

1 NCCUSL acted favorably upon the Report’s principal recommendation. The
2 Drafting Committee was organized in 1993.

3 The Drafting Committee met fourteen times (November, 1993; March, 1994;
4 September-October, 1994; December, 1994; March, 1995; June, 1995; December,
5 1995; March, 1996; June, 1996; November, 1996; March, 1997; November, 1997;
6 February, 1998; and March, 1998). Meetings of the ALI Members Consultative
7 Group on Article 9 were held on December 16-17, 1994, November 17, 1995, and
8 October 31, 1996. NCCUSL considered the 1995 Annual Meeting Draft of revised
9 Article 9 at its annual meeting in August, 1995, the 1996 Annual Meeting Draft of
10 revised Article 9 at its annual meeting in July, 1996, and the 1997 Annual Meeting
11 Draft of revised Article 9 at its annual meeting in July, 1997. The ALI Council
12 reviewed Council Draft No. 1 (November 15, 1995) at its meeting on December 8,
13 1995, Council Draft No. 2 (November 15, 1996) at its meeting on December 13,
14 1996, and Council Draft No. 3 (November 20, 1997) at its meeting on December
15 11, 1997. The Chair of the Drafting Committee and the Reporters made
16 informational reports to the membership of the ALI during its annual meetings in
17 May, 1995, May, 1996, and May, 1997.

18 **3. Reorganization and Renumbering; Style.**

19 The draft reflects a substantial reorganization of Article 9 and renumbering
20 of many sections. It also has been conformed to NCCUSL’s current style
21 conventions, with a few exceptions that have been approved by the Committee on
22 Style.

23 **4. Summary of Revisions.**

24 Following is a brief summary of some of the more significant proposed
25 revisions of Article 9 that are included in the draft. The summary focuses on
26 substantive revisions that would change current law. No effort is made to
27 summarize all of the proposed revisions of Article 9.

28 **a. Scope of Article 9.**

29 The draft expands the scope of Article 9 in several respects.

30 *Deposit accounts.* Section 9-109 includes within Article 9’s scope deposit
31 accounts as original collateral, except in consumer transactions. Former Article 9
32 deals with deposit accounts only as proceeds of other collateral.

33 *Sales of payment intangibles and promissory notes.* Section 9-109 also
34 includes within the scope of Article 9 most sales of “payment intangibles,” defined in
35 Section 9-102 as general intangibles under which an account debtor’s principal
36 obligation is a monetary obligation. Former Article 9 includes sales of accounts and
37 chattel paper, but not sales of payment intangibles. In its inclusion of sales of

1 payment intangibles, the draft continues the drafting convention found in former
2 Article 9; it provides that the sale of accounts, chattel paper, payment intangibles, or
3 promissory notes creates a “security interest.” The definition of “account” in
4 Section 9-102 has been expanded to include various rights to payment that would be
5 general intangibles under former Article 9.

6 Under the draft the scope of Article 9 also includes sales of promissory
7 notes. See Sections 9-102 (defining “promissory note”), 9-109. The Drafting
8 Committee, as well as a task force organized to advise it, concluded that sales of
9 these rights to payment should not be distinguished from sales of payment
10 intangibles.

11 *Health-care-insurance receivables.* Section 9-109 narrows Article 9’s
12 exclusion of transfers of interests in insurance policies by carving out “health-care-
13 insurance receivables” (defined in Section 9-102) assigned to a health-care provider.
14 See Section 9-109. A health-care-insurance receivable is included within the
15 definition of “account” in Section 9-102.

16 *Nonpossessory statutory agricultural liens.* Section 9-109 also brings
17 nonpossessory statutory agricultural liens within the scope of Article 9. In doing so,
18 it relies heavily upon the report and recommendations of the Article 9 Task Force of
19 the Subcommittee on Agricultural and Agri-Business Financing, Committee on
20 Commercial Financial Services, Section of Business Law, American Bar
21 Association. However, unlike some earlier drafts, this draft does not extend the
22 scope of Article 9 to statutory liens other than agricultural liens.

23 *Consignments.* Section 9-109 provides that “true” consignments—bailments
24 for the purpose of sale by the bailee—are security interests covered by Article 9, with
25 certain exceptions. See Sections 9-102 (defining “consignment”), 9-109. Currently,
26 many consignments are subject to Article 9’s filing requirements by operation of
27 Section 2-326.

28 *Supporting obligations and property securing rights to payment.* The draft
29 also addresses explicitly (i) obligations, such as guaranties and letters of credit, that
30 support payment or performance of collateral such as accounts, chattel paper, and
31 payment intangibles, and (ii) and property (including real property) that secures a
32 right to payment that is subject to an Article 9 security interest. See Sections 9-203,
33 9-308.

34 *Commercial tort claims.* Section 9-109 expands the scope of Article 9 to
35 include the assignment of commercial tort claims by narrowing the exclusion of tort
36 claims generally. However, the draft continues to exclude tort claims for bodily
37 injury and other non-business tort claims of a natural person. See Section 9-102
38 (defining “commercial tort claim”).

1 *Transfers by States and governmental units of States.* Section 9-109
2 narrows the exclusion of transfers by States and their governmental units. It
3 excludes only transfers covered by another statute (other than a statute generally
4 applicable to security interests), to the extent the statute governs the creation,
5 perfection, priority, or enforcement of security interests.

6 *Nonassignable general intangibles, promissory notes, health-care-*
7 *insurance receivables, and letter-of-credit rights.* Finally, the draft enables a
8 security interest to attach to letter-of-credit rights, health-care-insurance receivables,
9 promissory notes, and general intangibles, including contracts, permits, licenses, and
10 franchises, notwithstanding a contractual or statutory prohibition against or
11 limitation on assignment. The draft explicitly protects third parties against any
12 adverse effect of the creation or attempted enforcement of the security interest. See
13 Sections 9-408, 9-409.

14 Subject to these exceptions and two others (Sections 9-406, concerning
15 accounts, chattel paper, and payment intangibles, and 9-407, concerning interests in
16 leased goods), Section 9-401 establishes a baseline rule that the inclusion of
17 transactions and collateral within the scope of Article 9 has no effect on non-Article
18 9 law dealing with the alienability or inalienability of property. For example, if the
19 assignment of a commercial tort claim is invalid under other applicable law, the fact
20 that a security interest in the claim is within the scope of Article 9 does not override
21 the other applicable law.

22 **b. Duties of Secured Party.**

23 The draft provides for expanded duties of secured parties.

24 *Release of control.* Section 9-208 of the draft imposes upon a secured party
25 with control of a deposit account, investment property, or a letter-of-credit right the
26 duty to release control when there is no secured obligation and no commitment to
27 give value. Section 9-209 contains analogous provisions when an account debtor
28 has been notified to pay a secured party.

29 *Information.* Section 9-210 of the draft expands a secured party's duties to
30 provide the debtor with information concerning collateral and the obligations that it
31 secures.

32 **c. Choice of Law.**

33 The choice-of-law rules for the law governing perfection, the effect of
34 perfection or nonperfection, and priority are found in Part 3, Subpart 1, of the draft
35 (Sections 9-301 through 9-307).

36 *Where to file: Location of debtor.* The draft changes the choice-of-law rule
37 governing perfection (i.e., where to file) for most collateral to the law of the

1 jurisdiction where the debtor is located. See Section 9-301. Under current law, the
2 jurisdiction of the debtor’s location governs only perfection and priority of a security
3 interest in accounts, general intangibles, mobile goods, and, for purposes of
4 perfection by filing, chattel paper and investment property.

5 *Determining debtor’s location.* As a general matter, Section 9-307 of the
6 draft follows current law, under which the location of the debtor is the debtor’s
7 place of business (or chief executive office, if the debtor has more than one place of
8 business). Section 9-307 contains three major exceptions. First, a “registered
9 organization,” such as a corporation or limited liability company, is located in the
10 State under whose law the debtor is organized, e.g., a corporate debtor’s State of
11 incorporation. Second, an individual debtor (i.e., human being) is located at his or
12 her principal residence. Third, the draft contains special rules for determining the
13 location of the United States and registered organizations organized under the law
14 of the United States.

15 *Location of non-U.S. debtors.* If, applying the foregoing rules, a debtor is
16 located in a jurisdiction whose law does not require public notice as a condition of
17 perfection of a security interest, the entity is deemed located in the District of
18 Columbia. See Section 9-307. Thus, to the extent that revised Article 9 applies to
19 non-U.S. debtors, perfection could be accomplished in many cases by a domestic
20 filing.

21 *Priority.* For tangible collateral such as goods and instruments, Section 9-
22 301 provides that the law applicable to priority and the effect of perfection or
23 nonperfection will remain the law of the jurisdiction where the collateral is located,
24 as under current law. For intangible collateral, such as accounts, the applicable law
25 for priority will be that of the jurisdiction in which the debtor is located.

26 *Agricultural liens.* Section 9-302 provides that perfection, the effect of
27 perfection or nonperfection, and priority of an agricultural lien are governed by the
28 law of the jurisdiction where the farm products subject to the lien are located.

29 *Goods covered by certificates of title; deposit accounts; letter-of-credit*
30 *rights; investment property.* The draft includes several refinements to the treatment
31 of choice-of-law matters for goods covered by certificates of title. See Section 9-
32 303. It also provides special choice-of-law rules, similar to those for investment
33 property under current Articles 8 and 9, for deposit accounts (Section 9-304),
34 investment property (Section 9-305), and letter-of-credit rights (Section 9-306).

35 **d. Perfection.**

36 The rules governing perfection of security interests and agricultural liens are
37 found in Part 3, Subpart 2, of the draft (Sections 9-308 through 9-316).

1 *Deposit accounts; letter-of-credit rights.* With certain exceptions, the draft
2 provides that a security interest in a deposit account or a letter-of-credit right may
3 be perfected *only* by the secured party’s acquiring “control” of the deposit account
4 or letter-of-credit right. See Sections 9-312, 9-314. Under Section 9-104, a
5 secured party has “control” of a deposit account when, with the consent of the
6 debtor, the secured party obtains the depository bank’s agreement to act on the
7 secured party’s instructions (including when the secured party becomes the account
8 holder) or when the secured party is itself the depository bank. The control
9 requirements are patterned on current Section 8-106, which specifies the
10 requirements for control of investment property. Under Section 9-107, “control” of
11 a letter-of-credit right occurs when the issuer or nominated person consents to an
12 assignment of proceeds under Section 5-114.

13 *Electronic chattel paper.* Responding to industry requests concerning
14 emerging practices in electronic contracting and to the suggestions of a working
15 group established within the ABA Business Law Section, Section 9-102 of the draft
16 includes a new defined term: “electronic chattel paper.” This type of collateral is
17 chattel paper that consists of information stored in an electronic medium and
18 retrievable in perceivable form (i.e., it is not written). Perfection of a security
19 interest in electronic chattel paper may be by control or filing. See Sections 9-105
20 (*sui generis* definition of control of electronic chattel paper), 9-312 (perfection by
21 filing), 9-314 (perfection by control).

22 *Investment property.* The perfection requirements for “investment property”
23 (defined in Section 9-102), including perfection by control under Section 9-106,
24 remain substantially as under current law. However, a new provision in Section 9-
25 314 is designed to ensure that a secured party remains in control in “repledge”
26 transactions that are typical in the securities markets.

27 *Instruments, agricultural liens, and commercial tort claims.* The draft
28 expands the types of collateral in which a security interest may be perfected by filing
29 to include instruments. See Section 9-312. Agricultural liens and security interests
30 in commercial tort claims also are perfected by filing, under the draft. See Sections
31 9-308, 9-310.

32 *Sales of payment intangibles and promissory notes.* Former Article 9
33 covers the outright sale of accounts and chattel paper. The Drafting Committee
34 recognizes that sales of most other types of receivables likewise are financing
35 transactions to which Article 9 should apply. Accordingly, Section 9-102 expands
36 the definition of “account” to include many types of receivables that Article 9
37 currently classifies as “general intangibles,” including the newly defined “health-
38 care-insurance receivable.” It thereby subjects to Article 9’s filing system sales of
39 more types of receivables than does current law. Certain sales of payment
40 intangibles—primarily bank loan participation transactions—should not be subject to
41 the Article 9 filing rules. These transactions fall in a residual category of collateral,
42 “payment intangibles” (general intangibles under which the account debtor’s

1 principal obligation is monetary), the sale of which is exempt from the filing
2 requirements of Article 9. See Sections 9-102, 9-109, 9-309 (perfection upon
3 attachment). The perfection rules for sales of promissory notes are the same as
4 those for sales of payment intangibles.

5 *Possessory security interests.* Several provisions of the draft address aspects
6 of security interests when the secured party or a third party is in possession of the
7 collateral. In particular, Section 9-313 resolves a number of uncertainties under
8 current law. It provides that a security interest in collateral in the possession of a
9 third party is perfected when the third party acknowledges in an authenticated
10 record that it holds for the secured party's benefit. Section 9-313 also provides that
11 a third party need not so acknowledge and that its acknowledgment does not impose
12 any duties on it, unless it otherwise agrees. A special rule in Section 9-313 provides
13 that if a secured party is already in possession of collateral, its security interest
14 remains perfected by possession if it delivers the collateral to a third party and the
15 collateral is accompanied by instructions to hold it for the secured party or to
16 redeliver it to the secured party. The draft also clarifies the limited circumstances
17 under which a security interest in goods covered by a certificate of title may be
18 perfected by the secured party's taking possession.

19 *Automatic perfection.* Section 9-309 of the draft lists various types of
20 security interests as to which no public-notice step is required for perfection (e.g.,
21 purchase-money security interests in consumer goods other than automobiles). This
22 automatic perfection also extends to a transfer of a health-care-insurance receivable
23 to a health-care provider. Those transfers normally will be made by natural persons
24 who receive health-care services; the Drafting Committee saw little value in
25 requiring filing for perfection in that context. Automatic perfection also applies to
26 security interests created by sales of payment intangibles and promissory notes.
27 Section 9-308 provides that a perfected security interest in collateral supported by a
28 "supporting obligation" (such as an account supported by a guaranty) also is a
29 perfected security interest in the supporting obligation, and that a perfected security
30 interest in an obligation secured by a security interest or lien on property (e.g., a
31 real-property mortgage) also is a perfected security interest in the security interest
32 or lien.

33 **e. Priority; Special Rules for Banks and Deposit Accounts.**

34 The rules governing priority of security interests and agricultural liens are
35 found in Part 3, Subpart 3, of the draft (Sections 9-317 through 9-342). The draft
36 includes several new priority rules and some special rules relating to banks and
37 deposit accounts (Sections 9-340 through 9-342).

38 *Purchase-money security interests: General; consumer-goods transactions;*
39 *inventory.* Section 9-103 of the draft substantially rewrites the definition of
40 purchase-money security interest (PMSI) (although the term is not formally a
41 "definition," as such). The substantive changes, however, apply only to non-

1 consumer-goods transactions. (Consumer transactions and consumer-goods
2 transactions are discussed below in part 5.j.) The definition makes clear that a
3 security interest in collateral may be (to some extent) both a PMSI as well as a non-
4 PMSI, in accord with the “dual status” rule applied by some courts under current
5 law (thereby rejecting the “transformation” rule). The definition provides an even
6 broader conception of a PMSI in inventory, yielding a result that accords with
7 private agreements entered into in response to the uncertainty of current law. It also
8 treats consignments as purchase-money security interests in inventory. Section 9-
9 324 of the draft revises the PMSI priority rules, but for the most part without
10 material change in substance. However, an Official Comment will make clear that a
11 secured party that holds a possessory purchase-money security interest in inventory
12 that has not been delivered to the debtor need not give notice to the holder of a
13 conflicting security interest in order to achieve PMSI priority. Section 9-324 also
14 clarifies the priority rules for competing PMSIs in the same collateral.

15 *Purchase-money security interests in livestock; agricultural liens.* Section
16 9-324 of the draft provides a special PMSI priority, similar to the inventory PMSI
17 priority rule, for livestock. Section 9-322 (which contains the baseline first-to-file-
18 or-perfect priority rule) also recognizes special non-Article 9 priority rules for
19 agricultural liens, which can override the baseline first-in-time rule.

20 *Purchase-money security interests in software.* Section 9-324 contains a
21 new priority rule for a software purchase-money security interest. (Section 9-102
22 includes a definition of “software” adapted from Section 2B-102 of the April 15,
23 1998, draft of Article 2B.) A software PMSI under Section 9-103 includes a PMSI
24 in software that is used in goods that are also subject to a PMSI. (Note also that the
25 definition of “chattel paper” has been expanded to include records that evidence a
26 monetary obligation and a security interest in or lease of specific goods and software
27 used in the goods.)

28 *Investment property.* The priority rules for investment property are
29 substantially similar to the priority rules found in former Section 9-115, which were
30 added to current law in conjunction with the 1994 revisions to UCC Article 8. See
31 Section 9-328. Under Section 9-328, if a secured party has control of investment
32 property (Sections 8-106, 9-106), its security interest is senior to a security interest
33 perfected in another manner (e.g., by filing). Also under Section 9-328, security
34 interests perfected by control generally rank according to the time that control is
35 obtained or, in the case of a security entitlement and a commodity contract carried in
36 a commodity account, the time that the control arrangement is entered into (this is a
37 change from former Section 9-115 and from earlier drafts, under each of which the
38 security interests would rank equally). However, as between a securities
39 intermediary’s security interest in a security entitlement that it maintains for the
40 debtor and a security interest held by another secured party, the securities
41 intermediary’s security interest is senior.

1 *Deposit accounts.* The draft's priority rules applicable to deposit accounts
2 are found in Section 9-327. They are patterned on and are similar to those for
3 investment property in former Section 9-115 and Section 9-328 of the draft. Under
4 Section 9-327, if a secured party has control of a deposit account, its security
5 interest is senior to a security interest perfected in another manner (i.e., as cash
6 proceeds). Also under Section 9-327, security interests perfected by control rank
7 according to the time that control is obtained (this is a change from earlier drafts,
8 under which they would rank equally), but as between a depositary bank's security
9 interest and one held by another secured party, the depositary bank's security
10 interest is senior. A corresponding rule in Section 9-340 makes a depositary bank's
11 right of setoff generally senior to a security interest held by another secured party.
12 However, if the other secured party becomes the depositary bank's customer with
13 respect to the deposit account, then its security interest is senior to the depositary
14 bank's security interest and right of setoff. Sections 9-327, 9-340.

15 *Letter-of-credit rights.* The draft's priority rules for security interests in
16 letter-of-credit rights are found in Section 9-329. They are somewhat analogous to
17 those for deposit accounts. A security interest perfected by control has priority of
18 one perfected in another manner (i.e., as a supporting obligation for the collateral in
19 which a security interest is perfected). Security interests in a letter-of-credit right
20 perfected by control rank according to the time that control is obtained (this is a
21 change from earlier drafts, under which they would rank equally). However, the
22 rights of a transferee beneficiary or a nominated person are independent and
23 superior to the extent provided in Section 5-114.

24 *Chattel paper and instruments.* Section 9-330 of the draft is the successor
25 to former Section 9-308. After extensive discussions and comment during the last
26 year, the Drafting Committee has settled on revisions to Section 9-330 that appear
27 to reflect a satisfactory balance to all concerned, although the result is a somewhat
28 complicated formulation. As under former Section 9-308, differing priority rules
29 apply to purchasers of chattel paper who give new value and take possession (or, in
30 the case of electronic chattel paper, obtain control) of the collateral depending on
31 whether a conflicting security interest in the collateral is claimed merely as proceeds.
32 The principal difference relates to the role of knowledge and the effect of an
33 indication of a previous assignment on the collateral. Section 9-330 also affords
34 priority to purchasers of instruments who take possession in good faith and without
35 knowledge that the purchase violates the rights of the competing secured party. In
36 addition, to qualify for priority, purchasers of chattel paper, but not of instruments,
37 must purchase in the ordinary course of their business.

38 *Proceeds.* Section 9-322 contains new priority rules that clarify when a
39 special priority of a security interest in collateral continues or does not continue with
40 respect to proceeds of the collateral. Other refinements to the priority rules for
41 proceeds are included in Sections 9-324 (purchase money security interest priority)
42 and 9-330 (priority of certain purchasers of chattel paper and instruments).

1 *Miscellaneous priority provisions.* The draft also includes (i) clarifications
2 of selected good-faith-purchase and similar issues (Sections 9-317, 9-321); (ii) new
3 priority rules to deal with the “double debtor” problem arising when a debtor creates
4 a security interest in collateral acquired by the debtor subject to a security interest
5 created by another person (Section 9-325); (iii) new priority rules to deal with the
6 problems created when a change in corporate structure or the like results in a new
7 entity that has become bound by the original debtor’s after-acquired property
8 agreement (Section 9-326); (iv) a provision enabling most transferees of money to
9 take free of a security interest (Section 9-332); (v) substantially rewritten and
10 refined priority rules dealing with accessions and commingled goods (Sections 9-
11 335, 9-336); (vi) revised priority rules for security interests in goods covered by a
12 certificate of title (Section 9-337); and (vii) provisions designed to ensure that
13 security interests in deposit accounts will not extend to most transferees of funds on
14 deposit or payees from deposit accounts and will not otherwise “clog” the payments
15 system (Sections 9-341, 9-342).

16 *Model provisions relating to production-money security interests.*
17 Appendix II to the draft contains model definitions and priority rules relating to
18 “production-money security interests” held by secured parties that give new value
19 used in the production of crops. No consensus emerged on this issue within the
20 Task Force, the Drafting Committee, or the agricultural financing community. For
21 this reason, the Drafting Committee has included the production-money provisions
22 in a separate Appendix. Under this approach, the UCC sponsors would make no
23 recommendation one way or the other. In contrast to earlier drafts, which presented
24 the production-money priority rule as proposed uniform statutory text, Appendix II
25 presents the rules as “model” provisions.

26 **f. Proceeds.**

27 Section 9-102 of the draft contains an expanded definition of “proceeds” of
28 collateral which includes additional rights and property that arise out of collateral,
29 such as distributions on account of collateral and claims arising out of the loss or
30 nonconformity of, defects in, or damage to collateral. The term also includes
31 collections on account of “supporting obligations,” such as guarantees.

32 **g. Part 4: Additional Provisions Relating to Third-Party Rights.**

33 New Part 4 of the draft contains several provisions relating to the
34 relationships between certain third parties and the parties to secured transactions. It
35 contains provisions that are the successors to former Sections 9-311 (draft Section
36 9-401) (alienability of debtor’s rights), 9-317 (draft Section 9-402) (secured party
37 not obligated on debtor’s contracts), 9-206 (draft Section 9-403) (agreement not to
38 assert defenses against assignee), 9-318 (draft Sections 9-404, 9-405, and 9-406)
39 (rights acquired by assignee, modification of assigned contract, discharge of account
40 debtor, restrictions on assignment of account, chattel paper, promissory note, or
41 payment intangible ineffective), 2A-303 (draft Section 9-407) (restrictions on

1 creation or enforcement of security interest in leasehold interest or lessor’s residual
2 interest ineffective). It also contains new draft Sections 9-408 (restrictions on
3 assignment of promissory notes, health-care-insurance receivables ineffective, and
4 certain general intangibles ineffective) and 9-409 (restrictions on assignment of
5 letter-of-credit rights ineffective), which are discussed above.

6 **h. Filing.**

7 Part 5 (formerly Part 4) of Article 9 has been substantially rewritten to
8 simplify the statutory text and to deal with numerous problems of interpretation and
9 implementation that have arisen over the years. Many of the revisions during the
10 last year are stylistic or structural and are not mentioned here.

11 *Medium-neutrality.* The draft continues to be “medium-neutral”; that is, it
12 makes clear that parties may file and otherwise communicate with a filing office by
13 means of records communicated and stored in media other than on paper.

14 *Identity of person who files a record; authorization.* Part 5 of the draft is
15 largely indifferent as to the person who effects a filing. Instead, it addresses whose
16 authorization is necessary for a person to file a record with a filing office. The filing
17 scheme does not contemplate that the identity of a “filer” will be a part of the
18 searchable records. This is a change from the approach reflected in many of the
19 earlier drafts. However, it is consistent with, and a necessary aspect of, eliminating
20 signatures or other evidence of authorization from the system (except to the extent
21 that filing offices may choose to employ authentication procedures in connection
22 with electronic communications). As long as the appropriate person authorizes the
23 filing, or, in the case of a termination statement, the debtor is entitled to the
24 termination, it is largely insignificant whether the secured party or another person
25 files any given record.

26 Section 9-509 of the draft collects in one place most of the rules that
27 determine when a record may be filed. In general, the debtor’s authorization is
28 required for the filing of an initial financing statement or an amendment that adds
29 collateral. With one further exception, a secured party of record’s authorization is
30 required for the filing of other amendments. The exception arises if a secured party
31 has failed to provide a termination statement that is required because there is no
32 outstanding secured obligation or commitment to give value. In that situation, a
33 debtor is authorized to file a termination statement indicating that it has been filed by
34 the debtor.

35 *Financing statement formal requisites.* The formal requisites for a financing
36 statement are set out in Section 9-502 of the draft. A financing statement must
37 provide the name of the debtor and the secured party and an indication of the
38 collateral that it covers. Sections 9-503 and 9-506 address the sufficiency of a name
39 provided on a financing statement and clarify when a debtor’s name is correct and
40 when an incorrect name is insufficient. Section 9-504 addresses the indication of

1 collateral covered. Under Section 9-504, a super-generic description (e.g., “all
2 assets” or “all personal property”) in a financing statement is a sufficient indication
3 of the collateral. (Note, however, that a super-generic description is inadequate for
4 purposes of a security agreement. See Sections 9-108, 9-203.) To facilitate
5 electronic filing, the draft does not require that the debtor’s signature or other
6 authorization appear on a financing statement. Instead, it prohibits the filing of
7 unauthorized financing statements and imposes liability upon those who violate the
8 prohibition. See Sections 9-509, 9-626.

9 *Filing-office operations.* The draft, as did earlier drafts, contains several
10 provisions governing filing operations. First, it prohibits the filing office from
11 rejecting an initial financing statement or other record for a reason other than one of
12 the few set forth in the draft. See Sections 9-520, 9-516. Second, the filing office is
13 obliged to link all subsequent records (e.g., assignments, continuation statements,
14 etc.) to the initial financing statement to which they relate. See Section 9-519.
15 Third, under the draft, the filing office may delete a financing statement and related
16 records from the files no earlier than one year after lapse (lapse normally is five
17 years after the filing date), and then only if a continuation statement has not been
18 filed. See Sections 9-515, 9-519, 9-522. Thus, a financing statement and related
19 records would be discovered by a search of the files even after the filing of a
20 termination statement. This approach helps eliminate filing-office discretion and
21 also eases problems associated with multiple secured parties and multiple partial
22 assignments. Fourth, the draft mandates performance standards for filing offices.
23 See Section 9-519, 9-520, 9-523. Fifth, it provides for the promulgation of filing-
24 office rules to deal with details best left out of the statute and a duty of the filing
25 office to submit periodic reports. See Section 9-526, 9-527.

26 *Correction of records: Missing secured parties and fraudulent filings.* In
27 some areas of the country, serious problems have arisen from fraudulent financing
28 statements that are filed against public officials and other prominent persons. In part
29 to address and deter fraudulent filings of all kinds, some earlier drafts included an
30 alternative formulation that would have required that the filing office communicate
31 to each debtor and secured party of record on a financing statement the information
32 contained in the financing statement and in each related record. That requirement
33 has been removed from Section 9-519 in this draft. The Drafting Committee as well
34 as many filing officers are of the view that the enormous costs of these
35 communications would not be worthwhile, on balance. Instead, the Drafting
36 Committee believes that the fraud problem is addressed by providing the
37 opportunity for a debtor to file a termination statement when a secured party
38 wrongfully refuse to provide a terminations statement, as discussed above. This
39 opportunity also addresses the problem of secured parties that simply disappear
40 through mergers or liquidations. In addition, Section 9-520 of the draft affords a
41 statutory method by which a debtor who believes that a filed record is inaccurate or
42 was wrongfully filed may indicate that fact in the files by filing a correction
43 statement, albeit without affecting the efficacy, if any, of the challenged record.

1 *Extended period of effectiveness for certain financing statements.* Section
2 9-515 contains an exception to the usual rule that financing statements are effective
3 for five years unless a continuation statement is filed to continue the effectiveness
4 for another five years. Under that section, an initial financing statement filed in
5 connection with a “public-finance transaction” or a “manufactured-home
6 transaction” (terms defined in Section 9-102) is effective for 30 years.

7 *National form of financing statement and related forms.* The draft provides
8 for uniform, national written forms of financing statements and related written
9 records that must be accepted by a filing office that accepts written records. See
10 Section 9-521.

11 **i. Default and Enforcement.**

12 Part 6 (formerly Part 5) of Article 9 extensively revises current law. Certain
13 consumer-protection provisions are discussed below in section 5.j.

14 *Debtor, secondary obligor; waiver.* Section 9-602 clarifies the identity of
15 persons who have rights and persons to whom a secured party owes specified duties
16 under Part 6. Under that section, the rights and duties are enjoyed by and run to the
17 “debtor,” defined in Section 9-102 to mean any person with a non-lien property
18 interest in collateral, and to any “obligor.” However, with one exception (Section 9-
19 616, as it relates to a consumer obligor), the rights and duties concerned affect only
20 obligors that are “secondary obligors.” “Secondary obligor” is defined in Section 9-
21 102 to include one who is secondarily obligated on the secured obligation, e.g., a
22 guarantor, or one who has a right of recourse against the debtor or another obligor
23 with respect to an obligation secured by collateral. However, under Section 9-628,
24 the secured party is relieved from any duty or liability to any person unless the
25 secured party knows that the person is a debtor or obligor. Under most earlier
26 drafts, a non-debtor obligor (in a non-consumer transaction) could effectively waive
27 its rights and the secured party’s duties to the extent and in the manner provided by
28 other law, e.g., the law of suretyship. This draft changes that rule. It generally
29 prohibits waiver by a secondary obligor. See Section 9-602. However, Section 9-
30 624 permits a secondary obligor (and a debtor) to waive the right to notification of
31 disposition of collateral and, in a non-consumer transaction, the right to redeem
32 collateral, if the secondary obligor (or debtor) agrees to do so after default.

33 *Rights of collection and enforcement of collateral.* Section 9-607 explains
34 in greater detail than former 9-502 the rights of a secured party that seeks to collect
35 or enforce collateral, including accounts, chattel paper, and payment intangibles. It
36 also sets forth the enforcement rights of a depositary bank holding a security interest
37 in a deposit account maintained with the depositary bank. Section 9-607 relates
38 solely to the rights of a secured party to vis-a-vis a debtor with respect to collections
39 and enforcement. It does not affect the rights or duties of third parties, such as
40 account debtors on collateral, which are addressed elsewhere (e.g., Section 9-406).

1 Section 9-608 clarifies the manner in which proceeds of collection or enforcement
2 are to be applied.

3 *Disposition of collateral: Warranties of title.* Section 9-610 imposes on a
4 secured party that disposes of collateral the warranties of title, quiet possession, and
5 the like that are otherwise applicable under other law, and it provides rules for the
6 exclusion or modification of those warranties.

7 *Disposition of collateral: Notification, application of proceeds, surplus
8 and deficiency, other effects.* Section 9-611 requires a secured party to give
9 notification of a disposition of collateral to other secured parties and lienholders
10 who have filed financing statements against the debtor which cover the collateral.
11 (That duty was eliminated by the 1972 revisions to Article 9.) However, that
12 section relieves the secured party from that duty when the secured party undertakes
13 a search of the records and a report of the results is unreasonably delayed. Section
14 9-613, which applies to non-consumer transactions, specifies the contents of a
15 sufficient notification of disposition and provides that a notification sent 10 days or
16 more before the earliest time for disposition is sent within a reasonable time.
17 Section 9-615 addresses the application of proceeds of disposition, the entitlement
18 of a debtor to any surplus, and the liability of an obligor for any deficiency. Section
19 9-619 clarifies the effects of a disposition by a secured party, including the rights of
20 transferees of the collateral.

21 *Rights and duties of secondary obligor.* Section 9-620 provides that a
22 secondary obligor obtains the rights and assumes the duties of a secured party if the
23 secondary obligor receives an assignment of a secured obligation, agrees to assume
24 the secured party's rights and duties upon a transfer to it of collateral, or becomes
25 subrogated to the rights of the secured party with respect to the collateral. The
26 assumption, transfer, or subrogation is not a disposition of collateral under Section
27 9-620, but it relieves the former secured party of further duties. In contrast, most
28 earlier drafts provided that a secured party would *not* be relieved of its duties.
29 Former Section 9-504(5) does not address whether a secured party is relieved of its
30 duties in this situation.

31 *Transfer of record or legal title.* Section 9-619 contains a new provision
32 making clear that a transfer of record or legal title to a secured party is not of itself a
33 disposition under Part 6. This rule applies regardless of the circumstances under
34 which the transfer of title occurs.

35 *Strict foreclosure.* Section 9-620 permits a secured party to accept
36 collateral in partial satisfaction, as well as full satisfaction, of the obligations
37 secured. This right of strict foreclosure extends to intangible as well as tangible
38 property. Section 9-622 clarifies the effects of an acceptance of collateral on the
39 rights of junior claimants. It rejects the approach taken by some courts—deeming a
40 secured party to have constructively retained collateral in satisfaction of the secured
41 obligations—in the case of a secured party's unreasonable delay in the disposition of

1 collateral. Instead, unreasonable delay is relevant when determining whether a
2 disposition under Section 9-610 is commercially reasonable. (Special consumer-
3 protection rules affecting these provisions are described in section 5.j. below.)

4 *Effect of noncompliance: “Rebuttable presumption” test.* Section 9-620
5 adopts the “rebuttable presumption” test for the failure of a secured party to
6 proceed in accordance with certain provisions of Part 6. (As noted below in section
7 5.j., in this draft the rebuttable presumption rule applies only to transactions other
8 than consumer transactions.) Under this approach, the deficiency claim of a
9 noncomplying secured party is calculated by crediting the obligor with the greater of
10 the actual net proceeds of a disposition and the amount of net proceeds that would
11 have been realized if the disposition had been conducted in accordance with Part 6,
12 e.g., in a commercially reasonable manner. The draft rejects the “absolute bar” test
13 that some courts have imposed; that approach bars a noncomplying secured party
14 from recovering any deficiency, regardless of the loss (if any) the debtor suffered as
15 a consequence of the noncompliance.

16 *“Low-price” dispositions: Calculation of deficiency and surplus.* Section
17 9-615(f) addresses the problem of procedurally regular dispositions that fetch a low
18 price. Subsection (f) provides a special method for calculating a deficiency if the
19 proceeds of a disposition of collateral to a secured party, a person related to the
20 secured party, or a secondary obligor are “significantly below the range of proceeds
21 that a complying disposition to a person other than the secured party, a person
22 related to the secured party, or a secondary obligor would have brought.” (“Person
23 related to” is defined in Section 9-102.) In these situations there is reason to
24 suspect that there may be inadequate incentives to obtain a better price.
25 Consequently, instead of calculating a deficiency (or surplus) based on the actual net
26 proceeds, the deficiency (or surplus) would be calculated based on the proceeds that
27 would have been received in a disposition to person other than the secured party, a
28 person related to the secured party, or a secondary obligor. The Drafting
29 Committee envisions that the Official Comments would not attempt explain the test
30 for low price sales beyond references to the statutory formulation. Application
31 would be left to the courts.

32 **j. Consumer Transactions.**

33 The draft includes several provisions applicable only to “consumer
34 transactions” or “consumer-goods transactions.” Each term is defined in Section 9-
35 102.

36 *Background.* In 1995, NCCUSL appointed a subcommittee of the Drafting
37 Committee to consider whether and to what extent Article 9 draft should contain
38 consumer-protection provisions. The subcommittee made several recommendations
39 that the Drafting Committee considered during its meetings in 1996 and 1997.
40 Many of the provisions that the Drafting Committee adopted, and which were
41 discussed at the annual meetings of the ALI membership and NCCUSL, remained

1 highly controversial. The draft that emerged proved unsatisfactory to many
2 representatives of both consumers and consumer creditors.

3 *Proposed compromise solution.* In 1997, the Chair of the Drafting
4 Committee initiated a renewed effort to reach a consensus solution that would not
5 be actively opposed by consumer or consumer-creditor interests. After many rounds
6 of discussions and much “shuttle diplomacy,” a tentative solution was reached
7 during the February, 1998, meeting of the Drafting Committee. During that
8 meeting, the Drafting Committee approved in principle, and asked the Reporters to
9 incorporate in the next draft, a list of proposed revisions relating to consumer
10 transactions. Most of the proposals, but not all, related to Part 6, Default. The
11 Chair of the Drafting Committee presented the proposals as a compromise,
12 explaining that if the Drafting Committee and its sponsors accepted the package of
13 proposals, then representatives of consumer creditors involved in the process would
14 actively support, and advocates of consumer interests involved in the process would
15 not oppose, enactment of revised Article 9. The Chair explained further that the
16 alternative could be widespread opposition, with pitched battles in the various
17 legislatures during the enactment process. This controversy could delay or inhibit
18 enactment of the revisions.

19 In the following discussion of the proposed compromise, references are
20 made to the section numbers of earlier drafts which were the subject of the proposal.
21 Section references to the corresponding sections of this draft (if different and where
22 applicable) are indicated in square brackets.

23 *Deleted provisions.* Under the proposal, several consumer-related
24 provisions in the January, 1998, draft, which had been approved by the Drafting
25 Committee, would be deleted:

26 (i) Section 9-104(d) and (e) [Section 9-103] (allocation of payments for
27 determining purchase-money status in consumer-goods transactions);

28 (ii) Section 9-613(b)(3) (notice of disposition containing minor errors
29 not seriously misleading is sufficient);

30 (iii) Section 9-622 (reinstatement rights of consumer debtor or secondary
31 obligor);

32 (iv) Section 9-624(d) and (e) [Section 9-625] (reduction of secured
33 party’s liability for statutory damages by amount of loss of deficiency or actual
34 damages awarded to consumer);

35 (v) Section 9-625, Alternative A [Section 9-626] (absolute bar of
36 deficiency alternative for secured party noncompliance in consumer transactions);

1 (vi) Section 9-627(d) [Section 9-628] (good-faith error defense to
2 statutory damages);

3 (viii) Section 9-627(e) [Section 9-628] (limitation on recoveries in class
4 actions); and

5 (vii) Section 9-628 (reciprocal attorney's fees in consumer transactions).

6 *Additional revised provisions.* The proposal also called for revision of
7 several other provisions.

8 (i) In addition to deleting Alternative A of Section 9-625 [Section 9-
9 626] (absolute bar rule), the rebuttable presumption rule in Section 9-624 [Section
10 9-625] would be made applicable only to transactions other than consumer
11 transactions. The draft would remain silent as to the effect of a secured party's
12 noncompliance in consumer transactions, leaving that issue to the courts. (During
13 its March, 1998, meeting the Drafting Committee decided that the draft should
14 contain a statutory statement that no inference for consumer transactions should be
15 drawn from the statutory rebuttable presumption rule for non-consumer
16 transactions. See Section 9-626(b) of this draft.)

17 (ii) Sections 9-104(f) and (g) [Section 9-103] (approving "dual status"
18 rule for purchase-money security interests (i.e., rejecting "transformation" rule) and
19 setting burden of proof) would be applicable only to non-consumer-goods
20 transactions. (During its March, 1998, meeting the Drafting Committee decided
21 that the draft should contain a statutory statement that no inference for consumer-
22 goods transactions should be drawn from the statutory treatment of non-consumer-
23 goods transactions. See Section 9-103(i) of this draft.)

24 (iii) Either the definition of "buyer in ordinary course of business" would
25 not be revised to provide that BIOCOB status depends on a possessory right as
26 against the seller, or certain proposed provisions in revised Article 2 would
27 accompany revised Article 9 to provide protection for a prepaying buyer. (During
28 its March, 1998, meeting the Drafting Committee adopted the latter approach,
29 reflected in this draft. See Appendix I.)

30 (iv) The comment to Section 9-111 [Section 9-108] would contain no
31 examples of sufficient collateral descriptions in consumer transactions (e.g., the
32 previous approval of "all jewelry" in the Reporters' Comments would be deleted).

33 (v) Sections 9-403 and 9-404 would be expanded to make effective the
34 FTC's anti-holder-in-due-course rule (when applicable) even in the absence of the
35 required legend.

1 (vi) Section 9-614A [Section 9-616] (post-disposition notice) would be
2 revised to provide for a somewhat more refined statement of how a deficiency or
3 surplus was calculated.

4 (vii) The comments would be modified to delete any explicit statement
5 that “price” is not a term of a disposition which is required to be commercially
6 reasonable, and an explanatory comment would be added to the effect that a low
7 price mandates enhanced judicial scrutiny of the terms of a disposition.

8 (viii) Section 9-618 [Section 9-620] would be revised to prohibit partial
9 strict foreclosure for consumer goods.

10 *Drafting Committee resolution.* During its March, 1998, meeting, the
11 Drafting Committee considered the Reporters’ efforts, incorporated in the March,
12 1998, draft, to implement the proposed solution. The Drafting Committee gave its
13 general approval to the proposed solution. It also considered a number of specific
14 issues that had been raised by the consumer and consumer creditor representatives.
15 The Drafting Committee resolved all remaining material issues. This draft reflects
16 that resolution. However, we should note three caveats. First, this draft reflects
17 changes to the March, 1998, draft which have not been reviewed by anyone other
18 than the Reporters. Second, several elements of the proposed solution for the
19 consumer-related issues implicate the language of the Official Comments that will
20 accompany the final revised text of Article 9. While substantial progress has been
21 made in formulating these comments, they have not yet been finalized. Finally, the
22 proposed solution of the consumer-related issues has been recognized by all
23 concerned as a compromise. The statutory text that has emerged is less than ideal in
24 substance and approach. It represents a balance struck in the hope that it will
25 enhance the opportunities for prompt and uniform enactment of revised Article 9.

26 *Additional consumer-related provisions.*

27 *Description of consumer goods and certain investment property.*
28 Section 9-111 [Section 9-108] provides that in a consumer transaction a description
29 of consumer goods, a security entitlement, securities account, or commodity
30 account by Article 9-defined “type” alone (e.g., “all consumer goods” or “all
31 securities accounts”) is not a sufficient collateral description in a security agreement.

32 *Notification of disposition of collateral.* Section 9-613A [Section 9-
33 614] contains a safe-harbor form of notification, in “plain English,” for consumer
34 transactions.

35 *Notification of calculation of deficiency.* Section 9-614A [Section 9-
36 616] requires a secured party to provide a debtor with a notification of how it
37 calculated a deficiency at the time it first undertakes to collect a deficiency.

38 **k. Good Faith.**

1 Section 9-102 contains a new definition of “good faith” that includes not
2 only “honesty in fact” but also “the observance of reasonable commercial standards
3 of fair dealing.” The definition is similar to the ones adopted in connection with
4 other, recently completed revisions of the UCC.

5 **l. Transition Provisions.**

6 Part 7 of the draft (Sections 9-701 through 9-707) contains transition
7 provisions. A subcommittee of the Drafting Committee presented a report on
8 transition issues to the Drafting Committee at its February, 1998, meeting. At the
9 March, 1998, meeting, the Reporters presented draft provisions based on the report
10 and the Drafting Committees discussion. Part 7 of this draft reflects the Drafting
11 Committee’s deliberations and the Reporters’ further refinements.

12 **m. Conforming and Related Amendments to Other UCC Articles.**

13 Appendix I to the draft contains several proposed revisions to the provisions
14 and Official Comments of other UCC articles. For the most part the revisions are
15 explained in the Reporters’ Comments to the proposed revisions.

16 *Article 1.* Revised Section 1-201 contains revisions to the definitions of
17 “buyer in ordinary course of business,” “purchaser,” and “security interest.”

18 *Articles 2 and 2A.* Sections 2-210, 2-326, 2-502, 2-716, 2A-303, and 2A-
19 307 have been revised to address the intersection between Articles 2 and 2A and
20 Article 9.

21 *Article 5.* New Section 5-118 is patterned on Section 4-210. It provides for
22 a security interest in documents presented under a letter of credit in favor of the
23 issuer and a nominated person on the letter of credit.

24 *Article 8.* Revisions to Sections 8-106, which deals with “control” of
25 securities and security entitlements, conform it to Section 8-302, which deals with
26 “delivery.” Revisions to Section 8-110, which deals with a “securities
27 intermediary’s jurisdiction,” conform it to the revised treatment of a “commodity
28 intermediary’s jurisdiction” in Section 9-305. Sections 8-301 and 8-302 have been
29 revised for clarification. Section 8-510 has been revised to conform it to the revised
30 priority rules of Section 9-328. Several Official Comments in Article 8 also have
31 been revised.

32 Finally, cross-references in other articles to sections of Article 9 have been
33 revised.