Failure to Comply With Revised Article 9

Revised Section 9-625 provides for recovery against a secured party that fails to comply with the provisions of Revised Article 9. Revised Section 9-625 is based on Current Section 9-507(1) with certain significant new provisions.

Revised Subsections (a) and (b) have been given further reach to create liability where a secured party fails to comply with any provision of Revised Article 9, rather than being limited to noncompliance with the relevant Part as under the Current codification. Note, however, that under Revised Subsection (c)(2), in consumer transactions, a secured party must fail to comply with the Revised Part, not the entire Revised Article.

Revised Subsection (a) provides that a court may take certain actions regarding the collateral if a secured party fails to comply with the requirements of Revised Article 9. Revised Subsection (a) is expanded to allow a court to order or restrain collection, enforcement or disposition of the collateral, rather than simply disposition as under the Current codification.

Revised Subsection (b) retains from Current Section 9-507(1) the provision that a secured party may be held liable for damages due to noncompliance with Revised Article 9.

Revised Subsection (c) provides the parties that may recover against a secured party under Revised Subsection (b), adding new language to specifically include obligors. Revised Subsection (c)(2) sets the minimum damage recovery in consumer goods cases.

Revised Subsection (d) is new. It operates in conjunction with Revised Section 9-626, which deals with a dispute over a surplus or deficiency, to eliminate "double recovery" by a debtor or obligor in certain situations.

Revised Subsection (e), which is new, provides an additional recovery in both consumer and non-consumer cases where a secured party fails to comply with certain sections of Revised Article 9.

Revised Subsection (f) also creates a new source of recovery against a secured party that fails to comply with a request for an accounting, request regarding a list of collateral or a request regarding a statement of account under Revised Section 9-210. Revised Subsection (f) must be read in conjunction with Revised Subsection (g) which limits the extent to which a secured party that failed to comply with a request under Revised Section 9-210 may claim a security interest.

26. Section 9-626: Action in Which Deficiency or Surplus is in Issue

a. Commercial Transactions. Revised Section 9-626, which has no analogue in Current Article 9, controls the situation where there is a dispute as to the amount of a deficiency or surplus. Revised Section 9-626 applies only to commercial transactions. Revised Section 9-626 resolves a significant issue regarding the appropriate test to be applied where there is a dispute as to the calculation of a deficiency or surplus. Revised Section 9-626 codifies what is commonly referred to as the Rebuttable Presumption Rule, rejecting the Absolute Bar Rule (*see* discussion below) and Offset Rule used in certain jurisdictions.

Revised Subsection (a) establishes the Rebuttable Presumption Rule. Under the rule, if the debtor or a secondary obligor places in issue a secured party's compliance with the provisions of Revised Article 9 relating to collection, enforcement, disposition or acceptance, the burden is on the secured party to prove that such collection, enforcement, disposition or acceptance complied with the relevant provisions.

Revised Subsection (a)(1) provides that Revised Section 9-626 only applies where there is a dispute. Revised Subsection (a)(2) provides that the burden of proof is on the secured party when an issue is raised. Notably, Revised Subsections (a)(3) and (a)(4) place with the secured party the burden of proving that compliance with the provisions of Revised Article 9 would have led to a deficiency. If this condition is not met, the secured party may not recover any deficiency.

b. Consumer Transactions. In the event that a secured party errs in disposing of the collateral after the debtor defaults and there is a deficiency remaining still chargeable to the debtor, the question arises to what extent the secured party's error should affect its right to a deficiency judgment. Three principal themes have emerged from

the case law across the nation: (i) the deficiency stands unless the debtor can show a causal connection between the deficiency and the secured party's error; (ii) the rebuttable presumption test; and (iii) the erring secured party is barred from collecting the deficiency (the absolute bar test). New York's case law has adopted each of these three alternatives, and the Court of Appeals has never resolved this conflict among the Appellate Divisions.

In 1983 the Law Revision Commission made a report to the Legislature concerning this confusion. In that report the Commission recommended that Article 9 be amended to provide for a rebuttable presumption in all cases. Revised Article 9 follows that recommendation for non-consumer defaults. With respect to consumer defaults, Revised Article 9 makes no recommendation whatsoever, leaving the courts free to shape a remedy as is appropriate to each case. The Commission understands that this exclusion of consumer defaults from the statute is part of a large compromise between consumer interests and consumer financial interests. The value of preserving this compromise outweighs the possible benefit of having a legislatively chosen rule governing consumer cases.

27. Section 9-627: Determination of Whether Conduct Was Commercially Reasonable

Revised Section 9-627, adopted primarily from Current Section 9-507(2), continues in Revised Subsection (a) the rule that just because a secured party could have obtained a greater amount in disposing of the collateral does not preclude the disposition from being commercially reasonable. Price is not dispositive of commercial reasonableness.

Revised Subsection (b) continues with little variation the rules for a commercially reasonable disposition of collateral, while Revised Subsection (c)(4) is added to the prior rule regarding approvals that are sufficient, but not necessary, to make a transaction commercially reasonable. The Official Comment 4 to Revised Section 9-627 notes that the definition of 'recognized market' used in Revised Subsection (b) is limited, applying only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges. *Cf. Bankers Trust Co. v. J.V. Dowler & Co.,* 47 N.Y. 2d l28; 390 N.E.2d 766 (1979) (holding that foreclosure sale of bonds on the open market constituted a commercially reasonable manner in light of the standard prevailing in the municipal securities market where the proceeds received from the sale were the actual market value on the date of the sale and the bonds were sold through regular market channels).

Revised Subsection (d), regarding the absence of an approval, is unchanged from the prior law.

28. Section 9-628: Nonliability and Limitation on Liability of Secured Party

Revised Section 9-628, which has no analogue in Current Article 9, offers protection to secured creditors where the secured creditor does not have sufficient information about a debtor, guarantor or obligor. If the secured party does not have sufficient information about the debtor or obligor, Revised Subsections (a) and (b) provide that the secured party is not liable to them, or to a secured party or a lienholder that has filed a financing statement against such debtor or obligor.

Revised Subsection (c) protects a secured party that reasonably believes that a transaction is not a consumer goods transaction or that the underlying goods are not

consumer goods from liability where the secured party failed to comply with Revised Article 9, provided the secured party reasonably relied on certain representations of a debtor or an obligor.

Revised Subsection (d) provides that a secured party's noncompliance with the requirements of Revised Section 9-616 does not create a damage claim under Revised Section 9-625(c)(2).

Revised Subsection (e) ensures that a secured party will incur statutory liability only once in connection with a secured obligation.

G. Section-by-Section Analysis of Part 7: Transition

1. Section 9-701: Effective Date

Revised Section 9-701 establishes July 1, 2001 as the effective date of Revised Article 9.

Although the transition provisions of Revised Part 7 by their nature do not amend existing transition provisions, this discussion addresses analogous transition provisions for the prior and Current versions of Article 9. July 1, 2001 reflects a significant delay from the time the statute was initially proposed for legislative action. This relatively lengthy period of deferred effectiveness (as opposed to deferred effectiveness for particular aspects of the new law, as addressed in the succeeding sections of Part 7) is a new departure.

Deferred effectiveness for Revised Article 9 has two principal objectives. First, it allows an additional period of almost three years following approval of the statute by NCCUSL for various affected parties to familiarize themselves with and adapt their practices to the requirements of the new law. Second, and more importantly, it makes it possible for Revised Article 9 to become effective simultaneously in a large number of jurisdictions. Both of these factors should mitigate transitional problems.

2. Section 9-702: Savings Clause

Revised Section 9-702 states three general transitional rules. Under Revised Subsection (a), Revised Article 9 applies to a transaction or lien entered into or created prior to the effectiveness of Revised Article 9, except as otherwise provided in Revised Part 7. Hence, any party wishing to defer or avoid a requirement of full compliance with Revised Article 9 immediately upon its effectiveness must identify a provision in Revised Part 7 which enables it to do so. Revised Subsection (b) states an exception to this general rule. Under Revised Subsection (b), transactions and liens outside the scope of Current Article 9 which were validly entered into or created prior to effectiveness of Revised Article 9 remain valid, and may be terminated, completed, consummated and enforced either in accordance with Current law or under Revised Article 9. Revised Subsection (b) is itself, however, subject to the further provisions of Revised Part 7, which significantly limit the impact of its validation of existing non-Current Article 9 liens which are within the scope of Revised Article 9. Revised Subsection (c) states the conventional rule that Revised Article 9 does not affect litigation or other proceedings pending at the effective date.

This provision is consistent with Current transition provisions.

Revised Section 9-702 essentially creates the framework within which the particular

transition rules stated in Revised Sections 9-703 through 9-709 operate.

3. Section 9-703: Security Interest Perfected Before Effective Date

Revised Section 9-703 deals with a security interest which is enforceable against the debtor under Current law immediately prior to the effective date and which is perfected under Current law at that time. Under Revised Subsection (a), such a security interest continues as a perfected security interest if the applicable requirements for enforceability and perfection under Revised Article 9 are satisfied at the effective date. If the Revised Article 9 requirements for either enforceability or perfection are not met at the effective date, then Revised Subsection (b) affords a one-year grace period within which these new requirements may be met. This one-year grace period is subject to Revised Section 9-705, discussed below, which specifies special rules applicable to changes in perfection requirements.

The one-year grace period provided for by Revised Section 9-703 is consistent with the analogous grace period under New York law in the transition provisions for the 1997 enactment of the revised version of UCC Article 8 and related amendments to Current Article 9, adopted in New York in 1997, and the transition provisions relating to security interests in accounts in connection with New York's original adoption of the 1962 version of Article 9. In the former case, the New York grace period lengthened a four-month period in the uniform transition provision; in the latter case, the uniform transition rule would have allowed perpetual grace for pre-original Article 9 perfected security arrangements. The New York transition provisions for the 1972 amendments to Article 9, on the other hand, provided a three-year grace period, consistent with the uniform transition provisions, as did the 1962 New York transition rule for collateral other than accounts.

Particularly in light of the deferred effectiveness of the statute, the one-year grace period (and no more) seems appropriate.

4. Section 9-704: Security Interest Unperfected Before Effective Date

Revised Section 9-704 affords a substantially identical one-year grace period for the unperfected but enforceable security interest under Current law which fails to meet the enforceability requirements of Revised Article 9. In addition, Revised Section 9-704 specifies when this unperfected security interest may become perfected under Revised Article 9. If action sufficient to perfect the security interest under Revised Article 9 is taken at or before the effective date of the legislation, the security interest is perfected at the effective date. If such action is taken after the effective date, the security interest is perfected at that time.

The discussion of Revised Section 9-703 applies equally to this Revised Section 9-704.

The comment to Revised Section 9-703 applies equally to this Revised Section 9-704.

5. Section 9-705: Effectiveness of Action Taken Before Effective Date

Revised Section 9-705 deals generally with security interests as to which the steps relied upon to achieve perfection are taken prior to the effective date of Revised Article 9 but which security interests attach and become enforceable after such effective date.

Revised Subsection (a) addresses perfection by steps other than filing which are sufficient under Current Article 9 or other applicable law but which are not sufficient under Revised Article 9. In this instance, the pre-effective-date perfection steps continue to be effective as to collateral to which the security interest attaches after the effective date for a period of one year.

Revised Section 9-705(b) addresses pre-effective-date filings, stating that they are effective to the extent they satisfy the requirements for perfection by filing under Revised Article 9 even if they were not effective for that purpose when filed.

Revised Section 9-705(c) continues the effectiveness following the effective date of Revised Article 9 of a financing statement filed in the appropriate jurisdiction to achieve perfection under Current Article 9. Thus, a financing statement which satisfied applicable requirements for perfection under Current Article 9 operates to perfect a security interest for purposes of Revised Article 9 notwithstanding the fact that Revised Article 9 may require filing in a different jurisdiction. However, unless a longer period of effectiveness is provided for in Revised Subsection (d) or (e) of Revised Section 9-705 or in Revised Section 9-706, the pre-effective-date financing statement ceases to be effective at the earlier of the time it would have lapsed (absent continuation) under the law of the filing jurisdiction or June 30, 2006.

Revised Section 9-705(d) deals with the filing of a continuation statement (as opposed to an initial financing statement filed as a continuation statement under Revised Section 9-706) after the effective date of Revised Article 9 with respect to an original financing statement filed prior to such effective date. Such a continuation statement is effective for purposes of Revised Article 9 if and only if it is filed to continue the effectiveness of a financing statement filed in the same office in the same jurisdiction as would be required for an initial filing under Revised Article 9. Thus, if Revised Article 9 does not result in a change in the applicable filing office, pre-effective-date filings may be continued through the filing of a conventional continuation statement; otherwise, if Revised Article 9 requires filing in a different jurisdiction or filing office, continuations may only be effected by filing an initial financing statement in accordance with Revised Section 9-706.

Revised Section 9-705(e) deals with financing statements filed against a transmitting utility under the Current Article 9. Under both Current Section 9-403(6) and Revised Section 9-515(f), a financing statement filed against a debtor identified as a transmitting utility is effective until a termination statement is filed, and has no scheduled lapse date. Revised Subsection (e) of Revised Section 9-705 gives effect to this rule by making Revised Subsection (c)(2) — the June 30, 2006 outside date for continued perfection of a pre-effective-date filings — applicable to a financing statement filed against a transmitting utility only if Revised Article 9 would require it to be filed in a different jurisdiction.

Revised Section 9-705(f) states the rule that a financing statement comprised of both an initial filing made prior to the effective date of Revised Article 9 and a continuation statement filed after such effective date is effective only to the extent that it satisfies the requirements of Revised Part 5 for an initial financing statement. In other words, to the extent that the pre-effective-date filing does not itself satisfy those requirements as applicable under Revised Article 9, the continuation statement must remedy the deficiency. When subsection (f) refers to the requirements that are applicable under Part 5, it can only mean the provisions in Section 9-502 and not, for example the provisions of 9-516(b), which would, in context, not be applicable. The possibility that subsection (f) as worded could cause confusion explains why the Commission recommends that the following

commentary be recommended for publication as a comment to Revised Article 9:

> **Law Revision Commission Comment (2001).** Subsection (f) provides that a financing statement that includes a financing statement filed before the effective date of Revised Article 9 and a continuation statement filed after the effective date of Revised Article 9 is effective only to the extent that it "satisfies the requirements of Part 5 for an initial financing statement." The quoted phrase, which is also used in Section 9-706(c)(1), refers to a financing statement that satisfies the requirements set forth in Section 9-502 for a sufficient financing statement. It is irrelevant whether a filing office would be justified in declining to accept the financing statement for one of the reasons set forth in Section 9-516(b).

The discussion under Revised Section 9-703 applies equally to Revised Subsection (a). Revised Subsection (b) has no specific analogue in Current transition provisions, but is intended as a clarification of what the rule would be in the absence of explicit provision. Revised Subsection (c) is consistent with the 1972 transition provisions in providing that existing financing statements remain effective until their scheduled lapse date. Unlike the 1972 transition provisions, however, Revised Section 9−705(c) applies this result with respect to security interests perfected by filing as to collateral acquired after the effective date of the legislation as well as with respect to collateral in existence at that time. Revised Subsections (d) and (e) have no specific analogues in Current transition provisions, but are part of the mechanics in Revised Part 7 for implementing the policy reflected in Revised Subsection (c). Revised Subsection (f) has no analogue in Current transition provisions, but attempts to specify the appropriate resolution of an issue as to which the result is unclear under Current transition rules.

Revised Section 9-705 addresses the transition question which is likely of paramount practical importance: under circumstances where Revised Article 9 requires filing in a different jurisdiction from Current Article 9, within what time frame must the new filing be made? The basic answer provided in Revised Section 9-705(c) is that the new filing must be made prior to the scheduled lapse of the existing filing, in superficial conformity with the analogous provisions of the 1972 transition provisions (which are the only analogous Current transition rules). Assuming that the correct policy decision is to allow the secured party to rely on its existing filing until its scheduled lapse, so that the new filings may be made in an orderly manner as part of the normal continuation process, this policy conclusion appears equally applicable to existing and to after-acquired collateral. Revised Section 9-705(b) reflects another policy which appears in Revised Part 7, namely, encouragement of early compliance with the filing requirements of Revised Article 9 through validation of action taken prior to its effective date. Note that there are a variety of different reasons why a previously ineffective filing may become effective under Revised Article 9. The secured party may have consciously decided to “profile” in the filing jurisdiction mandated by Revised Article 9 before it was necessary or legally effective to do so. Alternatively, such a filing may simply have been made in error. In addition, descriptions of collateral which were ineffective either generally or as to particular types of collateral may become effective under Revised Article 9. Subsection (b) gives effect to all such filings, whether to the calculated or serendipitous benefit of the secured party.

6. Section 9-706: When Initial Financing Statement Suffices to Continue Effectiveness of Financing Statement

As noted above, Section 9-705(d) governs situations in which a pre-effective-date financing statement may be continued through the filing of a continuation statement in the same filing office. In situations where Revised Article 9 mandates a filing in a different jurisdiction or filing office, a pre-effective-date financing statement may be continued only

pursuant to this section. As the title implies, this section contemplates the filing of an initial financing statement, containing all information which would be required for an initial financing statement under the Revised Article 9, and in addition identifying the pre-effective-date financing statement to be continued. Such a filing continues the effectiveness of the pre-effective-date financing statement for the period applicable to an initial financing statement, as specified in Current Section 9-403 if the continuation filing is made prior to the effective date of Revised Article 9 and for the period specified in Revised Section 9-515 if the continuation filing is made after the effective date. Note that an initial financing statement filed pursuant to Revised Section 9-706 need not be filed within the six-month period prior to scheduled lapse of the prior filing as would be required for a continuation statement.

The concept embodied in Revised Section 9-706 is consistent with the 1972 transition provisions, although Revised Section 9-706 contains much more detail specifying the mechanics for continuing an existing filing through the filing of a new financing statement in a new filing office.

The detail provided in Revised Section 9-706 should be helpful to practitioners. There is no apparent policy issue. Like Revised Section 9-705(b)(3) this Revised Section 9-706 validates pre-effective date filings under Revised Article 9.

The drafting of Section 9-706 has the same defect as does the drafting of 9-705. For that reason the Commission recommends that the following commentary be recommended for publication as a comment to Revised Article 9:

> **Law Revision Commission Comment (2001).** Subsection (c) states that an initial financing statement is effective for purposes of subsection (a) only if, among other things, it "satisf[ies] the requirements of Part 5 for an initial financing statement." The quoted phrase, which is also used in Section 9-705(f), refers to a financing statement that satisfies the requirements set forth in Section 9-502 for a sufficient financing statement. It is irrelevant whether a filing office would be justified in declining to accept the financing statement for one of the reasons set forth in Section 9-516(b).

7. Section 9-707: Amendment of Pre-Effective-Date Financing Statement

Revised Section 9-707 deals with amendments to be filed subsequent to the effective date of Revised Article 9 to financing statements themselves filed prior to such effective date. It states the general rule that amendments to such pre-effective-date financing statements are effective only if filed in the filing office specified by the law of the jurisdiction governing perfection in accordance with Revised Article 9. Therefore, unless the pre-effective-date financing statement was itself filed in the appropriate filing office under Revised Article 9, it must be continued by the filing of an initial financing statement in that office in accordance with Revised Section 9-706(c) concurrently with or prior to the filing of an amendment in that office. Alternatively, the initial financing statement filed in accordance with Revised Section 9-706(c) may reflect the amended information without the separate filing of an amendment.

There is one exception to this general rule: if the pre-effective-date financing statement has not previously been continued under Revised Section 9-706, it may be terminated by the filing of a termination statement in the filing office in which it was originally filed. Any other amendment filed in that office, however, as well as a termination statement filed in that office after continuation of the pre-effective-date financing statement under Revised Article 9, is ineffective.

This provision has no analogue in Current transition provisions.

Revised Section 9-707 is intended to afford guidance and clarity in an area of some practical importance during the transition. To the extent policy considerations are implicated, the general rule promotes swifter transition to the filing regime of Revised Article 9. At the same time, it recognizes the practical benefit of permitting existing filings to be terminated in accordance with existing law.

8. Section 9-708: Persons Entitled to File Initial Financing Statement or Continuation Statement

Revised Section 9-708 confirms the authority of the secured party of record to authorize such a filing (or any other filing necessitated by the requirements of Revised Part 7 in order to perfect or continue the perfection of a security interest), without further authorization from the debtor.

Revised Section 9-708 makes explicit what was implicit in the 1972 transition provisions, namely that the secured party is entitled to make the filings which are necessitated by the new law in order to continue the effectiveness of its pre-existing financing statement.

Because Revised Section 9-708 merely authorizes the continuation of a filing which the debtor has previously authorized, there is no apparent policy concern. Both Current Article 9 and Revised Article 9 authorize the filing of continuation statements without the debtor's signature or other authentication; Revised Section 9-708 simply extends that rule to the broader range of filings necessary to effect a continuation under Revised Part 7. *See* Current Article 9 Section 9-403(3); Revised Article 9 Section 9-509.

9. Section 9-709: Priority

True to its title Revised Section 9-709 deals with priority contests. The base line rule, stated in Revised Subsection (a), is that Revised Article 9 determines the priority of conflicting claims to collateral unless the relative priorities of the parties were established before its effective date. In the latter cases, Current Article 9 will determine priority.

Revised Section 9-709(b) provides a special priority rule for certain priority contests which in accordance with Revised Subsection (a) are governed by Revised Article 9. Under Revised Subsection (b), the first-to-file-or-perfect rule of Revised Section 9-322(a) is modified in its application to a security interest which becomes enforceable under Revised Article 9 and which is perfected by a pre-effective-date filing which is effective under Revised Article 9 but which would not have been effective under Current Article 9. For purposes of Revised Section 9-322(a), the priority of such a security interest dates from the effective date of Revised Article 9 rather than from the date of filing. This rule, however, does not apply to two competing security interests each of which was perfected by such a filing.

The base line rule in Revised Subsection (a) is consistent with Current transition provisions. Revised Subsection (b) has no analogue in Current transition provisions.

The Official Comments provide particularly helpful examples to illustrate the operation of Revised Section 9-709. Generally, it is believed to establish a rule of priority

consistent with the legitimate expectations of the parties and consistent with Current law.

H. Production Money Security Interests

Revised Article 9 is accompanied by model provisions designed to replace Current Section 9-312(2) which permitted the creation of a security interest in crops with priority over an earlier filed security interest in those same crops. The priority afforded by Current Section 9-312(2) was thought to be of "little value for its intended beneficiaries," as the Official Comment 2 to Model Section 9-324A notes.

The model provisions designed to replace Current Section 9-312(2) are not part of Revised Article 9. Intense discussions at meetings of the Drafting Committee revealed that states had distinctive financing patterns. In some states, the production money security interest, if made effective, would undermine agricultural financing patterns while in other states (some of which have adopted non-uniform provisions along the lines of the model provisions), a production money security interest would help financing of successive crops. Because no single rule made sense nationally, these model provisions are available for use by states desiring to encourage this type of financing.

No evidence exists that New York needs to adopt these provisions. They are strongly opposed by banks. The provisions presuppose the financing by a new lender of a new crop. That presupposition simply does not apply to agricultural activities such as dairy operations and the cultivation of orchards or vineyards. As these activities constitute the bulk of New York agriculture, adoption of the model provisions would be unnecessary and would also risk disrupting existing agricultural financing patterns with no obvious benefit to the intended beneficiaries.

Part VI. Non-Uniform Amendments Affecting Cooperative Interests.

A. Background and Summary

In 1988, New York added a series of amendments to its Article 9 in order to provide a framework within which ownership interests in cooperative apartments and other property held through cooperative ownership could be financed. Because the structure of Revised Article 9 differs radically from its predecessor, these non-uniform amendments could not be carried forward into Revised Article 9 without substantial modification. In the summer of 1999, at the request of the Commission, a working group consisting of representatives of the City and State Bar real estate and/or coop committees, was formed to undertake the task of advising the Commission and its consultant concerning these modifications.[36] The working group was later joined by representatives from the New York Council of

[36] The Commission wishes to thank the members of the working group. Because the attendance at the meetings of the working group varied over time, it is impossible to thank by name all those who worked on the project. Among those who participated were David L. Berkey, Esq. of Gallet, Dreyer & Berkey LLP, John A. Dandola, Esq., Robert J. Egan, Esq. of The Chase Manhattan Bank, Ronald J. Gold, Esq. of Wagner, Davis & Gold, PC, Douglas P. Heller, Esq. of Friedman, Krauss & Zlotolow, Matthew J. Leeds, Esq. of Robinson, Silverman, Pearce, Aronsohn, & Berman LLP, Terry Lewis, Esq. of National Cooperative Bank, Joel E. Miller, Esq., Melvyn Mitzner, Esq. of Commonwealth Land Title Insurance Company, Richard A. Nardi, Esq. of Corbin, Silverman & Sanseverino LLP, Robert E. Parella, Esq. of Saint John's University School of Law, Alan B. Reis, Esq. of Friedman, Krauss & Zlotolow, Mary Ann Rothman, Esq. of The Council of New York Cooperatives and Condominiums, Paul Shupack, Esq. of the Cardozo School of Law, Stanley R. Simon, Esq. of Allen, Morris, Troisi & Simon LLP, Sandra Stern, Esq. of Nordquist & Stern PLLC, and Lewis C. Taishoff, Esq. of A. Edward Major's Office.

Cooperatives and Condominiums. The working group also benefitted from the advice given by representatives of national cooperative organizations. Those representatives indicated that while New York has the largest concentration of cooperatives of any state, some other states have substantial numbers of coops. In those states, the New York non-uniform amendments would be looked to as a model to follow.

Early on, it became clear that the 1988 coop amendments were seriously flawed. The principal flaws addressed by the proposed new coop amendments are as follows:

1. The current provisions do not adequately define the coops that are subject to these non-uniform rules. One example of how the current provisions create confusion is the term in current law apparently limiting the scope of the current provisions to corporations or partnerships "formed for the purpose of cooperative ownership of real property". Many coops are built on leased land, making questionable the application of the 1988 amendments to these coops. The additional non-uniform definitions that appear in the proposed New York text of § 9-102 make clear the subject matter of these non-uniform amendments.

2. Current law was intended to enable secondary lenders, especially home-equity lenders, to use ownership interests in coops as security for loans. Current law fails to take into account the fact that under both Current and Revised Article 9, any advance made by the first lender after a second lender has made its loan will have priority over the second lender. Section 9-323 of the proposed coop amendments replaces that rule with a rule that will adequately allow for first priority line-of-credit loans while protecting second priority home equity lenders from being unduly squeezed by future advances made by the first priority lender.

3. Current law provides that filing is the means of perfection against an ownership interest in a coop, but fails explicitly to state that filing is exclusive and that any other means of perfection (including recording the lease on the real estate records) is ineffective. Proposed section 9-310(d) removes any ambiguity on this point. Proposed sections 9-310(b) and 9-310(d) in combination provide for a change in the law – automatic perfection of a security interest in an ownership interest in a coop in favor to the coop for unpaid maintenance -- that at first sight may appear radical. In fact the change is not radical, as virtually every coop requires any lender who takes a security interest in an ownership interest in the coop subordinate that security interest to the interest of the cooperative organization. This provision simply states as a legal rule the all but universal practice today.

4. Proposed Section 9-513(d) is designed to improve the operation of the termination statement rules as applied to security interests in ownership interests in coops. Because the typical coop transaction is one in which immediately following the end of the previous security interest, there arises a security interest on behalf of a new buyer or a new financier, the uniform provisions allowing the secured party to provide a termination statement at a leisurely pace does not work for coops.

5. The proposed coop amendments permit coop filings to be accompanied by a distinctive addendum to the uniform filing form. This modest reform would reduce errors in filing offices as long as paper forms are used, and would provide a template for electronic filings of security interests in coops. While coop filings made on the regular forms would be effective to perfect a security interest, the special benefits of a coop filing – a duration of fifty years and notice to the world – would not be given to ordinary filings.

As this special form (and its electronic equivalent) supplements but does not replace the uniform forms, the proposed coop addendum raises no serious issues concerning uniformity.

6. Under both Current and Revised Article 9, the filing of a financing statement with respect to an ownership interest in a coop does by itself provide notice of the security interest in share certificates associated with that ownership interest. In the event that the owner of share certificates evidencing ownership of a coop fraudulently sells them to an innocent purchaser, the relationship between the rules in Article 8 that protect innocent purchasers of certificated securities and the rules of Article 9 pertaining to the permanence of a lien against a coop is unclear under current law, and cases addressing this issue have reached inconsistent results. By providing that a UCC filing accompanied or amended by a coop addendum does constitute notice of the lender's security interest, proposed § 9-516(e) will settle that question. The proposed coop amendments also make conforming changes to Article 8 to remove any possible claim that the two Articles are inconsistent.

The Law Revision Commission agrees with the working group that existing law concerning security interests in coops is flawed. It concludes that the proposals made by the working group are sensible and would improve New York's law.

The proposals concerning coops made by the working group and accepted by the Commission leave one question open. Under current law, a financing statement with respect to an ownership interest in a coop is filed locally. Proposed § 9-501(a)(1)(C) likewise mandates local filing but the working group left that provision in brackets. If that section is deleted, all coop filings would be made with the Secretary of State. Further complicating the question of the appropriate place to file is the reality that Revised Article 9 continues the rule that fixture filings are filed locally. New Jersey, for example, has departed from uniformity on that point and required all fixture filings to be filed centrally.

The Legislature must consider whether financing statements against cooperative apartment units should (a) continue to be filed with county filing offices (as under current law), or (b) be filed with the Department of State. If the Legislature adopts alternative (b), the Legislature may also wish to consider following New Jersey and making a further and more radical non-uniform change, namely (c) requiring that all real-estate-related filings be made with the Department of State rather than with the county filing offices, thereby taking the county filing offices completely out of business so far as Article 9 is concerned (except for preserving their existing records). The Commission makes no recommendation as among these three alternatives. The Commission has not prepared language to implement alternative (c). New Jersey's bill enacting Revised Article 9 should provide a reasonable template should the Legislature wish to implement that alternative.

The Legislature has three reasonable alternatives. It can leave both coop and fixture filings local as under existing law, it can change existing law and have coop filings made with the Secretary of State while leaving fixture filings local, or it can have all real estate related filings be made with the Secretary of State. There are no major policy issues involved in this choice. Nor is uniformity a serious concern because the question of where to file within the state has no effect outside the state. The appropriate resolution of the question of where to file turns on practical choices and the preferences of the affected users and filing officers. Because the greatest number of coop filings made in New York are made within New York City, the views of the City Register, in whose office all filings for New York City (except for Staten Island) are made, merit considerable weight, as does, of course, the views of the Secretary of State.

The Commission has consulted with the City Register, and the City Register has no special desire to maintain the current practice of local filing for coops. The working group also had no strong preference. The Secretary of State expects that New York's central filing system will soon be accessible by Internet, which would facilitate lien searches at that filing office. If that easy method of searching does in fact come into existence, then most of the members of the working group would mildly prefer central filing. If that easy method of access to data does not come into existence, then most members of the working group would mildly prefer that coop filings continue to be made locally.

The Commission sees some benefit to leaving the place of filing for cooperative interests and other real estate related filings with the local filing officers. Real estate filings are local, and unless the Legislature chooses to adopt non-uniform filing rules, UCC real estate related filings such as fixtures will continue to be made locally. Cooperative interests, although a unique form of property, are closely related to real estate. That affinity suggests a reason to keep cooperative interests filed locally. In addition, there is some limit to the amount of changes in practice that can be absorbed at one time. In light of the number of changes in practices and procedures that Revised Article 9 requires, there is some sense to leaving this one component of practice untouched for the time being.

B. Proposed Coop Amendments to Revised Article 9

Below are the proposed cooperative amendments agreed to by the working group that will need to be made to certain of the uniform provisions of Revised Article 9. The text, other than the Coop provisions, are the Uniform text, and do not reflect non-Uniform amendments to these sections recommended elsewhere in this Report. Text that will need to be added to Revised Article 9 is underlined and text in Revised Article 9 that will need to be deleted is stricken.

§ 9-102. Definitions and Index of Definitions.

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

(27a) "Cooperative Addendum" means a record that satisfies Section 9-502(e).

(27b) "Cooperative Interest" means an ownership interest in a cooperative organization, which interest, when created, is coupled with possessory rights of a proprietary nature in identified physical space in this state belonging to the cooperative organization. A subsequent termination of the possessory rights shall not cause an ownership interest to cease being a cooperative interest.

(27c) "Cooperative Organization" means an organization which has as its principal asset an interest in real property in this state and in which organization all ownership interests are cooperative interests.

(27d) "Cooperative Organization Security Interest" means a security interest which is in a cooperative interest, is in favor of the cooperative organization, is created by the cooperative record, and secures only obligations incident to ownership of that cooperative interest.

(27e) "Cooperative Record" means those records which, as a whole, evidence cooperative interests and define the mutual rights and obligations of the owners of the cooperative interests and the cooperative organization.

(27f) "Cooperative Unit" means the physical space associated with a cooperative interest.

(44) "Goods" means all things that are movable when a security interest attaches. The term

includes (I) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (I) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consists solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, cooperative interests, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(73) "Security agreement" means an agreement that creates or provides for a security interest. A cooperative record which provides that the owner of a cooperative interest has an obligation to pay amounts to the cooperative organization incident to ownership of that cooperative interest and which gives the cooperative organization a direct remedy against that cooperative interest if such amounts are not paid, is a security agreement creating a cooperative organization security interest.

§ 9-108. Sufficiency of Description.

(a) **Sufficiency of description.** Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) **Examples of reasonable identification.** Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(i) specific listing;

(2) category;

(3) except as otherwise provided in subsection (e), a type of collateral defined in [the Uniform Commercial Code];

(4) quantity;

(5) computational or allocational formula or procedure; or

(6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

(c) **Supergeneric description not sufficient.** A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

(d) **Investment property.** Except as otherwise provided in subsection (e), a description of a security entitlement, security account, or commodity account is sufficient if it describes:

(1) the collateral by those terms or as investment property; or

(2) the underlying financial asset or commodity contract.

(e) **When description by type insufficient.** A description only by type of collateral defined in the [Uniform Commercial Code] is an insufficient description of:

(1) a commercial tort claim; ~~or~~

(2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account~~.~~; or

(3) a cooperative interest.

SUBPART 2. APPLICABILITY OF ARTICLE

§ 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;

(2) an agricultural lien;

(3) a sale of accounts, chattel paper, payment intangibles, or promissory notes;

(4) a consignment;

(5) a security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5), as provided in Section 9-110; ~~and~~

(6) a security interest arising under Section 4-210 or 5-118~~.~~; and

(7) a security interest in a cooperative interest.

(b) **Security interest in secured obligation.** The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

(c) **Extent to which article does not apply.** This article does not apply to the extent that:

(1) a statute, regulation, or treaty of the United States preempts this article;

(2) another statute of this State expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or a governmental unit of this State;

(3) a statute of another State, a foreign country, or a governmental unit of another State or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the State, country, or governmental unit; or

(4) the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Section 5-114.

(d) **Inapplicability of article.** This article does not apply to:

(1) a landlord's lien, other than an agricultural lien;

(2) a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Section 9-333 applies with respect to priority of the lien;

(3) an assignment of a claim for wages, salary, or other compensation of an employee;

(4) a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;

(5) an assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;

(6) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(7) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(8) a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds;

(9) an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(10) a right of recoupment or set-off, but:

(A) Section 9-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and

(B) Section 9-404 applies with respect to defenses or claims of an account debtor;

(11) the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(A) liens on real property in Section 9-203 and 9-308;

(B) fixtures in Section 9-334;

(C) fixture filings in Sections 9-501, 9-502, 9-512, 9-516, and 9-519; ~~and~~

(D) security agreements covering personal and real property in Section 9-604; and

(E) security interests in cooperative interests;

(12) an assignment of a claim arising in tort, other than a commercial tort claim, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds; or

(A) an assignment of a deposit account in a consumer transaction, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.

PART 3

PERFECTION AND PRIORITY

SUBPART 1. LAW GOVERNING PERFECTION AND PRIORITY

§ 9-301. Law Governing Perfection and Priority of Security Interests.

Except as otherwise provided in Section 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:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that 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.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

(5) When collateral is a cooperative interest, the law of this state governs perfection, the effect of perfection or nonperfection, and the priority of the security interest in such collateral.

§ 9-305. Law Governing Perfection and Priority of Security Interests in Investment Property.

(a) **Governing law: general rules.** Except as otherwise provided in subsections (c) and (d), the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in Section 8-110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in Section 8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) **Commodity intermediary's jurisdiction.** The following rules determine a commodity intermediary's jurisdiction for purposes of this part:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that jurisdiction is the commodity intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) **When perfection governed by law of jurisdiction where debtor located.** The local law of the jurisdiction in which the debtor is located governs:

(1) perfection of a security interest in investment property by filing;

(2) automatic perfection of a security interest in investment property created by a broker or securities intermediary; and

(3) automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

(d) **Cooperative interests.** Subsections (a) through (c) do not apply to cooperative interests.

SUBPART 2. PERFECTION

§ 9-308. When Security Interest or Agricultural Lien Is Perfected; Continuity of Perfection.

(a) **Perfection of security interest.** Except as otherwise provided in this section and Section 9-309, a security interest is perfected if it has attached and ll of the applicable requirements for protection in Section 9-310 through 9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) **Perfection of agricultural lien.** An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in Section 9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) **Continuous perfection; perfection by different methods.** A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under this article and is later perfected by another method under this article, without an intermediate period when it was unperfected.

(d) **Supporting obligation.** Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) **Lien securing right to payment.** Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

(f) **Security entitlement carried in securities account.** Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) **Commodity contract carried in commodity account.** Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

(h) **Cooperative Organization Security Interest.** A cooperative organization security interest becomes perfected when the cooperative interest first comes into existence and remains perfected so long as the cooperative interest exists.

§ 9-310. When Filing Required to Perfect Security Interest or Agricultural Lien; Security Interests and Agricultural Liens to Which Filing Provisions Do Not Apply.

(a) **General rule: perfection by filing.** Except as otherwise provided in subsection (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) **Exceptions: filing not necessary.** Except as provided in subsection (d), the ~~The~~ filing of a financing statement is not necessary to perfect a security interest:

(1) that is perfected under Section 9-308(d), (e), (f), or (g);

(2) that is perfected under Section 9-309 when it attaches;

(3) in property subject to a statute, regulation, or treaty described in Section 9-311(a);

(4) in goods in possession of a bailee which is perfected under Section 9-312(d)(1) or (2);

(5) in certificated securities, documents, goods, or instruments which is perfected without filing or possession under Section 9-312(e), (f), or (g);

(6) in collateral in the secured party's possession under Section 9-313;

(7) in a certificated security which is perfected by delivery of the security certificate to the secured party under Section 9-313;

(8) in deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights which is perfected by control under Section 9-314;

(9) in proceeds which is perfected under Section 9-315; ~~or~~

(10) that is perfected under Section 9-316; or~~.~~

(11) that is a cooperative organization security interest.

(c) **Assignment of perfected security interest.** If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(d) **Special rule for cooperative interests.** Except for a cooperative organization security interest, a security interest in a cooperative interest may be perfected only by filing a financing statement.

§ 9-312. Perfection of Security Interests in Chattel Paper, Deposit Accounts, Documents, Goods Covered by Documents, Instruments, Investment Property, Letter-of-Credit Rights, and Money; Perfection by Permissive Filing; Temporary Perfection without Filing or Transfer of Possession.

(a) **Perfection by filing permitted.** A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) **Control or possession of certain collateral.** Except as otherwise provided in Section 9-315(c) and (d) for proceeds:

(1) a security interest in a deposit account may be perfected only by control under Section 9-314;

(2) and except as otherwise provided in Section 9-308(d), a security interest in a letter-of-credit right may be perfected only by control under Section 9-314; and

(3) a security interest in money may be perfected only by the secured party's taking possession under Section 9-313.

(c) **Goods covered by negotiable documents.** While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) a security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) a security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) **Goods covered by nonnegotiable documents.** While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) issuance of a document in the name of the secured party;

(2) the bailee's receipt of notification of the secured party's interest; or

(3) filing as to the goods.

(e) **Temporary perfection: new value.** A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) **Temporary perfection: goods or documents made available to debtor.** A perfected security interest in a negotiable document or goods in possession of a bailee other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) ultimate sale or exchange; or

(2) loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) **Temporary perfection: delivery of security certificate or instrument to debtor.** A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) ultimate sale or exchange; or

(2) presentation, collection, enforcement, renewal, or registration of transfer.

(h) **Expiration of temporary perfection.** After the 20-day period specified in subsection (e), (f), or (g) expires, perfection depends upon compliance with this article.

(i) **Cooperative interests.** Subsections (a) through (h) do not apply to cooperative interests.

§ 9-313. When Possession by or Delivery to Secured Party Perfects Security Interest without Filing.

(a) **Perfection by possession or delivery.** Except as otherwise provided in subsection (b), a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Section 8-301.

(b) **Goods covered by certificate of title.** With respect to goods covered by a certificate of title issued by this State, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in Section 9-316(d).

(c) **Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) `the person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) the person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) **Time of perfection by possession; continuation of perfection.** If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) **Time of perfection by delivery; continuation of perfection.** A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under Section 8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) **Acknowledgment not required.** A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) **Effectiveness of acknowledgment; no duties or confirmation.** If a person acknowledges that it holds possession for the secured party's benefit:

(1) the acknowledgment is effective under subsection (c) or Section 8-301(a), even if the acknowledgment violates the rights of a debtor; and

(2) unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) **Secured party's delivery to person other than debtor.** A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) to hold possession of the collateral for the secured party's benefit; or

(2) to redeliver the collateral to the secured party.

(i) **Effect of delivery under subsection (h); no duties or confirmation.** A secured party does not relinquish possession, even if a delivery under subsection (h) violates the rights of a debtor. A person to which collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or the law other than this article otherwise provides.

(j) **Cooperative interests.** Subsections (a) through (i) do not apply to cooperative interests.

§ 9-314. Perfection by Control.

(a) **Perfection by control.** A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral under Section 9-104, 9-105, 9-106, or 9-107.

(b) **Specified collateral: time of perfection by control; continuation of perfection.** A security interest in deposit accounts, electronic chattel paper, or letter-of-credit rights is perfected by control under Section 9-104, 9-105, or 9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) **Investment property: time of perfection by control; continuation of perfection.** A security interest in investment property is perfected by control under Section 9-106 from the time the secured party obtains control and remains perfected by control until:

(1) the secured party does not have control; and

(2) one of the following occurs:

(A) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

(d) **Cooperative interests.** Subsections (a) through (c) do not apply to cooperative interests.

SUBPART 3. PRIORITY

§ 9-317. Interests That Take Priority over or Take Free of Security Interest or Agricultural Lien.

(a) **Conflicting security interests and rights of lien creditors.** A security interest or agricultural lien is subordinate to the rights of:

(1) a person entitled to priority under Section 9-322; and

(2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:

(A) the security interest or agricultural lien is perfected; or

(B) one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed.

(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 received 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 other than 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.

(e) **Purchase-money security interest.** Except as otherwise provided in Sections 9-320 and 9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing. The preceding sentence does not apply to cooperative interests.

§ 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.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(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.

(c) **Special priority rules: proceeds and supporting obligations.** Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under Section 9-327, 9-328, 9-329, 9-330, or 9-331 also has priority over a conflicting security interest in:

(1) any supporting obligation for the collateral; and

(2) proceeds of the collateral if:

(A) the security interest in proceeds is perfected;

(B) the proceeds are cash proceeds or of the same type as the collateral; and

(C) in the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) **First-to-file priority rule for certain collateral.** Subject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) **Applicability of subsection (d).** Subsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) **Limitations on subsections (a) through (e).** Subsections (a) through (e) are subject to:

(1) subsection (g) and the other provisions of this part;

(2) Section 4-210 with respect to a security interest of a collecting bank;

(3) Section 5-118 with respect to a security interest of an issuer or nominated person; and

(4) Section 9-110 with respect to a security interest arising under Article 2 or 2A.

(g) **Priority under agricultural lien statute.** A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

(h) **Special priority rules: cooperative interests**.

(1) With respect to all amounts secured, a cooperative organization security interest has priority over all other security interests in a cooperative interest.

(2) As to security interests in cooperative interests other than cooperative organization security interests, §9-323(h) provides special rules for future advances.

§ 9-323. Future Advances.

(a) **When priority based on time of advance.** Except as otherwise provided in subsections (c) and (h), for purposes of determining the priority of a perfected security interest under Section 9-322(a)(1), perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

(1) is made while the security interest is perfected only:

(A) under Section 9-309 when it attaches; or

(B) temporarily under Section 9-312(e), (f), or (g); and

(2) is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under Section 9-309 or 9-312(e), (f), or (g).

(b) **Lien creditor.** Except as otherwise provided in subsections (c) and (h), a security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless the advance is made:

(1) without knowledge of the lien; or

(2) pursuant to a commitment entered into without knowledge of the lien.

(c) **Buyer of receivables.** Subsections (a) and (b) do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(d) **Buyer of goods.** Except as otherwise provided in subsection (e), a buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the earlier of:

(1) the time the secured party acquires knowledge of the buyer's purchase; or

(2) 45 days after the purchase.

(e) **Advances made pursuant to commitment: priority of buyer of goods.** Subsection (d) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the 45-day period.

(f) **Lessee of goods.** Except as otherwise provided in subsection (g), a lessee of goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

(1) the time the secured party acquires knowledge of the lease; or

(2) 45 days after the lease contract becomes enforceable.

(g) **Advances made pursuant to commitment: priority of lessee of goods.** Subsection (f) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45-day period.

(h) **Priority with respect to cooperative interests.** The following rules apply for purposes of determining under §9-322(a)(1) the priority of a perfected security interest in a cooperative interest:

(1) Perfection of the security interest with respect to a future advance dates from the time of the filing under §9-310(d) if all of the following are true:

(A) The security agreement states the maximum amount to be advanced pursuant to commitment;

(B) The future advance is made pursuant to that commitment;

(C) The future advance plus the outstanding sum of any prior advances is not more than the stated maximum amount; and

(D) The filed financing statement includes a cooperative addendum disclosing that the security agreement contains a commitment to make future advances.

(2) Except as provided in paragraph (1), perfection of the security interest with respect to a future advance dates from the time the advance is made.

(3) For purposes of paragraph (1), no amendment of a security agreement shall adversely affect

the priority of any other security interest in the same cooperative interest that was perfected prior to the amendment.

(4) This subsection applies only to advances made subsequent to an initial advance.

§ 9-328. Priority of Security Interests in Investment Property.

The following rules govern priority among conflicting security interests in the same investment property:

(1) A security interest held by a secured party having control of investment property under Section 9-106 has priority over a security interest held by a secured party that does not have control of the investment property.

(2) Except as otherwise provided in paragraphs (3) and (4), conflicting security interests held by secured parties each of which has control under Section 9-106 rank according to priority in time of:

(A) if the collateral is a security, obtaining control;

(B) if the collateral is a security entitlement carried in a securities account and:

(i) if the secured party obtained control under Section 8-106(d)(1), the secured party's becoming the person for which the securities account is maintained;

(ii) if the secured party obtained control under Section 8-106(d)(2), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) if the secured party obtained control through another person under Section 8-106(d)(3), the time on which priority would be based under this paragraph if the other person were the secured party; or

(C) if the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in Section 9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under Section 9-313(a) and not by control under Section 9-314 has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under Section 9-106 rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by Sections 9-322 and 9-323.

(8) Subsections (1) through (7) do not apply to cooperative interests.

§ 9-331. Priority of Rights of Purchasers of Instruments, Documents, and Securities under Other Articles; Priority of Interests in Financial Assets and Security Entitlements under Article 8.

(a) **Rights under Articles 3, 7, and 8 not limited.** This article does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8.

(b) **Protection under Article 8.** This article does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Article 8.

(c) **Filing not notice.** Filing under this article does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b).

(d) **Section not applicable to cooperative interests.** Subsections (a), (b), and (c) do not apply to cooperative interests.

PART 5

FILING

SUBPART 1. FILING OFFICE; CONTENTS AND EFFECTIVENESS OF FINANCING STATEMENT

§ 9-501. Filing Office.

(a) **Filing offices.** Except as otherwise provided in subsection (b), if the local law of this State governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) the office designated for the filing or recording of a record of a mortgage on the related real property, if:

(A) the collateral is as-extracted collateral or timber to be cut; or

(B) the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

[(C) the collateral is a cooperative interest; or]

(2) the office of [ ] [or any office duly authorized by [ ]], in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(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.

§ 9-502. Contents of Financing Statement; Record of Mortgage as Financing Statement; Time of Filing Financing Statement; Contents of Cooperative Addendum.

(a) **Sufficiency of financing statement.** Subject to subsection (b), a financing statement is sufficient only if it:

(1) provides the name of the debtor;

(2) provides the name of the secured party or a representative of the secured party; ~~and~~

(3) indicates the collateral covered by the financing statement.; and

(4) in the case of a cooperative interest, indicates the number or other designation and the street address of the cooperative unit .

(b) **Real-property-related financing statements.** Except as otherwise provided in Section 9-501(b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, or, unless a cooperative addendum is filed, which covers a cooperative interest, must satisfy subsection (a) and also:

(1) indicate that it covers this type of collateral;

(2) indicate that it is to be filed in the real property records;

(3) provide a description of the real property to which the collateral is related including the location of the real estate by reference to a book and page number in a deed or mortgage index maintained in the county clerk's office in the county where the property is situate or by street and number and town or city, or, if the real estate is in the city of New York, by county, except that if the real estate is in the city of New York or counties of Nassau or Onondaga, where the block system of recording or registering and indexing conveyances is in use, the statement must also specify the block in which the real estate is situated; and

(4) if the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) **Record of mortgage as financing statement.** A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

(1) the record indicates the goods or accounts that it covers;

(2) the goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;

(3) the record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and

(4)the record is [duly] recorded.

(d) **Filing before security agreement or attachment.** A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

(e) **Contents of Cooperative Addendum.** A cooperative addendum is sufficient only if it satisfies subsection (a) and also:

(1) if not filed simultaneously with the initial financing statement, identifies, by its file number, the initial financing statement to which the addendum relates;

(2) indicates the street address of the cooperative unit;

(3) indicates the county in which the cooperative unit is located;

(4) indicates the city, town or village in which the cooperative unit is located;

(5) indicates the real property tax designation associated with the real property in which the cooperative unit is located as assigned by the local real property tax assessing authority; and

(6) indicates the name of the cooperative organization.

§ 9-513. Termination Statement.

(a) **Consumer goods.** A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

(1) there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) the debtor did not authorize the filing of the initial financing statement.

(b) **Time for compliance with subsection (a)**. To comply with subsection (a), a secured party shall cause the secured party of record to file the termination statement:

(1) within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) if earlier, within 20 days after the secured party receives an authenticated demand from a debtor.

(c) **Other collateral.** In cases not governed by subsection (a), within 20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

(1) except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

(2) the financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

(3) the financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

(4) the debtor did not authorize the filing of the initial financing statement.

(d) **Effect of filing termination statement.** Except as otherwise provided in Section 9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in Section 9-510, for purposes of Sections 9-519(g), 9-522(a), and 9-523(c), the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

(e) **Cooperative Interests.**

(1) "Cooperative Interest Settlement" means the time and place at which an owner of a cooperative interest transfers the cooperative interest, or refinances or pays off the debt secured by the cooperative interest.

(2) Upon an authenticated demand with sufficient notice by a debtor, the secured party shall deliver to a cooperative interest settlement a termination statement or partial release and any component of the cooperative record of which it took possession, which shall be released to the debtor upon payment of the debt secured by the cooperative interest and the discharge of any obligation of the secured party to make further advances. Unless the secured party has agreed otherwise or the cooperative interest settlement takes place at the offices of the secured party, the secured party or its agent shall be entitled to a reasonable fee for attendance at the cooperative interest settlement.

(3) Upon payment of the debt secured by a cooperative interest other than at a cooperative interest settlement and the discharge of any obligation of the secured party to make further advances, the secured party shall arrange for a termination statement or partial release to be filed within one month of receipt of the payment or discharge of the obligation to make further advances, whichever is later, and shall send to the debtor any component of the cooperative record of which it took possession.

§ 9-515. Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.

(a) **Five-year effectiveness.** Except as otherwise provided in subsections (b), (e), (f), ~~and~~ (g), and (h), a filed financing statement is effective for a period of five years after the date of filing.

(b) **Public-finance or manufactured-home transaction.** Except as otherwise provided in subsections (e), (f), ~~and~~ (g), and (h), an initial financing statement filed in connection with a public-financed 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.

(c) **Lapse and continuation of financing statement.** The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d). Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(d) **When continuation statement may be filed.** A continuation statement may be filed only within six months before the expiration of the five-year period specified in subsection (a) or the 30-year period specified in subsection (b)~~;~~ or the 50-year period specified in subsection (h), whichever is applicable.

(e) **Effect of filing continuation statement.** Except as otherwise provided in Section 9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. Upon the expiration of the five-year period, the financing statement lapses in the same manner as provided in subsection (c), unless, before the lapse, another continuation statement is filed pursuant to subsection (d). Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

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

(g) **Record of mortgage as financing statement.** A record of a mortgage that is effective as a financing statement filed as a fixture filing under Section 9-502(c) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

(h) **Cooperative Interest transaction.** An initial financing statement covering a cooperative interest is effective for a period of 50 years after the date of the filing of the initial financing statement if a cooperative addendum is filed simultaneously with the initial financing statement or is filed as an amendment before the financing statement lapses.

§ 9-516. What Constitutes Filing; Effectiveness of Filing.

(a) **What constitutes filing.** Except as otherwise provided in subsection (b), communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) **Refusal to accept record; filing does not occur.** Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) the record is not communicated by a method or medium of communication authorized by the filing office;

(2) an amount equal to or greater than the applicable filing fee is not tendered;

(3) the filing office is unable to index the record because:

(A) in the case of an initial financing statement, the record does not provide a name for the debtor;

(B) in the case of an amendment or correction statement, the record:

(i) does not identify the initial financing statement as required by Section 9-512 or 9-518, as applicable; or

(ii) identifies an initial financing statement whose effectiveness has lapsed under Section 9-515;

(C) in the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or

(D) in the case of a record filed [or recorded] in the filing office described in Section 9-501(a)(1), the record does not provide a sufficient description of the real property to which it relates;

(4) in the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) provide a mailing address for the debtor;

(B) indicate whether the debtor is an individual or an organization; or

(C) if the financing statement indicates that the debtor is an organization, provide:

(i) a type of organization for the debtor;

(ii) a jurisdiction of organization for the debtor; or

(iii) an organizational identification number for the debtor or indicate that the debtor has none;

(6) in the case of an assignment reflected in an initial financing statement under Section 9-514(a) or an amendment filed under Section 9-514(b), the record does not provide a name and mailing address for the assignee; or

(7) in the case of a continuation statement, the record is not filed within the six-month period prescribed by Section 9-515(d).

(c) **Rules applicable to subsection (b).** For purposes of subsection (b):

(1) a record does not provide information if the filing office is unable to read or decipher the information; and

(2) a record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by Section 9-512, 9-514, or 9-518, is an initial financing statement.

(d) **Refusal to accept record; record effective as filed record.** A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b), is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

(e) **Special rule for cooperative interests; record effective as notice.** A filing that includes or is amended by a cooperative addendum covering a cooperative interest constitutes notice of the existence of the security interest in the cooperative interest as of the date of the filing of the cooperative addendum, except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

SUBPART 2. DUTIES AND OPERATION OF FILING OFFICE

§ 9-519. Numbering, Maintaining, and Indexing Records; Communicating Information Provided in Records.

(a) Filing office duties. For each record filed in a filing office, the filing office shall:

(1) assign a unique number to the filed record;

(2) create a record that bears the number assigned to the filed record and the date and time of filing;

(3) maintain the filed record for public inspection; and

(4) index the filed record in accordance with subsections (c), (d), and (e).

(b) **File number.** A file number [assigned after January 1, 2002,] must include a digit that:

(1) is mathematically derived from or related to the other digits of the file number; and

(2) aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.

(c) **Indexing: general.** Except as otherwise provided in subsections (d) and (e), the filing office shall:

(1) index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and

(2) index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.

(d) **Indexing: real-property-related financing statement.** If a financing statement is filed as a fixture filing or covers as-extracted collateral, timber to be cut or a cooperative interest, it must be filed for record and the filing office shall index it:

(1) under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) to the extent that the law of this State provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, ~~or~~ and;

(3) if the real estate is in the City of New York or in Nassau, Onondaga, or any other county where the block system of recording or registering and indexing conveyances is in use, according to the block in which the real estate is situated; the filing officer may index such statements according to the names of the record owners of the real estate in a single consolidated index installed and maintained by him pursuant to section five hundred twenty-

nine of the county law.

(e) **Indexing: real-property-related assignment.** If a financing statement is filed as a fixture filing or covers as-extracted collateral, timber to be cut or a cooperative interest, the filing office shall index an assignment filed under Section 9-514(a) or an amendment filed under Section 9-514(b):

(1) under the name of the assignor as grantor; and

(2) to the extent that the law of this State provides for indexing a record of the assignment of a mortgage under the name of the assignee, under the name of the assignee~~.~~, and

(3) by description, as if the assignment were a record of an assignment of mortgage of the real property described.

(f) **Retrieval and association capability.** The filing office shall maintain a capability:

(1) to retrieve a record by the name of the debtor and;

(A) if the filing office is described in Section 9-501(a)(1), by the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed; or

(B) if the filing office is described in Section 9-501(a)(2), by the file number assigned to the initial financing statement to which the record relates; and

(2) to associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement~~.~~ ; and

(3) if the real estate is in the City of New York or in Nassau, Onondaga, or any other county where the block system of recording or registering and indexing conveyances is in use, to retrieve a record according to the block in which the real estate is situated.

(g) **Removal of debtor's name.** The filing office may not remove a debtor's name from the index until one year after the effectiveness of a financing statement naming the debtor lapses under Section 9-515 with respect to all secured parties of record.

(h) **Timeliness of filing office performance.** The filing office shall perform the acts required by subsections (a) through (e) at the time and in the manner prescribed by filing-office rule, but not later than two business days after the filing office receives the record in question.

[(I) **Inapplicability to real-property-related filing office.** Subsection[s] [(b)] [and] [(h)] do[es] not apply to a filing office described in Section 9-501(a)(1).]

§ 9-521. Uniform Form of Written Financing Statement, ~~and~~ Amendment, and Cooperative Addendum.

(a) **Initial financing statement form.** A filing office that accepts written records may not refuse to accept a written initial financing statement in the form promulgated by the Department of State except for a reason set forth in Section 9-516(b).

(b) **Amendment form.** A filing office that accepts written records may not refuse to accept a written financing statement amendment in the form promulgated by the Department of State except for a reason set forth in Section 9-516(b).

(c) **Cooperative Addendum form.** A filing office that accepts written records may not refuse to accept a written Cooperative Addendum in the form promulgated by the Department of State except for a reason set forth in Section 9-516(b).

§ 9-522. Maintenance and Destruction of Records.

(a) **Post-lapse maintenance and retrieval of information.** The filing office shall maintain a record

of the information provided in a filed financing statement for at least one year after the effectiveness of the financing statement has lapsed under Section 9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and:

(1) if the record was filed in the filing office described in Section 9-501(a)(1), by using ~~the file number assigned to the initial financing statement to which the record relates and the date [and time] that the record was filed [or recorded], or~~ :

(A) the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed; and

(B) in the case of collateral which is a cooperative interest, indicates the real property tax designation associated with the real property in which the cooperative unit is located as assigned by the local real property tax assessing authority; or

(2) if the record was filed in the filing office described in Section 9-501(a)(2), by using the file number assigned to the initial financing statement to which the record relates.

(b) **Destruction of written records.** Except to the extent that a statute governing disposition of public records provides otherwise, the filling office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, is shall maintain another record of the financing statement which complies with subsection (a).

§ 9-523. Information from Filing Office; Sale or License of Records.

(a) **Acknowledgment of filing written record.** If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to Section 9-519(a)(1) and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) note upon the copy the number assigned to the record pursuant to Section 9-519(a)(1) and the date and time of the filing of the record; and

(2) send the copy to the person.

(b) **Acknowledgment of filing other record.** If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) the information in the record;

(2) the number assigned to the record pursuant to Section 9-519(a)(1); and

(3) the date and time of the filing of the record.

(c) **Communication of requested information.** The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that:

(A) designates a particular debtor [or, if the request so states, designates a particular debtor at the address specified in the request];

(B) has not lapsed under Section 9-515 with respect to all secured parties of record; and

(C) if the request so states, has lapsed under Section 9-515 and a record of which is maintained by the filing office under Section 9-522(a); and

(D) is filed in the filing office described in Section 9-501(a)(1), if the request indicates the real property tax designation associated with the real property as assigned by the local real property tax assessing authority;

(2) the date and time of filing of each financing statement; and

(3) the information provided in each financing statement.

(d) **Medium for communicating information.** In complying with its duty under subsection (c), the filing office may communicate information in any medium or otherwise make information available in any medium. . If requested, the filing office shall communicate information by issuing its written certificate that satisfies the requirements of CPLR Section 4540.

(e) **Timeliness of filing office performance.** The filing office shall perform the acts required by subsections (a) through (d) at the time and in the manner prescribed by filing-office rule, but not later than two business days after the filing office receives the request.

(f) **Public availability of records.** At least weekly, the [insert appropriate official or governmental agency] [filing office] shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part, in every medium from time to time available to the filing office.

PART 6

DEFAULT

SUBPART 1. DEFAULT AND ENFORCEMENT OF SECURITY INTEREST

§ 9-604. Procedure If Security Agreement Covers Real Property, ~~or~~ Fixtures or Cooperative Interests.

(a) **Enforcement: personal and real property.** If a security agreement covers both personal and real property, a secured party may proceed:

(1) under this part as to the personal property without prejudicing any rights with respect to the real property; or

(2) as to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply.

(b) **Enforcement: fixtures.** Subject to subsection (c), if a security agreement covers goods that are or become fixtures, a secured party may proceed:

(1) under this part; or

(2) in accordance with the rights with respect to real property, in which case the other provisions of this part do not apply.

(c) **Removal of fixtures.** Subject to the other provisions of this part, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) **Injury caused by removal.** A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

(e) **Enforcement: cooperative interests.** A security interest in a cooperative interest may be enforced only as provided in §9-601(a).

§ 9-615. Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.

(a) **Application of proceeds.** A secured party shall apply or pay over for application the cash proceeds of disposition under Section 9-610 in the following order to:

(1) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(1-a) in the case of a cooperative organization security interest, the holder thereof in the amount secured thereby;

(2) the satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) the secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) a secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) **Proof of subordinate interest.** If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subsection (a)(3).

(c) **Application of noncash proceeds.** A secured party need not apply or pay over for application noncash proceeds of disposition under Section 9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) **Surplus or deficiency if obligation secured.** If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) and permitted by subsection (c):

(1) unless subsection (a)(4) requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) the obligor is liable for any deficiency.

(e) **No surplus or deficiency in sales of certain rights to payment.** If the underlying transaction is a sale of accounts, chattel paper, payment intangible, or promissory notes:

(1) the debtor is not entitled to any surplus; and

(2) the obligor is not liable for any deficiency.

(f) **Calculation of surplus or deficiency in disposition to person related to secured party.** The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) the transferee in the disposition is the secured party, a person related to the secured party, or

a secondary obligor; and

(2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) **Cash proceeds received by junior secured party.** A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) takes the cash proceeds free of the security interest or other lien;

(2) is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

§ 9-625. Remedies for Secured Party's Failure to Comply with Article.

(a) **Judicial orders concerning noncompliance**. If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) **Damages for noncompliance**. Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) **Persons entitled to recover damages; statutory damages in consumer-goods transaction.** 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 ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

(d) **Recovery when deficiency eliminated or reduced**. A debtor whose deficiency is eliminated under Section 9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under Section 9-626 may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) **Statutory damages: noncompliance with specified provisions**. In addition to any damages recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover five hundred dollars in each case from a person that:

(1) fails to comply with Section 9-208;

(2) fails to comply with Section 9-209;

(3) files a record that the person is not entitled to file under Section 9-509(a);

(4) fails to cause the secured party of record to file or send a termination statement as required by Section 9-513(a), (c), or (e);

(5) fails to comply with Section 9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) fails to comply with Section 9-616(b)(2).

(f) **Statutory damages: noncompliance with Section 9-210.** A debtor or consumer obligor may recover damages under subsection (b) and, in addition, five hundred dollars in each case from a person that, without reasonable cause, fails to comply with a request under Section 9-210. A recipient of a request under Section 9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) **Limitation of security interest: noncompliance with Section 9-210.** If a secured party fails to comply with a request regarding a list of collateral or a statement of account under Section 9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure.

§ 9-703. Security Interest Perfected before Effective Date.

(a) **Continuing priority over lien creditor: perfection requirements satisfied.** If a security interest is enforceable immediately before this article takes effect and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this article if, when this article takes effect, the applicable requirements for enforceability and perfection under this article are satisfied without further action.

(b) **Continuing priority over lien creditor: perfection requirements not satisfied.** Except as otherwise provided in Section 9-705 and subsection (c), if, immediately before this article takes effect, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this article are not satisfied when this article takes effect, the security interest:

(1) is a perfected security interest for one year after this article takes effect;

(2) remains enforceable thereafter only if the security interest becomes enforceable under Section 9-203 before the year expires; and

(3) remains perfected thereafter only if the applicable requirements for perfection under this article are satisfied before the year expires.

(c) **Special rule for cooperative interests: perfection requirements not satisfied.** If, immediately before this article takes effect, a security interest in a cooperative interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for perfection under this article are not satisfied when this article takes effect, the security interest:

(1) is a perfected security interest for five years after this article takes effect; and

(2) remains perfected thereafter only if the applicable requirements for perfection under this article are satisfied before the five years expire.

C. Proposed Revisions to Article 8 of the UCC in Light of the Coop Amendments to Revised Article 9

The following revisions to Article 8 of the Uniform Commercial Code are required to be made to accommodate the proposed nonuniform cooperative-related provisions to be included in Revised Article 9.

1. In section 8-102, add

> (e) The following definitions in Article 9 apply to this article
>
> | | |
> |---|---|
> | Cooperative Interest | Section 9-102(a)(27b) |
> | Cooperative Organization | Section 9-102(a)(27c) |
> | Cooperative Record | Section 9-102(a)(27(e) |

2. Rewrite Section 8-105(e) to read,

> Except as provided in section 9-516(e), filing of a financing statement under Article 9 is not notice of an adverse claim to a financial asset.

REASON FOR CHANGE

The coop amendments to Article 9 provide that filing does constitute notice with respect to a cooperative interest. This change eliminates a conflict that would otherwise appear between an Article 9 modified by the coop amendments and Article 8.

3. Rewrite 8-110(c) to read:

> Except with respect to cooperative interests, the local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

4. Rewrite Section 8-113(b) to read:

> A contract or modification of a contract for the sale or purchase of a cooperative interest is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

REASONS FOR CHANGE

The point of keeping a statute of frauds for contracts of sales of securities that establish a cooperative interest, was simply to prevent a gap opening between the formal requirements for a contract to transfer the shares in a coop and a contract to transfer a proprietary lease. There is, however, some linguistic difference between current Article 8 and the real estate Statute of Frauds in the General Obligation Law Section 5-703. This amendment conforms Article 8 to the GOL.

5. Rewrite Section 8-204 to read:

> A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

(1) the security is certificated and the restriction is noted conspicuously on the security certificate;

(2) the security is uncertificated and the registered owner has been notified of the restriction; or

(3) the restriction is on the transfer of a cooperative interest and the restriction is set forth in the cooperative record.

REASON FOR CHANGE

The capacity to limit transfer of securities evidencing ownership of a cooperative organization defines the social reality of the New York coop. Many coops have not thought to conform their certificates to Revised Article 9. Rather than attempting a difficult educational effort, this change in the statute conforms its rule to social realty.

6. Rewrite Section 8-209 to read:

A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate or, in the case of a cooperative interest, is set forth in the cooperative record.

REASON FOR CHANGE

Coops usually provide, somewhere in their documents, that the coop will have a direct right against the coop in the event the tenant does not pay amounts due the coop. That lien often does not appear on the share certificates. As a practical matter, no coop will transfer shares without first being paid amounts due. This change conforms the statute to reality.