

# Uniform Commercial Code Amendments (2022)

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Uniform Law Commission

and by it

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at its

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*With Prefatory Notes and Comments*



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## **Uniform Commercial Code Amendments (2022)**

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

Edwin E. Smith	Massachusetts, <i>Chair</i>
Juliet M. Moringiello	Pennsylvania, <i>Vice Chair</i>
Carl S. Bjerre	Oregon
Thomas J. Buiteweg	Michigan
Henry Deeb Gabriel	North Carolina
Larry T. Garvin	Ohio
Thomas S. Hemmendinger	Rhode Island
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Harvey S. Perlman	Nebraska
Sandra S. Stern	New York
Frank Sullivan Jr.	Indiana
Martin D. Carr	California, <i>Division Chair</i>
Dan Robbins	California, <i>President</i>

## **American Law Institute Members**

The committee appointed by and representing The American Law Institute in preparing this act consists of the following individuals:

Amelia H. Boss	Pennsylvania
Sylvia F. Chin	New York (2021–2022)
Neil B. Cohen	New York
Marek Dubovec	Arizona
Walter Effross	District of Columbia
Teresa Wilton Harmon	Illinois
Tarik J. Haskins	Delaware
Stephanie A. Heller	New York
Charles W. Mooney Jr.	Pennsylvania (2019–2021)
Norman M. Powell	Delaware
Sandra M. Rocks	New York
Steven O. Weise	California

## **Other Participants**

Charles W. Mooney Jr.	Pennsylvania, <i>Reporter (2021–2022)</i>
Stephen L. Sepinuck	Tennessee, <i>Associate Reporter</i>
Steven L. Harris	Illinois, <i>Reporter (2019–2021)</i>
Stephen Y. Chow	Massachusetts, <i>American Bar Association Advisor</i>
Candace M. Zierdt	North Dakota, <i>American Bar Association Advisor</i>
Guido Carducci	France, <i>American Bar Association Section Advisor</i>

Stephen J. Curley

Andrew Hinkes  
Stephen A. Keen  
Carla L. Reyes  
Andrea Tosato  
Mark J. Cutrona  
Tim Schnabel

Connecticut, *American Bar Association Section  
Advisor*

Florida, *Advisor*  
Colorado, *Advisor*  
Texas, *Advisor*  
Pennsylvania, *Advisor*  
Delaware, *Style Liaison*  
Illinois, *Executive Director*

Copies of this act may be obtained from:

Uniform Law Commission  
111 N. Wabash Ave., Suite 1010  
Chicago, IL 60602  
(312) 450-6600  
[www.uniformlaws.org](http://www.uniformlaws.org)

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## UNIFORM COMMERCIAL CODE AMENDMENTS (2022)

### Prefatory Note to Uniform Commercial Code Amendments (2022)

1. **Background.** In 2019, the Uniform Law Commission and The American Law Institute (the Sponsors) appointed a Joint Committee to consider whether changes to the UCC are advisable to accommodate emerging technologies, such as artificial intelligence, distributed ledger technology, and virtual currency. The Joint Committee was initially formed as a study committee, but subsequently was constituted as the Drafting Committee to prepare amendments to the UCC.

The Drafting Committee held 18 meetings from October 2019 to March 2022. It also met with ULC commissioners in advance of the ULC Annual Meetings in 2021 and 2022. Several informal working groups were formed and these groups provided substantial input to the Drafting Committee. More than 300 observers to the Drafting Committee participated in the process. During the process members of the Drafting Committee and observers reached out to industry groups and other stakeholders for input and also participated in many CLE presentations and meetings to educate members of the bar and other interested constituencies.

The work of the Drafting Committee focused primarily on the following areas concerning the UCC: digital assets (controllable electronic records), electronic money, chattel paper, “bundled” or “hybrid” transactions (consisting of the sale or lease of goods together with the sale, lease, or licensing of other property and the provision of services as an integrated transaction), documents of title, payment systems, miscellaneous UCC amendments, and consumer issues.

The ALI approved Tentative Draft No. 1 (April 2022) of the Uniform Commercial Code and Emerging Technologies draft, subject to the usual caveats, at its annual meeting in May 2022. The ULC approved the Uniform Commercial Code Amendments (2022) (2022 Amendments) at its annual meeting in July 2022.

### 2. Overview of 2022 Amendments.

a. **New UCC Article 12—Controllable electronic records, controllable accounts, controllable payment intangibles.** The 2022 Amendments include a new UCC Article 12 that governs the transfer of property rights in certain intangible digital assets (“controllable electronic records”) that have been or may be created and may involve the use of new technologies. These assets include, for example, certain types of (non-fiat) virtual currency and nonfungible tokens (NFTs). “Control” of controllable electronic records is a central organizing concept under Article 12. Controllable electronic records are defined to include only those electronic records that can be subjected to control. Control is best understood in a general sense as a functional equivalent of “possession” of a controllable electronic record and a necessary condition for protection as a good faith purchaser for value (a “qualifying purchaser”) of a controllable electronic record. Article 12 confers an attribute of negotiability on controllable electronic records because a qualifying purchaser takes its interest free of conflicting property claims to the record.

Controllable electronic records also provide a mechanism for evidencing certain rights to payment—controllable accounts and controllable payment intangibles. An account debtor (obligor) on such a right to payment agrees to make payments to the person that has control of the controllable electronic record that evidences the right to payment. Assignments and other aspects of these rights to payment are governed by revisions to UCC Article 9, discussed below, as well as Article 12. Because a qualifying purchaser of a controllable account or controllable payment intangible will take free of competing property claims, these rights to payment also would have this attribute of negotiability. Article 12 provides special rules with respect to the payment obligations and conditions of discharge of account debtors on controllable accounts and controllable payment obligations.

Article 12 includes a choice-of-law rule for the matters that it covers in connection with transactions in controllable electronic records.

**b. Secured transactions amendments—UCC Article 9.**

*Article 12 conforming and other amendments.* The 2022 Amendments include extensive amendments to UCC Article 9. Several of these amendments address security interests in controllable electronic records and in the rights to payment that are embedded in, or tethered to, controllable electronic records—controllable accounts and controllable payment intangibles. Perfection (i.e., essentially, enforceability against third parties) of security interests in these assets may be achieved by a secured party obtaining control of the asset or filing a financing statement in the appropriate jurisdiction’s filing office. A security interest perfected by control has priority over a security interest perfected by filing. The amendments also provide special rules for the law governing perfection and priority for security interests in controllable electronic records, controllable accounts, and controllable payment intangibles. These rules draw on the Article 12 choice-of-law rule.

*Chattel paper.* UCC Article 9 affords special treatment to “chattel paper” (e.g., installment sale contracts and personal property leases). The amendments redefine “chattel paper” and update the relevant Article 9 provisions. The revised definition resolves uncertainty that has arisen under the previous definition and more accurately reflects the distinction between the seller’s or lessor’s right to payment and the record (e.g., installment sale contract or lease) evidencing that right. The revised definition also resolves uncertainty that has arisen when goods are leased as part of a hybrid transaction involving services or non-goods property as well as specific goods. The amendments address additional issues relating to hybrid transactions, mentioned in 2.d., below, and provide an amended definition of “control” of an authoritative electronic copy of a record evidencing chattel paper, which reflects a more accurate and technologically flexible approach than the previous definition.

*Money.* The amendments include a revised definition of “money” in Article 1, which applies throughout the UCC unless otherwise provided. They also include amendments that define “electronic money” and provide a definition of “control” of electronic money that tracks the corresponding definition for control of controllable electronic records. Perfection of a security interest in electronic money (a subset of money) as original collateral must be by control, not filing. The amendments provide a revised Article 9 definition of “money” that

excludes deposit accounts (which could in the future be adopted by a government as money) and money in an electronic form that cannot be subjected to control. The amendments also update and clarify the take-free rules for transferees of money—both electronic money and tangible money—and transferees of funds from deposit accounts.

*Control through another person.* Revisions to the provisions on control in Sections 9-104 (control of deposit accounts), 9-105 (control of authoritative electronic copy of record evidencing chattel paper), and 9-105A (control of electronic money) and a conforming modification to Section 8-106(d)(3) (control of security entitlement) address control through the acknowledgment of a person in control. For similar provisions, see Sections 7-106 (control of electronic document of title) and 12-105 (control of controllable electronic record). For a discussion relevant to these revisions, see Section 12-105, Comment 8.

*Assignments.* The amendments contain new Article 9 definitions of the terms “assignee” and “assignor,” which conform to the descriptions in the pre-2022 official comments.

**c. Payments amendments—UCC Articles 3 (negotiable instruments), 4 (bank deposits and collections), and 4A (funds transfers).** The amendments include several revisions to Articles 3, 4 and 4A or their official comments. The amendments relate to negotiability, remote deposit capture, statements of account, the scope of Article 4A (definition of payment order), and security procedures. The amendments also replace references to a “writing” with references to a “record.” Many of the changes are to the official comments and are intended to further clarify the statutory text.

**d. Other emerging technologies-related amendments.** The amendments contain a revised definition of “conspicuous” in Article 1 and a revised and an updated official comment on that term. They also add to Article 1 the standard definition of “electronic” used by the ULC and adopt revised Article 1 definitions of “send” and “sign,” which address records other than writings.

The amendments also amend Sections 2-102 and 2A-102 and related definitions to clarify the scope of Articles 2 and 2A with respect to hybrid transactions. They also include amendments to several provisions of Articles 2 and 2A to change previous references to a “writing” or “written” communication to refer instead to a “record.”

The amendments include a revised Section 7-106, defining “control” for electronic documents of title. The revised section retains the general rule and the safe harbor under the previous provision and adds an additional safe harbor along the lines of the revised section on control of chattel paper. The amendments also include revisions to the official comments to several provisions of Articles 7 and 9, in particular to clarify the treatment of nonnegotiable documents of title.

Finally, the amendments include several revisions to the official comments to Article 8 (investment securities), in particular to make clear that a controllable electronic record may be a “financial asset” credited to a securities account.

e. **Miscellaneous amendments.** The Article 1 definition of “person” is amended to include a protected series established under non-UCC law.

Amendments to Section 5-116 cure an ambiguity relating to the separate status of bank branches in the former provision and to reject incorrectly decided case law arising from that ambiguity.

f. **Official Comments.** The amendments include additional revisions of the official comments to many sections. The amended official comments remove certain references to obsolete and withdrawn UCC provisions and other uniform laws except as may be necessary or useful to explain particular issues.

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# UNIFORM COMMERCIAL CODE AMENDMENTS (2022)

## ARTICLE 1

### GENERAL PROVISIONS

#### Section 1-101. Short Titles.

\* \* \*

#### Official Comment

\* \* \*

1. Each other article of the Uniform Commercial Code (~~except Articles 10 and 11~~) may also be cited by its own short title. See Sections 2-101, 2A-101, 3-101, 4-101, 4A-101, 5-101, 6-101, 7-101, 8-101, ~~and 9-101~~, 12-101, and A-101.

#### Section 1-103. Construction of [Uniform Commercial Code] to Promote its

#### Purposes and Policies; Applicability of Supplemental Principles of Law.

\* \* \*

#### Official Comment

\* \* \*

2. \* \* \*

\* \* \*

The supplemental principles of law and equity to which subsection (b) refers may evolve over time to take into account developments in technology. These developments may include, for example, developing case law on contract formation in an electronic environment and the use of automated transactions and arrangements that are sometimes referred to as “electronic agents” (which may or may not actually reflect or create agency relationships under the applicable law of agency). See generally Uniform Electronic Transactions Act (UETA); Restatement (Third) of Agency § 1.04, Reporter’s Note to Comment *e* (2006) (discussing the relationship between “electronic agents” and the law of principal and agent). The supplementation recognized by subsection (b) should reflect this evolution.

\* \* \*

#### Section 1-107. Section Captions.

\* \* \*

## Official Comment

\* \* \*

1. Section captions are a part of the text of the Uniform Commercial Code, and not mere surplusage. This is not the case, however, with respect to subsection headings appearing in ~~Article 9~~ Articles 9, 12, and A (Transitional Provisions). See ~~Comment 3 to Section~~ Section 9-101, Comment 3 (“subsection headings are not a part of the official text itself and have not been approved by the sponsors.”); Section 12-101, Comment; Section A-101, Comment.

### **Section 1-201. General Definitions.**

\* \* \*

(b) Subject to definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof:

\* \* \*

(10) “Conspicuous”, with reference to a term, means so written, displayed, or presented that, based on the totality of the circumstances, a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. ~~Conspicuous terms include the following:~~

~~(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and~~

~~(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.~~

\* \* \*

(15) “Delivery”, with respect to an electronic document of title, means voluntary



transfer of control and, with respect to an instrument, a tangible document of title, or an authoritative tangible copy of a record evidencing chattel paper, means voluntary transfer of possession.

\* \* \*

(16A) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

\* \* \*

(21) “Holder” means:

(A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

(B) the person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) the person in control, other than pursuant to Section 7-106(g), of a negotiable electronic document of title.

\* \* \*

(24) “Money” means a medium of exchange that is currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization, or pursuant to an agreement between two or more countries. The term does not include an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by the government.

\* \* \*

(27) “Person” means an individual, corporation, business trust, estate, trust,

partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, ~~public corporation~~, or any other legal or commercial entity. The term includes a protected series, however denominated, of an entity if the protected series is established under law other than [the Uniform Commercial Code] that limits, or limits if conditions specified under the law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series.

\* \* \*

(36) “Send”, in connection with a ~~writing~~, record, or ~~notice~~ notification, means:

(A) to deposit in the mail, ~~or~~ deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, ~~and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none~~ addressed to any address reasonable under the circumstances; or

(B) ~~in any other way to cause to be received any record or notice within the time it would have arrived if properly sent~~ to cause the record or notification to be received within the time it would have been received if properly sent under subparagraph (A).

(37) ~~“Signed” includes using any symbol executed or adopted with present intention to adopt or accept a writing.~~ “Sign” means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

“Signed”, “signing”, and “signature” have corresponding meanings.

\* \* \*

**Legislative Note:**

A state should review and amend any statute or regulation that relies on or refers to the definition of “money” in subsection (b)(24) to account for the amendment to that definition.

A state should enact the amendment to subsection (b)(27) whether the state has enacted the Uniform Protected Series Act (2017) or otherwise recognizes a protected series under its law. Because the amendment applies only under the enacting state’s Uniform Commercial Code, inclusion of the amendment does not require the enacting state to recognize a limit on liability of a protected series organized under the law of another jurisdiction or a limit on liability of the entity that established the protected series. The amendment clarifies the status of a protected series as a “person” under the choice-of-law and substantive law rules of the enacting state’s Uniform Commercial Code.

**Official Comment**

\* \* \*

3. “Agreement.” Derived from former Section 1-201. As used in the Uniform Commercial Code the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of the Uniform Commercial Code to displace a stated rule of law. Whether an agreement has legal consequences is determined by applicable provisions of the Uniform Commercial Code and, to the extent provided in Section 1-103, by the law of contracts. Concerning developments in technology, including, for example, contract formation in electronic environments, automated transactions, and electronic agents, see Section 1-103, Comment 2.

\* \* \*

10. “Conspicuous.” Derived from former Section 1-201(10). This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person against which the term is to operate. Whether a term is conspicuous is an issue for the court. ~~Subparagraphs (A) and (B) set out several methods for making a term conspicuous. Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved). Although these paragraphs indicate some of the methods for making a term attention-calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test. Whether the appearance and presentation of a particular term satisfy this standard is determined by reference to the totality of the circumstances and requires a case-by-case analysis.~~

Historically, contract terms were presented in writing, making the use of standards that relate to the size and appearance of type relevant to the determination of conspicuousness. Today terms in a record are frequently communicated electronically. New technologies have created opportunities for terms to be displayed or presented in novel ways, such as by the use of pop-up

windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual elements such as vibrations, to name a few.

The definition has been revised in the Uniform Commercial Code Amendments (2022) (2022 Amendments) by deleting the statutory examples relating to the appearance of type and instead indicating in these comments a broader universe of factors that are applicable to both written and electronic presentations. This approach is intended to be both more protective of consumers and more useful to drafters by providing more clarity and flexibility in the methods that may be used to call attention to a term.

The attributes of a reasonable person against which a term is to operate can vary depending upon the nature of the transaction and the market in which the transaction occurs. For example, assume that a merchant of goods wishes to enter into a transaction for the sale or lease of goods which does not include an implied warranty of merchantability or fitness for particular purpose. Depending on the particular transaction, the person against which the term excluding implied warranties is to operate may be a large business buyer or lessee, a small business, or a consumer. Similarly, the determination of whether a term is conspicuous may, depending on the context, yield a different conclusion when the term is used in a standard form agreement than when terms of the agreement are the subject of negotiation or discussion.

Terms presented in an online record raise issues that differ in some respects from the issues associated with presenting the same terms in a writing. For example, how a term appears depends to some extent on the equipment and settings used by the person presented with the term.

The test of whether a term is conspicuous remains constant notwithstanding the different contexts referenced above. A term is conspicuous if its appearance and presentation are such that it ought to be noticed by a reasonable person against which the term is to operate. If the term is in a standard form intended for use in many agreements, the determination of whether the term is conspicuous may be made with reference to typical likely parties to the agreements, taking into account all aspects of the transaction, the range of likely equipment and settings used by such parties, and the education, sophistication, disabilities, and other attributes of such parties. If the term is not in a standard form, the determination of whether it is conspicuous should be made with reference to a reasonable person in the position of the actual person against which it is to operate.

Factors relevant to whether a term is conspicuous include, but are not limited to, the following:

(i) The use of headings and text that contrast with the surrounding text. For example, a term is likely to be conspicuous if it is introduced by a heading in uppercase letters equal to or greater in size than the surrounding text. Similarly, a term is likely to be conspicuous if set out in language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language. However, even with those characteristics, for a term to be conspicuous the overall statutory test

must always be met. For example, even if in bold, uppercase letters, a term might not be conspicuous if placed among other terms also in bold, uppercase letters so there is no contrast with the surrounding text or if the application of other factors causes the term not to be provided such that a reasonable person against which it is to operate ought to have noticed it.

(ii) The placement of the term in the record. A term appearing at, or hyperlinked from, text at the beginning of a record, or near the place where the person against which the term is to operate must signify assent, is more likely to be conspicuous than a term in the middle of a lengthy record absent the use of a method reasonably designed to draw the person's attention to the term in middle of the record (for example, by providing separate reasonable notice of the term before presenting the record containing the term to the person for assent or forcing the person to stop on a screen highlighting the term during the presentation of the record for assent).

(iii) If terms are available only through the use of a hyperlink, in addition to the placement of the hyperlink as described above, factors to be considered include whether there is language drawing attention to the hyperlink and describing its function, and the size and color of the text used for the hyperlink and any related language.

(iv) The language of the heading, if any. A misleading heading – such as the heading “Warranty” for a paragraph that contains a disclaimer of warranties – might cause a reasonable person to fail to notice the language that would disclaim warranties, so that the term would not be conspicuous.

(v) The effort needed to access the term. The process and flow of the display and presentation is also relevant. For example, a term accessible only by triggering multiple hyperlinks is less likely to be conspicuous than a term accessible from a single hyperlink.

(vi) Whether the person against which the term is to operate must separately assent to or acknowledge the term. Obtaining separate assent or acknowledgment of a term is generally sufficient to make the term conspicuous.

As noted above, the evolution of technology has led to an evolution in the ways in which terms in an electronic record are displayed or presented. A term displayed or presented in a novel way utilizing emerging technologies is, of course, conspicuous if the effect of the display or presentation is that a reasonable person against which the term is to operate ought to have noticed it.

This definition deals only with requirements that a term be conspicuous (or noted conspicuously) that are stated in particular provisions of the Uniform Commercial Code. Other protective doctrines designed to assure that assent is meaningful that are found in law outside the UCC may also apply. See Section 1-103(b).

\* \* \*

15. “Delivery.” Derived from former Section 1-201. The reference to certificated securities ~~has been~~ in a pre-2022 version was deleted in light of the more specific treatment of

the matter in Section 8-301. The definition ~~has been~~ also was revised to accommodate electronic documents of title. Control of an electronic document of title is defined in Article 7 (Section 7-106). Another revision in the 2022 Amendments conformed the reference to chattel paper to the revised definition of that term and the revised methods of perfection. See Sections 9-102(a)(11) (defining “chattel paper”); 9-314A (perfection by possession and control of chattel paper).

16. “Document of title.” \* \* \*

\* \* \*

A document of title may be either tangible or electronic. ~~Tangible Paper documents of title should be construed to mean traditional paper documents.~~ are “tangible documents of title.” Electronic documents of title are documents that are stored in an electronic medium instead of in tangible form. ~~The concept of an electronic medium should be construed liberally to include electronic, digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies.~~ “Electronic” is defined in paragraph 16A. As to reissuing a document of title in an alternative medium, see Article 7, Section 7-105. Control for electronic documents of title is defined in Article 7 (Section 7-106).

16A. “Electronic.” The basic nature of most modern technologies and the need for a recognized, single term warrants the use of “electronic” as the defined term, even though not all technologies listed may be technically “electronic” in nature. The definition is intended to be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to validate commercial transactions regardless of the medium used by the parties to document them. See generally Uniform Electronic Transactions Act, Section 2, Comment 4.

\* \* \*

20. “Good faith.” \* \* \*

Over time, however, amendments to the Uniform Commercial Code brought the Article 2 merchant concept of good faith (subjective honesty and objective commercial ~~reasonableness~~ standards of fair dealing) into other Articles. First, Article 2A explicitly incorporated the Article 2 standard. ~~See Section 2A-103(7).~~ Then, other Articles broadened the applicability of that standard by adopting it for all parties rather than just for merchants. ~~See, e.g., Sections 3-103(a)(4), 4A-105(a)(6), 7-102(a)(6), 8-102(a)(10), and 9-102(a)(43).~~ Finally, Articles 2 and 2A were amended ~~so as~~ to apply the standard to non-merchants as well as merchants. ~~See Sections 2-103(1)(j), 2A-103(1)(m).~~ All of these definitions are comprised of two elements-honesty in fact and the observance of reasonable commercial standards of fair dealing. Only revised Article 5 ~~defines~~ continued to define “good faith” solely in terms of subjective honesty, and only Article 6 (in the few states that have not chosen to delete the Article) is without a definition of good faith. \* \* \*

\* \* \*

21. ~~“Holder.” Derived from former Section 1-201.~~ The definition has been reorganized for clarity and amended to provide for electronic negotiable documents of title. The definition excludes persons who have control of an electronic document of title pursuant to Section 7-106(g) through the acknowledgment by a person in control. This ensures that an issuer of a document can ascertain who is entitled to delivery from the document itself or from the system in which the document is recorded, without any obligation to look behind the document or the system to ascertain the identity of an undisclosed principal.

\* \* \*

24. ~~“Money.” Substantively identical to former Section 1-201. The test is that of sanction of government, whether by authorization before issue or adoption afterward, which recognizes the circulating medium as a part of the official currency of that government. The narrow view that money is limited to legal tender is rejected. The definition of “money” applies to the term only as used in the Uniform Commercial Code. The definition does not determine whether an asset constitutes “money” for other purposes. Only something currently authorized or adopted as a medium of exchange by a government can be money. As further elaborated in the second sentence of the definition, adoption by a government may occur through establishment by an intergovernmental organization or pursuant to an agreement between governments. Coins and paper currency previously, but not currently, authorized or adopted as a medium of exchange by a government, and currently owned and traded only for their numismatic or historical value, are not money.~~

An electronic medium of exchange established pursuant to a country’s law and that is recorded and transferable in a system that did not exist and did not operate for that medium of exchange before the electronic medium of exchange was authorized or adopted by the country’s government also constitutes money. This is so even if ownership is established or maintained through a system not operated by the government. In contrast, an existing medium of exchange created or distributed by one or more private persons is not money solely because the government of one or more countries later authorizes or adopts the pre-existing medium of exchange.

Although the term “money” is used in several articles, the definition is particularly significant under Article 9. Under the pre-2022 version of this definition, money was generally understood to include only tangible coins, bills, notes, and the like, although the statutory text did not explicitly so limit the term. This worked well under Article 9, which provided that the only method of perfecting a security interest in money as original collateral was by taking possession of it. See pre-2022 Section 9-312(b)(3). The 2022 revised definition of money in Section 1-201(b)(24) is broader and includes both “tangible money” and “electronic money” (new defined types of collateral under the 2022 revisions to Article 9). As under the pre-2022 Article 9, a security interest in tangible money as original collateral may be perfected only by possession. Section 9-312(b)(3). A security interest in electronic money as original collateral may be perfected only by control. Section 9-102(a)(31A) (defining “electronic money”); 9-312(b)(4) (perfection by control for electronic money). Note that the definition of “money” in Section 9-102(a)(54A) is narrower in two respects than the definition in this section—the Article 9 definition excludes deposit accounts and money in electronic form that cannot be subjected to

control under Section 9-105A. See Section 9-102(a)(54A).

Examples: The following examples illustrate the definition of “money.”

**Example 1:** Nation A enacts legislation authorizing or adopting an existing cryptocurrency (spitcoin), created on a private blockchain, as a medium of exchange. Because spitcoin was recorded and transferable in a system that existed and operated for that cryptocurrency before the electronic record was authorized or adopted by Nation A, spitcoin does not become “money” under this definition as a result of Nation A’s legislation.

**Example 2:** Nation B creates a new cryptocurrency (beebuck) and authorizes or adopts it as a medium of exchange. Beebuck is “money.” Beebuck is not recorded and transferable in a system that existed and operated for that cryptocurrency before the electronic record was authorized or adopted by Nation B.

**Example 3:** Nation C enacts legislation authorizing or adopting as a medium of exchange beebuck, the cryptocurrency previously adopted by Nation B in Example 2. Although beebuck is recorded and transferable in a system that existed and operated for beebuck before it was authorized or adopted by Nation C, beebuck was *already* money when authorized or adopted by Nation C. Consequently, beebuck is “money.” Nation C’s action had no relevance or effect on the characterization of beebuck as money.

\* \* \*

27. “Person.” ~~The former definition of this word~~ A previous definition of this term has been replaced with the standard definition language used in acts prepared by the National Conference of Commissioners on Uniform State Laws. A protected series formed under the Uniform Protected Series Act (2017) is a “person.” See PEB Commentary No. 23, dated February 24, 2021. The Commentary is available at <https://www.ali.org/peb-ucc>. This definition recognizes the wide range of subjects that can enjoy legal rights and possess legal duties, including the catchall residual category of “any other legal or commercial entity.” See, e.g., JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray rev., 2d ed., The MacMillan Co. 1931) (“a ‘person’ is a subject of legal rights and duties”). For additional authorities, see PEB Commentary No. 23, n. 5. The reference to a “public corporation” in the pre-2022 text of the definition has been deleted as unnecessary and duplicative of other examples in the definition of entities that are persons.

The second sentence of the definition provides needed clarity as to the status of a protected series for purposes of the Uniform Commercial Code. See PEB Commentary No. 23. Several states have enacted statutes that provide for protected series within a limited liability company or other unincorporated organization. These statutes afford rights and impose duties upon a protected series and generally empower a protected series to conduct its own activities under its own name. The types of protected series that are included as persons under the definition include, but are not limited to, those established under the Uniform Protected Series Act.



Providing that a protected series is a “person” for purposes of the enacting state’s Uniform Commercial Code will expressly permit a protected series, whether created under the law of the enacting state or of another jurisdiction, to be a “seller” or a “buyer” under Article 2, a “lessor” or a “lessee” under Article 2A, or an “organization.” It also permits a protected series to be a “debtor” under Article 9, and, if the law under which the protected series is organized requires a public filing for the protected series to be recognized under that law, a “registered organization” under Article 9.

\* \* \*

33. “Representative.” ~~Derived from former Section 1-201. Reorganized, and form changed from “includes” to “means.”~~ Concerning developments in technology, including, for example, contract formation in electronic environments, automated transactions, and electronic agents, see Section 1-103, Comment 2.

\* \* \*

36. “Send.” ~~Derived from former Section 1-201. Compare “notifies.”~~ The definition of “send” adopts pre-2022 Section 9-102(a)(75). The explicit statement in the previous text of this definition on the appropriateness of sending to an agreed upon address or to an “address reasonable under the circumstances” was limited to “the case of an instrument.” The definition no longer includes that limitation relating to an instrument. Moreover, it is common for parties to rely on their agreement as to appropriate addresses for purposes of notifications and communications. Nothing in the definition or in the Uniform Commercial Code limits the effectiveness of sending a record or notification to an address that has been agreed upon by affected persons. See generally Sections 1-103 and 1-302.

37. “Signed.” “Sign.” ~~Derived from former Section 1-201. Former Section 1-201 referred to “intention to authenticate”; because other articles now use the term “authenticate,” the language has been changed to “intention to adopt or accept.” The latter formulation is derived from the definition of “authenticate” in Section 9-102(a)(7). This provision refers only to writings, because the term “signed,” as used in some articles, refers only to writings. The definition of “sign” adopted in the 2022 Amendments is broad—it encompasses the authentication or adoption of all records, not just writings. The definition replaces the definition of “signed” in pre-2022 texts of this Article. This provision definition also makes it clear that, as the term terms “sign,” “signed,” is and “signature” are used in the Uniform Commercial Code, a complete signature is not necessary. The A symbol may be printed, stamped stamped, or written on, or electronically attached or associated with, a record; it It may be by initials or by thumbprint or by electronic symbol, sound, or process. It may be on any part of the document a writing or other record and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations 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, sound, or process was executed or adopted by the party with present intention to authenticate or adopt or accept the writing record.~~

A “writing,” which necessarily is in tangible form, must exist at the time it is signed and must be signed by the execution or adoption of a tangible symbol to qualify as a signed writing. A writing adopted only by use of an electronic symbol, sound, or process would not be a signed writing until and unless it results in a tangible symbol being on or affixed to the writing. Moreover, if an electronic record is electronically signed and subsequently printed in tangible form, the resulting writing would not constitute a signed writing unless and until some action is taken with “present intent to authenticate or adopt” the writing.

Concerning developments in technology, including, for example, contract formation in electronic environments, automated transactions, and electronic agents, see also Section 1-103, Comment 2.

\* \* \*

43. “Written” or “writing.” ~~Unchanged from former Section 1-201.~~ Several amendments to the Uniform Commercial Code over the years have replaced the terms “written” and “writing” with the term “record,” defined in paragraph (31) and also in some other Articles. Pursuant to the 2022 Amendments, additional references to the terms “writing,” “writings,” and “written” have been replaced by “record.” For example, the 2022 revisions to Articles 2 and 2A made these changes in provisions where an affected party may be assumed to have assented to the use of a record that is not a writing. Where references to those terms remain in Articles 2 and 2A, the use by parties of a record other than a writing may be given effect for purposes of those Articles under law other than the Uniform Commercial Code, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq.*, and the Uniform Electronic Transactions Act. See Sections 2-207, Comment 8; 2A-102, Comment (g).

\* \* \*

### **Section 1-203. Lease Distinguished from Security Interest.**

\* \* \*

### **Official Comment**

\* \* \*

This section begins where Section ~~1-201(35)~~ 1-201(b)(35) leaves off. It draws a sharper line between leases and security interests disguised as leases to create greater certainty in commercial transactions.

\* \* \*

### **Section 1-204. Value.**

Except as otherwise provided in Articles 3, 4, ~~[and] 5, [and 6],~~ [6,] and 12, a person gives

value for rights if the person acquires them:

\* \* \*

### Official Comment

\* \* \*

1. ~~All the~~ Historically, most Uniform Acts in the commercial law field (~~except the Uniform Conditional Sales Act~~) have carried definitions of “value.” ~~All these~~ Those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Subsections (1), (2), and (4) in substance continue the definitions of “value” in the earlier acts. Subsection (3) makes explicit that “value” is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation.

This definition is not applicable to Articles 3 and 4, but the express inclusion of immediately available credit as value follows the separate definitions in those articles. See Sections 4-208, 4-209, 3-303. A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is “immediately available” within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only be made when difficulties in collection arise in connection with the specific transaction involved. Article 12 adopts the substance of the Article 3 definition. See Section 12-102(a)(4).

### **Section 1-301. Territorial Applicability; Parties’ Power to Choose Applicable Law.**

\* \* \*

(c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

\* \* \*

(8) Sections 9-301 through 9-307;

(9) Section 12-107.

### Official Comment

\* \* \*

5. Sections 9-301 through 9-307 should be consulted as to the rules for perfection of security interests and agricultural liens and the effect of perfection and nonperfection and priority. In transactions to which the Hague Securities Convention applies, the requirements for foreclosure and the like, the characterization of a transfer as being outright or by way of security, and certain other issues will generally be governed by the law specified in the account agreement. See PEB Commentary No. 19, ~~dated April 11, 2017.~~

\* \* \*

### **Section 1-306. Waiver or Renunciation of Claim or Right After Breach.**

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in ~~an authenticated~~ a signed record.

#### **Official Comment**

\* \* \*

**Changes from former law:** ~~This section changes former law in two respects. First, former Section 1-107, requiring the “delivery” of a “written waiver or renunciation” merges merged the separate concepts of the aggrieved party’s agreement to forego rights and the manifestation of that agreement. This section separates those concepts, and explicitly requires agreement of the aggrieved party. Second, the revised section reflects developments in electronic commerce by providing for memorialization in an authenticated record. In this context, a party may “authenticate” a record by (i) signing a record that is a writing or (ii) attaching to or logically associating with a record that is not a writing an electronic sound, symbol or process with the present intent to adopt or accept the record. Sections 1-201(b)(37) and 9-102(a)(7).~~

1. This section makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a ~~commercial~~ contract where the agreement effecting such renunciation is memorialized in a record ~~authenticated~~ signed by the aggrieved party. Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith: (Section 1-304).

2. Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

## **ARTICLE 2**

### **SALES**

#### **Section 2-102. Scope; Certain Security and Other Transactions Excluded from**

**this Article.**

~~Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.~~

(1) Unless the context otherwise requires, and except as provided in subsection (3), this Article applies to transactions in goods and, in the case of a hybrid transaction, it applies to the extent provided in subsection (2).

(2) In a hybrid transaction:

(a) If the sale-of-goods aspects do not predominate, only the provisions of this Article which relate primarily to the sale-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply.

(b) If the sale-of-goods aspects predominate, this Article applies to the transaction but does not preclude application in appropriate circumstances of other law to aspects of the transaction which do not relate to the sale of goods.

(3) This Article does not:

(a) apply to a transaction that, even though in the form of an unconditional contract to sell or present sale, operates only to create a security interest; or

(b) impair or repeal a statute regulating sales to consumers, farmers, or other specified classes of buyers.

### **Official Comment**

\* \* \*

**Purposes of Changes and New Matter:**

1. To make it clear that: The article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions. “Security transaction” is used in the same sense as in the article on Secured Transactions (Article 9). Subsection (3) makes it clear that this Article does not govern aspects of a transaction that, although in the form of a sale or contract to sell, create a security interest. See Sections 1-201(b)(35); 9-109(a)(1). Of course, this Article does apply to any sales aspects of such a transaction.

2. Many ordinary transactions involve both a sale of goods and the provision of services, a lease of other goods, or a sale, lease, or license of property other than goods. In its original formulation, Article 2 provided no guidance on whether or to what extent the Article applied to such a hybrid transaction, although by defining a “sale” as “the passing of title [to goods] from the seller to the buyer for a price,” Section 1-206 arguably regarded such transactions as sales. This section was substantially revised to address hybrid transactions pursuant to the Uniform Commercial Code Amendments (2022) (2022 Amendments). See Section 2-106(5) (defining “hybrid transaction”).

In dealing with the issue of whether and to what extent, under the pre-2022 version of this section, Article 2 applied to hybrid transactions, most courts used some version of a “predominant purpose” test. Under those tests, Article 2 applied either in full or not at all, depending on whether the hybrid transaction, at its inception, was predominantly about the goods. In some cases, courts looked instead to the “gravamen of the claim,” applying Article 2 to issues relating to the goods and applying other law to issues relating to other aspects of the transaction. Still other courts used what was sometimes referred to as the “bifurcation approach,” under which Article 2 applied to the sale-of-goods aspect of a hybrid transaction and other law applies to the other aspects of the transaction. The bifurcation approach was similar to the gravamen of the claim, but instead of applying all of Article 2 to some, but not all, types of claims relating to a hybrid transaction, it distinguished the provisions in Article 2 that deal with the goods from those that deal with the transaction as a whole, and applied only the former in a hybrid transaction.

Subsection (2) codifies aspects of the predominant purpose test and the bifurcation approach, establishing a two-tiered test. If the sale-of-goods aspects of a hybrid transaction predominate, then Article 2 applies. If the other aspects of the hybrid transaction predominate, then the provisions of Article 2 which relate primarily to the sale of goods, as opposed to those that relate to the transaction as a whole, apply. This approach has the benefit, for example, of ensuring that a person acquiring ownership of goods in a transaction in which the sale-of-goods aspects do not predominate is a buyer that benefits from the warranty provisions of this Article and may have a right to recover the goods from the seller and thereby may qualify as a buyer in ordinary course of business under Section 1-201(b)(9).

3. It is important to note that, in contrast to the frequent reference (under prior case law in many states) to the predominant *purpose* of a hybrid transaction, subsection (2) focuses on which aspect of the transaction predominates without requiring a finding of the “purpose” of either or both parties (although that purpose, when evident, may be a relevant factor in deciding which aspect predominates). The determination of which aspect of a hybrid transaction

predominates is left to the court, which should evaluate each transaction on a case-by-case basis without the necessity of applying any particular formula. Factors that may be relevant to that determination include, but are not limited to, the language of the agreement, the portion of the total price that is attributable to the sale of goods (as to which an agreed-upon allocation will ordinarily be binding on the parties), the purposes of the parties in entering into the transaction (when that is ascertainable), and the nature of the businesses of the parties (such as whether the seller is in the business of selling goods of that kind). Because the definition of “goods” expressly includes “specially manufactured goods,” services involved in manufacturing goods are normally attributable to the sale-of-goods aspects of the transaction. Services in designing specially manufactured goods, however, would not normally be attributable to the sale-of-goods aspects of the transaction.

4. If the sale-of-goods aspects of a hybrid transaction predominate, then this Article applies to the transaction. However, the application of this Article to a hybrid transaction does not preclude the application of principles of law and equity to supplement the provisions of this Article, see Section 1-103(b), nor does it preclude, in appropriate circumstances, the application of other law to the non-sale-of-goods aspects of the transaction. Whether it is appropriate to apply such other law will depend in part on what purposes the other law is designed to achieve and whether application of the other law would be likely to interfere with the application of this Article.

**Example 1.** Owner hires Contractor to replace the roof on a structure. As part of the transaction, Contractor promises to remove the existing shingles and install new shingles, which Contractor is providing. The transaction is a hybrid transaction because it involves the passing of title to the new shingles and the provision of services. If the sale-of-goods aspects of the transaction predominate, this Article applies to the transaction.

**Example 2.** Same facts as in Example 1. Even if the sale-of-goods aspects of the transaction predominate, other law might apply to the services aspects of the transaction. For example, if applicable law regulates the provision of roofing services, such as by requiring the roofer to be licensed, requiring specified disclosures, requiring or implying a warranty with respect to the quality of services, or giving the property owner a brief period of time to cancel the contract, such other law might apply.

**Example 3.** In a single transaction, Seller agrees to sell a warehouse full of goods to Buyer. The transaction includes the goods contained in the warehouse, the warehouse itself, and the real property on which the warehouse is situated. Assume the goods aspects of the transaction predominate. The application of this Article to the transaction does not preclude the application of real property law to the real-property aspects of the transaction. Accordingly, whether the sale of the real property complies with the applicable requirements of real property law is determined by law other than this Article. Other law will also determine whether consummation of the sale of the real property is a condition to the parties’ obligations to buy and sell the goods.

5. If the sale-of-goods aspects of a hybrid transaction do not predominate, under subsection (3), the provisions of this Article relating primarily to the sale of goods, as opposed to the transaction as a whole, apply. These provisions include those relating to warranties under Sections 2-212, 2-313, 2-314, 2-315, 2-316, 2-317, 2-318; tender of delivery and risk of loss under Sections 2-503, 2-504, 2-509, 2-510; acceptance, rejection, and cure under Sections 2-508, 2-601, 2-602, 2-603, 2-604, 2-605, 2-606; and remedies for non-delivery of the goods or for tender of nonconforming goods under Sections 2-711, 2-712, 2-713, 2-714, 2-715, 2-716. In contrast, the provisions of this Article dealing with the transaction as a whole do not apply. These provisions include those relating to: the requirement of a signed record, Section 2-201; contract formation, Sections 2-204 through 2-207; and whether consideration is needed to modify the agreement, Section 2-209.

**Example 4.** Owner sends a purchase order to Contractor offering to enter into a contract with Contractor to replace the roof on a structure. The proposed transaction involves Contractor removing the existing shingles and installing new shingles, which Contractor is to provide. Contractor responds with a confirmation purporting to accept but containing additional and different terms. The transaction is a hybrid transaction because it involves the passing of title to the new shingles and the provision of services. If the sale-of-goods aspects of the transaction do not predominate, this Article does not apply to determine whether a contract was formed. That issue is governed by other law.

**Example 5.** Under the facts of Example 1, assume that the sale-of-goods aspects of the transaction do not predominate. The agreement provides that the job will be completed by December 31. Due to unforeseen circumstances affecting the availability of supplies and labor, the job is not completed by the agreed-upon deadline. Whether Contractor's failure to perform on time is excused is determined by general contract law, rather than by this Article (Section 2-615).

**Example 6.** Under the facts of Example 1, assume that the sale-of-goods aspects of the transaction do not predominate. A dispute between the parties arises and during litigation one party seeks to admit evidence of usage of trade to supplement or explain the parties' written agreement. If the proffered evidence relates to the sale-of-goods aspects of the transaction, the parol evidence rule in this Article, Section 2-202 applies. If the proffered evidence relates to the other aspects of the transaction or to the transaction as a whole, other law will govern the admissibility of the evidence.

**Example 7.** Restaurateur hires Remodeler to remodel Restaurateur's kitchen. The transaction requires Remodeler to supply a new oven meeting detailed specifications, but the services aspects of the transaction predominate. The oven supplied does not meet a minor aspect of those specifications (but does substantially satisfy the specifications as a whole). Whether Restaurateur may reject the oven (or must retain it subject to price adjustment), whether Restaurateur has a right to cover by purchasing a substitute oven, and the measure of Restaurateur's damages for the oven's nonconformity to the specifications are



determined by this Article.

**Example 8.** Restaurateur hires Remodeler to remodel Restaurateur's kitchen by a specified completion date. The transaction requires Remodeler to supply a new oven, but the services aspects of the transaction predominate. Remodeler breaches by failing to complete the project by the specified date. The measure of Restaurateur's damages for Remodeler's failure to timely complete the project is not determined by this Article.

6. The rules of subsections (1) and (2) are essentially gap fillers that apply when the parties' agreement is silent on what legal rules govern the different aspects of their transaction. In general, parties are free to preclude the application of this Article to the aspects of their transaction that are not about the sale of goods.

**Example 9.** Robotics Manufacturer contracts to design, build, and sell customized robotics to Car Maker. The transaction includes a sale of goods and the provision of services and is therefore a hybrid transaction. Assume that the sale-of-goods aspects predominate. The parties may, in their agreement, provide that Article 2 does not govern the services aspects of the transaction.

As Example 9 illustrates, parties may agree that Article 2 will not govern non-goods aspects of a hybrid transaction, even though the sale-of-goods aspects predominate. But, when sale-of-goods aspects predominate, the parties cannot agree that Article 2 does not govern matters that relate to the transaction as a whole, such as contract formation and enforceability. For example, in a situation such as Example 9, if the requirements of the Section 2-201 statute of frauds are not satisfied, it would make little sense to hold that the services aspects of the transaction are enforceable when the provision of services is clearly dependent on the existence of the sale-of-goods aspects. Of course, even when this article applies, its provisions may be varied by agreement to the extent provided in section 1-302.

**Section 2-106. Definitions: “Contract”; “Agreement”; “Contract for Sale”; “Sale”; “Present Sale”; “Conforming” to Contract; “Termination”; “Cancellation”; “Hybrid Transaction”.**

\* \* \*

(5) “Hybrid transaction” means a single transaction involving a sale of goods and:

(a) the provision of services;

(b) a lease of other goods; or

(c) a sale, lease, or license of property other than goods.

## Official Comment

\* \* \*

### **Purposes of Changes and New Matter:**

\* \* \*

4. In some transactions, the passing of title to goods from the seller to the buyer in return for a price is part of a larger transaction. The other aspects of the transaction might involve the seller providing services to the buyer, the seller leasing other goods to the buyer, or the seller transferring to the buyer rights to property other than goods. Such a transaction is a “hybrid transaction,” as defined in subsection (5). Section 2-102 indicates the extent to which this Article applies to a hybrid transaction.

5. A hybrid transaction is a single transaction. If contracting parties enter into separate agreements at the same time, each agreement creating a separate transaction, each transaction must be evaluated separately to determine if it is a hybrid transaction.

**Example 1.** To sell an ongoing business, Seller and Buyer enter into three separate written agreements: (i) a sale of goods used in the business; (ii) an agreement for Seller to provide consulting services to Buyer for a period of six months; and (iii) a sale of intangible assets associated with the business. Each agreement creates a separate transaction. None of those transactions involves both a sale of goods and the provision of services, the lease of other goods, or the sale, lease, or license of property other than goods. Thus, none of the separate transactions constitutes a hybrid transaction.

**Example 2.** To sell an ongoing business, Seller and Buyer enter into two separate written agreements: (i) a sale of goods and intangible assets used in the business; and (ii) an agreement for Seller to provide consulting services to Buyer for a period of six months, and not to compete with Buyer for a period of one year. The agreement to sell goods and intangible assets creates a hybrid transaction. The agreement for consulting services, a separate transaction, is not a hybrid transaction.

Even when contracting parties enter into a single agreement involving both a sale of goods and a sale, lease, or license of other property or the provision of services, the elements of the single agreement may be so independent that they create separate transactions. In that case, no hybrid transaction would exist merely because the separate transactions arose out of the same agreement.

**Example 3.** Farmer A and Farmer B sign a written agreement pursuant to which Farmer A will sell a tractor to Farmer B and Farmer A will board and feed Farmer B’s cattle until the cattle are sold. The agreement specifies a price for the tractor, which is due upon delivery, and specifies a mechanism for determining the price

for Farmer A's services, which is to be paid when the cattle are sold. The parties would have entered into an agreement to buy and sell the tractor even if they had not entered into an agreement to board and feed the cattle, and vice-versa. Two separate transactions arise from the single agreement, neither of which is a hybrid transaction. Article 2 applies to the sale of the tractor. Other law applies to the agreement to board and feed the cattle.

**Example 4.** In a single record, Landscaper agrees to sell plants to Homeowner and to install the plants on Homeowner's property. The agreement specifies a total price but provides no mechanism for determining what portion of the price is allocable to the sale of plants and what portion is allocable to the installation services. Because the terms of the agreement relating to the sale of goods and those relating to services are not severable, the transaction is a hybrid transaction.

## **Section 2-201. Formal Requirements; Statute of Frauds.**

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is ~~some writing~~ a record sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by ~~his~~ the party's authorized agent or broker. A ~~writing~~ record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this ~~paragraph~~ subsection beyond the quantity of goods shown in ~~such writing~~ the record.

(2) Between merchants if within a reasonable time a ~~writing~~ record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against ~~such~~ the party unless ~~written~~ notice in a record of objection to its contents is given within 10 days after it is received.

\* \* \*

### **Official Comment**

\* \* \*

**Purposes of Changes:** ~~The changed phraseology of this~~ **Purposes:** This section is intended to make it clear that:

1. The required ~~writing~~ record need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the ~~writing~~ record afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad or another medium. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of the fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, “market” prices and valuations that are current in the vicinity constitute a similar check. Thus, if the price is not stated in the ~~memorandum~~ record evidencing the contract it can normally be supplied without danger of fraud. Of course, if the “price” consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the ~~memorandum~~ record are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be “signed”, a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

\* \* \*

3. Between merchants, failure to answer a ~~written confirmation of~~ record confirming a contract within ten days of receipt is tantamount to a ~~writing~~ record under subsection (2) and is sufficient against both parties under subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to ~~the written confirmation giving a~~ record confirming a contract is unaffected. Compare the effect of a failure to reply under Section 2-207.

\* \* \*

5. The requirement of “signing” is discussed in ~~the Comment to~~ Section 1-201, Comment 37.

6. ~~It~~ For purposes of subsection (1), it is not necessary that the ~~writing~~ record be delivered to anybody. It need not be signed by both parties but it is, of course, not sufficient against one who has not signed it. Prior to a dispute no one can determine which party’s signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional ~~writing~~ record is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

8. In furtherance of medium neutrality, references to “writing” and “written” in the pre-2022 text of this section have been changed to refer to a “record.”

### **Section 2-202. Final ~~Written~~ Expression: Parol or Extrinsic Evidence.**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a ~~writing~~ record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

\* \* \*

(b) by evidence of consistent additional terms unless the court finds the ~~writing~~ record to have been intended also as a complete and exclusive statement of the terms of the agreement.

### **Official Comment**

\* \* \*

#### **Purposes:**

1. This section definitely rejects:

(a) Any assumption that because a ~~writing~~ record has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

\* \* \*

2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any ~~writing~~ record stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such ~~writings~~ records are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document

was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing record to mean.

3. Under paragraph (b) consistent additional terms, not reduced to writing a record, may be proved unless the court finds that the writing record was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document record in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

4. In furtherance of medium neutrality, references to a “writing” in the pre-2022 text of this section have been changed to refer to a “record.”

### **Section 2-203. Seals Inoperative.**

The affixing of a seal to a writing record evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing record a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

#### **Official Comment**

\* \* \*

3. In furtherance of medium neutrality, the reference to a “writing” in the pre-2022 text of this section has been changed to refer to a “record.”

### **Section 2-205. Firm Offers.**

An offer by a merchant to buy or sell goods in a signed writing record which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

#### **Official Comment**

\* \* \*

**Purposes of Changes: Purposes:**

1. This section is intended to modify the former rule which required that “firm offers” be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed ~~writings~~ records.

2. The primary purpose of this section is to give effect to the deliberate intention of a merchant to make a current firm offer binding. The deliberation is shown in the case of an individualized document by the merchant’s signature to the offer, and in the case of an offer included on a form supplied by the other party to the transaction by the separate signing of the particular clause which contains the offer. “Signed” here also includes authentication but the reasonableness of the authentication herein allowed must be determined in the light of the purpose of the section. The circumstances surrounding the signing may justify something less than a formal signature or initialing but typically the kind of authentication involved here would consist of a minimum of initialing of the clause involved. A handwritten memorandum on the writer’s letterhead purporting in its terms to “confirm” a firm offer already made would be enough to satisfy this section, although not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and it would adequately show its own authenticity. Similarly, an authorized telegram will suffice, and this is true even though the original draft contained only a typewritten signature. See generally Section 1-201(b)(37) (defining “sign”) and Comment 37. However, despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this Article since authentication by a ~~writing~~ record is the essence of this section.

\* \* \*

7. In furtherance of medium neutrality, the reference to a “writing” in the pre-2022 text of this section has been changed to refer to a “record.”

\* \* \*

## **Section 2-207. Additional Terms in Acceptance or Confirmation.**

\* \* \*

### **Official Comment**

\* \* \*

8. Pursuant to the 2022 Amendments, some references in this Article to the terms “writing,” “writings,” or “written” have been changed to refer to a “record.” These changes are made in provisions where an affected party may be assumed to have assented to the use of a record that is not a writing. For example, Section 2-201 involves a record signed by an affected party and Section 2-202 refers to a record intended by parties to be a final expression of their agreement. However, in this section and some other sections in this Article references to these terms remain. Where such references remain in this Article, the use by parties of a record other than a writing may be given effect for purposes of this Article under law other than the Uniform

Commercial Code, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., and the Uniform Electronic Transactions Act.

**Section 2-209. Modification, Rescission, and Waiver.**

\* \* \*

(2) A signed agreement which excludes modification or rescission except by a signed writing or other signed record cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

\* \* \*

**Official Comment**

\* \* \*

Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing or other signed record. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed ~~writing~~ record from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct as a waiver is further regulated in subsection (5).

5. In furtherance of medium neutrality, the reference to a signed "writing" in the pre-2022 text of this section has been supplemented to refer as well to a signed "record."

\* \* \*

**Section 2-316. Exclusion or Modification of Warranties.**

\* \* \*

**Official Comment**

\* \* \*

10. As to the use of a record other than a writing and communications that are not



written, see Section 2-207, Comment 8. Whether a term is conspicuous, including a term in a record other than a writing, is discussed in Section 1-201, Comment 10.

### **Section 2-326. Sale on Approval and Sale or Return; Rights of Creditors.**

\* \* \*

#### **Official Comment**

\* \* \*

4. The transactions governed by this section are sales; the persons to whom the goods are delivered are buyers. This section has no application to transactions in which goods are delivered to a person who has neither bought the goods nor contracted to buy them. See PEB Commentary No. 20, ~~dated January 24, 2019~~. Transactions in which a non-buyer takes delivery of goods for the purpose of selling them are bailments called consignments and are not “sale on approval” or “sale or return” transactions. Certain consignment transactions were dealt with in ~~former pre-1998~~ Sections 2-326(3) and 9-114. These provisions have been deleted and have been replaced by new provisions in Article 9. See, e.g., Sections 9-109(a)(4); 9-103(d); 9-319.

\* \* \*

### **Section 2-403. Power to Transfer; Good Faith Purchase of Goods; “Entrusting.”**

\* \* \*

#### **Official Comment**

\* \* \*

3. The definition of “buyer in ordinary course of business” (Section 1-201) is effective applies here and preserves the essence of the healthy limitations engrafted by the case-law on the older statutes. The older loose concept of good faith and wide definition of value combined to create apparent good faith purchasers in many situations in which the result outraged common sense; the court’s solution was to protect the original title especially by use of “cash sale” or of over-technical construction of the enabling clauses of the statutes. But such rulings then turned into limitations on the proper protection of buyers in the ordinary market. Section ~~1-201(9)~~ 1-201(b)(9) cuts down the category of buyer in ordinary course in such fashion as to take care of the results of the cases, but with no price either in confusion or in injustice to proper dealings in the normal market.

### **Section 2-507. Effect of Seller’s Tender; Delivery on Condition.**

\* \* \*

#### **Official Comment**

\* \* \*

3. Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's "right as against the seller" conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this Article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. This subsection (2) codifies the cash seller's right of reclamation which is in the nature of a lien. There is no specific time limit for a cash seller to exercise the right of reclamation. However, the right will be defeated by delay causing prejudice to the buyer, waiver, estoppel, or ratification of the buyer's right to retain possession. Common law rules and precedents governing such principles are applicable (Section 1-103). If third parties are involved, Section 2-403(1) protects good faith purchasers. See PEB Commentary No. 1; dated March 10, 1990.

#### **Section 2-605. Waiver of Buyer's Objections by Failure to Particularize.**

\* \* \*

#### **Official Comment**

\* \* \*

5. As to the use of a record other than a writing and communications that are not written, see Section 2-207, Comment 8.

#### **Section 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.**

\* \* \*

#### **Official Comment**

\* \* \*

9. As to the use of a record other than a writing and communications that are not written, see Section 2-207, Comment 8.

#### **Section 2-609. Right to Adequate Assurance of Performance.**

#### **Official Comment**

\* \* \*

7. As to the use of a record other than a writing and communications that are not written, see Section 2-207, Comment 8.

**Section 2-616. Procedure on Notice Claiming Excuse.**

\* \* \*

**Official Comment**

1. \* \* \*

2. As to the use of a record other than a writing and communications that are not written, see Section 2-207, Comment 8.

**Section 2-702. Seller's Remedies on Discovery of Buyer's Insolvency.**

\* \* \*

**Official Comment**

\* \* \*

4. As to the use of a record other than a writing and communications that are not written, see Section 2-207, Comment 8.

**ARTICLE 2A**

**LEASES**

**Section 2A-101. Short Title.**

\* \* \*

**Official Comment**

\* \* \*

**Issues:** The drafting committee then identified and resolved several issues critical to codification:

\* \* \*

**Definition of Lease:** Lease was defined to exclude leases intended as security (Section 2A-103(1)(j)). Given the litigation to date a revised definition of security interest was suggested for inclusion in the Act. (~~Section 1-201(37)~~) See pre-2001 Section 1-201(37). ~~This revision~~ Section 1-203 now sharpens the distinction between leases and security interests disguised as leases.

\* \* \*

## **Section 2A-102. Scope.**

(1) This Article applies to any transaction, regardless of form, that creates a lease and, in the case of a hybrid lease, it applies to the extent provided in subsection (2).

(2) In a hybrid lease:

(a) if the lease-of-goods aspects do not predominate:

(i) only the provisions of this Article which relate primarily to the lease-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply;

(ii) Section 2A-209 applies if the lease is a finance lease; and

(iii) Section 2A-407 applies to the promises of the lessee in a finance lease to the extent the promises are consideration for the right to possession and use of the leased goods; and

(b) if the lease-of-goods aspects predominate, this Article applies to the transaction, but does not preclude application in appropriate circumstances of other law to aspects of the lease which do not relate to the lease of goods.

## **Official Comment**

\* \* \*

### **Purposes:**

1. \* \* \*

To achieve that end it was necessary to provide that this Article applies to any transaction, regardless of form, that creates a lease. Since lease is defined as a transfer of an interest in goods (Section 2A-103(1)(j)) and goods is defined to include fixtures (Section 2A-103(1)(h)), application is limited to the extent the transaction relates to goods, including fixtures. Further, since the definition of lease does not include a sale (Section 2-106(1)) or retention or creation of a security interest (Section ~~1-201(37)~~ 1-201(b)(35)), application is further limited; sales and security interests are governed by other Articles of this Act.

2. Finally, in In recognition of the diversity of the transactions to be governed, the sophistication of many of the parties to these transactions, and the common law tradition as it applies to the bailment for hire or lease, freedom of contract has been preserved. DeKoven, Proceedings After Default by the Lessee Under a True Lease of Equipment, in 1C P. Coogan, W. Hogan, D. Vagts, Secured Transactions Under the Uniform Commercial Code, § 29B.02[2] (1986). Thus, despite the extensive regulatory scheme established by this Article, the parties to a lease will be able to create private rules to govern their transaction. Sections 2A-103(4) and 1-102(3). However, there are special rules in this Article governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

3. A court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of goods and a lease of other property. \* \* \*

Further, parties to a transaction creating a lease of personal property other than goods, or another bailment of personal property, may provide by agreement that this Article applies. Upholding the parties' choice is consistent with the spirit of this Article.

4. If the lease-of-goods aspects of a hybrid lease do not predominate, under subsection (2)(a)(i) the provisions of this Article which relate primarily to the lease-of-goods aspects of the transaction apply and those that relate primarily to the transaction as a whole do not apply. Under subsection (2)(b), if the lease-of-goods aspects of a hybrid lease predominate, this Article applies to the transaction.

5. Relevant factors in determining whether the lease-of-goods aspects of a hybrid lease predominate include the language of the agreement and the portion of the total price that is attributable to the lease of goods, although neither is determinative. An agreed-upon allocation of a portion of the total price to the right to possession and use of the goods is ordinarily binding on the parties, as is an agreement that the transaction includes or does not include a finance lease.

6. A finance lease, defined in Section 2A-103(1)(g), may be included in a hybrid lease in which the lease-of-goods aspects of the transaction do not predominate. In such a situation, subsection (2)(a)(ii) makes Section 2A-209 applicable and subsection (2)(a)(iii) addresses the application of Section 2A-407 to the promises made by the lessee under the finance lease. That latter section applies to those promises that are consideration for the lessee's right to possession and use of the leased goods. Whether a promise of a lessee so qualifies is a question of fact but an agreed-upon allocation of a portion of the total price to the right to possession and use of the leased goods is ordinarily binding on the parties. The fact that subsection (2)(a)(ii) and (iii) expressly make Sections 2A-209 and 2A-407 applicable if the lease is a finance lease does not prevent application of other provisions of this Article relating to finance leases pursuant to subsection (2)(b).

**Example 1.** Lessor and Customer enter into a contract that provides for Lessor to: (i) lease equipment to Customer; and (ii) provide to Customer a variety of

maintenance and consulting services. The services aspects of the transaction predominate. Lessor did not select, manufacture, or supply the goods; instead, the goods were selected by Customer, and Lessor acquired the goods from Supplier for the sole purpose of leasing the goods to Customer. Assume that the lease aspects of the transaction involve a finance lease under Section 2A-103(1)(g). Pursuant to subsection (3)(a), Sections 2A-212 and 2A-213 apply. Under those sections, because the lease aspect of the transaction is a finance lease, Lessor makes no implied warranty of merchantability or implied warranty of fitness for particular purpose. Pursuant to subsection (2)(a)(ii), Section 2A-209 applies. Under that section, all warranties made by Supplier to Lessor extend to Customer.

**Example 2.** Same facts as Example 1. As consideration for Lessor's obligations under the contract, Customer promises to pay a single monthly fee of a specified amount. The contract does not indicate what portion of the monthly fee is consideration for the services or what portion is consideration for possession and use of the equipment. Section 2A-407 applies to the lessee's promises that are consideration for the lessee's right to possession and use of the equipment. In an action involving the application of Section 2A-407, the determination of what portion of the monthly fee is for the right to possession and use of the equipment is a question of fact.

**Example 3.** Same facts as Example 1 except that the lease-of-goods aspects of the transaction predominate. Section 2A-407 applies to all of the lessee's promises under the transaction.

7. Even if the lease-of-goods aspects of a hybrid lease predominate and this Article applies to the transaction, the application of this Article to a hybrid lease does not preclude the application of principles of law and equity to supplement the provisions of this Article, see Section 1-103(b), nor does it preclude, in appropriate circumstances, the application of other law to the non-lease-of-goods aspects of the transaction. Whether it is appropriate to apply such other law will depend in part on what purposes the other law is designed to achieve and whether application of the other law would be likely to interfere with the application of this Article.

**Example 4.** Same facts as Example 3 (the lease-of-goods aspects of the transaction predominate) except that the lease is not a finance lease. This Article applies to the transaction. Nevertheless, because principles of law and equity also apply unless displaced by particular provisions the Uniform Commercial Code, see Section 1-103(b), and this Article does not displace other law relating to whether Lessor's performance of services conforms to the contract, other law determines whether the services conform to the contract.

8. The rules of subsections (2)(a) and (2)(b) are essentially gap fillers that apply when the parties' agreement is silent on what legal rules govern the different aspects of their transaction. In general, parties are free to preclude the application of this Article to the aspects of their transaction that are not about the lease of goods. See Section 2-102, Comment 6.

## Section 2A-103. Definitions and Index of Definitions.

(1) In this Article, unless the context otherwise requires:

\* \* \*

(h.1) “Hybrid lease” means a single transaction involving a lease of goods and:

(i) the provision of services;

(ii) a sale of other goods; or

(iii) a sale, lease, or license of property other than goods.

\* \* \*

### Official Comment

\* \* \*

(e) “Consumer lease”. \* \* \*

\* \* \*

This definition focuses on the parties as well as the transaction. If a lease is within this definition, the lessor must be regularly engaged in the business of leasing or selling, and the lessee must be an individual, not an organization; note that a lease to two or more individuals having a common interest through marriage or the like is not excluded as a lease to an organization under Section ~~1-201(28)~~ 1-201(b)(25). The lessee must take the interest primarily for a personal, family or household purpose. If required by the enacting state, total payments under the lease contract, excluding payments for options to renew or buy, cannot exceed the figure designated.

(f) “Fault”. Section ~~1-201(16)~~ 1-201(b)(17).

(g) “Finance Lease”. \* \* \*

\* \* \*

Pursuant to the Uniform Commercial Code Amendments (2022) (2022 Amendments), some references in this Article to the terms “writing,” “writings,” or “written” have been changed to refer to a “record.” These changes are made in provisions where an affected party may be assumed to have assented to the use of a record that is not a writing. For example, Section 2A-201 involves a record signed by an affected party and Section 2A-202 refers to a record intended by parties to be a final expression of their agreement. Where such references remain in this Article, the use by parties of a record other than a writing may be given effect for

purposes of this Article under law other than the Uniform Commercial Code, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq.*, and the Uniform Electronic Transactions Act.

\* \* \*

(h.1) “Hybrid lease”. In some transactions, the transfer of the right to possession and use of goods for a term in return for consideration (i.e., a lease), is part of a larger transaction. The other aspects of the transaction might involve the provision of services, a sale of other goods, or a transfer of rights to property other than goods. Such a transaction is a hybrid lease. Section 2A-102 indicates the extent to which this Article applies to a hybrid lease.

A hybrid lease is a single transaction. If contracting parties enter into separate agreements at the same time, each agreement must be evaluated separately to determine if it is a hybrid lease.

**Example 1.** Lessor and Customer A enter into a single agreement that provides for Lessor, in return for periodic payments from Customer A, to: (i) lease a photocopier to Customer A for twelve months; (ii) supply all the paper, staples, and toner needed to operate the copier during that period, and (iii) provide routine maintenance and repair services needed to keep the copier operating during that period. The transaction is a hybrid lease because it involves a lease of goods (the copier), a sale of goods (the paper, staples, and toner), and the provision of services.

**Example 2.** Lessor and Customer B enter into three separate written agreements at the same time: (i) a lease of a photocopier to Customer B for twelve months; (ii) a contract for Lessor to supply Customer B with all the paper, staples, and toner needed to operate the copier during that period, and (iii) a contract for Lessor to provide routine maintenance and repair services needed to keep the copier operating during that period. Because the parties executed three separate agreements, and the lease does not involve a sale, lease, or license of other property or the provision of services, the lease is not a hybrid lease.

Even when contracting parties enter into a single agreement involving both a lease of goods and a sale, lease, or license of other property or the provision of services, the agreement may involve separate transactions and not a single transaction. In that situation, the lease transaction would not be a hybrid lease if the lease of goods is unrelated to the other aspects of the agreement and the terms of the agreement relating to the lease of goods are readily severable from the terms of the agreement relating to the other transactions.

**Example 3.** Farmer A and Farmer B sign a written agreement pursuant to which Farmer A will lease a tractor to Farmer B for one year and Farmer B will board and feed Farmer A’s cattle until the cattle are sold. The agreement specifies a rental payment for the tractor, which is due monthly, and a mechanism for determining the price for Farmer B’s services, which is to be paid when the cattle are sold. The parties would have entered into an agreement to lease the tractor



even if they had not entered into an agreement to board and feed the cattle, and vice-versa. The transaction is not a hybrid lease. Article 2A applies to the lease of the tractor. Other law applies to the agreement to board and feed the cattle.

\* \* \*

#### **Section 2A-107. Waiver or Renunciation of Claim or Right After Default.**

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a ~~written~~ waiver or renunciation in a signed and record delivered by the aggrieved party.

#### **Official Comment**

\* \* \*

#### **Changes:**

1. Revised to reflect leasing practices and terminology. \* \* \*
2. In furtherance of medium neutrality, the reference to a signed “written” waiver or renunciation in the pre-2022 text of this section has been changed to refer to a waiver in a signed “record.”

#### **Section 2A-201. Statute of Frauds.**

(1) A lease contract is not enforceable by way of action or defense unless:

\* \* \*

(b) there is a ~~writing~~ record, signed by the party against whom enforcement is sought or by that party’s authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

\* \* \*

(3) A ~~writing~~ record is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1)(b) beyond the lease term and the quantity of goods shown in the ~~writing~~ record.

\* \* \*

(5) The lease term under a lease contract referred to in subsection (4) is:

(a) if there is a ~~writing~~ writing record signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

\* \* \*

### **Official Comment**

\* \* \*

#### **Changes:**

1. This section is modeled on Section 2-201, with changes to reflect the differences between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds a requirement that the ~~writing~~ writing record "describe the goods leased and the lease term", borrowing that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that requirement.

2. In furtherance of medium neutrality, the references to a "writing" in the pre-2022 text of this section have been changed to refer to a "record."

\* \* \*

#### **Section 2A-202. Final ~~Written~~ Expression: Parol or Extrinsic Evidence.**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a ~~writing~~ writing record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

\* \* \*

(b) by evidence of consistent additional terms unless the court finds the ~~writing~~ writing record to have been intended also as a complete and exclusive statement of the terms of the

agreement.

### Official Comment

\* \* \*

**Changes:** In furtherance of medium neutrality, the references to a “writing” have been changed to refer to a “record.”

\* \* \*

### Section 2A-203. Seals Inoperative.

The affixing of a seal to a ~~writing~~ record evidencing a lease contract or an offer to enter into a lease contract does not render the ~~writing~~ record a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

### Official Comment

\* \* \*

**Changes:** Revised to reflect leasing practices and terminology. In furtherance of medium neutrality, the references to a “writing” have been changed to refer to a “record.”

\* \* \*

### Section 2A-205. Firm Offers.

An offer by a merchant to lease goods to or from another person in a signed ~~writing~~ record that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed 3 months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

### Official Comment

\* \* \*

**Changes:** Revised to reflect leasing practices and terminology. In furtherance of medium neutrality, the reference to a signed “writing” in the pre-2022 text of this section has been

changed to refer to a signed “record.”

#### **Section 2A-208. Modification, Rescission, and Waiver.**

\* \* \*

(2) A signed lease agreement that excludes modification or rescission except by a signed ~~writing~~ record may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

\* \* \*

#### **Official Comment**

\* \* \*

#### **Changes:**

1. Revised to reflect leasing practices and terminology, except that the provisions of subsection 2-209(3) were omitted.

2. In furtherance of medium neutrality, the reference to a signed “writing” in the pre-2022 text of this section has been changed to refer to a signed “record.”

\* \* \*

#### **Section 2A-214. Exclusion or Modification of Warranties.**

\* \* \*

#### **Official Comment**

\* \* \*

#### **Purposes:**

1. \* \* \*

2. As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g). Whether a term is conspicuous, including a term in a record other than a writing, is discussed in Section 1-201, Comment 10.

## **Section 2A-301. Enforceability of Lease Contract.**

### **Official Comment**

\* \* \*

#### **Purposes:**

\* \* \*

2. The effectiveness or enforceability of the lease contract is not dependent upon the lease contract or any financing statement or the like being filed or recorded; however, the priority of the interest of a lessor of fixtures with respect to the interests of certain third parties in such fixtures is subject to the provisions of the Article on Secured Transactions (Article 9). Section 2A-309. Prior to the adoption of this Article filing or recording was not required with respect to leases, only for nominal leases intended as security that created security interests. ~~The definition of security interest, as amended concurrently with the adoption of this Article, more clearly delineates leases and leases intended as security and thus signals the need to file. Section 1-201(37) 1-203 now more clearly distinguishes leases from transactions that create security interests.~~ Those lessors who are concerned about whether the transaction creates a lease or a security interest will continue to file a protective financing statement. Section ~~9-408~~ 9-506. ~~Coogan, Leasing and the Uniform Commercial Code, in Equipment Leasing Leveraged Leasing 681, 744-46 (2d ed. 1980).~~

## **Section 2A-303. Alienability of Party's Interest Under Lease Contract or of Lessor's Residual Interest in Goods; Delegation of Performance; Transfer of Rights.**

\* \* \*

### **Official Comment**

\* \* \*

#### **Purposes:**

\* \* \*

8. Subsection (7) requires that a provision in a consumer lease prohibiting a transfer, or making it an event of default, must be specific, written and conspicuous. See Section ~~1-201(10)~~ 1-201(b)(10). This assists in protecting a consumer lessee against surprise assertions of default.

9. Subsection (5) is taken almost verbatim from the provisions of Section 2-210(5). The subsection states a rule of construction that distinguishes a commercial assignment, which substitutes the assignee for the assignor as to rights and duties, and an assignment for security or

financing assignment, which substitutes the assignee for the assignor only as to rights. Note that the assignment for security or financing assignment is a subset of all security interests. Security interest is defined to include “any interest of a buyer of . . . chattel paper.” Section ~~1-201(37)~~ 1-201(b)(35). Chattel paper is defined to include a lease. Section 9-102. Thus, a buyer of leases is the holder of a security interest in the leases. That conclusion should not influence this issue, as the policy is quite different. Whether a buyer of leases is the holder of a commercial assignment, or an assignment for security or financing assignment should be determined by the language of the assignment or the circumstances of the assignment.

10. As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

### **Section 2A-304. Subsequent Lease of Goods by Lessor.**

\* \* \*

#### **Official Comment**

\* \* \*

#### **Purposes:**

\* \* \*

2. This section must also be read in conjunction with Section 2-403. This section and Section 2A-305 are derived from Section 2-403, which states a unified policy on good faith purchases of goods. Given the scope of the definition of purchaser (Section ~~1-201(33)~~ 1-201(b)(30)), a person who bought goods to lease as well as a person who bought goods subject to an existing lease from a lessor will take pursuant to Section 2-403. Further, a person who leases such goods from the person who bought them should also be protected under Section 2-403, first because the lessee’s rights are derivative and second because the definition of purchaser should be interpreted to include one who takes by lease; no negative implication should be drawn from the inclusion of lease in the definition of purchase in this Article. Section 2A-103(1)(v).

3. There are hypotheticals that relate to an entrustee’s unauthorized lease often trusted goods to a third party that are outside the provisions of Sections 2-403, 2A-304 and 2A-305. Consider a sale of goods by M, a merchant, to B, a buyer. After paying for the goods B allows M to retain possession of the goods as B is short of storage. Before B calls for the goods M leases the goods to L, a lessee. This transaction is not governed by Section 2-403(2) as L is not a buyer in the ordinary course of business. Section ~~1-201(9)~~ 1-201(b)(9). Further, this transaction is not governed by Section 2A-304(2) as B is not an existing lessee. Finally, this transaction is not governed by Section 2A-305(2) as B is not M’s lessor. Section 2A-307(2) resolves the potential dispute between B, M and L. By virtue of B’s entrustment of the goods to M and M’s lease of the goods to L, B has a cause of action against M under the common law. Sections 2A-103(4) and 1-103. See, e.g., Restatement (Second) of Torts §§ 222A-243. Thus, B is a creditor of M. Sections 2A-103(4) and ~~1-201(12)~~ 1-201(b)(13). Section 2A-307(2) provides

that B, as M's creditor, takes subject to M's lease to L. Thus, if L does not default under the lease, L's enjoyment and possession of the goods should be undisturbed. However, B is not without recourse. B's action should result in a judgment against M providing, among other things, a turnover of all proceeds arising from M's lease to L, as well as a transfer of all of M's right, title and interest as lessor under M's lease to L, including M's residual interest in the goods. Section 2A-103(1)(q).

\* \* \*

## **Section 2A-307. Priority of Liens Arising by Attachment or Levy on, Security**

### **Interests in, and Other Claims to Goods.**

\* \* \*

#### **Official Comment**

\* \* \*

#### **Purposes:**

1. Subsection (1) states a general rule of priority that a creditor of the lessee takes subject to the lease contract. The term lessee (Section 2A-103(1)(n)) includes sublessee. Therefore, this subsection not only covers disputes between the prime lessor and a creditor of the prime lessee but also disputes between the prime lessor, or the sublessor, and a creditor of the sublessee. Section 2A-301, ~~official comment~~ Comment 3(g). Further, by using the term creditor (Section ~~1-201(12)~~ 1-201(b)(13)), this subsection will cover disputes with a general creditor, a secured creditor, a lien creditor and any representative of creditors. Section 2A-103(4).

\* \* \*

## **Section 2A-308. Special Rights of Creditors.**

\* \* \*

#### **Official Comment**

\* \* \*

#### **Purposes: \* \* \***

\* \* \*

Finally, subsection (3) states a new rule with respect to sale-leaseback transactions, i.e., transactions where the seller sells goods to a buyer but possession of the goods is retained by the seller pursuant to a lease contract between the buyer as lessor and

the seller as lessee. Notwithstanding any statute or rule of law that would treat such retention as fraud, whether per se, prima facie, or otherwise, the retention is not fraudulent if the buyer bought for value (Section ~~1-201(44)~~ 1-204) and in good faith (~~Sections 1-201(19) and 2-103(1)(b)~~ Section 1-201(b)(20)). Section 2A-103(3) and (4). This provision overrides Section 2-402(2) to the extent it would otherwise apply to a sale-leaseback transaction.

### **Section 2A-309. Lessor's and Lessee's Rights When Goods Become Fixtures.**

\* \* \*

#### **Official Comment**

\* \* \*

#### **Purposes:**

\* \* \*

6. Finally, subsection (9) provides a mechanism for the lessor of fixtures to perfect its interest by filing a financing statement under the provisions of the Article on Secured Transactions (Article 9), even though the lease agreement does not create a security interest. See Section ~~1-201(37)~~ 1-203. The relevant provisions of Article 9 must be interpreted permissively to give effect to this mechanism as it implicitly expands the scope of Article 9 so that its filing provisions apply to transactions that create a lease of fixtures, even though the lease agreement does not create a security interest. ~~This mechanism is similar to that provided in Section 2-326(3)(c) for the seller of goods on consignment, even though the consignment is not "intended as security". Section 1-201(37). Given the lack of litigation with respect to the mechanism created for consignment sales, this new mechanism should prove effective.~~

7. As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

### **Section 2A-310. Lessor's and Lessee's Rights When Goods Become Accessions.**

\* \* \*

#### **Official Comment**

\* \* \*

#### **Purposes:**

\* \* \*

As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).



## **Section 2A-401. Insecurity: Adequate Assurance of Performance.**

\* \* \*

### **Official Comment**

\* \* \*

**Changes:** \* \* \* As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

## **Section 2A-406. Procedure on Excused Performance.**

\* \* \*

### **Official Comment**

\* \* \*

#### **Changes:**

1. \* \* \*

2. As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

## **Section 2A-504. Liquidation of Damages.**

\* \* \*

### **Official Comment**

\* \* \*

#### **Purposes:** \* \* \*

\* \* \*

A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor's estimated residual interest, less the net proceeds of disposition (whether by sale or re-lease) of the leased goods is the lessor's damages. Tax indemnities, costs, interest and attorney's fees are also added to determine the lessor's damages. Another common liquidated damages formula utilizes a periodic depreciation allocation as a credit to the aforesaid amount in mitigation of a lessor's damages. A third formula provides for a fixed number of periodic payments as a means of liquidating damages. Stipulated loss or stipulated damage schedules are also common. Whether these formulae are enforceable will be determined in the context of each case by applying a standard of

reasonableness in light of the harm anticipated when the formula was agreed to. Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case. Section 1-201(37) 1-203. E.g., In re Noack, 44 Bankr. 172, 174-75 (Bankr.E.D.Wis.1984).

\* \* \*

#### **Section 2A-511. Merchant Lessee's Duties as to Rightfully Rejected Goods.**

\* \* \*

#### **Official Comment**

\* \* \*

**Changes:** Revised to reflect leasing practices and terminology. ~~This section, by its terms, applies to merchants as well as others. Thus, in construing the section it is important to note that under this Act the term good faith is defined differently for merchants (Section 2-103(1)(b)) than for others (Section 1-201(19)). Section 2A-103(3) and (4).~~

#### **Section 2A-514. Waiver of Lessee's Objections.**

\* \* \*

#### **Official Comment**

\* \* \*

#### **Purposes:**

1. \* \* \*

2. As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

#### **Section 2A-516. Effect of Acceptance of Goods; Notice of Default; Burden of Establishing Default After Acceptance; Notice of Claim or Litigation to Person Answerable Over.**

\* \* \*

#### **Official Comment**

\* \* \*

**Purposes:**

\* \* \*

4. As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

**Section 2A-523. Lessor's Remedies.**

\* \* \*

**Official Comment**

\* \* \*

**Purposes:**

\* \* \*

5. **Hypothetical:** To better understand the application of subparagraphs (a) through (e), it is useful to review a hypothetical. Assume that A is a merchant in the business of selling and leasing new bicycles of various types. B is about to engage in the business of subleasing bicycles to summer residents of and visitors to an island resort. A, as lessor, has agreed to lease 60 bicycles to B. While there is one master lease, deliveries and terms are staggered. 20 bicycles are to be delivered by A to B's island location on June 1; the term of the lease of these bicycles is four months. 20 bicycles are to be delivered by A to B's island location on July 1; the term of the lease of these bicycles is three months. Finally, 20 bicycles are to be delivered by A to B's island location on August 1; the term of the lease of these bicycles is two months. B is obligated to pay rent to A on the 15th day of each month during the term for the lease. Rent is \$50 per month, per bicycle. B has no option to purchase or release and must return the bicycles to A at the end of the term, in good condition, reasonable wear and tear excepted. Since the retail price of each bicycle is \$400 and bicycles used in the retail rental business have a useful economic life of 36 months, this transaction creates a lease. Sections 2A-103(1)(j) and ~~1-201(37)~~ 1-203.

\* \* \*

**ARTICLE 3**

**NEGOTIABLE INSTRUMENTS**

**Section 3-104. Negotiable Instrument.**

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other

charges described in the promise or order, if it:

\* \* \*

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, ~~or~~ (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor, (iv) a term that specifies the law that governs the promise or order, or (v) an undertaking to resolve in a specified forum a dispute concerning the promise or order.

\* \* \*

### Official Comment

1. The definition of “negotiable instrument” defines the scope of Article 3 since Section 3-102 states: “This Article applies to negotiable instruments.” The definition in Section 3-104(a) incorporates other definitions in Article 3. An instrument is either a “promise,” defined in Section 3-103(a)(12), or “order,” defined in Section 3-103(a)(8). A promise is a written undertaking to pay money signed by the person undertaking to pay. An order is a written instruction to pay money signed by the person giving the instruction. Thus, the term “negotiable instrument” is limited to a signed writing that orders or promises payment of money. “Money” is defined in Section 1-201(b)(24) and is not limited to United States dollars. It also includes a medium of exchange established by a foreign government or monetary units of account established by an intergovernmental organization or by agreement between two or more nations. Five other requirements are stated in Section 3-104(a): First, the promise or order must be “unconditional.” The quoted term is explained in Section 3-106. Second, the amount of money must be “a fixed amount . . . with or without interest or other charges described in the promise or order.” Section 3-112(b) relates to “interest.” Third, the promise or order must be “payable to bearer or to order.” The quoted phrase is explained in Section 3-109. An exception to this requirement is stated in subsection (c). Fourth, the promise or order must be payable “on demand or at a definite time.” The quoted phrase is explained in Section 3-108. Fifth, the promise or order may not state “any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money” with ~~three~~ five exceptions. The quoted phrase is based on the first sentence of N.I.L. Section 5 which is the precursor of “no other promise, order, obligation or power given by the maker or drawer” appearing in former Section 3-104(1)(b). The words “instruction” and “undertaking” are used instead of “order” and “promise” that are used in the N.I.L. formulation because the latter words are defined terms that include only orders or promises to pay money. The first three exceptions stated in Section

3-104(a)(3) are based on and are intended to have the same meaning as former Section 3-112(1)(b), (c), (d), and (e), as well as N.I.L. § 5(1), (2), and (3). The final two exceptions stated in Section 3-104(a)(3), added pursuant to the Uniform Commercial Code Amendments (2022), deal with choice-of-law and choice-of-forum clauses. The latter of these includes an agreement to arbitrate. Subsection (b) states that “instrument” means a “negotiable instrument.” This follows former Section 3-102(1)(e) which treated the two terms as synonymous.

\* \* \*

### **Section 3-105. Issue of Instrument.**

(a) “Issue” means:

(1) the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person; or

(2) if agreed by the payee, the first transmission by the drawer to the payee of an image of an item and information derived from the item that enables the depository bank to collect the item by transferring or presenting under federal law an electronic check.

\* \* \*

### **Official Comment**

1. Under former Section 3–102(1)(a) “issue” was defined as the first delivery to a “holder or a remitter” but the term “remitter” was neither defined nor otherwise used. In revised Article 3, Section 3–105(a) defines “issue” more broadly to include the first delivery to anyone by the drawer or maker for the purpose of giving rights to anyone on the instrument. “Delivery” with respect to instruments is defined in ~~Section 1–201(14)~~ Section 1-201(b)(15) as meaning “voluntary transfer of possession.” The reference in subsection (a)(2) to transmission of an image of an item and information derived from the item is derived from Section 4–110(a), dealing with electronic presentment.

Subsection (a) permits an instrument to be issued by an electronic transmission of an image of and information derived from the instrument by maker and drawer, rather than by delivery. Thus, for example, a drawer might, with the permission of the payee, write and sign a check, take a photograph of the check, send the photograph to the drawee for processing electronically, and destroy the original check. If the electronic image and the information derived from it can be processed as an “electronic check” under Regulation CC, see 12 C.F.R. § 229.2(ggg), the check is “issued” and hence can be enforced pursuant to this Article.

\* \* \*

### **Section 3-309. Enforcement of Lost, Destroyed, or Stolen Instrument.**

\* \* \*

#### **Official Comment**

\* \* \*

4. The destruction of a check in connection with a truncation process in which information is extracted from the check and an image of the check is made, and then such information and image are transmitted for payment does not, by itself, prevent application of this section. See Section 3-604, Comment 2.

**Example:** The payee of a check creates an image of the check, destroys the check, and transmits the image and information derived from the check for payment. Due to an error in transmission, the depository bank never receives the transmission. The payee may be able to enforce the check if the payee can prove the terms of the check and otherwise satisfy the requirements of this section. The result would be different if there were no error in the transmission and the payor discharged its obligation on the check.

### **Section 3-401. Signature Necessary for Liability on Instrument.**

(a) A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under Section 3-402.

~~(b) A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.~~

#### **Official Comment**

1. ~~Obligation~~ This section provides the fundamental rule that an obligation on an instrument depends on a signature that is binding on the obligor. The signature may be made by the obligor personally or by an agent or other representative authorized to act for the obligor. Signature by agents and other representatives is covered by Section 3-402. It is not necessary that the name of the obligor appear on the instrument, so long as there is a signature that binds the obligor. Signature includes an indorsement. These obligations include those on an “order” (Section 3-103(a)(6)) and a “promise” (Section 3-103(a)(9)) and those of an “issuer,” “maker,” or “drawer” (Sections 3-103(a)(5) and (7), 3-105(c), 3-412, and 3-414), an “acceptor” (Sections 3-409 and 3-413), and an indorser (Sections 3-204(b) and 3-415).

2. ~~A signature may be handwritten, typed, printed or made in any other manner. It need not be subscribed, and may appear in the body of the instrument, as in the case of “I, John Doe, promise to pay \*\*\* “without any other signature. It may be made by mark, or even by thumbprint. It may be made in any name, including any trade name or assumed name, however false and fictitious, which is adopted for the purpose. Parol evidence is admissible to identify the signer, and when the signer is identified the signature is effective. Indorsement in a name other than that of the indorser is governed by Section 3-204(d). Subsection (b) of the pre-2022 text of this section has been deleted as unnecessary in view of the 2022 revision of the definition of “sign.” See Section 1-201(b)(37) and Comment 37. Although former subsection (b) had not proven to be problematic, its deletion eliminates any implication that the revised definition of “sign” is inadequate for purposes of this Article. For example, former subsection (b) provided examples of the means of making a signature with the present intention of authenticating a writing, such as by means of a device or machine, by the use of a trade name or assumed name, or by the use of a word, mark, or symbol. These means now are encompassed by the broad, general terms of the revised definition of “sign.” A signature may appear in the body of the instrument, as in the case of “I, John Doe, promise to pay \*\*\*” without any other signature. It may be made in any name, including a name other than a designated payee. However, to be signed an instrument (a writing) must exist at the time it is signed by the execution or adoption of a tangible symbol on the instrument. The deletion of former subsection (b) effected no change in the law.~~

3. ~~This section is not intended to affect any other law requiring a signature by mark to be witnessed, or any signature to be otherwise authenticated, or requiring any form of proof.~~

### **Section 3-415. Obligation of Indorser.**

\* \* \*

#### **Official Comment**

\* \* \*

5. \* \* \* See PEB Commentary No. 11, ~~dated February 10, 1994 [Appendix V, infra].~~

### **Section 3-419. Instruments Signed for Accommodation.**

\* \* \*

#### **Official Comment**

\* \* \*

3. \* \* \*

\* \* \* See PEB Commentary No. 11, ~~dated February 10, 1994 [Appendix V, infra].~~

4. \* \* \*
- \* \* \* See PEB Commentary No. 11,~~supra~~.
5. \* \* \* See PEB Commentary No. 11,~~supra~~.
6. \* \* \* See PEB Commentary No. 11,~~supra~~.
7. \* \* \* See PEB Commentary No. 11,~~supra~~.

### **Section 3-604. Discharge by Cancellation or Renunciation.**

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record. The obligation of a party to pay a check is not discharged solely by destruction of the check in connection with a process in which information is extracted from the check and an image of the check is made and, subsequently, the information and image are transmitted for payment.

\* \* \*

~~(c) In this section, "signed," with respect to a record that is not a writing, includes the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.~~

### **Official Comment**

1. Section 3-604 replaces former Section 3-605.
2. The destruction of a check in connection with a truncation process in which information is extracted from the check and an image of the check is made, and then such information and image are transmitted for payment is not within the scope of this section and does not by itself discharge the obligation of a party to pay the instrument. The destruction of the



check also does not affect whether the check has been issued. See Section 3-105(a) and Comment 1.

3. Former subsection (c) has been deleted as unnecessary in view of the revised definition of “sign” in Section 1-201.

## **ARTICLE 4**

### **BANK DEPOSITS AND COLLECTIONS**

#### **Section 4-105. Definitions of Types of Banks.**

\* \* \*

#### **Official Comment**

\* \* \*

2. Paragraph (1): “Bank” is defined in Section ~~4-201(4)~~ 1-201(b)(4) as meaning “~~any~~ a person engaged in the business of banking.” The definition in paragraph (1) makes clear that “bank” includes savings banks, savings and loan associations, credit unions and trust companies, in addition to the commercial banks commonly denoted by use of the term “bank.”

\* \* \*

#### **Section 4-207. Transfer Warranties.**

\* \* \*

#### **Official Comment**

\* \* \*

3. The warranties provided for in this section and in Sections 4-208 and 4-209 are supplemented by warranties created under federal law. For example, under Section 4-209(b), a person who undertakes to retain an item in connection with an agreement for electronic presentment makes a warranty that retention and presentment comply with the agreement. Under federal law, a person might also make a warranty that no person will be asked to make payment based on a check already paid. See 12 C.F.R. § 229.34(a).

\* \* \*

## **ARTICLE 4A**

### **FUNDS TRANSFERS**

## PREFATORY NOTE

\* \* \*

### International Transfers.

\* \* \* See PEB Commentary No. 13, ~~dated February 16, 1994.~~

### Section 4A-103. Payment Order – Definitions.

(a) In this Article:

(1) “Payment order” means an instruction of a sender to a receiving bank, transmitted orally, ~~electronically, or in writing~~ or in a record, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

(i) the instruction does not state a condition to payment to the beneficiary other than time of payment,

(ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) the instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

\* \* \*

### Official Comment

1. This section is discussed in the Comment following Section 4A-104.

2. Pursuant to the Uniform Commercial Code Amendments (2022) and in furtherance of medium neutrality, the reference to “electronically, or in writing” in the pre-2022 text of this section has been changed to refer to “in a record.”

### Section 4A-104. Funds Transfer – Definitions.

\* \* \*

## Official Comment

\* \* \*

3. Further limitations on the scope of Article 4A are found in the three requirements found in subparagraphs (i), (ii), and (iii) of Section 4A-103(a)(1). Subparagraph (i) states that the instruction to pay is a payment order only if it “does not state a condition to payment to the beneficiary other than time of payment.” An instruction to pay a beneficiary sometimes is subject to a requirement that the beneficiary perform some act such as delivery of documents.

~~For example, a~~ **Example:** A New York bank ~~may have~~ issued a letter of credit in favor of X, a California seller of goods to be shipped to the New York bank’s customer in New York. The terms of the letter of credit provide for payment to X if documents are presented to prove shipment of the goods. Instead of providing for presentment of the documents to the New York bank, the letter of credit states that they may be presented to a California bank that acts as an agent for payment. The New York bank sends an instruction to the California bank to pay X upon presentation of the required documents. The instruction is not covered by Article 4A because payment to the beneficiary is conditional upon receipt of shipping documents. The function of banks in a funds transfer under Article 4A is comparable to the role of banks in the collection and payment of checks in that it is essentially mechanical in nature. The low price and high speed that characterize funds transfers reflect this fact. Conditions to payment by the California bank other than time of payment impose responsibilities on that bank that go beyond those in Article 4A funds transfers. Although the payment by the New York bank to X under the letter of credit is not covered by Article 4A, if X is paid by the California bank, payment of the obligation of the New York bank to reimburse the California bank could be made by an Article 4A funds transfer. In such a case there is a distinction between the payment by the New York bank to X under the letter of credit and the payment by the New York bank to the California bank. For example, if the New York bank pays its reimbursement obligation to the California bank by a Fedwire naming the California bank as beneficiary (see Comment 1 to Section 4A-107), payment is made to the California bank rather than to X. That payment is governed by Article 4A and it could be made either before or after payment by the California bank to X. The payment by the New York bank to X under the letter of credit is not governed by Article 4A and it occurs when the California bank, as agent of the New York bank, pays X. No payment order was involved in that transaction. In this example, if the New York bank had erroneously sent an instruction to the California bank unconditionally instructing payment to X, the instruction would have been an Article 4A payment order. If the payment order was accepted (Section 4A-209(b)) by the California bank, a payment by the New York bank to X would have resulted (Section 4A-406(a)). But Article 4A would not prevent recovery of funds from X on the basis that X was not entitled to retain the funds under the law of mistake and restitution, letter of credit law or other applicable law.

An instruction to pay might be a component of a computer program or a transaction protocol intended to execute automatically under specified circumstances. The fact that the program or protocol itself is subject to a condition does not necessarily mean that an instruction

to pay issued pursuant to that program or protocol “state[s] a condition to payment of the beneficiary” within the meaning of Section 4A-103(a)(1)(i). Whether the instruction does state such a condition depends on what the instruction says when it is received by the receiving bank. An instruction that neither grants discretion nor imposes a limitation on payment by the receiving bank does not state a condition to payment. What distinguishes the prior example is that the New York bank’s instruction to the California bank did state a condition when the California bank received it.

Similarly, an instruction that is subject to a condition when received by Bank A, and which therefore does not constitute a payment order, does not become a payment order when the condition is satisfied. However, if, after the condition is satisfied, Bank A sends the instruction to Bank B without the stated condition, that second instruction could be a payment order if the instruction otherwise complies with Section 4A-103(a).

\* \* \*

### **Section 4A-201. Security Procedure.**

“Security procedure” means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may impose an obligation on the receiving bank or the customer and may require the use of algorithms or other codes, identifying words, ~~or~~ numbers, symbols, sounds, biometrics, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer or requiring a payment order to be sent from a known email address, IP address, or telephone number is not by itself a security procedure.

### **Official Comment**

1. \_\_\_\_ A large percentage of payment orders and communications amending or cancelling payment orders are transmitted electronically and it is standard practice to use security procedures that are designed to assure the authenticity of the message through steps designed to assure the identity of the sender, the integrity of the message, or both. Security procedures can also be used to detect error in the content of messages or to detect payment orders that are transmitted by mistake as in the case of multiple transmission of the same payment order.

Security procedures might also apply to communications that are transmitted by telephone or in ~~writing~~ a record. Section 4A-201 defines these security procedures. The second sentence of the definition provides several examples of a security procedure, but this list is not exhaustive. The inclusion of the phrase “or similar security devices” means that, as new technologies emerge, what can be a security procedure will evolve. The definition of security procedure limits the term to a procedure “established by agreement of a customer and a receiving bank.” The term does not apply to procedures that the receiving bank may follow unilaterally in processing payment orders. The question of whether loss that may result from the transmission of a spurious or erroneous payment order will be borne by the receiving bank or the sender or purported sender is affected by whether a security procedure was or was not in effect and whether there was or was not compliance with the procedure. Security procedures are referred to in Sections 4A-202 and 4A-203, which deal with authorized and verified payment orders, and Section 4A-205, which deals with erroneous payment orders.

Requiring that a payment order be sent from a known email, IP address or phone number is not by itself a “security procedure” within the meaning of this section because it is possible to make a payment order with a different origin appear to have been sent from such an address or phone number. However, requiring that a payment order have such an apparent origin in combination with other security protocols might be a security procedure.

2. Several revisions to the pre-2022 text of this section were made in furtherance of medium neutrality. Other 2022 revisions were made for clarification.

## **Section 4A-202. Authorized and Verified Payment Orders.**

\* \* \*

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the bank’s obligations under the security procedure and any ~~written~~ agreement or instruction of the customer, evidenced by a record, restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates ~~a written~~ an agreement with the customer, evidenced by a record, or notice of which is not received at a time and in a manner affording the

bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in ~~writing~~ a record to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the bank's obligations under the security procedure chosen by the customer.

\* \* \*

### **Official Comment**

1. This section is discussed in the Comment following Section 4A-203.

2. In furtherance of medium neutrality, references to “written” and “writing” have been changed to refer to a “evidenced by a record” and “a record.” Other 2022 revisions were made for clarification.

### **Section 4A-203. Unenforceability of Certain Verified Payment Orders.**

(a) If an accepted payment order is not, under Section 4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Section 4A-202(b), the following rules apply:

(1) By express ~~written~~ agreement evidenced by a record, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

\* \* \*

## Official Comment

\* \* \*

3. Subsection (b) of Section 4A-202 is based on the assumption that losses due to fraudulent payment orders can best be avoided by the use of commercially reasonable security procedures, and that the use of such procedures should be encouraged. The subsection is designed to protect both the customer and the receiving bank. A receiving bank needs to be able to rely on objective criteria to determine whether it can safely act on a payment order. Employees of the bank can be trained to “test” a payment order according to the various steps specified in the security procedure. The bank is responsible for the acts of these employees. Subsection (b)(ii) requires the bank to prove that it accepted the payment order in good faith and “in compliance with the bank’s obligations under the security procedure.” If the fraud was not detected because the bank’s employee did not perform the acts required by the security procedure, the bank has not complied. Subsection (b)(ii) also requires the bank to prove that it complied with any agreement or instruction that restricts acceptance of payment orders issued in the name of the customer. If an agreement establishing a security procedure places obligations on both the sender and the receiving bank, the receiving bank need prove only that it complied with the obligations placed on the receiving bank. A customer may want to protect itself by imposing limitations on acceptance of payment orders by the bank. For example, the customer may prohibit the bank from accepting a payment order that is not payable from an authorized account, that exceeds the credit balance in specified accounts of the customer, or that exceeds some other amount. Another limitation may relate to the beneficiary. The customer may provide the bank with a list of authorized beneficiaries and prohibit acceptance of any payment order to a beneficiary not appearing on the list. Such limitations may be incorporated into the security procedure itself or they may be covered by a separate agreement or instruction. In either case, the bank must comply with the limitations if the conditions stated in subsection (b) are met. Normally limitations on acceptance would be incorporated into an agreement between the customer and the receiving bank, but in some cases the instruction might be unilaterally given by the customer. If standing instructions or an agreement state limitations on the ability of the receiving bank to act, provision must be made for later modification of the limitations. Normally this would be done by an agreement that specifies particular procedures to be followed. Thus, subsection (b) states that the receiving bank is not required to follow an instruction that violates a ~~written~~ an agreement evidenced by a record. The receiving bank is not bound by an instruction unless it has adequate notice of it. ~~Subsections (25), (26), and (27) of Section 1-201 apply~~ Section 1-202 applies.

\* \* \*

4. The principal issue that is likely to arise in litigation involving subsection (b) is whether the security procedure in effect when a fraudulent payment order was accepted was commercially reasonable. In considering this issue, a court will need to consider the totality of the security procedure, including each party’s obligations under the procedure. The concept of what is commercially reasonable in a given case is flexible. Verification entails labor and

equipment costs that can vary greatly depending upon the degree of security that is sought. A customer that transmits very large numbers of payment orders in very large amounts may desire and may reasonably expect to be provided with state-of-the-art procedures that provide maximum security. But the expense involved may make use of a state-of-the-art procedure infeasible for a customer that normally transmits payment orders infrequently or in relatively low amounts. Another variable is the type of receiving bank. It is reasonable to require large money center banks to make available state-of-the-art security procedures. On the other hand, the same requirement may not be reasonable for a small country bank. A receiving bank might have several security procedures that are designed to meet the varying needs of different customers. The type of payment order is another variable. For example, in a wholesale wire transfer, each payment order is normally transmitted electronically and individually. A testing procedure will be individually applied to each payment order. In funds transfers to be made by means of an automated clearing house many payment orders are incorporated into an electronic device such as a magnetic tape that is physically delivered. Testing of the individual payment orders is not feasible. Thus, a different kind of security procedure must be adopted to take into account the different mode of transmission.

The issue of whether a particular security procedure is commercially reasonable is a question of law. Whether the receiving bank complied with the procedure is a question of fact. It is appropriate to make the finding concerning commercial reasonability a matter of law because security procedures are likely to be standardized in the banking industry and a question of law standard leads to more predictability concerning the level of security that a bank must offer to its customers. The purpose of subsection (b) is to encourage banks to institute reasonable safeguards against fraud but not to make them insurers against fraud. A security procedure is not commercially unreasonable simply because another procedure might have been better or because the judge deciding the question would have opted for a more stringent procedure. For example, the use of a computer program to detect fraud is not commercially unreasonable merely because it does not detect all fraud or because another system or approach might be more successful at detecting fraud. The standard is not whether the security procedure is the best available. Rather it is whether the procedure is reasonable for the particular customer and the particular bank, which is a lower standard. What is reasonable for a particular customer requires the court to consider the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank. Article 4A does not create an affirmative obligation on the receiving bank to obtain information about its customer. However, whatever knowledge the bank does have about the customer is relevant in determining the commercial reasonableness of the security procedure. ~~On the other hand, a~~ A security procedure that fails to meet prevailing standards of good banking practice applicable to the particular bank and customer should not be held to be commercially reasonable. Subsection (c) states factors to be considered by the judge in making the determination of commercial reasonableness. The reasonableness of a security procedure is to be determined at the time that a payment order is processed, not at the time the customer and the bank agree to the security procedure. Accordingly, a security procedure that was reasonable when agreed to might become unreasonable as technologies emerge, prevailing practices change, or the bank acquires knowledge about the customer. Sometimes an informed customer refuses a security procedure that is commercially reasonable and suitable for that customer and insists on using a higher-risk procedure because it is more convenient or cheaper. In that case, under the last sentence of



subsection (c), the customer has voluntarily assumed the risk of failure of the procedure and cannot shift the loss to the bank. But this result follows only if the customer expressly agrees in ~~writing~~ a record to assume that risk. It is implicit in the last sentence of subsection (c) that a bank that accedes to the wishes of its customer in this regard is not acting in bad faith by so doing so long as the customer is made aware of the risk. In all cases, however, a receiving bank cannot get the benefit of subsection (b) unless it has made available to the customer a security procedure that is commercially reasonable and suitable for use by that customer. In most cases, the mutual interest of bank and customer to protect against fraud should lead to agreement to a security procedure which is commercially reasonable.

4A. Subsection (b) generally allows a receiving bank to treat a payment order as authorized by the customer if the bank accepts the payment order in good faith and in compliance with the bank's obligations under a commercially reasonable, agreed-upon security procedure. For this purpose, "good faith" requires the exercise of reasonable commercial standards of fair dealing, see Section 4A-105(a)(6), not the absence of negligence. Consequently, the bank has no duty, beyond that to which the bank has agreed, to investigate suspicious activity or to advise its customer of such activity. However, a bank that obtains knowledge that a customer's operations have been infiltrated or knowledge that the customer is the victim of identity fraud might not be acting in good faith if the bank, without receiving some assurance from the customer that the issue has been remediated, thereafter accepts a payment order.

\* \* \*

8. In furtherance of medium neutrality, the reference to "written" in the pre-2022 text of this section has been changed to refer to "evidenced by a record."

## **Section 4A-206. Transmission of Payment Order Through Funds-Transfer or Other Communication System.**

\* \* \*

### **Official Comment**

1. A payment order may be issued to a receiving bank directly by delivery of a ~~writing or electronic device~~ record or by an oral ~~or electronic~~ communication. If an agent of the sender is employed to transmit orders on behalf of the sender, the sender is bound by the order transmitted by the agent on the basis of agency law. Section 4A-206 is an application of that principle to cases in which a funds transfer or communication system acts as an intermediary in transmitting the sender's order to the receiving bank. The intermediary is deemed to be an agent of the sender for the purpose of transmitting payment orders and related messages for the sender. Section 4A-206 deals with error by the intermediary.

\* \* \*

## **Section 4A-207. Misdescription of Beneficiary.**

\* \* \*

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

\* \* \*

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a ~~writing~~ record stating the information to which the notice relates.

\* \* \*

### Official Comment

\* \* \*

2. \* \* \* ~~"Know"~~ is "Knowledge" and "knows" are defined in Section ~~1-201(25)~~ 1-202(b) to mean actual knowledge, and Section ~~1-201(27)~~ 1-202(f) states rules for determining when an organization has knowledge of information received by the organization. The time of payment is the pertinent time at which knowledge or lack of knowledge must be determined.

\* \* \*

4. In furtherance of medium neutrality, the reference to a "writing" in the pre-2022 text of this section has been changed to refer to a "record."

#### **Section 4A-208. Misdescription of Intermediary Bank or Beneficiary's Bank.**

\* \* \*

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

\* \* \*

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1), as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a ~~writing~~ record stating the information to which the notice relates.

\* \* \*

#### **Official Comment**

\* \* \*

4. In furtherance of medium neutrality, the reference to a "writing" in the pre-2022 text of this section has been changed to refer to a "record."

#### **Section 4A-209. Acceptance of Payment Order.**

\* \* \*

#### **Official Comment**

\* \* \*

5. \* \* \* The beneficiary's bank may also accept by notifying the beneficiary that the order has been received. "Notifies" is defined in Section ~~4-201(26)~~ 1-202(d).

\* \* \*

#### **Section 4A-210. Rejection of Payment Order.**

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, ~~electronically~~, or in ~~writing~~ a record. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

\* \* \*

#### **Official Comment**

\* \* \*

2. A payment order to the beneficiary's bank can be accepted by inaction of the bank. Section 4A-209(b)(2) and (3). To prevent acceptance under those provisions it is necessary for the receiving bank to send notice of rejection before acceptance occurs. Subsection (a) of Section 4A-210 states the rule that rejection is accomplished by giving notice of rejection. This incorporates the definitions in Section ~~4-201(26)~~ 1-202(d). \* \* \*

3. \* \* \* Subsection (b) obliges the receiving bank to pay interest to the sender as restitution unless the sender receives notice of rejection on the execution date. The time of receipt of notice is determined pursuant to ~~§ 4-201(27)~~ Section 1-202(e) and (f). The rate of interest is stated in Section 4A-506. If the sender receives notice on the day after the execution date, the sender is entitled to one day's interest. If receipt of notice is delayed for more than one day, the sender is entitled to interest for each additional day of delay.

\* \* \*

5. In furtherance of medium neutrality, the reference to “electronically” in the pre-2022 text of this section has been deleted as unnecessary and the reference to a “writing” in the pre-2022 text has been changed to refer to a “record.”

#### **Section 4A-211. Cancellation and Amendment of Payment Order.**

(a) A communication of the sender of a payment order cancelling or amending the order may be transmitted to the receiving bank orally, ~~electronically~~, or in writing a record. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

\* \* \*

#### **Official Comment**

\* \* \*

2. Subsection (a) allows a cancellation or amendment of a payment order to be communicated to the receiving bank “orally, ~~electronically~~, or in writing a record.” The quoted phrase is consistent with the language of Section 4A-103(a) applicable to payment orders. Cancellations and amendments are normally subject to verification pursuant to security procedures to the same extent as payment orders. Subsection (a) recognizes this fact by providing that in cases in which there is a security procedure in effect between the sender and the receiving bank the bank is not bound by a communication cancelling or amending an order unless verification has been made. This is necessary to protect the bank because under subsection (b) a cancellation or amendment can be effective by unilateral action of the sender. Without verification the bank cannot be sure whether the communication was or was not effective to cancel or amend a previously verified payment order.

\* \* \*

9. In furtherance of medium neutrality, the reference to “electronically” in the pre-2022 text of this section has been deleted as unnecessary and the reference to a “writing” in the pre-2022 text has been changed to refer to a “record.”

#### **Section 4A-305. Liability for Late or Improper Execution or Failure to Execute Payment Order.**

\* \* \*

(c) In addition to the amounts payable under subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express ~~written~~ agreement of the receiving bank, evidenced by a record.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express ~~written~~ agreement of the receiving bank, evidenced by a record, but are not otherwise recoverable.

\* \* \*

### Official Comment

\* \* \*

2. \* \* \*

\* \* \*

Subsection (c) allows the measure of damages in subsection (b) to be increased by an express ~~written~~ agreement of the receiving bank, evidenced by a record. An originator's bank might be willing to assume additional responsibilities and incur additional liability in exchange for a higher fee.

3. Subsection (d) governs cases in which a receiving bank has obligated itself by express agreement to accept payment orders of a sender. In the absence of such an agreement there is no obligation by a receiving bank to accept a payment order. Section 4A-212. The measure of damages for breach of an agreement to accept a payment order is the same as that stated in subsection (b). As in the case of subsection (b), additional damages, including consequential damages, may be recovered to the extent stated in an express ~~written~~ agreement of the receiving bank, evidenced by a record.

4. Reasonable attorney's fees are recoverable only in cases in which damages are limited to statutory damages stated in subsection (a), (b) and (d). If additional damages are recoverable because provided for by an express ~~written~~ agreement, evidenced by a record,

attorney's fees are not recoverable. The rationale is that there is no need for statutory attorney's fees in the latter case, because the parties have agreed to a measure of damages which may or may not provide for attorney's fees.

\* \* \*

6. In furtherance of medium neutrality, references to a "written" agreement have been changed to refer to an agreement "evidenced by a record."

## ARTICLE 5

### LETTERS OF CREDIT

#### Section 5-104. Formal Requirements.

A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a signed record ~~and is authenticated (i) by a signature or (ii) in accordance with the agreement of the parties or the standard practice referred to in Section 5-108(e).~~

#### Official Comment

\* \* \*

2. This section was revised pursuant to the Uniform Commercial Code Amendments (2022). The reference in the pre-2022 text of this section to authentication by agreement of the parties or standard practice referred to in Section 5-108(e) is no longer necessary. Those forms of authentication are subsumed by the revised and expanded definition of "sign" in Section 1-201(b)(37), which is broad and flexible. The authentication requirement that a record be signed as specified in this section is authentication or adoption only of the identity of the issuer, confirmer, or adviser.

~~An authentication agreement may be by system rule, by standard practice, or by direct agreement between the parties. The reference to practice is intended to incorporate future developments in the UCP and other practice rules as well as those that may arise spontaneously in commercial practice.~~

\* \* \*

#### Section 5-116. Choice of Law and Forum.

(a) The liability of an issuer, nominated person, or adviser for action or omission is

governed by the law of the jurisdiction chosen by an agreement in the form of a record signed ~~or otherwise authenticated~~ by the affected parties ~~in the manner provided in Section 5-104~~ or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued.

(c) For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under ~~this~~ subsection (d).

(d) A branch of a bank is considered to be located at the address indicated in the branch's undertaking. If more than one address is indicated, the branch is considered to be located at the address from which the undertaking was issued.

~~(e)~~ (e) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with



the nonvariable provisions specified in Section 5-103(c).

~~(d)~~ (f) If there is conflict between this article and Article 3, 4, 4A, or 9, this article governs.

~~(e)~~ (g) The forum for settling disputes arising out of an undertaking within this article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).

### Official Comment

1. Subsection (a) refers to a record signed by the affected parties. The reference in the pre-2022 text of subsection (a) to an authentication pursuant to an agreement of the parties or standard practice is no longer necessary in view of the 2022 revision of “sign” in Section 1-201. See Section 5-104, Comment 2.

\* \* \*

1A. The last sentence of pre-2022 subsection (b) is now in a new subsection (c) and a new subsection (d) has been added. These revisions were necessary to eliminate a potential ambiguity arising from the first sentence of subsection (b). The first sentence has been construed incorrectly as meaning that the last sentence, which recognizes the separateness of bank branches for the specified purposes, is inapplicable when a governing law has been chosen pursuant to subsection (a). These revisions reject that construction and reject decisions such as *Zeeco, Inc. v. JPMorgan Chase Bank*, Case No. 17 -CV-384-JED-FHM, 2018 WL 1414119 (N.D. Okla. Mar. 21, 2018), *amending opinion dated March 20, 2018, both opinions vacated*, 2019 WL 3543081, 2019 U.S. Dist. LEXIS 133756 (Feb. 8, 2019).

\* \* \*

3. \* \* \*

Even though Article 5 is generally consistent with UCP 500, it is not necessarily consistent with other rules or with versions of the UCP that may be adopted after Article 5’s revision, or with other practices that may develop. The phrase in subsection 5-116(e), “rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits,” includes the International Standby Practices and the Uniform Rules for Demand Guarantees, as well as the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation. Rules of practice incorporated in the letter of credit or other undertaking are those in effect when the letter of credit or other undertaking is issued. Except in the unusual cases discussed in the immediately preceding paragraph, practice adopted in a letter of credit will override the rules of Article 5 and the parties to letter of credit transactions must be familiar with practice (such as future versions of the UCP) that is explicitly adopted in letters of credit.

\* \* \*

5. Subsection ~~(e)~~ (g) must be read in conjunction with existing law governing subject matter jurisdiction. If the local law restricts a court to certain subject matter jurisdiction not including letter of credit disputes, subsection ~~(e)~~ (g) does not authorize parties to choose that forum. For example, the parties' agreement under Section ~~5-116(e)~~ 5-116(g) would not confer jurisdiction on a probate court to decide a letter of credit case.

If the parties choose a forum under subsection ~~(e)~~ (g) and if—because of other law—that forum will not take jurisdiction, the parties' agreement or undertaking should then be construed (for the purpose of forum selection) as though it did not contain a clause choosing a particular forum. That result is necessary to avoid sentencing the parties to eternal purgatory where neither the chosen State nor the State which would have jurisdiction but for the clause will take jurisdiction—the former in disregard of the clause and the latter in honor of the clause.

## ARTICLE 7

### DOCUMENTS OF TITLE

#### Section 7-102. Definitions and Index of Definitions.

(a) In this article, unless the context otherwise requires:

\* \* \*

(10) ~~“Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.~~ [Reserved.]

(11) ~~“Sign” means, with present intent to authenticate or adopt a record:~~

~~(A) to execute or adopt a tangible symbol; or~~

~~(B) to attach to or logically associate with the record an electronic sound, symbol, or process.~~ [Reserved.]

\* \* \*

#### Official Comment

\* \* \*

5. ~~The definitions of “record” and “sign” are included to facilitate electronic mediums. See comment 9 to Section 9-102 discussing “record” and the comment to amended Section 2-103 discussing “sign.” Pursuant to the Uniform Commercial Code Amendments~~

(2022) (2022 Amendments), paragraphs (10) and (11) of subsection (a) have been deleted as unnecessary. Section 1-201 includes substantially equivalent definitions of “record” and “sign.”

6. \* \* \*

In the case of a negotiable document of title, the person entitled is the holder. See Section 1-201(b)(21) (defining “holder”). For a nonnegotiable document of title, the person entitled is the person provided in the terms of the document or instructions under the document. A transferee of a nonnegotiable document to which the document has been delivered acquires the transferee’s rights and rights that the transferor had actual authority to convey. Section 7-504(a). However, until but not after the bailee receives notice of a transfer, such a transferee’s rights are subject to those of persons identified in Section 7-504(b), including “as against the bailee, by good faith dealings of the bailee with the transferor.” Moreover, such a transferee is *not* a person entitled under the document unless so provided in the document or in instructions under the document.

Article 7 does not explain what constitutes an “instruction under” a nonnegotiable document, but instead leaves it to commercial practice, including usage of trade (Section 1-303(c)). In practice the term is generally understood to include a delivery order or other instruction to the bailee, by the person named in the document, to deliver the goods to a transferee of the document or to another person. A delivery order or other instruction under a nonnegotiable document should be distinguished from a mere “notice” or “notification” to the bailee of a transfer or security interest, as contemplated by Sections 7-504(b) and 9-312(d)(2). However, an instruction could, functionally, also constitute such a notice.

\* \* \*

#### **Section 7-106. Control of Electronic Document of Title.**

\* \* \*

(b) A system satisfies subsection (a), and a person ~~is deemed to have~~ has control of an electronic document of title, if the document is created, stored, and ~~assigned~~ transferred in such a manner that:

\* \* \*

(4) copies or amendments that add or change an identified ~~assignee~~ transferee of the authoritative copy can be made only with the consent of the person asserting control;

\* \* \*

(c) A system satisfies subsection (a), and a person has control of an electronic document

of title, if an authoritative electronic copy of the document, a record attached to or logically associated with the electronic copy, or a system in which the electronic copy is recorded:

(1) enables the person readily to identify each electronic copy as either an authoritative copy or a nonauthoritative copy;

(2) enables the person readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as the person to which each authoritative electronic copy was issued or transferred; and

(3) gives the person exclusive power, subject to subsection (d), to:

(A) prevent others from adding or changing the person to which each authoritative electronic copy has been issued or transferred; and

(B) transfer control of each authoritative electronic copy.

(d) Subject to subsection (e), a power is exclusive under subsection (c)(3)(A) and (B) even if:

(1) the authoritative electronic copy, a record attached to or logically associated with the authoritative electronic copy, or a system in which the authoritative electronic copy is recorded limits the use of the document of title or has a protocol that is programmed to cause a change, including a transfer or loss of control; or

(2) the power is shared with another person.

(e) A power of a person is not shared with another person under subsection (d)(2) and the person's power is not exclusive if:

(1) the person can exercise the power only if the power also is exercised by the other person; and

(2) the other person:

(A) can exercise the power without exercise of the power by the person; or

(B) is the transferor to the person of an interest in the document of title.

(f) If a person has the powers specified in subsection (c)(3)(A) and (B), the powers are presumed to be exclusive.

(g) A person has control of an electronic document of title if another person, other than the transferor to the person of an interest in the document:

(1) has control of the document and acknowledges that it has control on behalf of the person; or

(2) obtains control of the document after having acknowledged that it will obtain control of the document on behalf of the person.

(h) A person that has control under this section is not required to acknowledge that it has control on behalf of another person.

(i) If a person acknowledges that it has or will obtain control on behalf of another person, unless the person otherwise agrees or law other than this article or Article 9 otherwise provides, the person does not owe any duty to the other person and is not required to confirm the acknowledgment to any other person.

### **Official Comment**

\* \* \*

### **Purpose:**

1. The 2022 revision of this section on control of electronic documents of title preserves subsection (a), the general rule, and subsection (b), the “safe harbor” from the pre-2022 section. The minor stylistic revisions are not substantive. The other revisions add a second “safe harbor” in subsection (c), explanatory provisions relating to exclusivity of powers in subsections (d) and (e), a presumption of exclusivity of powers in subsection (f), and a new subsection (g) on control through another person. The requirements for obtaining control under subsection (c) were inspired by Section 12-105 on control of controllable electronic records. See Section 12-105 and Comments.

~~The~~ This section defines “control” for electronic documents of title. Subsections (a) and (b) and derives its rules derive from the Uniform Electronic Transactions Act § Section 16 on transferrable records. Unlike under UETA § Section 16, however, a document of title may be reissued in an alternative medium pursuant to Section 7-105. At any point in time in which a document of title is in electronic form, the control concept of this section is relevant. As under UETA § Section 16, the control concept embodied in this section provides the legal framework for developing systems for electronic documents of title.

2. Control of an electronic document of title substitutes for the concept of indorsement (for negotiable documents) and possession ~~in the tangible document of title context~~ (for tangible documents of title). See Section 7-501. A person with a tangible document of title delivers the document by voluntarily transferring possession and a person with an electronic document of title delivers the document by voluntarily transferring control. (Delivery is defined in Section 1-201**(b)(15)**).

3. Subsection (a) sets forth the general rule that the “system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.” The key to having a system that satisfies this test is that identity of *the* person to which the document was issued or transferred must be reliably established. Of great importance to the functioning of the control concept under subsection (a), as well as under the safe harbors in subsections (b) and (c), is to be able to demonstrate and identify, at any point in time, *the person* entitled under the electronic document. For example, a carrier may issue an electronic bill of lading by having the required information in a database that is encrypted and accessible by virtue of a password. If the computer system in which the required information is maintained identifies the person as *the* person to which the electronic bill of lading was issued or transferred, that person has control of the electronic document of title. That identification may be by virtue of passwords or other encryption methods. Registry systems may satisfy this test. For example, see the electronic warehouse receipt system established pursuant to 7 C.F.R. Part 735. This Article leaves to the market place the development of sufficient technologies and business practices that will meet the test.

An electronic document of title is evidenced by a record consisting of information stored in an electronic medium. See Section 1-201**(b)(16A)** (defining “electronic”) and **(31)** (defining “record”). For example, a record in a computer database could be an electronic document of title assuming that it otherwise meets the definition of document of title. To the extent that third parties wish to deal in paper mediums, Section 7-105 provides a mechanism for exiting the electronic environment by having the issuer reissue the document of title in a tangible medium. Thus if a person entitled to enforce an electronic document of title causes the information in the record to be printed onto paper without the issuer’s involvement in issuing the document of title pursuant to Section 7-105, that paper is not a document of title.

4. Subsection (a) sets forth the general test for control. ~~Subsection~~ Subsections (b) and (c) sets set forth a safe harbor ~~test tests~~ that, if satisfied, ~~results result~~ in control under the general test in subsection (a). The safe harbor in subsection (b) requires the existence of only one authoritative copy of the document but the safe harbor in subsection (c) allows for either a single

authoritative copy or multiple authoritative copies.

~~The test in subsection (b) is also used in Section 9-105 although Section 9-105 does not include the general test of subsection (a).~~ Under subsection (b), at any point in time, a party should be able to identify the single authoritative copy which is unique and identifiable as the authoritative copy. This does not mean that once created ~~that~~ the authoritative copy need be static and never moved or copied from its original location. To the extent that backup systems exist which result in multiple copies, the key to this idea is that at any point in time, the one authoritative copy needs to be unique and identifiable.

~~Parties may not by contract provide that control exists. The test for control is a factual test that depends upon whether the general test in subsection (a) or the safe harbor in subsection (b) is satisfied.~~

5. Article 7 has historically provided for rights under documents of title and rights of transferees of documents of title as those rights relate to the goods covered by the document. Third parties may possess or have control of documents of title. While misfeasance or negligence in failure to transfer or misdelivery of the document by those third parties may create serious issues, this Article has never dealt with those issues as it relates to tangible documents of title, preferring to leave those issues to the law of contracts, agency and tort law. In the electronic document of title regime, ~~third-party registry systems are just beginning to develop. It is very difficult to write rules regulating those third parties without some definitive sense of how the third-party registry systems will be structured. Systems that are evolving to date tend to be “closed” systems in which all participants must sign on to the master agreement which provides for rights as against the registry system as well as rights among the members. In those closed systems, the document of title never leaves the system so the parties rely upon the master agreement as to rights against the registry for its failures in dealing with the document. This article contemplates that those “closed” systems will continue to evolve and that the control mechanism in this statute provides a method for the participants in the closed system to achieve the benefits of obtaining control allowed by this article. This article also contemplates that parties will evolve open systems where parties need not be subject to a master agreement. In an open system a party that is expecting to obtain rights through an electronic document may not be a party to the master agreement. continue to evolve.~~ To the extent that ~~open~~ these systems evolve by use of the control ~~concept~~ concepts contained in this section, the law of contracts, agency, and torts as it applies to the registry’s misfeasance or negligence concerning the transfer of control of the electronic document will allocate the risks and liabilities of the parties as that other law now does so for third parties who hold tangible documents and fail to deliver the documents.

6. The subsection (c) “safe harbor” generally follows Section 12-105 for control of controllable electronic records as well as revised Section 9-105 on control of chattel paper evidenced by electronic records. See generally Sections 9-105 and 12-105 and Comments. It differs from subsection (b), which (as noted above) is based on a “single authoritative copy” of an electronic document of title and so is unavailable when the relevant record is maintained on a blockchain or another distributed ledger. The utility of distributed ledger technology depends on there being multiple authoritative copies of an electronic record. It is important to note that compliance with the conditions for control in subsection (c) also would satisfy the conditions

provided in subsection (b). However, subsection (b) was retained out of an abundance of caution and to provide assurances that existing systems for control of electronic documents of title continue to be viable. The conditions for “control” in subsection (c) reflect the functions that possession serves with respect to writings, but in a more accurate and technologically flexible way than do the conditions in subsection (b).

7. Under subsection (c), to obtain control of an electronic document of title a person must be able to identify each electronic copy as authoritative or nonauthoritative and identify itself as the person to which each authoritative electronic copy has been issued or transferred. As to the means of identification, see Section 12-105, Comment 7. In addition, the person must have the exclusive powers, first, to prevent others from adding or changing an identified person to which each authoritative electronic copy has been issued or transferred and, second, to transfer control of each authoritative copy. However, once it is established that a person has received those powers, subsection (f) provides a presumption of exclusivity. Consequently, a person asserting control need not prove exclusivity in order to make out a *prima facie* case. Application of the presumption will be governed also by Section 1-206 (effects of a presumption under the UCC) and applicable non-UCC law (including rules of procedure and evidence). In addition, subsection (d) contains two qualifications of the term “exclusive” as used in subsection (c)(3). A power can be “exclusive” under subsection (c)(3) even if one or both of these qualifications apply.

Subsection (e) provides that in certain circumstances a power is not shared within the meaning of subsection (d)(2), the relaxation of the exclusivity requirement provided by subsection (d)(2) does not apply, and, consequently, a person’s power is not exclusive. Subsection (e) provides that a person does not share an exclusive power with another person if the person can exercise the power only with the other person’s cooperation (subsection (e)(1)) but the other person either (i) can exercise of the power without the person’s cooperation (subsection (e)(2)(A)) or (ii) is the transferor to the person (transferee) of an interest in the document of title (subsection (e)(2)(B)). It follows that a person to which subsection (e) applies does not have control based on its exclusive powers (although it might have control through another person under subsection (g), discussed below, or if another person having control is acting as the person’s agent). As to the rationale for disqualifying a transferee (which includes a secured party in a secured transaction) from the benefit of shared control under subsection (d)(2), as provided in subsection (e)(2)(B), and for examples of the operation of subsection (e) (in the context of the similar provision in Section 12-105), see Section 12-105, Comments 5 and 9.

8. Subsection (g) provides for a person to obtain control through the control of another person. It follows revisions to the corresponding provisions for control of a security entitlement (Section 8-106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of authoritative electronic copies of records evidencing chattel paper (Section 9-105(g)), control of electronic money (Section 9-105A(e)), and control of controllable electronic records (Section 12-105(e)). For a brief discussion and background, see Section 12-105, Comment 8. Under subsection (g) for an acknowledgement by another person to be effective to confer control on a person, the other person making the acknowledgment must be one “other than the transferor of an interest in the electronic record” to the person. The rationale for this limitation is discussed in Section 12-105, Comment 9. Control based on an acknowledgment under subsection (g) by



another person having control continues only while the other person retains control. This result necessarily follows because such control derives solely from the other person's continued control.

Subsections (h) and (i) derive from Section 9-313(f) and (g). Subsection (h) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, subsection (i) leaves to the agreement of the parties and to any other applicable law (other than this Article or Article 9) any duties of a person that does acknowledge that it has or will obtain control on behalf of another person and provides that a person making an acknowledgment is not required to confirm the acknowledgment to another person. For example, subsection (g) would apply to give control to a person, Alpha, when another person, Beta, has control of each authoritative electronic document of title and acknowledges that it has control on behalf of Alpha. However, under subsection (h), Beta is not required to so acknowledge. And under subsection (i), even if Beta does so acknowledge, Beta owes no duty to Alpha, unless Beta agrees or other law so provides, and Beta is not required to confirm its acknowledgment to any other person.

9. This section applies to both negotiable and nonnegotiable electronic documents of title. For negotiable electronic documents of title, "delivery" is a necessary condition for negotiation, and therefore for due negotiation, under Section 7-501(b). "Delivery" of an electronic document of title is defined in Section 1-201(b)(15) as the "voluntary transfer of control." The person in control of a negotiable document, other than pursuant to subsection (g), also is a "holder," as defined in Section 1-201(b)(21)(C). Of course, nonnegotiable documents cannot be negotiated.

A security interest in an electronic document of title, whether negotiable or nonnegotiable, may be perfected by control. Section 9-314(a). But perfection of a security interest by control in a nonnegotiable document does not perfect a security interest in goods covered by the document and does not confer on a secured party or other purchaser the status of a person entitled under the document. See Section 7-102(a)(9) (defining "person entitled under the document") and Comment 6. This distinction arises from the differing rights conferred by a negotiable document and a nonnegotiable document. Both types serve as a receipt for the goods delivered to the bailee and a contract of storage (in the case of a warehouse receipt) or contract of carriage (in the case of a bill of lading). However, a negotiable document is also a representation of the goods themselves, whereas a nonnegotiable document confers only the right to receive possession of the goods. (On perfection of security interests in negotiable documents of title and goods covered by negotiable and nonnegotiable documents of title, see generally Section 9-312(a), (c), and (g) and Comment 7.)

### **Section 7-403. Obligation of Bailee to Deliver; Excuse.**

\* \* \*

### **Official Comment**

\* \* \*

5. In addition to compliance with subsection (b), ~~Subsection~~ subsection (c) conditions the bailee's duty to deliver the goods to a person entitled under a negotiable document on the surrender of possession or control of the document for cancellation or indication of partial deliveries. It also states the obvious duty of a bailee to take up a negotiable document or note partial deliveries conspicuously thereon, and the result of failure in that duty. It is subject to only one exception, that stated in subsection (a)(1) of this section and in Section 7-503(a). Subsection (c) is limited to cases of delivery to a claimant; it has no application, for example, where goods held under a negotiable document are lawfully sold to enforce the bailee's lien.

Subsection (c) does not specify any conditions on the duty of the bailee to deliver the goods covered by a nonnegotiable document to a person entitled, other than the conditions inherent in the definition of "person entitled under the document." See Sections 7-102(a)(9) (defining "person entitled under the document") and Comment 6; 7-504. In addition, the document itself may specify that the person entitled must present the document to the bailee in order to obtain delivery of the goods.

\* \* \*

## **Section 7-504. Rights Acquired in Absence of Due Negotiation; Effect of Diversion; Stoppage of Delivery.**

\* \* \*

### **Official Comment**

\* \* \*

2. As in the case of transfer—as opposed to “due negotiation”—of negotiable documents, subsection (a) empowers the transferor of a nonnegotiable document to transfer only such rights as the transferor has or has “actual authority” to convey. In contrast to situations involving the goods themselves the operation of estoppel or agency principles is not here recognized to enable the transferor to convey greater rights than the transferor actually has. Subsection (b) makes it clear, however, that the transferee of a nonnegotiable document may acquire rights greater in some respects than those of his transferor by giving notice of the transfer to the bailee. ~~New subsection~~ Subsection (b)(3) provides for the rights of a lessee in the ordinary course.

Mere notice of a transfer of the document only prevents the persons identified in subsections (b)(1) through (4) from cutting off the rights of the transferee. For the transferee to become a “person entitled under the document,” with a right to obtain delivery from the bailee under Section 7-403(a), either the document itself must provide for delivery to the transferee or the bailee must receive instructions in a record to deliver to the transferee. See Section 7-102(a)(9) (defining “person entitled under the document”) and Comment 6.

Subsection (b)(2) ~~& and~~ (3) ~~require~~ requires delivery of the goods. Delivery of the goods means the voluntary transfer of physical possession of the goods. See ~~amended~~ Section 2-103.

\* \* \*

## ARTICLE 8

### INVESTMENT SECURITIES

#### Section 8-102. Definitions and Index of Definitions.

(a) In this Article:

\* \* \*

(6) “Communicate” means to:

(i) send a signed ~~writing~~ record; or

(ii) transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

\* \* \*

(b) ~~Other~~ The following definitions ~~applying to~~ in this Article and ~~the sections in which they appear~~ are other Articles apply to this Article:

\* \* \*

“Controllable account”. Section 9-102.

“Controllable electronic record”. Section 12-102.

“Controllable payment intangible”. Section 9-102.

\* \* \*

#### Official Comment

\* \* \*

6. “Communicate.” The term “communicate” assures that the Article 8 rules will be sufficiently flexible to adapt to changes in information technology. Sending a signed writing always suffices as a communication, but the parties can agree that a different means of

transmitting information is to be used. Agreement is defined in Section ~~1-201(3)~~ 1-201(b)(3) as “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.” Thus, use of an information transmission method might be found to be authorized by agreement, even though the parties have not explicitly so specified in a formal agreement. The term communicate is used in Sections 8-102(a)(7) (definition of entitlement order), 8-102(a)(11) (definition of instruction), and 8-403 (demand that issuer not register transfer). Also in furtherance of medium neutrality, pursuant to the Uniform Commercial Code Amendments (2022) (2022 Amendments) the reference in paragraph (6)(i) to a “signed writing” has been changed to refer to a “signed record.”

9. “Financial asset.” \* \* \*

\* \* \*

It is not necessary for all of the Part 5 rules to be relevant to a particular financial asset for the relevant property to qualify as a “financial asset” credited to a securities account. Many of the duties set forth in Part 5 will often be relevant to a digital asset such as a “controllable electronic record” (Section 12-102), or a “controllable account” or “controllable payment intangible” (Section 9-102) evidenced by a controllable electronic record, treated as a financial asset credited to a securities account. These duties include the duty to exercise rights as directed by the entitlement holder, comply with the entitlement holder’s entitlement orders, and change the position to another form of holding.

If the parties agree to treat a digital asset as a financial asset under Article 8 and the digital asset is in fact held in a securities account for an entitlement holder, the rules applicable to controllable electronic records under Article 12 would not apply to the entitlement holder’s security entitlement related to the financial asset. If the financial asset itself is a controllable electronic record, however, then the rules in Article 12 could apply to the securities intermediary’s rights with respect to the controllable electronic record if the intermediary holds the asset directly.

\* \* \*

14. “Securities intermediary.” A “securities intermediary” is a person that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity. The most common examples of securities intermediaries would be clearing corporations holding securities for their participants, banks acting as securities custodians, and brokers holding securities on behalf of their customers. However, a person need not be such an entity in order to be a securities intermediary. Because a “securities account” is an account to which a financial asset is or may be credited under Section 8-501(a) and the definition of “financial asset” is not limited to securities, a person may be a “securities intermediary” even if that person does not credit “securities” (as defined in Article 8) to the account. Rather, the securities accounts that a securities intermediary maintains may consist exclusively of financial assets described in Section 8-102(a)(9)(ii) and (iii). For example, a cryptocurrency exchange that holds only cryptocurrencies (and not securities) for customers might be a securities intermediary.

Clearing corporations are listed separately as a category of securities intermediary in subparagraph (i) even though in most circumstances they would fall within the general definition in subparagraph (ii). The reason is to simplify the analysis of arrangements such as the NSCC-DTC system in which NSCC performs the comparison, clearance, and netting function, while DTC acts as the depository. Because NSCC is a registered clearing agency under the federal securities laws, it is a clearing corporation and hence a securities intermediary under Article 8, regardless of whether it is at any particular time or in any particular aspect of its operations holding securities on behalf of its participants.

\* \* \*

The definition of securities intermediary includes the requirement that the person in question “in the ordinary course of its business maintain securities accounts for others”. This “ordinary course” requirement does not have a fixed quantitative requirement and is determined by the facts of each case. Thus, a person need not necessarily satisfy a specified threshold of activity or necessarily have a minimum number of customers. Law other than the UCC may determine who may legally engage in such a business.

\* \* \*

18. “Uncertificated security.” The term “uncertificated security” means a security that is not represented by a security certificate—i.e., a paper certificate. This is so even if, for example, the organic documents relating to the security refer to it as being “certificated” or refer to the electronic record evidencing the security as an “electronic certificate.” For uncertificated securities, there is no need to draw any distinction between the underlying asset and the means by which a direct holder’s interest in that asset is evidenced. Compare “certificated security” and “security certificate.”

As discussed above in Comment 9, a controllable electronic record may be a “financial asset.” However, a controllable electronic record is not itself a “security,” defined in part in Section 8-102(a)(15) as “an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer.” It also is not “a share or similar equity interest,” an “investment company security,” or “an interest in a partnership or limited liability company.” See Section 8-103(a), (b), and (c). Of course, a controllable electronic record might be involved in the issuance and distribution of something that is a security for other, non-Article 8 purposes, including the federal securities laws. For example, a controllable electronic record (perhaps labeled as a “token” or “coin”) might provide a mechanism for facilitating investments in such securities. As Section 8-102(d) makes clear, however, characterization under Article 8 does not determine characterization for other purposes. The converse is also true—characterization for other purposes does not determine characterization under Article 8.

Although not itself an Article 8 security, a controllable electronic record might play a role in the facilitating transactions in Article 8 securities. The following examples address situations in which controllable electronic records may have such a role as well as situations in which investment property is not involved.

**Example 1 (corporate shares: Article 8 uncertificated securities; token as instruction).** A Delaware corporation (D Corp) issues shares of stock and maintains books and records evidencing the registered ownership of the shares. Because the shares are not represented by security certificates, they are uncertificated securities. Pursuant to the applicable law and the organic documentation of D Corp, D Corp creates, or causes to be created, controllable electronic records (CERs)—“tokens”—to facilitate transfers of the shares. Also pursuant to that law and documentation, the transfer of control of a token on the platform on which the token is recorded constitutes an instruction to D Corp, as issuer, for the transfer of registration of the share(s) represented by the token to the transferee of control. Following receipt of the instruction upon transfer of control of a token, D Corp transfers registration of the share(s) on its books and records. See Sections 8-102(a)(12) (defining “instruction”); 8-401 (duty of issuer to register transfer). Although Article 12 governs the tokens (as CERs) and the transfer of control thereof, other law, including Delaware corporate law and Delaware Article 8 (and Article 9 of the relevant jurisdiction, if applicable) governs rights in the uncertificated securities and the transfer of registration. See Sections 8-110(a); 12-104(f).

**Example 2 (LLC membership interests: Article 8 uncertificated securities; token as instruction).** A Delaware limited liability company (LLC) issues membership interests that are dealt in or traded on securities exchanges or in securities markets and which by their terms are securities governed by Article 8. See Section 8-103(c). LLC maintains books and records evidencing the registered ownership of the interests. Because the interests are not represented by security certificates, they are uncertificated securities. Pursuant to the applicable law and the organic documentation of LLC, LLC creates, or causes to be created, controllable electronic records (CERs)—“tokens”—to facilitate transfers of the interests. Also pursuant to that law and documentation, the transfer of control of a token on the platform on which the token is recorded constitutes an instruction to LLC, as issuer, for the transfer of registration of the interest(s) represented by the token to the transferee of control. Following receipt of the instruction upon transfer of control of a token, LLC transfers registration of the interest(s) on its books and records. See Sections 8-102(a)(12) (defining “instruction”); 8-401 (duty of issuer to register transfer). Although Article 12 governs the tokens (as CERs) and the transfer of control thereof, other law, including Delaware LLC law and Delaware Article 8 (and Article 9 of the relevant jurisdiction, if applicable), governs rights in the uncertificated securities and the transfer of registration. See Sections 8-110(a); 12-104(f).

**Example 3 (LLC membership interests not covered by Article 8; interests are general intangibles).** A Delaware limited liability company issues membership interests that are not securities governed by UCC Article 8 and, consequently, are not investment property. See Section 8-103(c). Instead, the membership interests are general intangibles. LLC maintains books and records evidencing ownership of the interests. Pursuant to the applicable law and the organic documentation of LLC, LLC creates, or causes to be created, controllable electronic records (CERs)—“tokens”—to facilitate transfers of the interests. Also pursuant to that law and documentation, the transfer of control of a token on the platform on which the token is recorded constitutes a request to LLC, as issuer, for the transfer of the interest(s) related to the token. Following receipt of the request upon

transfer of control of a token, LLC transfers the interest(s) on its books and records. Although Article 12 governs the tokens (as CERs) and the transfer of control, other law (including Article 9 or the relevant jurisdiction, if applicable, but not Article 8) governs rights in the interests (general intangibles). See Section 12-104(f).

Examples 1 and 2 posit that controllable electronic records function as instructions to the issuers. For an analogous example in another context, see Section 4A-104, Comment 3 (“An instruction to pay might be a component of a computer program or a transaction protocol intended to execute automatically under specified circumstances.”). The central point is that the roles of the controllable electronic records must comply with the organic corporate and LLC laws and documentation as well as the Article 8 regime for uncertificated securities. Although controllable electronic records might be structured to functionally “represent” the underlying uncertificated securities, Article 8 makes no provision for such a “representation” for uncertificated securities (unlike the role of security certificates for certificated securities). Whether it would be possible and feasible to expand the structure contemplated in Examples 1 and 2 so that transfer of control of a controllable electronic record would, *ipso facto*, constitute a transfer of registration on the issuer’s books and records would depend on the terms of and compliance with both the underlying organic laws and documentation for the uncertificated securities, the requirements of Article 8, and, where applicable, other law.

If the securities issued by D Corp or LLC in Examples 1 and 2 were payment obligations of the issuers that met the definition of “security” in Section 8-102(a)(15)—i.e., debt securities—the same analysis discussed in those examples as to the applicability and scope of Articles 8 and 12 would apply. However, if the debt obligations were not Article 8 securities (as in Example 3) but were obligations of account debtors on controllable accounts or controllable payment intangibles, then the relevant provisions of Articles 9 and 12, and not those of Article 8, would apply. See, e.g., Sections 9-107A; 9-306B; 9-314; 12-104(a), (b), and (e) and Comments 6 – 10; Article 12, Prefatory Note 4.

### **Section 8-103. Rules for Determining Whether Certain Obligations and Interests are Securities or Financial Assets.**

\* \* \*

(h) A controllable account, controllable electronic record, or controllable payment intangible is not a financial asset unless Section 8-102(a)(9)(iii) applies.

#### **Official Comment**

\* \* \*

8. Subsection (g) allows a document of title to be a financial asset and thus subject to the indirect holding system rules of Part 5 only to the extent that the intermediary and the person entitled under the document so agree to do so pursuant to Section 8-102(a)(9)(iii). Subsection (h), added pursuant to the 2022 Amendments, adopts the same approach for a

controllable account, controllable electronic record, or controllable payment intangible. This is to prevent the inadvertent application of the Part 5 rules to intermediaries who may hold either electronic or tangible documents of title or controllable accounts, controllable electronic records, or controllable payment intangibles.

### **Section 8-105. Notice of Adverse Claim.**

\* \* \*

#### **Official Comment**

1. \* \* \*

~~The general Article 1 definition of “notice” in Section 1-201(25) — which provides that a person has notice of a fact if “from all the facts and circumstances known to him at the time in question he has reason to know that it exists” — Section 1-202(d), (e), and (f), on giving and receiving notice, does not apply to the interpretation of “notice of adverse claims.” The Section 1-201(25) definition of notice~~ Section 1-202(d), (e), and (f) does, however, apply to usages of that term and its cognates in giving and receiving notice under Article 8 in contexts other than notice of adverse claims.

\* \* \*

3. Paragraph (a)(1) provides that a person has notice of an adverse claim if the person has knowledge of the adverse claim. Knowledge is defined in Section ~~1-201(25)~~ 1-202(b) as actual knowledge.

4. \* \* \*

\* \* \* For this purpose, information known to individuals within an organization who are not conducting or aware of a transaction, but not forwarded to the individuals conducting the transaction, is not pertinent in determining whether the individuals conducting the transaction had knowledge of a substantial probability of the existence of the adverse claim. Cf. Section ~~1-201(27)~~ 1-202(f) (receipt of notice or knowledge by an organization). An organization may also “deliberately avoid information” if it acts to preclude or inhibit transmission of pertinent information to those individuals responsible for the conduct of purchase transactions.

\* \* \*

### **Section 8-106. Control**

\* \* \*

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

\* \* \*



(3) ~~another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.~~ person, other than the transferor to the purchaser of an interest in the security entitlement:

(A) has control of the security entitlement and acknowledges that it has control on behalf of the purchaser; or

(B) obtains control of the security entitlement after having acknowledged that it will obtain control of the security entitlement on behalf of the purchaser.

\* \* \*

(h) A person that has control under this section is not required to acknowledge that it has control on behalf of a purchaser.

(i) If a person acknowledges that it has or will obtain control on behalf of a purchaser, unless the person otherwise agrees or law other than this Article or Article 9 otherwise provides, the person does not owe any duty to the purchaser and is not required to confirm the acknowledgment to any other person.

### **Official Comment**

1. The concept of “control” plays a key role in various provisions dealing with the rights of purchasers, including secured parties. See Sections 8-303 (protected purchasers); 8-503(e) (purchasers from securities intermediaries); 8-510 (purchasers of security entitlements from entitlement holders); 9-203(b)(3)(D) (attachment of security interests); 9-314 (perfection of security interests); 9-328 (priorities among conflicting security interests).

Obtaining “control” means that the purchaser has taken whatever steps are necessary, given the manner in which the securities or other financial assets are held, to place itself in a position where it can have the securities or other financial assets sold, without further action by the owner, registered owner, entitlement holder, transferor, or other person with an interest in the securities or other financial assets.

\* \* \*

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

~~This section~~ Subsection (d) specifies only the minimum requirements that such an arrangement must meet to confer "control" of a security entitlement; the details of the arrangement can be specified by agreement. The arrangement might cover all of the positions in a particular account or subaccount, or only specified positions. There is no requirement that the control party's right to give entitlement orders be exclusive. The arrangement might provide, for example, that only the control party can give entitlement orders, ~~or~~ that either the entitlement holder or the control party can give entitlement orders, that more than one person has unilateral control, or that two or more persons share control. The essential factor is whether a person may originate entitlement orders without further consent of the entitlement holder. See subsection (f).

The following examples illustrate the application of subsection (d):

\* \* \*

Example 9. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Beta Bank agrees with Alpha to act as Alpha's collateral agent with respect to the security entitlement. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta also has the right to direct dispositions. Because Able has agreed that it will comply with entitlement orders originated by Beta without further consent by Debtor, Beta has control of the security entitlement (see Example 3). Because Beta has acknowledged that it has control on behalf of Alpha, Alpha also has control under subsection (d)(3). It is not necessary for Able to enter into an agreement directly with Alpha or for Able to be aware of Beta's ~~agency~~ relationship with Alpha.

\* \* \*

4A. Pursuant to the 2022 Amendments, subsection (d)(3) was revised to conform the provision for control through another person to the corresponding provisions for control of other types of assets. See Section 12-105, Comment 8; see also Sections 7-106(g) (control of electronic

document of title); 9-104(a)(4) (control of deposit account); 9-105(g) (control of authoritative electronic copy of a record evidencing chattel paper); 9-105A(e) (control of electronic money). Control based on an acknowledgment under subsection (d)(3) by another person having control continues only while the other person retains control. This result necessarily follows because such control derives solely from the other person's continued control. Under subsection (d)(3), for an acknowledgment to be effective to confer control, it must be made by a person "other than the transferor of an interest in the security entitlement." See Section 12-105, Comment 9 (discussing the rationale for this requirement). Subsections (h) and (i) derive from Section 9-313(f) and (g). Subsection (h) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of a purchaser. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, subsection (i) leaves to the agreement of the parties and to any other applicable law (other than this Article or Article 9) any duties of a person that does acknowledge that it has or will obtain control on behalf of a purchaser and provides that a person making an acknowledgment is not required to confirm the acknowledgment to any other person.

\* \* \*

#### **Section 8-107. Whether Indorsement, Instruction, or Entitlement Order is**

**Effective.**

\* \* \*

#### **Official Comment**

\* \* \*

3. \* \* \*

Subsections (c), (d), and (e) supplement the general rule of subsection (b) on effectiveness. The term "representative," used in subsections (c) and (d), is defined in Section ~~1-201(35)~~ 1-201(b)(33).

\* \* \*

#### **Section 8-110. Applicability; Choice of Law.**

\* \* \*

(g) The local law of the issuer's jurisdiction or the securities intermediary's jurisdiction governs a matter or transaction specified in subsection (a) or (b) even if the matter or transaction does not bear any relation to the jurisdiction.

## Official Comment

1. \* \* \*

\* \* \* See Comments 3 and 5 through 7 below and PEB Commentary No. 19, ~~dated April 11, 2017.~~

\* \* \*

3. \* \* \*

Where the Hague Securities Convention applies, the foregoing provisions of an account agreement effectively determine the applicable law only if the intermediary, at the time of the agreement, had an office in the designated jurisdiction (which may be anywhere in the United States if the account agreement specifies a state of the United States) that is engaged in a regular activity of maintaining securities accounts (a “Qualifying Office”). However, because the policy of this section and the Convention is to enable parties to determine, in advance and with certainty, what law will apply to transactions governed by this Article, the validation of the parties’ selection of governing law by agreement is not conditioned upon a determination that the jurisdiction whose law is chosen bear a “reasonable relation” to a matter or the transaction. See Subsection (g) makes this explicit. See Comment 5A; see also Section 4A-507; compare Section ~~1-105(1) (Revised Section~~ 1-301(a)). That is also true with respect to the similar provisions in subsection (d) of this section and in Section 9-305. The remaining paragraphs in subsection (e) and Convention article 5 contain additional default rules for determining the applicable law.

\* \* \*

5A. Subsection (g) reflects what is stated in Comment 3—that the local law of the issuer’s jurisdiction or securities intermediary’s jurisdiction governs even if a matter or transaction bears no relation to that jurisdiction. This also is implicit in Section 1-301(c), which provides that the applicable law provided in this section (and other specified provisions) governs.

\* \* \*

### **Section 8-116. Securities Intermediary as Purchaser for Value.**

\* \* \*

## Official Comment

1. \* \* \*

\* \* \* Even though the securities intermediary does not give value to the transferor, it does give value by incurring obligations to its own entitlement holder. Although the general definition of value in Section ~~1-201(44) (d)~~ 1-204 should be interpreted to cover the point, this section is included to make this point explicit.

\* \* \*

## **Section 8-207. Rights and Duties of Issuer with Respect to Registered Owners.**

\* \* \*

### **Official Comment**

1. \* \* \*

\* \* \* See PEB Commentary No. 4, ~~dated March 10, 1990.~~

\* \* \*

## **Section 8-303. Protected Purchaser.**

\* \* \*

(b) ~~In addition to acquiring the rights of a purchaser, a~~ A protected purchaser acquires its interest in the security free of any adverse claim.

### **Official Comment**

\* \* \*

2. To qualify as a protected purchaser under subsection (a), a purchaser must give value, take without notice of any adverse claim, and obtain control. Value is used in the broad sense defined in Section ~~4-201(44)~~ 1-204. See also Section 8-116 (securities intermediary as purchaser for value). Adverse claim is defined in Section 8-102(a)(1). Section 8-105 specifies whether a purchaser has notice of an adverse claim. Control is defined in Section 8-106. To qualify as a protected purchaser under subsection (b), there must be a time at which all of the requirements are satisfied. Thus if a purchaser obtains notice of an adverse claim before giving value or satisfying the requirements for control, the purchaser cannot be a protected purchaser. See also Section 8-304(d). The requirement that a protected purchaser obtain control expresses the point that to qualify for the adverse claim cut-off rule a purchaser must take through a transaction that is implemented by the appropriate mechanism. By contrast, the rules in Part 2 provide that any purchaser for value of a security without notice of a defense may take free of the issuer's defense based on that defense. See Section 8-202.

The reference to the acquisition of the rights of a purchaser in the pre-2022 text of subsection (b) has been deleted. However, because a protected purchaser acquires the rights of a purchaser under Section 8-302, the revised text does not diminish a protected purchaser's rights. That revision aligned the text more closely to that of Section 12-104(e) on the rights of a qualifying purchaser of a controllable electronic record, controllable account, or controllable payment intangible.

\* \* \*

## **Section 8-501. Securities Account; Acquisition of Security Entitlement from Securities Intermediary.**

\* \* \*

### **Official Comment**

1. Part 5 rules apply to security entitlements, and Section 8-501(b) provides that a person has a security entitlement when a financial asset has been credited to a “securities account.” Thus, the term “securities account” specifies the type of arrangements between ~~institutions~~ intermediaries and their customers that are covered by Part 5. A securities account is a consensual arrangement in which the intermediary undertakes to treat the customer as entitled to exercise the rights that comprise the financial asset. The consensual aspect is covered by the requirement that the account be established pursuant to agreement. The term agreement is used in the broad sense defined in Section ~~4-201(3)~~ 1-201(b)(3). There is no requirement that a formal or written agreement be signed.

\* \* \*

Whether an arrangement between ~~a firm~~ an intermediary and another person concerning a security or other financial asset is a “securities account” under this Article depends on whether the firm has undertaken to treat the other person as entitled to exercise (through an entitlement order) the rights that comprise the security or other financial asset. Section ~~4-402~~ 1-103, however, states the fundamental principle of interpretation that the Code provisions should be construed and applied to promote their underlying purposes and policies. Thus, the question whether a given arrangement is a securities account should be decided not by dictionary analysis of the words of the definition taken out of context, but by considering whether it promotes the objectives of Article 8 to include the arrangement within the term securities account.

The effect of concluding that an arrangement is a securities account is that the rules of Part 5 apply. Accordingly, the definition of “securities account” must be interpreted in light of the substantive provisions in Part 5, which describe the core features of the type of relationship for which the commercial law rules of Revised Article 8 concerning security entitlements were designed. There are many arrangements between ~~institutions~~ intermediaries and other persons concerning securities or other financial assets which do not fall within the definition of “securities account” because the ~~institutions~~ intermediaries have not undertaken to treat the other persons as entitled to exercise the ordinary rights of an entitlement holder specified in the Part 5 rules. For example, the term securities account does not cover the relationship between a bank and its depositors or the relationship between a trustee and the beneficiary of an ordinary trust, because those are not relationships in which the holder of a financial asset has undertaken to treat the other as entitled to exercise the rights that comprise the financial asset in the fashion contemplated by the Part 5 rules. The interpretation of the term “securities account” does not depend on the type of security or other financial asset that might be involved.

\* \* \*

4. \* \* \*

\* \* \*

Subsection (d) uses terminology applicable to conventional certificated securities (e.g., “indorsed”) and contemplates the limited circumstances in which a securities intermediary (defined in Section 8-102(a)(14) to include only a clearing corporation or another person that in the ordinary course of its business maintains securities accounts for others and that is acting in that capacity) may hold a financial asset for a customer under a direct holding arrangement rather than as a security entitlement. However, assets such as controllable electronic records, controllable accounts, and controllable payment intangibles also might be associated with an intermediary as well as with its customer under a similar direct holding arrangement. For example, the intermediary and the customer might share control of the financial asset under an arrangement whereby the intermediary could exercise powers, such as the power to transfer control, only with the concurrent exercise of the powers by the customer. As with conventional certificated securities, whether an intermediary has created a security entitlement in favor of an entitlement holder or its customer is holding a financial asset directly depends on the nature of the relationship and the nature of the rights of the intermediary and the customer with respect to the financial asset. A securities intermediary and a customer wishing to establish the customer’s direct holding status could avoid uncertainty by means of unambiguous contractual documentation of their relationship. Moreover, a person holding such an asset for the benefit of another may not be acting in the capacity of a securities intermediary at all, even if the person also regularly acts in that capacity. In such a case, subsection (d) would not apply and the relationship would be governed by the agreement of the parties and the application of law other than this Article.

\* \* \*

## **Section 8-502. Assertion of Adverse Claim Against Entitlement Holder.**

\* \* \*

### **Official Comment**

3. \* \* \*

\* \* \*

Example 2. \* \* \* Creditor acquired the security entitlement for value, since Creditor acquired it as security for or in satisfaction of Thief’s debt to Creditor. See Section ~~4-201(44)~~ 1-204. If Creditor did not have notice of Owner’s claim, Section 8-502 precludes any action by Owner against Creditor, whether framed in constructive trust or other theory. Section 8-105 specifies what counts as notice of an adverse claim.

\* \* \*

Example 5. \* \* \* Lending Bank acquired the security entitlement for value, since it acquired it as security for a debt. See Section ~~1-201(44)~~ 1-204. If Lending Bank did not have notice of Acme's claim, Section 8-502 will preclude any action by Acme against Lending Bank, whether framed in constructive trust or other theory.

\* \* \*

## **Section 8-505. Duty of Securities Intermediary with Respect to Payments and Distributions.**

\* \* \*

### **Official Comment**

1. One of the core elements of the securities account relationships for which the Part 5 rules were designed is that the securities intermediary passes through to the entitlement holders the economic benefit of ownership of the financial asset, such as payments and distributions made by the issuer of the financial asset. Subsection (a) expresses the ordinary understanding that a securities intermediary will take appropriate action to see to it that any payments or distributions made by the issuer are received. One of the main reasons that investors make use of securities intermediaries is to obtain the services of a professional in performing the record-keeping and other functions necessary to ensure that payments and other distributions are received.

\* \* \*

4. This section applies to payments and distributions made by an issuer of a financial asset credited to a securities account. If a distribution is made to, or made available to, a securities intermediary on account of a financial asset as to which there is no issuer, the duties, if any, of the securities intermediary with respect to the distribution are subject to the agreement of the intermediary and the entitlement holder. However, in the absence of an agreement, this section may be applied by analogy in an appropriate case. If the securities intermediary is a secured party, Section 9-207(c) applies.

## **Section 8-510. Rights of Purchaser of Security Entitlement from Entitlement Holder.**

\* \* \*

### **Official Comment**

\* \* \*



3. \* \* \*

Example 3. \* \* \*

Buyer had a position in the bonds, which Buyer held in the form of a security entitlement against Baker. Buyer then made a gift of the position to Alma Mater. Although Alma Mater is a purchaser, Section ~~1-201(33)~~ 1-201(b)(30), it did not give value. Thus, Alma Mater is a person who purchased a security entitlement, or an interest therein, from an entitlement holder (Buyer). Buyer was protected against Owner's adverse claim by the Section 8-502 rule. Thus, by virtue of Section 8-510(b), Owner is also precluded from asserting an adverse claim against Alma Mater.

\* \* \*

## ARTICLE 9

### SECURED TRANSACTIONS

#### Section 9-101. Short Title.

\* \* \*

#### Official Comment

~~1. **Source.** This Article supersedes former Uniform Commercial Code (UCC) Article 9. As did its predecessor, it provides a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part this Article follows the general approach and retains much of the terminology of former Article 9. In addition to describing many aspects of the operation and interpretation of this Article, these Comments explain the material changes that this Article makes to former Article 9. Former Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however, these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to former Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.~~

~~Citations to "Bankruptcy Code Section \_\_" in these Comments are to Title 11 of the United States Code as in effect on July 1, 2010.~~

~~2. 1. **Source, Background, and History.** In 1990, the Permanent Editorial Board for the UCC with the support of its sponsors, The American Law Institute and the National Conference of Commissioners on Uniform State Laws, established a committee to study Uniform Commercial Code (UCC) Article 9 of the UCC. The study committee issued its report as of December 1, 1992, recommending the creation of a drafting committee for the revision of Article 9 and also recommending numerous specific changes to Article 9. Organized in 1993, a drafting committee met fifteen times from 1993 to 1998. This Extensive revisions of this Article was were approved by its sponsors in 1998 (1998 Revisions). This The Article was conformed to~~

revised Article 1 in 2001 and to amendments to Article 7 in 2003. The sponsors approved amendments to selected sections of this Article in 2010.

The 1998 Revisions superseded former Article 9 (pre-1998 Article 9) and, as did their predecessor, provided a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part the 1998 Article 9 followed the general approach and retains much of the terminology of pre-1998 Article 9. Comment 3 describes the material changes made by the 1998 Revisions. Pre-1998 Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to pre-1998 Article 9, however, these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to pre-1998 Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.

Article 9 was again extensively revised in 2022 (2022 Article 9 Revisions) pursuant to the Uniform Commercial Code Amendments (2022) (2022 Amendments). In particular, the 2022 Article 9 Revisions conform and adapt Article 9 to Article 12, covering controllable electronic records and rights to payment that are tethered to controllable electronic records—controllable accounts and controllable payment intangibles. For a brief summary of the 2022 Article 9 Revisions, see Comment 4, below. *Except as noted in Comments 3 and 4 below, the 1998 Article 9 remains substantially unchanged following the 2022 Article 9 Revisions.*

Note also that citations to “Bankruptcy Code Section” in these Comments are to Title 11 of the United States Code as in effect on July 1, 2022.

**3 2. 1998 Revisions: Reorganization and Renumbering; Captions; Style.** ~~This Article reflects a~~ The 1998 Revisions embraced a substantial reorganization of former Article 9 and renumbering of most sections of Article 9. ~~New including a new Part 4 deals dealing with several aspects of third-party rights and duties that are unrelated to perfection and priority. Some of these were covered by Part 3 of former pre-1998 Article 9. Also added was a new Part 5, deals dealing with filing (formerly covered by former pre-1998 Part 4), and Part 6, deals dealing with default and enforcement (formerly covered by former pre-1998 Part 5). Appendix I contains conforming revisions to other articles of the UCC, and Appendix II contains model provisions for production money priority. This Article~~ The 1998 Revisions also includes include headings for the subsections as an aid to readers. Unlike section captions, which are part of the UCC, see Section 1-107, subsection headings are not a part of the official text itself and have not been approved by the sponsors. Each jurisdiction in which this Article is introduced may consider whether to adopt the headings as a part of the statute and whether to adopt a provision clarifying the effect, if any, to be given to the headings. This Article also has been conformed to current style conventions.

**4 3. Summary of 1998 Revisions.** Following is a brief summary of some of the more significant revisions features of the 1998 Revisions of Article 9 that are included in the 1998 revision of this Article.

a. **Scope of Article 9.** ~~This Article expands~~ The 1998 Revisions expanded the scope of Article 9 in several respects.

*Deposit accounts.* Section 9-109 includes within this Article's scope deposit accounts as original collateral, except in consumer transactions. ~~Former Pre-1998~~ Article 9 dealt with deposit accounts only as proceeds of other collateral.

*Sales of payment intangibles and promissory notes.* Section 9-109 also includes within the scope of this Article most sales of "payment intangibles" (defined in Section 9-102 as general intangibles under which an account debtor's principal obligation is monetary) and "promissory notes" (also defined in Section 9-102). ~~Former Pre-1998~~ Article 9 included sales of accounts and chattel paper, but not sales of payment intangibles or promissory notes. In its inclusion of sales of payment intangibles and promissory notes, this Article continues the drafting convention found in ~~former pre-1998~~ Article 9; ~~it provides that~~ the sale of accounts, chattel paper, payment intangibles, or promissory notes creates a "security interest." The definition of "account" in Section 9-102 also ~~has been~~ was expanded to include various rights to payment that were general intangibles under ~~former pre-1998~~ Article 9.

\* \* \*

*Consignments.* Section 9-109 ~~provides that~~ added "true" consignments—bailments for the purpose of sale by the bailee—~~are security interests covered by~~ to the scope of Article 9, with certain exceptions. See Section 9-102 (defining "consignment"). ~~Currently Under the pre-1998 UCC, many consignments are were~~ subject to Article 9's filing requirements by operation of ~~former pre-1998~~ Section 2-326.

*Supporting obligations and property securing rights to payment.* ~~This Article~~ The 1998 Revisions also ~~addresses~~ addressed explicitly (i) obligations, such as guaranties and letters of credit, that support payment or performance of collateral such as accounts, chattel paper, and payment intangibles, and (ii) any property (including real property) that secures a right to payment or performance that is subject to an Article 9 security interest. See Sections 9-203, 9-308.

*Commercial tort claims.* Section 9-109 expands the scope of Article 9 to include the assignment of commercial tort claims by narrowing the exclusion of tort claims generally. However, ~~this Article continues~~ Article 9 continues to exclude tort claims for bodily injury and other non-business tort claims of a natural person. See Section 9-102 (defining "commercial tort claim").

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

*Nonassignable general intangibles, promissory notes, health-care-insurance receivables, and letter-of-credit rights.* ~~This Article enables~~ The 1998 Revisions enabled a security interest to attach to letter-of-credit rights, health-care-insurance receivables, promissory notes, and general intangibles, including contracts, permits, licenses, and franchises, notwithstanding a contractual

or statutory prohibition against or limitation on assignment. ~~This~~ The revised Article explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest. See Sections 9-408, 9-409.

\* \* \*

**b. Duties of Secured Party.** ~~This Article provides~~ The 1998 Revisions provided for expanded duties of secured parties.

\* \* \*

**c. Choice of Law.** The choice-of-law rules included in the 1998 Revisions for the law governing perfection, the effect of perfection or nonperfection, and priority are found in Part 3, Subpart 1 (Sections 9-301 through 9-307). See also Section 9-316.

*Where to file: Location of debtor.* ~~This Article changes~~ The 1998 Revisions changed the choice-of-law rule governing perfection (i.e., where to file) for most collateral to the law of the jurisdiction where the debtor is located. See Section 9-301. Under ~~former pre-1998~~ Article 9, the jurisdiction of the debtor's location governed only perfection and priority of a security interest in accounts, general intangibles, mobile goods, and, for purposes of perfection by filing, chattel paper and investment property.

*Determining debtor's location.* As a baseline rule, Section 9-307 follows ~~former pre-1998~~ Section 9-103, under which the location of the debtor is the debtor's place of business (or chief executive office, if the debtor has more than one place of business). Section 9-307 contains three major exceptions. First, a "registered organization," such as a corporation or limited liability company, is located in the State under whose law the debtor is organized, e.g., a corporate debtor's State of incorporation. Second, an individual debtor is located at his or her principal residence. Third, there are special rules for determining the location of the United States and registered organizations organized under the law of the United States.

\* \* \*

*Priority.* For tangible collateral such as goods and instruments, Section 9-301 provides that the law applicable to priority and the effect of perfection or nonperfection will remain the law of the jurisdiction where the collateral is located, as under ~~former pre-1998~~ Section 9-103 (but without the confusing "last event" test). For intangible collateral, such as accounts, the applicable law for priority ~~will be~~ is that of the jurisdiction in which the debtor is located.

\* \* \*

*Goods covered by certificates of title; deposit accounts; letter-of-credit rights; investment property.* ~~This Article includes~~ The 1998 Revisions to Article 9 included several refinements to the treatment of choice-of-law matters for goods covered by certificates of title. See Section 9-303. ~~It~~ The revision also ~~provides~~ provided special choice-of-law rules, similar to those for

investment property under Articles 8 and 9, for deposit accounts (Section 9-304), investment property (Section 9-305), and letter-of-credit rights (Section 9-306).

\* \* \*

d. **Perfection.** The 1998 revised rules governing perfection of security interests and agricultural liens are found in Part 3, Subpart 2 (Sections 9-308 through 9-316).

*Deposit accounts; letter-of-credit rights.* With certain exceptions, ~~this Article provides~~ the 1998 Revisions provided that a security interest in a deposit account or a letter-of-credit right may be perfected *only* by the secured party's acquiring "control" of the deposit account or letter-of-credit right. See Sections 9-312, 9-314. Under Section 9-104, a secured party has "control" of a deposit account when, with the consent of the debtor, the secured party obtains the depository bank's agreement to act on the secured party's instructions (including when the secured party becomes the account holder) or when the secured party is itself the depository bank. The control requirements are patterned on Section 8-106, which specifies the requirements for control of certain investment property. Under Section 9-107, "control" of a letter-of-credit right occurs when the issuer or nominated person consents to an assignment of proceeds under Section 5-114.

*Electronic chattel paper and tangible chattel paper definitions deleted in 2022 Article 9 Revisions.* Section 9-102 ~~includes of the 1998 Revisions included a new defined term terms:~~ "electronic chattel ~~paper.~~ paper" and "tangible chattel paper." ~~Electronic chattel paper is a record or records consisting of information stored in an electronic medium (i.e., it is not written). Perfection of a security interest in electronic chattel paper may be by control or filing. See Sections 9-105 (sui generis definition of control of electronic chattel paper), 9-312 (perfection by filing), 9-314 (perfection by control). However, the 2022 Article 9 Revisions deleted those terms and modified the definition of "chattel paper" and the rules for chattel paper evidenced by electronic records, as discussed in Comment 4 and Section 9-102, Comment 5.b.~~

*Investment property.* The 1998 Revisions left the perfection requirements for "investment property" (defined in Section 9-102), including perfection by control under Section 9-106, ~~remain~~ substantially unchanged. However, a new provision in Section 9-314 is designed to ensure that a secured party retains control in "repledge" transactions that are typical in the securities markets.

*Instruments, ~~agricultural liens~~, and commercial tort claims.* ~~This Article expands~~ The 1998 Revisions expanded the types of collateral in which a security interest may be perfected by filing to include instruments. See Section 9-312. ~~Agricultural~~ Under the revised Article ~~liens~~ and security interests in commercial tort claims also are perfected by filing ~~under this Article~~. See Sections 9-308, 9-310.

*Sales of payment intangibles and promissory notes.* Although ~~former~~ pre-1998 Article 9 covered the outright sale of accounts and chattel paper, under the revised Article sales of most other types of receivables also are financing transactions to which Article 9 should apply. Accordingly, Section 9-102 expanded the definition of "account" to include many types of

receivables (including “health-care-insurance receivables,” defined in Section 9-102) that ~~former pre-1998~~ Article 9 classified as “general intangibles.” It thereby subjects to Article 9’s filing system sales of more types of receivables than did ~~former pre-1998~~ Article 9. Certain sales of payment intangibles—primarily bank loan participation transactions—should not be subject to the Article 9 filing rules. These transactions ~~fall~~ are placed in a residual category of collateral, “payment intangibles” (general intangibles under which the account debtor’s principal obligation is monetary), the sale of which is exempt from the filing requirements of Article 9. See Sections 9-102, 9-109, 9-309 (perfection upon attachment). The perfection rules for sales of promissory notes are the same as those for sales of payment intangibles.

*Possessory security interests.* Several provisions of 1998 Article 9 address aspects of security interests involving a secured party or a third party who is in possession of ~~the~~ collateral. In particular, Section 9-313 resolves a number of uncertainties under ~~former pre-1998~~ Section 9-305. It provides that a security interest in collateral in the possession of a third party is perfected when the third party acknowledges in ~~an authenticated~~ a signed record that it holds for the secured party’s benefit. Section 9-313 also provides that a third party need not so acknowledge and that its acknowledgment does not impose any duties on it, unless it otherwise agrees. A special rule in Section 9-313 provides that if a secured party already is in possession of collateral, its security interest remains perfected by possession if it delivers the collateral to a third party and the collateral is accompanied by instructions to hold it for the secured party or to redeliver it to the secured party. Section 9-313 also clarifies the limited circumstances under which a security interest in goods covered by a certificate of title may be perfected by the secured party’s taking possession.

*Automatic perfection.* The 1998 Revisions added Section 9-309, which lists various types of security interests as to which no public-notice step is required for perfection (e.g., purchase-money security interests in consumer goods other than automobiles). This automatic perfection also extends to a transfer of a health-care-insurance receivable *to* a health-care provider. Those transfers normally will be made by natural persons who receive health-care services; there is little value in requiring filing for perfection in that context. Automatic perfection also applies to security interests created by sales of payment intangibles and promissory notes. Section 9-308 provides that a perfected security interest in collateral supported by a “supporting obligation” (such as an account supported by a guaranty) also is a perfected security interest in the supporting obligation, and that a perfected security interest in an obligation secured by a security interest or lien on property (e.g., a real-property mortgage) also is a perfected security interest in the security interest or lien.

**e. Priority; Special Rules for Banks and Deposit Accounts.** The rules governing priority of security interests and agricultural liens under the 1998 Revisions are found in Part 3, Subpart 3 (Sections 9-317 through 9-342). ~~This~~ The revised Article includes several new priority rules and some special rules relating to banks and deposit accounts (Sections 9-340 through 9-342).

*Purchase-money security interests: General; consumer-goods transactions; inventory.* Section 9-103 substantially rewrites the definition of purchase-money security interest (PMSI) (although the term is not formally “defined”). The substantive changes, however, apply only to

non-consumer-goods transactions. (Consumer transactions and consumer-goods transactions are discussed below in Comment 4.j.) For non-consumer-goods transactions, Section 9-103 makes clear that a security interest in collateral may be (to some extent) both a PMSI as well as a non-PMSI, in accord with the “dual status” rule applied by some courts under ~~former pre-1998~~ Article 9 (thereby rejecting the “transformation” rule). The revised definition provides an even broader conception of a PMSI in inventory, yielding a result that accords with private agreements entered into in response to the uncertainty under ~~former pre-1998~~ Article 9. It also treats consignments as purchase-money security interests in inventory. Section 9-324 ~~revises~~ clarifies the PMSI priority rules, but for the most part without material change in substance. Section 9-324 also clarifies the priority rules for competing PMSIs in the same collateral.

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

*Purchase-money security interests in software.* Section 9-324 contains a new priority rule for a software purchase-money security interest. (Section 9-102 includes a definition of “software.”) Under Section 9-103, a software PMSI includes a PMSI in software that is used in goods that are also subject to a PMSI. (~~Note also that the definition of “chattel paper” has been also is expanded to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods.~~)

*Investment property.* The 1998 priority rules for investment property are substantially similar to the priority rules found in ~~former pre-1998~~ Section 9-115, which was added in conjunction with the 1994 revisions to UCC Article 8. Under Section 9-328, if a secured party has control of investment property (Sections 8-106, 9-106), its security interest is senior to a security interest perfected in another manner (e.g., by filing). Also under Section 9-328, security interests perfected by control generally rank according to the time that control is obtained or, in the case of a security entitlement or a commodity contract carried in a commodity account, the time when the control arrangement is entered into. This is That was a change from ~~former pre-1998~~ Section 9-115, under which the security interests ranked equally. However, as between a securities intermediary’s security interest in a security entitlement that it maintains for the debtor and a security interest held by another secured party, the securities intermediary’s security interest is senior.

*Deposit accounts.* ~~This Article’s~~ The 1998 priority rules applicable to deposit accounts are found in Section 9-327. ~~They and~~ are patterned on and ~~are~~ similar to those for investment property in ~~former pre-1998~~ Section 9-115 and Section 9-328 ~~of this Article~~. Under Section 9-327, if a secured party has control of a deposit account, its security interest is senior to a security interest perfected in another manner (i.e., as cash proceeds). Also under Section 9-327, security interests perfected by control rank according to the time that control is obtained, but as between a depository bank’s security interest and one held by another secured party, the depository bank’s security interest is senior. A corresponding rule in Section 9-340 makes a depository bank’s right of set-off generally senior to a security interest held by another secured party. However, if

the other secured party becomes the depositary bank's customer with respect to the deposit account, then its security interest is senior to the depositary bank's security interest and right of set-off. Sections 9-327, 9-340.

*Letter-of-credit rights.* The 1998 priority rules for security interests in letter-of-credit rights are ~~found~~ set out in Section 9-329. They are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority over one perfected in another manner (i.e., as a supporting obligation for the collateral in which a security interest is perfected). Security interests in a letter-of-credit right perfected by control rank according to the time that control is obtained. However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided in Section 5-114. See Section 9-109(c)(4).

*Chattel paper and instruments.* Section 9-330 is the 1998 successor to ~~former pre-1998~~ Section 9-308. As under ~~former pre-1998~~ Section 9-308, under the 1998 Revisions differing priority rules apply to purchasers of chattel paper who give new value and take possession (or, in the case of electronic chattel paper, obtain control) of the collateral—depending on whether a conflicting security interest in the collateral is claimed merely as proceeds. The principal change ~~relates~~ related to the role of knowledge and the effect of an indication of a previous assignment of the collateral. 1998 Section 9-330 also ~~affords~~ afforded priority to purchasers of instruments who take possession in good faith and without knowledge that the purchase violates the rights of the competing secured party. In addition, to qualify for priority, purchasers of chattel paper, but not of instruments, must purchase in the ordinary course of business. The 2022 Article 9 Revisions eliminated the defined terms “electronic chattel paper” and “tangible chattel paper,” revised the definition of “chattel paper” in Section 9-102 and modified the Section 9-330 priority rule accordingly. See Comment 4.b. and Section 9-102, Comment 5.b.

*Proceeds.* 1998 Section 9-322 contains new priority rules that clarify when a special priority of a security interest in collateral continues or does not continue with respect to proceeds of the collateral. Other 1998 refinements to the priority rules for proceeds are included in Sections 9-324 (purchase-money security interest priority) and 9-330 (priority of certain purchasers of chattel paper and instruments).

*Miscellaneous priority provisions.* ~~This Article also includes~~ The 1998 Revisions to Article 9 also included (i) clarifications of selected good-faith-purchase and similar issues (Sections 9-317, 9-331); (ii) new priority rules to deal with the “double debtor” problem arising when a debtor creates a security interest in collateral acquired by the debtor subject to a security interest created by another person (Section 9-325); (iii) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by the original debtor's after-acquired property agreement (Section 9-326); (iv) a provision enabling most transferees of funds from a deposit account or money to take free of a security interest (Section 9-332); (v) substantially rewritten and refined priority rules dealing with accessions and commingled goods (Sections 9-335, 9-336); (vi) revised priority rules for security interests in goods covered by a certificate of title (Section 9-337); and (vii) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees



of funds on deposit or payees from deposit accounts and will not otherwise “clog” the payments system (Sections 9-341, 9-342).

*Model provisions relating to production-money security interests.* Appendix II to ~~this Article contains~~ the 1998 Revisions contained model definitions and priority rules relating to “production-money security interests” held by secured parties who give new value used in the production of crops. Because no consensus emerged on the wisdom of these provisions during the drafting process, the sponsors ~~make~~ made no recommendation on whether these model provisions should be enacted.

f. **Proceeds.** Revised Section 9-102 ~~contains~~ provides an expanded definition of “proceeds” of collateral, which includes additional rights and property that arise out of collateral, such as distributions on account of collateral and claims arising out of the loss or nonconformity of, defects in, or damage to collateral. The ~~term also includes~~ revised definition of “proceeds” also includes collections on account of “supporting obligations,” such as guarantees.

g. **Part 4: Additional Provisions Relating to Third-Party Rights.** ~~New~~ The 1998 Revisions added a new Part 4 ~~contains~~ that includes several provisions relating to the relationships between certain third parties and the parties to secured transactions. ~~It contains~~ Part 4 contains new Sections 9-401 (replacing ~~former pre-1998~~ Section 9-311) (alienability of debtor’s rights), 9-402 (replacing ~~former pre-1998~~ Section 9-317) (secured party not obligated on debtor’s contracts), 9-403 (replacing ~~former pre-1998~~ Section 9-206) (agreement not to assert defenses against assignee), 9-404, 9-405, and 9-406 (replacing ~~former pre-1998~~ Section 9-318) (rights acquired by assignee, modification of assigned contract, discharge of account debtor, restrictions on assignment of account, chattel paper, promissory note, or payment intangible ineffective), 9-407 (replacing some provisions of ~~former pre-1998~~ Section 2A-303) (restrictions on creation or enforcement of security interest in leasehold interest or lessor’s residual interest ineffective). ~~It~~ New Part 4 also contains added new Sections 9-408 (restrictions on assignment of promissory notes, health-care-insurance receivables ineffective, and certain general intangibles ineffective) and 9-409 (restrictions on assignment of letter-of-credit rights ineffective), ~~which are discussed above.~~ See Comment 3.a.

h. **Filing.** New Part 5 (~~formerly replacing pre-1998~~ Part 4) of Article 9 ~~has been~~ was substantially rewritten to simplify the statutory text and to deal with numerous problems of interpretation and implementation that have arisen over the years.

*Medium-neutrality.* ~~This Article~~ Part 5 is “medium-neutral”; that is, it makes clear that parties may file and otherwise communicate with a filing office by means of records communicated and stored in media other than on paper.

*Identity of person who files a record; authorization.* Part 5 also is largely indifferent as to the person who effects a filing. Instead, it addresses whose authorization is necessary for a person to file a record with a filing office. The filing scheme does not contemplate that the identity of a “filer” will be a part of the searchable records. This approach is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system (except to the extent that filing offices may choose to employ authentication procedures in

connection with electronic communications). As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is largely insignificant whether the secured party or another person files any given record.

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*Financing statement formal requisites.* The formal requisites for a financing statement under the 1998 Revisions are set out in Section 9-502. A financing statement must provide the name of the debtor and the secured party and an indication of the collateral that it covers. Sections 9-503 and 9-506 address the sufficiency of a name provided on a financing statement and clarify when a debtor's name is correct and when an incorrect name is insufficient. Section 9-504 addresses the indication of collateral covered. Under Section 9-504, a super-generic description (e.g., "all assets" or "all personal property") in a financing statement is a sufficient indication of the collateral. (Note, however, that a super-generic description is inadequate for purposes of a security agreement. See Sections 9-108, 9-203.) To facilitate electronic filing, this Article does not require that the debtor's signature or other authorization appear on a financing statement. Instead, it prohibits the filing of unauthorized financing statements and imposes liability upon those who violate the prohibition. See Sections 9-509, 9-626.

*Filing-office operations.* ~~The 1998 Part 5 contains~~ introduced several provisions governing filing operations. First, it prohibits the filing office from rejecting an initial financing statement or other record for a reason other than one of the few that are specified. See Sections 9-520, 9-516. Second, the filing office is obliged to link all subsequent records (e.g., assignments, continuation statements, etc.) to the initial financing statement to which they relate. See Section 9-519. Third, the filing office may delete a financing statement and related records from the files no earlier than one year after lapse (lapse normally is five years after the filing date), and then only if a continuation statement has not been filed. See Sections 9-515, 9-519, 9-522. Thus, a financing statement and related records would be discovered by a search of the files even after the filing of a termination statement. This approach helps eliminate filing-office discretion and also eases problems associated with multiple secured parties and multiple partial assignments. Fourth, Part 5 mandates performance standards for filing offices. See Sections 9-519, 9-520, 9-523. Fifth, it provides for the promulgation of filing-office rules to deal with details best left out of the statute and requires the filing office to submit periodic reports. See Sections 9-526, 9-527.

*Defaulting or missing secured parties and fraudulent filings.* In some areas of the country, serious problems ~~have had~~ arisen from fraudulent financing statements ~~that are~~ filed against public officials and other persons. ~~This~~ The 1998 Article 9 addresses addressed the fraud problem by providing the opportunity for a debtor to file a termination statement when a secured party wrongfully refuses or fails to provide a termination statement. See Section 9-509. This opportunity also addresses the problem of secured parties that simply disappear through mergers or liquidations. In addition, Section 9-518 ~~affords~~ provides a statutory method by which a debtor who believes that a filed record is inaccurate or was wrongfully filed may indicate that fact in the files, albeit without affecting the efficacy, if any, of the challenged record.

\* \* \*

i. **Default and Enforcement.** Part 6 of the 1998 Revisions to Article 9 extensively ~~revises~~ revised and replaced former pre-1998 Part 5. Provisions relating to enforcement of consumer-goods transactions and consumer transactions are discussed in Comment 4.j.

*Debtor, secondary obligor; waiver.* Section 9-602 clarifies the identity of persons who have rights and persons to whom a secured party owes specified duties under Part 6. Under that section, the rights and duties are enjoyed by and run to the “debtor,” defined in Section 9-102 to mean any person with a non-lien property interest in collateral, and to any “obligor.” However, with one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties concerned affect non-debtor obligors only if they are “secondary obligors.” “Secondary obligor” is defined in Section 9-102 to include one who is secondarily obligated on the secured obligation, e.g., a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. However, under ~~Section~~ Sections 9-605 and 9-628, the secured party is relieved from any ~~duty or liability~~ duties and liabilities to any person unless the secured party knows that the person is a debtor or obligor. (The 2022 Article 9 Revisions have modified Sections 9-605 and 9-628. See 2022 Section 9-605, Comments 2 and 3.) Resolving an issue on which courts disagreed under ~~former pre-1998~~ Article 9, this Article revised Article 9 generally prohibits waiver by a secondary obligor of its rights and a secured party’s duties under Part 6. See Section 9-602. However, Section 9-624 permits a secondary obligor or debtor to waive the right to notification of disposition of collateral and, in a non-consumer transaction, the right to redeem collateral, if the secondary obligor or debtor agrees to do so after default.

*Rights of collection and enforcement of collateral.* Section 9-607 explains in greater detail than ~~former pre-1998~~ Section 9-502 the rights of a secured party who seeks to collect or enforce collateral, including accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depository bank holding a security interest in a deposit account maintained with the depository bank. Section 9-607 relates solely to the rights of a secured party vis-a-vis a debtor with respect to collections and enforcement. It does not affect the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (e.g., new Section 9-406). Section 9-608 clarifies the manner in which proceeds of collection or enforcement are to be applied.

\* \* \*

*Rights and duties of secondary obligor.* Section 9-618 provides that a secondary obligor obtains the rights and assumes the duties of a secured party if the secondary obligor receives an assignment of a secured obligation, agrees to assume the secured party’s rights and duties upon a transfer to it of collateral, or becomes subrogated to the rights of the secured party with respect to the collateral. The assumption, transfer, or subrogation is not a disposition of collateral under Section 9-610, but it does relieve the former secured party of further duties. ~~Former Pre-1998~~ Section 9-504(5) did not address whether a secured party was relieved of its duties in this situation.

\* \* \*

*Strict foreclosure.* Section 9-620, unlike ~~former~~ pre-1998 Section 9-505, permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured. This right of strict foreclosure extends to intangible as well as tangible property. Section 9-622 clarifies the effects of an acceptance of collateral on the rights of junior claimants. It rejects the approach taken by some courts—deeming a secured party to have constructively retained collateral in satisfaction of the secured obligations—in the case of a secured party’s unreasonable delay in the disposition of collateral. Instead, unreasonable delay is relevant when determining whether a disposition under Section 9-610 is commercially reasonable.

\* \* \*

**j. Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions.** ~~This Article~~ The 1998 Revisions (including the accompanying conforming revisions (see Appendix I)) ~~includes~~ included several special rules for “consumer goods,” “consumer transactions,” and “consumer-goods transactions.” Each term is defined in Section 9-102.

(i) Revised Sections 2-502 and 2-716 provide a buyer of consumer goods with enhanced rights to possession of the goods, thereby accelerating and enhancing the opportunity to achieve “buyer in ordinary course of business” status under Section 1-201.

(ii) Section 9-103(e) (allocation of payments for determining extent of purchase-money status), (f) (purchase-money status not affected by cross-collateralization, refinancing, restructuring, or the like), and (g) (secured party has burden of establishing extent of purchase-money status) do not apply to consumer-goods transactions. ~~Sections~~ Section 9-103 also provides that the limitation of those provisions to transactions other than consumer-goods transactions leaves to the courts the proper rules for consumer-goods transactions and prohibits the courts from drawing inferences from that limitation.

\* \* \*

(ix) Section 9-620 prohibits partial strict foreclosure with respect to consumer goods collateral and, unless the debtor agrees to waive the requirement in ~~an authenticated~~ a signed record after default, in certain cases requires the secured party to dispose of consumer goods collateral which has been repossessed.

\* \* \*

**k. Good Faith.** ~~Section 9-102 contains~~ The 1998 Revisions added in Section 9-102 a new definition of “good faith” that ~~includes~~ included not only “honesty in fact” but also “the observance of reasonable commercial standards of fair dealing.” ~~The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC. That definition was deleted by the conforming amendments to the 2001 revision of Article 1 as unnecessary, given the revised definition in Section 1-201(b)(20).~~

~~1. **Transition Provisions.** Part 7 (Sections 9-701 through 9-709) contains transition provisions. Transition from former Article 9 to this Article will be particularly challenging in view of its expanded scope, its modification of choice of law rules for perfection and priority, and its expansion of the methods of perfection. *Amendment approved by the Permanent Editorial Board for Uniform Commercial Code December 31, 2001.* [Reserved.]~~

~~m. **Conforming and Related Amendments to Other UCC Articles.** Appendix I to the 1998 Revisions ~~contains~~ contained several revisions to the provisions and Comments of other UCC articles. For the most part ~~the~~ those revisions are explained in the Comments to the proposed revisions 1998 Revisions. Cross-references in other UCC articles to sections of Article 9 also have been revised.~~

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

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

\* \* \*

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

4. **Summary of 2022 Article 9 Revisions.** Following is a brief summary of some of the more significant revisions that are included in the 2022 Article 9 Revisions. The 2022 amendments to Article 9 are extensive. Many of the amendments are necessary to conform Article 9 to new Article 12, which (along with its Comments) should be read along with the Article 9 amendments and Comments. Other material amendments include those relating to chattel paper and money, among other matters.

a. **Article 12-Related Revisions.** Article 12-related amendments to Article 9 include the addition of two new kinds of collateral under Article 9: controllable account (a subset of account) and controllable payment intangible (a subset of payment intangible, which is a subset of general intangible). A controllable account or controllable payment intangible is created when the account or payment intangible is evidenced by a controllable electronic record (defined in Section 12-102(a)(1), and a subset of general intangible), which results if the account debtor obligated on the account or payment intangible has agreed to pay the person in control of the controllable electronic record. Perfection of a security interest in a controllable electronic record, controllable account, or controllable payment intangible may be by control or by filing a financing statement. Control of a controllable electronic record is determined under Section 12-105. Control of a controllable account or controllable payment intangible is achieved by obtaining control of

the controllable electronic record that evidences the account or payment intangible. Section 9-107A(b). A security interest in a controllable account, controllable electronic record, or controllable payment intangible which is perfected by control has priority over a security interest held by a secured party that does not have control. Section 9-326A.

As is the case for secured parties protected by take-free rules under other articles, the rights of a secured party that takes free of competing property interests under Section 12-104(e) or that is protected from certain actions under Section 12-104(g), as a qualifying purchaser of a controllable account, controllable electronic record, or controllable payment intangible, are respected under Article 9. Section 9-331.

The law of the controllable electronic record's jurisdiction under Section 12-107 governs perfection by control and priority of a security interest in a controllable account, controllable electronic record, or controllable payment intangible. Section 9-306B(a). The law of the jurisdiction in which a debtor is located governs perfection by filing (but not priority) for such collateral. Section 9-306B(b).

The 2022 Article 9 Revisions also contains several other Article 12-related conforming amendments to Article 9.

b. **Chattel Paper-Related Amendments.** These amendments primarily address two issues that have arisen under the pre-2022 Article 9 with respect to transactions in chattel paper.

First, the definition of "chattel paper" created uncertainty in "bundled" or "hybrid" transactions in which monetary obligations exist not only under a lease of goods but also with respect to other property and services relating to the leased goods. Frequently, the value of the non-goods aspect of a transaction is substantially greater than the value of the lessee's rights under the lease of goods. Uncertainty existed among those who finance chattel paper and other rights to payment as to whether these transactions give rise to chattel paper. The revisions resolve this issue by treating only those transactions whose predominant purpose was to give the obligor (lessee) the right to possession and use of the goods as giving rise to "chattel paper." Some similar issues arise in connection with chattel paper that includes a security interest securing specific goods. See Section 9-102, Comment 5.b.

Second, the pre-2022 statutory distinction between "tangible chattel paper" and "electronic chattel paper" caused practical problems. As to tangible chattel paper (i.e., evidenced by writings), problems arose in the case of multiple originals of writings and situations in which separate writings covered different components of chattel paper. Official comments issued in connection with the 1998 Revisions addressed, but did not entirely resolve, these issues. As to electronic chattel paper, the safe harbor for control was based on a "single authoritative copy" of the chattel paper. Moreover, in some situations tangible chattel paper is converted to electronic form and electronic chattel paper is converted to tangible form. Additional uncertainty existed when one or more records comprised one or more authoritative tangible copies of the records that evidenced the right to payment and rights in related property and one or more authoritative electronic copies of those records also existed.

The 2022 Article 9 Revisions provide a single rule, under which a security interest in chattel paper can be perfected by taking possession of the authoritative tangible copies, if any, and obtaining control of the electronic authoritative copies, if any. This single rule addresses cases where some records evidencing chattel paper are electronic and some are tangible or where a record in one medium is replaced by a record in another.

The 2022 Article 9 Revisions also define chattel paper more accurately, as the right to payment of a monetary obligation that is secured by a security interest in specific goods or owed under a lease of specific goods, if the right to payment and interest in the goods are evidenced by a record.

Finally, the 2022 Article 9 Revisions provide a new choice-of-law rule for perfection and priority of security interests in chattel paper that is evidenced by authoritative electronic copies of records or by such electronic copies and authoritative tangible copies. For such chattel paper, Section 9-306A provides that perfection by control and possession of authoritative copies and priority are governed by the law of the “chattel paper’s jurisdiction,” based loosely on Sections 8-110 and 9-305. For chattel paper evidenced only by authoritative tangible copies, Section 9-306A(d) provides that perfection by possession and priority are governed by the law of the location of the authoritative tangible copies. Perfection by filing continues to be governed by the law of the location of the debtor for all chattel paper.

### **c. Money-Related Amendments.**

Section 1-201(b)(24) defines “money” as including “a medium of exchange currently authorized or adopted by a domestic or foreign government . . . .” There is no way of knowing how money in an intangible form might develop, but there are indications that some countries might authorize or adopt intangible tokens as a medium of exchange and others might authorize or adopt deposit accounts with a central bank as money. (These tokens or accounts sometimes are referred to as central bank digital currency or CBDC.) For many purposes, there is no need for the UCC to distinguish among types of money. For Article 9 purposes, however, distinctions must be drawn. Only tangible money is susceptible of perfection by possession. And the steps needed for perfection by control with respect to intangible tokens, such as controllable electronic records, will not work for deposit accounts with a central bank, and vice versa. For this reason, the revisions provide an Article 9 definition of “money” that is narrower than the Article 1 definition. The Article 9 definition expressly excludes deposit accounts (but not CBDC that is a token). Thus, “electronic money,” defined in Section 9-102 as “money in an electronic form,” would not include deposit accounts. The Article 9 definition of “money” also excludes money in an electronic form that cannot be subjected to control under Section 9-105A.

The Article 9 provisions governing “deposit accounts” would remain suitable for accounts with a central bank, even if a government has adopted these accounts as money. The revisions leave Article 9’s treatment of deposit accounts largely unchanged. Under the revisions, a security interest in electronic money as original collateral can be perfected only by control. The requirements for obtaining control of electronic money under Section 9-105A are essentially the same as those for obtaining control of a controllable electronic record under Article 12.

The 2022 Article 9 Revisions also make changes to Section 9-332, the take-free rules for transferees of money, including the addition of a new rule applicable to electronic money, and transferees of funds from deposit accounts.

d. **Transitional Rules.** Article A to the 2022 Amendments provides important transitional rules. These rules are designed to protect the expectations of parties to transactions entered into before the effective date of a state’s enactment of the revisions. They also provide for an adequate period of time for parties to pre-effective date transactions to make adjustments so as to preserve certain pre-effective date priorities.

## **Section 9-102. Definitions and Index of Definitions.**

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

\* \* \*

(2) “Account”, except as used in “account for”, “account statement”, “account to”, “commodity account” in paragraph (14), “customer’s account”, “deposit account” in paragraph (29), “on account of”, and “statement of account”, means a right to payment of a monetary obligation, whether or not earned by performance, (i) for 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 a 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 or authorized to operate the game by a State or governmental unit of a State. The term includes controllable accounts and health-care-insurance receivables. The term does not include (i) ~~rights to payment evidenced by chattel paper or an instrument~~ chattel paper, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, ~~or~~ (vi) rights to payment for money or funds advanced or sold, other than rights arising



out of the use of a credit or charge card or information contained on or for use with the ~~card~~ card,  
or (vii) rights to payment evidenced by an instrument.

(3) “Account debtor” means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the negotiable instrument ~~constitutes part of~~ evidences chattel paper.

(4) “Accounting”, except as used in “accounting for”, means a record:

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

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

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

\* \* \*

(7) ~~“Authenticate” means:~~

~~(A) to sign; or~~

~~(B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process. [Reserved.]~~

(7A) “Assignee”, except as used in “assignee for benefit of creditors”, means a person (i) in whose favor a security interest that secures an obligation is created or provided for under a security agreement, whether or not the obligation is outstanding or (ii) to which an account, chattel paper, payment intangible, or promissory note has been sold. The term includes a person to which a security interest has been transferred by a secured party.

(7B) “Assignor” means a person that (i) under a security agreement creates or provides for a security interest that secures an obligation or (ii) sells an account, chattel paper, payment intangible, or promissory note. The term includes a secured party that has transferred a

security interest to another person.

\* \* \*

~~(11) “Chattel paper” means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, “monetary obligation” means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records 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. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.~~

(11) “Chattel paper” means:

(A) a right to payment of a monetary obligation secured by specific goods, if the right to payment and security agreement are evidenced by a record; or

(B) a right to payment of a monetary obligation owed by a lessee under a lease agreement with respect to specific goods and a monetary obligation owed by the lessee in connection with the transaction giving rise to the lease, if:

(i) the right to payment and lease agreement are evidenced by a record; and

(ii) the predominant purpose of the transaction giving rise to the lease was to give the lessee the right to possession and use of the goods.

The term does not include a right to payment arising out of a charter or other contract involving the use or hire of a vessel or 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.

\* \* \*

(27A) “Controllable account” means an account evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under Section 12-105 of the controllable electronic record.

(27B) “Controllable payment intangible” means a payment intangible evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under Section 12-105 of the controllable electronic record.

\* \* \*

~~(31) “Electronic chattel paper” means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.~~ [Reserved.]

(31A) “Electronic money” means money in an electronic form.

\* \* \*

(42) “General intangible” means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes controllable electronic records, payment intangibles, and software.

(43) [Reserved.] [“Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.]

\* \* \*

(47) “Instrument” 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. The term does not include (i) investment property, (ii) letters of credit, ~~or~~ (iii) 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, or (iv) writings that evidence chattel paper.

\* \* \*

(54A) “Money” has the meaning in Section 1-201(b)(24), but does not include (i) a deposit account or (ii) money in an electronic form that cannot be subjected to control under Section 9-105A.

\* \* \*

(61) “Payment intangible” means a general intangible under which the account debtor’s principal obligation is a monetary obligation. The term includes a controllable payment intangible.

\* \* \*

(66) “Proposal” means a record ~~authenticated~~ signed by a secured party which includes 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.

\* \* \*

(75) ~~“Send”, in connection with a record or notification, means:~~

~~(A) 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; or~~

~~(B) to cause the record or notification to be received within the time that it would have been received if properly sent under subparagraph (A). [Reserved.]~~

\* \* \*

~~(79) “Tangible chattel paper” means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium. [Reserved.]~~

(79A) “Tangible money” means money in a tangible form.

\* \* \*

(b) **[Definitions in other articles.]** “Control” as provided in Section 7-106 and the following definitions in other articles apply to this article:

\* \* \*

“Controllable electronic record”. Section 12-102.

\* \* \*

“Protected purchaser”. Section 8-303.

\* \* \*

“Qualifying purchaser”. Section 12-102.

\* \* \*

**Legislative Note:** *Replicate the formatting of the tabulated material in subsection (a)(11) exactly to ensure that the meaning of the material is preserved.*

*The definition of “good faith” in subsection (a)(43) was deleted from subsection (a) pursuant to a conforming amendment accompanying the 2001 amendments of Article 1. However, any jurisdiction that has not adopted the revised definition of “good faith” in Section 1-201(b)(20) should retain the definition of “good faith” in subsection (a)(43).*

### **Official Comment**

1. **Source.** All terms that are defined in Article 9 and used in more than one section are consolidated in this section. Note that the definition of “security interest” is found in Section

1-201, not in this Article, ~~and has been revised. See Appendix I.~~ Many of the definitions in this section ~~are new; many others~~ derive from those in ~~former pre-1998~~ Section 9-105. ~~The following Comments also indicate other sections of former Article 9 that defined (or explained) terms. Other definitions were added by the 1998 Revisions or modified or added by the 2022 Article 9 Revisions.~~

## 2. **Parties to Secured Transactions.**

a. **“Debtor”; “Obligor”; “Secondary Obligor.”** Determining whether a person was a “debtor” under ~~former pre-1998~~ Section 9-105(1)(d) required a close examination of the context in which the term was used. To reduce the need for this examination, ~~this Article redefines the 1998 Revisions redefined~~ “debtor” and ~~adds added~~ new defined terms, “secondary obligor” and “obligor.” In the context of Part 6 (default and enforcement), these definitions distinguish among three classes of persons: (i) those persons who may have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest (typically, an ownership interest) in the collateral, (ii) those persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt, and (iii) those persons who have an obligation to pay the secured debt but have no stake in the proper enforcement of the security interest. Persons in the first class are debtors. Persons in the second class are secondary obligors if any portion of the obligation is secondary or if the obligor has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. One must consult the law of suretyship to determine whether an obligation is secondary. The Restatement (3d), Suretyship and Guaranty § 1 (1996), contains a useful explanation of the concept. Obligor in the third class are neither debtors nor secondary obligors. With one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties provided by Part 6 affect non-debtor obligors only if they are “secondary obligors.”

By including in the definition of “debtor” all persons with a property interest (other than a security interest in or other lien on collateral), the definition includes transferees of collateral, whether or not the secured party knows of the transfer or the transferee’s identity. Exculpatory provisions in Part 6 protect the secured party in that circumstance. See Sections 9-605 and 9-628. The definition renders unnecessary ~~former pre-1998~~ Section 9-112, which governed situations in which collateral was not owned by the debtor. The definition also includes a “consignee,” as defined in this section, as well as a seller of accounts, chattel paper, payment intangibles, or promissory notes.

\* \* \*

If a security interest is granted by a protected series of a limited liability company formed, for example, under the Uniform Protected Series Act (2017), the debtor is the protected series. See PEB Commentary No. 23, ~~dated February 24, 2021. The Commentary is available at <https://www.ali.org/peb-uec>.~~ The 2022 definition of “person” in Section 1-201(b)(27) includes a protected series.

b. **“Secured Party.”** \* \* \*

\* \* \*

b.1. “Assignee”; “Assignor.” Instead of referring to a “debtor,” “secured party,” and “security interest,” all of which are defined terms, several provisions of Article 9, including Part 4, refer to the “assignment” or the “transfer” of property interests and some refer to an “assignor,” “assignee,” or “assigned contract.” None of those terms are defined in the UCC. Some courts have read the undefined terms in an unduly narrow way. In 2020, the Permanent Editorial Board for the UCC issued a Commentary clarifying the meanings of these terms and amended the official comments accordingly. PEB Commentary No. 21. This Article generally follows common usage by using the terms “assignment” and “assign” to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term “transfer” to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction (see Section 9-107, Comment 4), no significance should be placed on the use of one term or the other. Depending on the substance of the transaction, each term as used in this Article refers to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest, or both.

The 2022 Article 9 Revisions added new definitions of “assignee” and “assignor.” Paragraph 7A defines “assignee” as a person in whose favor a security interest securing an obligation is created or to which an account, chattel paper, a payment intangible, or a promissory note has been sold. Paragraph 7B defines “assignor” as creating a security interest securing an obligation or that sells an account, chattel paper, a payment intangible, or a promissory note. These definitions incorporate the essence of the 2020 PEB Commentary into the statutory text. The definitions also specify that an “assignor” includes a secured party that transfers a security interest to another person and an “assignee” includes a person to which a security interest has been transferred by a secured party. By their terms, the defined terms “assignee” and “assignor” contemplate assignments in particular contexts. However, several references in this article to “assigned,” “assignment” and “assignee” include transfers in broader contexts than those addressed in the defined terms. See, e.g., subsection (a)(2) (“assigned,” in definition of “account”) and (a)(47) (“assignment,” in definition of “instrument”) and Sections 9-109, 9-408, 9-409, and 9-519.

Absent a contrary agreement, an assignee obtains the rights and powers of an assignor as against an account debtor on assigned collateral (e.g., under Section 9-406) and as between the assignee and the assignor (debtor) (e.g., under Section 9-607). See also Restatement (Second) of Contracts § 317(1) (1981) (emphasis added):

An assignment of a right is a manifestation of the assignor’s intention to transfer it by virtue of which the assignor’s right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

Several provisions of this Article and its official comments also refer to the “transfer” of property interests. Although that term and its cognates are not defined, depending on the context it may include an “assignment.” Moreover, a transfer of property is not limited to

transactions of “purchase” and may include the transfer of a limited interest. See also Section 9-332, Comment 2A.

\* \* \*

### 3. **Definitions Relating to Creation of a Security Interest.**

a. **“Collateral.”** As under ~~former~~ pre-1998 Section 9-105, “collateral” is the property subject to a security interest and includes accounts, ~~and~~ chattel paper, payment intangibles, and promissory notes that have been sold. ~~It has been expanded in this Article. The 1998 Revisions expanded the term now explicitly includes to include~~ proceeds subject to a security interest. ~~It also reflects the~~ and also broadened the scope of the Article. ~~It includes to include as collateral~~ property subject to an agricultural lien as well as payment intangibles and promissory notes that have been sold.

b. **“Security Agreement.”** The definition of “security agreement” is substantially the same as under ~~former~~ pre-1998 Section 9-105—an agreement that creates or provides for a security interest. However, the term frequently was used colloquially in ~~former~~ pre-1998 Article 9 to refer to the document or writing that contained a debtor’s security agreement. ~~This Article eliminates~~ The 1998 Article 9 eliminated that usage, reserving the term for the more precise meaning specified in the definition.

\* \* \*

### 4. **Goods-Related Definitions.**

a. **“Goods”; “Consumer Goods”; “Equipment”; “Farm Products”; “Farming Operation”; “Inventory.”** The definition of “goods” is substantially the same as the definition in ~~former~~ pre-1998 Section 9-105. This Article also retains the four mutually-exclusive “types” of collateral that consist of goods: “consumer goods,” “equipment,” “farm products,” and “inventory.” The revisions are primarily for clarification.

The classes of goods are mutually exclusive. For example, the same property cannot simultaneously be both equipment and inventory. In borderline cases—a physician’s car or a farmer’s truck that might be either consumer goods or equipment—the principal use to which the property is put is determinative. Goods can fall into different classes at different times. For example, a radio may be inventory in the hands of a dealer and consumer goods in the hands of a consumer. As under ~~former~~ pre-1998 Article 9, goods are “equipment” if they do not fall into another category.

The definition of “consumer goods” follows ~~former~~ pre-1998 Section 9-109. The classification turns on whether the debtor uses or bought the goods for use “primarily for personal, family, or household purposes.”

Goods are inventory if they are leased by a lessor or held by a person for sale or lease. The revised definition of “inventory” makes clear that the term includes goods leased by the



debtor to others as well as goods held for lease. (The same result should have obtained under the ~~former pre-1998~~ definition.) Goods to be furnished or furnished under a service contract, raw materials, and work in process also are inventory. Implicit in the definition is the criterion that the sales or leases are or will be in the ordinary course of business. For example, machinery used in manufacturing is equipment, not inventory, even though it is the policy of the debtor to sell machinery when it becomes obsolete or worn. Inventory also includes goods that are consumed in a business (e.g., fuel used in operations). In general, goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use, but are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service.

\* \* \*

Crops, livestock, and their products cease to be “farm products” when the debtor ceases to be engaged in farming operations with respect to them. If, for example, they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory. Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing ~~operation~~ process is not specified in this Article. At one end of the spectrum, some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or sugar—that they would not constitute manufacturing. On the other hand an extensive canning operation would be manufacturing. Once farm products have been subjected to a manufacturing ~~operation~~ process, they normally become inventory.

\* \* \*

c. **“As-Extracted Collateral.”** Under this Article, oil, gas, and other minerals that have not been extracted from the ground are treated as real property, to which this Article does not apply. Upon extraction, minerals become personal property (goods) and eligible to be collateral under this Article. See the definition of “goods,” which excludes “oil, gas, and other minerals before extraction.” To take account of financing practices reflecting the shift from real to personal property, this Article contains special rules for perfecting security interests in minerals which attach upon extraction and in accounts resulting from the sale of minerals at the wellhead or minehead. See, e.g., Sections 9-301(4) (law governing perfection and priority); 9-501 (place of filing), 9-502 (contents of financing statement), 9-519 (indexing of records). The ~~new~~ term, “as-extracted collateral,” added by the 1998 Revisions, refers to the minerals and related accounts to which the special rules apply. The term “at the wellhead” encompasses arrangements based on a sale of the ~~produce~~ product (goods) at the moment that it issues from the ground and is measured, without technical distinctions as to whether title passes at the “Christmas tree” of a well, the far side of a gathering tank, or at some other point. The term “at . . . the minehead” is comparable.

The following examples explain the operation of these provisions.

**Example 5:** Debtor owns an interest in oil that is to be extracted. To secure Debtor's obligations to Lender, Debtor enters into ~~an authenticated~~ a signed agreement granting Lender an interest in the oil. Although Lender may acquire an interest in the oil under real-property law, Lender does not acquire a security interest under this Article until the oil becomes personal property, i.e., until it is extracted and becomes "goods" to which this Article applies. Because Debtor had an interest in the oil before extraction and Lender's security interest attached to the oil as extracted, the oil is "as-extracted collateral."

**Example 6:** Debtor owns an interest in oil that is to be extracted and contracts to sell the oil to Buyer at the wellhead. In ~~an authenticated~~ a signed agreement, Debtor agrees to sell to Lender the right to payment from Buyer. This right to payment is an account that constitutes "as-extracted collateral." If Lender then resells the account to Financer, Financer acquires a security interest. However, inasmuch as the debtor-seller in that transaction, Lender, had no interest in the oil before extraction, Financer's collateral (the account it owns) is not "as-extracted collateral."

\* \* \*

## 5. Receivables-related Definitions.

### a. "Account"; "Health-Care-Insurance Receivable"; "As-Extracted Collateral."

The definition of "account" has been expanded and reformulated. It is no longer limited to rights to payment relating to goods or services. Many categories of rights to payment that were classified as general intangibles under ~~former pre-1998~~ Article 9 are accounts under this Article. Thus, if they are sold, a financing statement must be filed to perfect the buyer's interest in them. As used in the definition of "account," 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" is the right of a card issuer to payment from its cardholder. A credit-card or charge-card transaction may give rise to other rights to payments; however, those other rights do not "arise out of the use" of the card or information contained on or for use with the card. Among the types of property that are expressly excluded from the definition is "a right to payment for money or funds advanced or sold." ~~As defined in Section 1-201, "money" is limited essentially to currency.~~ As used in the exclusion from the definition of "account," ~~however,~~ "funds" is a broader concept than money (although the term is not defined). For example, when a bank-lender credits a borrower's deposit account for the amount of a loan, the bank's advance of funds is not a transaction giving rise to an account. The 2022 Article 9 Revisions amended the definition of "money" in Section 1-201(b)(24) and added a new, more narrow, definition of "money" in Section 9-102(a)(54A). See Comment 12A.

\* \* \*

The 2022 Article 9 Revisions amended the definition of "account" to reflect the 2022 revised definition of "chattel paper," discussed in Comment 5.b. The revised definition of "account" also includes some additional exceptions that accommodate the use of the term "account" in other provisions. These new exceptions were implicit in the former definition. Moreover, the exceptions for the defined terms "commodity account" and "deposit account"

implicitly apply to all uses of those terms in this Article.

b. **“Chattel Paper.”; “Electronic Chattel Paper”; “Tangible Chattel Paper.”**  
~~“Chattel paper” consists of a monetary obligation together with a security interest in or a lease of specific goods if the obligation and security interest or lease are evidenced by “a record or records.”. The definition has been expanded from that found in former Article 9 to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, or a lease of specific goods and license of software used in the goods. The expanded definition covers transactions in which the debtor’s or lessee’s monetary obligation includes amounts owed with respect to software used in the goods. The monetary obligation with respect to the software need not be owed under a license from the secured party or lessor, and the secured party or lessor need not be a party to the license transaction itself. Among the types of monetary obligations that are included in “chattel paper” are amounts that have been advanced by the secured party or lessor to enable the debtor or lessee to acquire or obtain financing for a license of the software used in the goods. The definition also makes clear that rights to payment arising out of credit-card transactions are not chattel paper.~~ **“Chattel paper” consists of a monetary obligation that is either secured by specific goods or arises in connection with a lease of specific goods, in each case if the obligation and security interest or lease is evidenced by a record. The monetary obligation itself need not be related to the goods. For example, a loan secured by specific goods and evidenced by one or more records creates chattel paper regardless of the purpose of the loan.**

Rights to payment arising out of Charters ~~charters~~ of vessels or the use of credit or charge cards are expressly excluded from the definition of chattel paper; they are accounts. The term “charter” as used in this section includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for the use of vessels. Under former Section 9-105, only if the evidence of an obligation consisted of “a writing or writings” could an obligation qualify as chattel paper. In this Article, traditional, written chattel paper is included in the definition of “tangible chattel paper.” “Electronic chattel paper” is chattel paper that is stored in an electronic medium instead of in tangible form.

~~The concept of an electronic medium should be construed liberally to include electrical, digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies.~~

What distinguishes chattel paper from other rights to payment is the fact that creditor has an interest in specific goods to enforce the right to payment. For example, the fact that a secured party also has an interest in other property does not prevent the right to payment from being chattel paper, provided that the specific goods are the primary collateral.

**Example 8.** To secure a loan, Borrower grants Lender a security interest in a specified item of equipment and a deposit account. The loan and the security interest are evidenced by one or more records. The right to payment is chattel paper, assuming the equipment is the primary collateral.

In Example 8, the inclusion of some incidental collateral, such as a deposit account, does not prevent characterization of the right to payment as chattel paper. Another typical example would

be the inclusion of after-acquired replacement parts to be installed on the specific goods. On the other hand, to be chattel paper, a right to payment must be accompanied by a security interest in *specific* goods or a lease of *specific* goods. A right to payment secured by a security interest in rotating collateral is not chattel paper.

**Example 9.** To secure a loan, Borrower grants Lender a security interest in all of Borrower's existing and after-acquired inventory. The loan and the security interest are evidenced by one or more records. The right to payment is not chattel paper.

**Example 10.** To secure a loan, Borrower grants Lender a security interest in a specifically described item of equipment, which is not the primary collateral, and also in all of Borrower's existing and after-acquired equipment. The loan and the security interest are evidenced by one or more records. The right to payment is not chattel paper.

Example 9 is the easy case because no "specific goods" are identified. As to Example 10, it is true that the monetary obligation is secured by "specific goods" and the definition of chattel paper does not specify that the obligation must be secured *only* by specific goods. However, if the right to payment in Example 10 were to be characterized as chattel paper, it would be possible to convert virtually any monetary obligation evidenced by records and secured by any collateral into chattel paper merely by including as collateral a specific item of goods (whether inventory, equipment, consumer goods, or farm products). The special rules for chattel paper contemplate that specific goods are the primary collateral, even if some incidental property also might be included. If additional goods or other property are included and the specific goods are not the primary collateral, then classification as chattel paper would not be appropriate. Of course, there may be close cases. In those situations, parties should take appropriate precautions.

A right to payment arising from a lease of specific goods gives rise to chattel paper only if the predominant purpose of the transaction is to provide the lessee the right to possession and use of the goods. Therefore, under paragraph (11)(B)(ii), when a lease of specific goods is combined with an obligation to provide or right to receive other property or services, the resulting right to payment will be chattel paper only if the goods aspect of the transaction predominates.

**Example 11.** Customer and Car Dealer enter into a transaction, evidenced by one or more records, pursuant to which, in exchange for a payment of \$2,000 per month: (i) Customer is entitled to possession of a specific vehicle for 36 months; (ii) Car Dealer will provide round-the-clock monitoring of the vehicle's location and condition, and alert authorities to provide road-side assistance in the event of a malfunction or accident; and (iii) Car Dealer will, from time to time, remotely update the vehicle's operating system. The value of the right to possess and use the vehicle is significantly greater than the value of the monitoring service and updates. Because the goods aspect of the transaction predominates, under paragraph (11)(B)(ii) Customer's monetary obligation, including the portion attributable to Car Dealer's obligation to provide monitoring and updates, constitutes chattel paper.

**Example 12.** Customer and Cableco enter into a transaction, evidenced by one or more

records, pursuant to which, in exchange for a payment of \$200 per month, Cableco will provide Customer with specified television programming and a device needed to access the programming (a “lease” of the device). If the components of the transaction were priced separately, the price for the programming would be substantially more than the price for possession and use of the device. Because the goods aspect of this transaction does not predominate, under paragraph (11)(B)(ii) Customer’s monetary obligation does not constitute chattel paper.

The 2022 revision to the definition of chattel paper omits the references to “software used in the goods” and a “license of software used in the goods” as superfluous, inasmuch as there is no reason to single out software. Other types of property may secure an obligation or be included in a transaction involving a lease, as discussed above. See also Sections 2-102 (scope of Article 2); 2-106(5) (defining “hybrid transaction”); 2A-102 (scope of Article 2A); 2A-103(aa) (definition of “hybrid lease”). These references were omitted from the definition of chattel paper for clarification and did not result in any change in the scope of the definition.

The 2022 revision to the definition of “chattel paper” also changed the language from “a record or records that evidence a monetary obligation” to “a right to payment of a monetary obligation . . . evidenced by a record.” This semantic change was for clarification purposes only; it does not imply a change in meaning. Chattel paper is and has always been a right to payment of a monetary obligation. Because the revised definition is based on the obligation, rather than the record, the definition no longer includes the following statement, which was included in the previous definition: “If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.” The omission of that statement also does not imply a change in meaning, except that writings evidencing chattel paper are excluded from the definition of “instrument” under Section 9-102(a)(47). Although the definition refers to “a record,” chattel paper can be evidenced by one or more records because, under Section 1-106, unless the statutory context otherwise requires, words in the singular number include the plural.

Finally, the revised definition of “chattel paper” and the approach to perfection of a security interest by possession and control under Section 9-314A have eliminated the need to have separate definitions of “electronic chattel paper” and “tangible chattel paper” in Section 9-102. Consequently, those definitions have been deleted.

c. **“Instrument”; “Promissory Note.”** The definition of “instrument” includes a negotiable instrument. As under ~~former~~ pre-1998 Section 9-105, it also includes any other right to payment of a monetary obligation that is evidenced by a writing of a type that in ordinary course of business is transferred by delivery (and, if necessary, an indorsement or assignment). The 2022 revised definition of “instrument” explicitly excludes a writing that evidences a right to payment that is chattel paper. This revision clarifies and makes explicit the understanding before the revision that an obligation on an instrument that evidences chattel paper is to be treated (e.g., under Section 9-330) as an obligation on chattel paper and not on an instrument. ~~Except in the case of chattel paper~~ With that exception, the fact that an instrument is secured by a security interest or encumbrance on property does not change the character of the instrument as such or convert the combination of the instrument and collateral into a separate classification of personal

property. The definition also makes clear that rights to payment arising out of credit-card transactions are not instruments. The definition of “promissory note,” added in the 1998 Revisions, is new, was necessitated by the inclusion of sales of promissory notes within the scope of Article 9. It explicitly excludes obligations arising out of “orders” to pay (e.g., checks) as opposed to “promises” to pay. See Section 3-104. Under the 2022 Article 9 Revisions, Sections 9-406(d) and 9-408(g) adopt a modified meaning of “promissory note” as that term is used in Sections 9-406(d) and Sections 9-408(a) through (d). See Comment 5.h.; see also Sections 9-406, Comment 5; 9-408, Comment 11.

d. **“General Intangible”; “Payment Intangible.”** “General intangible” is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. As used in the definition of “general intangible,” “things in action” includes rights that arise under a license of intellectual property, including the right to exploit the intellectual property without liability for infringement. The definition ~~has been revised~~ was revised in 1998 to exclude commercial tort claims, deposit accounts, and letter-of-credit rights. Each of the three is a separate type of collateral. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not “account debtors” having the rights and obligations set forth in Sections 9-404, 9-405, and 9-406. In particular, tortfeasors, banks, and persons obligated on letters of credit are not obligated to pay an assignee (secured party) upon receipt of the notification described in Section 9-404(a). See Comment 5.h. Another important consequence relates to the adequacy of the description in the security agreement. See Section 9-108.

“Payment intangible” is a subset of the definition of “general intangible” The sale of a payment intangible is subject to this Article. See Section 9-109(a)(3). Virtually any intangible right could give rise to a right to payment of money once one hypothesizes, for example, that the account debtor is in breach of its obligation. The term “payment intangible,” however, embraces only those general intangibles “under which the account debtor’s *principal* obligation is a monetary obligation.” (Emphasis added.) A debtor’s right to payment from another person of amounts received by the other person on the debtor’s behalf, including the right of a merchant in a credit-card, debit-card, prepaid-card, or other payment-card transaction to payment of amounts received by its bank from the card system in settlement of the transaction, is a “payment intangible.” (In contrast, the right of a credit-card issuer to payment arising out of the use of a credit card is an “account.”) If a bank is the obligor on a monetary obligation not evidenced by an instrument or chattel paper, the obligation or the right to payment of the obligation may be a deposit account, an account, a payment intangible, or another type of collateral depending on the facts and circumstances. Of course, the classification of a monetary obligation or a right to payment of the obligation for purposes of this Article would not necessarily affect the application of laws regulating, for example, banking, securities, commodities, money transmission, and taxation.

\* \* \*

**d.1. “Controllable Account”; Controllable Payment Intangible.” Article 9**

affords special treatment for security interests in controllable accounts and controllable payment intangibles, i.e., those accounts and payment intangibles that are evidenced by a controllable electronic record and as to which the account debtor (obligor) undertakes to pay the person having control of the controllable electronic record. Of course, a person would be an account debtor only if it were actually obligated on the account or payment intangible evidenced by the controllable electronic record. Although the definitions refer to a controllable electronic record that “provides” for an account debtor’s undertaking, an account debtor’s promise to pay normally would arise and be evidenced apart from the controllable electronic record itself. However, the definitions contemplate that a controllable electronic record evidencing an account or payment intangible (or an associated records) would indicate in some fashion an account debtor’s obligation and that the controllable electronic record evidences the account or payment intangible. If a bank is the obligor on a monetary obligation payable to the person in control of a controllable electronic record, the obligation or the right to payment of the obligation may be a deposit account, a controllable account, a controllable payment intangible, or another type of collateral depending on the facts and circumstances. The classification of a monetary obligation or a right to payment of the obligation for purposes of this Article would not necessarily affect the application of laws regulating, for example, banking, securities, commodities, money transmission, and taxation.

An undertaking to pay the “person that has control” means an undertaking to pay the person that has control at the time payment is made. However, an undertaking to pay Smith, even though Smith happens to have control of the relevant controllable electronic record at the time the undertaking was made, is not an undertaking to pay the person that has control.

The special treatment for controllable accounts and controllable payment intangibles includes the following:

- Perfection of a security interest in a controllable account or controllable payment intangible can be achieved by filing a financing statement or by obtaining control of the controllable electronic record that evidences the controllable account or controllable payment intangible. Sections 9-312(a); 9-314(a); 9-107A(b).
- A security interest in a controllable electronic record, controllable account, or controllable payment intangible that is perfected by control has priority over a conflicting security interest that is perfected by another method. Section 9-326A.
- The benefit of the take-free and no-action rules for qualifying purchasers (including secured parties) of controllable electronic records also extends to qualifying purchasers of controllable accounts and controllable payment intangibles, whether or not the qualifying purchaser also purchases the related controllable electronic record. See Section 12-104(a) and Comments 5 through 8.

\* \* \*

g. **“Commercial Tort Claim.”** ~~This term is new.~~ A tort claim may serve as original collateral under this Article only if it is a “commercial tort claim.” See Section 9-

109(d). Although security interests in commercial tort claims are within its scope, this Article does not override other applicable law restricting the assignability of a tort claim. See Section 9-401. A security interest in a tort claim also may exist under this Article if the claim is proceeds of other collateral. See Section 9-204(b.1) and Comment 4A.

h. **“Account Debtor.”** An “account debtor” is a person obligated on an account, chattel paper, or general intangible. The account debtor’s obligation often is a monetary obligation; however, this is not always the case. For example, if a franchisee uses its rights under a franchise agreement (a general intangible) as collateral, then the franchisor is an “account debtor.” As a general matter, Article 3, and not Article 9, governs obligations on negotiable instruments. Accordingly, the definition of “account debtor” excludes obligors on negotiable instruments constituting part of chattel paper. The principal effect of this change from the definition in ~~former~~ pre-1998 Article 9 is that the rules in Sections 9-403, 9-404, 9-405, and 9-406, dealing with the rights of an assignee and duties of an account debtor, do not apply to an assignment of chattel paper in which the obligation to pay is evidenced by a negotiable instrument. (Section 9-406(d), however, does apply to ~~promissory notes, including negotiable promissory notes~~ a negotiable instrument that is a “promissory note,” as that term is used in the 2022 revision of subsection (d). See Comment 5.c.) Rather, the ~~assignee’s~~ rights of an assignee of a negotiable instrument are governed by Article 3. Similarly, the duties of an obligor on a nonnegotiable instrument are governed by non-Article 9 law unless the nonnegotiable instrument is a part of chattel paper, in which case the obligor is an account debtor.

The definition of “account debtor” was revised in 2022 to add the modifier “negotiable” to the second reference to “instrument,” making it clear that an obligor on a negotiable instrument is not an account debtor. This amendment (which is intended to clarify and not to change the meaning of the definition) is useful because the definition of “instrument” has been revised to exclude writings that evidence chattel paper. However, the definition of “negotiable instrument” in Section 1-201 continues to apply under Article 9. See Section 9-102(a)(47) and (b); Comment 5.c. Of course, a record or records evidencing chattel paper must evidence either a security agreement or lease agreement in addition to a right to payment of a monetary obligation.

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6. **Investment-Property-Related Definitions: “Commodity Account”; “Commodity Contract”; “Commodity Customer”; “Commodity Intermediary”; “Investment Property.”** These definitions are substantially the same as the corresponding definitions in ~~former~~ pre-1998 Section 9-115. “Investment property” includes securities, both certificated and uncertificated, securities accounts, security entitlements, commodity accounts, and commodity contracts. The term investment property includes a “securities account” in order to facilitate transactions in which a debtor wishes to create a security interest in all of the investment positions held through a particular account rather than in particular positions carried in the account. ~~Former Pre-1998~~ Section 9-115 was added in conjunction with Revised Article 8 and contained a variety of rules applicable to security interests in investment property. ~~These rules have been~~ The 1998 Revisions relocated these rules to the appropriate sections of Article 9. See, e.g., Sections 9-203 (attachment), 9-314 (perfection by control), 9-328 (priority).



The terms “security,” “security entitlement,” and related terms are defined in Section 8-102, and the term “securities account” is defined in Section 8-501. The terms “commodity account,” “commodity contract,” “commodity customer,” and “commodity intermediary” are defined in this section. Commodity contracts are not “securities” or “financial assets” under Article 8. See Section 8-103(f). Thus, the relationship between commodity intermediaries and commodity customers is not governed by the indirect-holding-system rules of Part 5 of Article 8. For securities, Article 9 contains rules on security interests, and Article 8 contains rules on the rights of transferees, including secured parties, on such matters as the rights of a transferee if the transfer was itself wrongful and gives rise to an adverse claim. For commodity contracts, Article 9 establishes rules on security interests, but questions relating to commodity contracts of the sort dealt with in Article 8 for securities are left to other law.

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7. **Consumer-Related Definitions: “Consumer Debtor”; “Consumer Goods”; “Consumer-goods transaction”; “Consumer Obligor”; “Consumer Transaction.”** The definition of “consumer goods” (discussed above) is substantially the same as the definition in ~~former pre-1998~~ Section 9-109. The 1998 Revisions added the definitions of “consumer debtor,” “consumer obligor,” “consumer-goods transaction,” and “consumer transaction” ~~have been added~~ in connection with various ~~new (and old)~~ 1998 and pre-1998 consumer-related provisions and to designate certain provisions that are inapplicable in consumer transactions.

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8. **Filing-Related Definitions: “Continuation Statement”; “File Number”; “Filing Office”; “Filing-office Rule”; “Financing Statement”; “Fixture Filing”; “Manufactured-Home Transaction”; “New Debtor”; “Original Debtor”; “Public-Finance Transaction”; “Termination Statement”; “Transmitting Utility.”** \* \* \*

The definition of “transmitting utility” ~~has been revised to embrace~~ embraces the business of transmitting communications generally to take account of new and future types of communications technology. The term designates a special class of debtors for whom separate filing rules are provided in Part 5, thereby obviating the many local fixture filings that would be necessary under the rules of Section 9-501 for a far-flung public-utility debtor. A transmitting utility will not necessarily be regulated by or operating as such in a jurisdiction where fixtures are located. For example, a utility might own transmission lines in a jurisdiction, although the utility generates no power and has no customers in the jurisdiction. Of course, the definition applies only for purposes of this Article and not for purposes of any other law, regulation, or rule.

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

a. **“Record.”** In ~~many, but not all, instances,~~ general the term “record” replaces the term “writing” and “written.” A “record” includes information that is in intangible form (e.g., electronically stored) as well as tangible form (e.g., written on paper). Section 9-102(a)(70).

Given the rapid development and commercial adoption of modern communication and storage technologies, requirements that documents or communications be “written,” “in writing,” or otherwise in tangible form do not necessarily reflect or aid commercial practices.

A “record” need not be permanent or indestructible, but the term does not include any oral or other communication that is not stored or preserved by any means. The information must be stored on paper or in some other medium. Information that has not been retained other than through human memory does not qualify as a record. Examples of modern technologies commercially used to communicate or store information include, but are not limited to, magnetic media, optical discs, digital voice messaging systems, electronic mail, audio tapes, and photographic media, as well as paper. “Record” is an inclusive term that includes all of these methods of storing or communicating information. Any “writing” is a record. A record may be ~~authenticated~~ signed. See Comment 9.b. A record may be created without the knowledge or intent of a particular person.

\* \* \*

b. ~~“Authenticate”; “Sign”; “Communicate”; “Send.”~~ The terms defined term “authenticate” has been deleted in the 2022 Article 9 Revisions. That term and “authenticated” were generally replace used in Article 9 instead of “sign” and “signed.” “Authenticated” replaces and broadens the definition of “signed.” However, the 2022 revised definition of “sign” in Section 1-201, to encompass encompasses authentication of all records, not just writings. Accordingly, “sign” and “signed” are now used in Article 9. (References to authentication signing of, e.g., an agreement, demand, or notification mean, of course, authentication signing of a record containing an agreement, demand, or notification.) The terms “communicate” and “send” also contemplate the possibility of communication by nonwritten media. These definitions include the act of transmitting both tangible and intangible records. The 2022 Amendments deleted the definition of “send” replaces, for purposes of this Article, the corresponding term in Section 1-201. The reference to “usual means of communication” in that definition contemplates an inquiry into the appropriateness of the method of transmission used in the particular circumstances involved in this section and added a corresponding definition to Section 1-201, replacing the pre-2022 definition in that section.

## 10. Scope-Related Definitions.

a. **Expanded Scope of Article: “Agricultural Lien”; “Consignment”; “Payment Intangible”; “Promissory Note.”** These new definitions reflect the expanded scope of 1998 Article 9, as provided in Section 9-109(a).

b. **Reduced Scope of Exclusions: “Governmental Unit”; “Health-Care-Insurance Receivable”; “Commercial Tort Claims.”** These new definitions reflect the reduced scope of the 1998 exclusions, provided in Section 9-109(c) and (d), of transfers by governmental debtors and assignments of interests in insurance policies and commercial tort claims.

11. **Choice-of-Law-Related Definitions: “Certificate of Title”; “Governmental Unit”; “Jurisdiction of Organization”; “Public Organic Record;” “Registered Organization”; “State.”** These ~~new~~ definitions reflect the changes in the law governing perfection and priority of security interests and agricultural liens provided in Part 3, Subpart 1 of the 1998 Revisions.

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12. **Deposit-Account-Related Definitions: “Deposit Account”; “Bank.”** The 1998 revised definition of “deposit account” incorporates the definition of “bank,” which is new. The new definition derives from the definitions of “bank” in Sections 4-105(1) and 4A-105(a)(2), which focus on whether the organization is “engaged in the business of banking.”

Deposit accounts evidenced by Article 9 “instruments” are excluded from the term “deposit account.” In contrast, ~~former~~ pre-1998 Section 9-105 excluded from the definition “an account evidenced by a certificate of deposit.” The revised definition clarifies the proper treatment of nonnegotiable or uncertificated certificates of deposit. Under the definition, an uncertificated certificate of deposit would be a deposit account (assuming there is no writing evidencing the bank’s obligation to pay) whereas a nonnegotiable certificate of deposit would be a deposit account only if it is not an “instrument” as defined in this section (a question that turns on whether the nonnegotiable certificate of deposit is “of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment.”)

A deposit account evidenced by an instrument is subject to the rules applicable to instruments generally. As a consequence, a security interest in such an instrument cannot be perfected by “control” (see Section 9-104), and the special priority rules applicable to deposit accounts (see Sections 9-327 and 9-340) do not apply. If a bank is the obligor on a monetary obligation not evidenced by an instrument or chattel paper, the obligation or the right to payment of the obligation may be a deposit account, an account, a payment intangible, or another type of collateral depending on the facts and circumstances. Of course, the classification of a monetary obligation or a right to payment of the obligation for purposes of this Article would not necessarily affect the application of laws regulating, for example, banking, securities, commodities, money transmission, and taxation.

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**12A. Money-Related Definitions and Terms: “Money”; “Electronic Money”; “Tangible Money”; “Funds”; “Monetary Obligation.”** The Article 9 definition of “money” in subsection (a)(54A), added by the 2022 Article 9 Revisions, is a subset of the definition of “money” as defined in Section 1-201(b)(24). It follows that cryptocurrencies, such as bitcoin, that are not “money” as defined in Section 1-201 because they were in existence and used before adoption by a government, also are not Article 9 money. An obligation to pay in such cryptocurrencies would not be an account, chattel paper, or a payment intangible or an obligation on an instrument because the obligation would not be a “monetary obligation” or an obligation to pay money. One purpose of the Article 9 definition is to ensure that even if some deposit accounts were to become “money” as defined in Article 1, the provisions relating to perfection

and priority for security interests in deposit accounts, and not those for money, will apply to that collateral. Some countries may authorize or adopt deposit accounts with a central bank as a form of “money.” See Section 9-101, Comment 4.c. However, the Article 9 provisions governing “deposit accounts” would remain suitable for such accounts with a central bank, even if a government has adopted these accounts as money. The 2022 Article 9 Revisions leave Article 9’s treatment of deposit accounts largely unchanged. However, for purposes of Article 9 and in the interest of clarity, the definition of “money” in Section 9-102(a)(31A) excludes deposit accounts. Under this definition, deposit accounts would not be money for Article 9 purposes even if they were to become money under the Article 1 definition. Another purpose of the Article 9 definition of “money” is to exclude from that definition money (as defined in Section 1-201(b)(24)) in an electronic form that cannot be subjected to control under Section 9-105A. Such property would be a general intangible, governed by the perfection and priority rules for that type of collateral.

Some countries may authorize or adopt intangible tokens as a medium of exchange that would be “money” as defined in both Article 1 and Article 9. See Section 9-101, Comment 4.c. Such intangible tokens would be “electronic money,” as defined in Section 9-102(a)(31A). A security interest in electronic money as original collateral can be perfected only by control. Sections 9-312(b)(4); 9-314; 9-105A. The requirements for obtaining control of electronic money are essentially the same as those for obtaining control of a controllable electronic record under Article 12. Sections 9-105A; 12-105. The definition of “tangible money” in Section 9-102(a)(79A) uses the word “tangible” with its normal meaning (as something that has physical or corporeal existence, such as goods).

“Monetary obligation” as used in the Uniform Commercial Code (including in Article 9) is not a defined term. The term contemplates an obligation to pay “money” as defined in Section 1-201(b)(24). Consequently, for example, a right to payment of money in an electronic form that cannot be subjected to control, excluded from the Article 9 definition of “money” in subsection (a)(54A), would be a monetary obligation. It follows that such a right to payment could be an account, chattel paper, a payment intangible, or an instrument—including a negotiable instrument, which is defined to include a promise to pay “money” as the term is defined in Section 1-201. See Section 3-104(a) (defining “negotiable instrument”). Also, the term “funds” (like “monetary obligation,” an undefined term), as used in the Uniform Commercial Code includes a right to payment of money as defined in Section 1-201(b)(24). As mentioned above, because cryptocurrencies such as bitcoin are not “money” as defined in Section 1-201 (unless they were not in existence and used before adoption by a government), a cryptocurrency or an obligation to pay in cryptocurrency would not be a “monetary obligation” or “funds.”

**13. Proceeds-Related Definitions: “Cash Proceeds”; “Noncash Proceeds”; “Proceeds.”** The revised definition of “proceeds” ~~expands~~ expanded the definition beyond that contained in ~~former~~ pre-1998 Section 9-306 and resolves ambiguities in the former ~~section~~ definition.

**a. Distributions on Account of Collateral.** The phrase “whatever is collected on, or distributed on account of, collateral,” in subparagraph (B), is broad enough to cover cash or stock dividends distributed on account of securities or other investment property that is original

collateral. Compare ~~former~~ pre-1998 Section 9-306 (“Any payments or distributions made with respect to investment property collateral are proceeds.”). This section rejects the holding of *Hastie v. FDIC*, 2 F.3d 1042 (10th Cir. 1993) (postpetition cash dividends on stock subject to a prepetition pledge are not “proceeds” under Bankruptcy Code Section 552(b)), to the extent the holding relies on the Article 9 definition of “proceeds.”

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**d. Proceeds Received by Person Who Did Not Create Security Interest.** When collateral is sold subject to a security interest and the buyer then resells the collateral, a question arose under ~~former~~ pre-1998 Article 9 concerning whether the “debtor” had “received” what the buyer received on resale and, therefore, whether those receipts were “proceeds” under ~~former~~ pre-1998 Section 9-306(2). This Article contains no requirement that property be “received” by the debtor for the property to qualify as proceeds. It is necessary only that the property be traceable, directly or indirectly, to the original collateral.

**e. Cash Proceeds and Noncash Proceeds.** The definition of “cash proceeds” is substantially the same as the corresponding definition in ~~former~~ pre-1998 Section 9-306. The phrase “and the like” covers property that is functionally equivalent to “money, checks, or deposit accounts,” such as some money-market accounts that are securities or part of securities entitlements. Proceeds other than cash proceeds are noncash proceeds.

**f. Forks and Airdrops for Controllable Electronic Records.** Sometimes there occurs a change in the software (code) of a system (sometimes referred to as a “protocol” or “platform”) in which a controllable electronic record is recorded. When such a change occurs in a blockchain platform, the blockchain may remain intact, no new blockchain may result, and the change sometimes is colloquially referred to as a “soft fork.” If, instead, such a change results in a new, separate blockchain that exists alongside the original blockchain and a new controllable electronic record is created, the change is sometimes referred to as a “hard fork.” But the terms “fork,” “soft fork,” and “hard fork” are ambiguous and not used consistently. Even in a hard fork situation the pre-fork controllable electronic record typically would remain intact (although its value might be affected). A person in control of the original record may not automatically obtain control of a new record. Additional steps may be required for the person in control of the original record to obtain control of the new record.

Depending on the nature and structure of the fork, a new controllable electronic record arising under a hard fork may be property “distributed on account of” the original record or “rights arising out of” the original record, thereby constituting proceeds of the original record under subparagraph (B) or (C), or both, of the definition of “proceeds.” If the new record is identifiable “proceeds,” then the rules on attachment, perfection, priority under Sections 9-203(f), 9-315, and 9-322 would apply. If a security interest in the original record is perfected by control, the creation of the new record in connection with a hard fork typically results in the secured party obtaining control (or having the opportunity to obtain control) of the new record. If that is not the case and perfection of the security interest in the original record is only by control, however, then perfection would continue in the new record only until the 21st day after the security interest attaches to the new record, unless one of the exceptions under subsection (d)

applies. Section 9-315(c), (d). For this reason, a secured party may wish also to perfect its security interest by filing so that the perfection would continue thereafter in any proceeds under Section 9-315(d)(1). A secured party that does so may, to ensure the priority of its perfected security interest, also wish to consider obtaining a release or subordination from any earlier filed secured party whose financing statement covers the same type of property. Even if that is achieved, a security interest in the record that is perfected by control (even if control is later obtained) would have priority over a security interest perfected only by filing. Section 9-326A.

New controllable electronic records also may be provided to persons in control of existing records by way of an “airdrop” that does not involve a fork in an existing blockchain. Depending on the circumstances, these new records may or may not be proceeds of the existing, original record.

If the original record were a financial asset credited to a securities account, the new record might become proceeds of a security entitlement for the reasons described above. Concerning the duties, if any, of a securities intermediary with respect to such a distribution, see Section 8-505, Comment 4.

This discussion focuses on forks and airdrops related to controllable electronic records in the context of blockchain technology, the prevailing relevant technology in 2022. In determining whether property may be proceeds of collateral in the contexts of other and future technologies, the principles and policies reflected in this discussion should be considered.

**14. Consignment-Related Definitions: “Consignee”; “Consignment”; “Consignor.”** The definition of “consignment,” added by the 1998 Revisions, excludes, in subparagraphs (B) and (C), transactions for which filing would be inappropriate or of insufficient benefit to justify the costs. A consignment excluded from the application of this Article by one of those subparagraphs may still be a true consignment; however, it is governed by non-Article 9 law. The definition also excludes, in subparagraph (D), what have been called “consignments intended for security.” These “consignments” are not bailments but secured transactions. Accordingly, all of Article 9 applies to them. See Sections 1-201(b)(35), 9-109(a)(1). The “consignor” is the person who delivers goods to the “consignee” in a consignment.

\* \* \*

Under clause (iii) of subparagraph (A), a transaction is not an Article 9 “consignment” if the consignee is “generally known by its creditors to be substantially engaged in selling the goods of others.” Clause (iii) does not apply solely because a particular competing claimant knows that the goods are held on consignment. See PEB Commentary No. 20, ~~dated January 24,~~ 2019.

**15. “Accounting.”** This definition describes the record and information that a debtor is entitled to request under Section 9-210. Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this definition.

\* \* \*

17. **“Encumbrance”; “Mortgage.”** The definitions of encumbrance” and “mortgage” are unchanged in substance from the corresponding definitions in ~~former~~ pre-1998 Section 9-105. They are used primarily in the special real-property-related priority and other provisions relating to crops, fixtures, and accessions.

18. **“Fixtures.”** This definition is unchanged in substance from the corresponding definition in ~~former~~ pre-1998 Section 9-313. See Section 9-334 (priority of security interests in fixtures and crops).

19. **“Good Faith.”** ~~This Article expands the definition of “good faith” to include “the observance of reasonable commercial standards of fair dealing.” The definition in this section applies when the term is used in this Article, and the same concept applies in the context of this Article for purposes of the obligation of good faith imposed by Section 1-203. See subsection (e). The definition of “good faith” added by the 1998 Revisions, which incorporated the concept of “reasonable commercial standards of fair dealing,” was deleted by the conforming amendments to the 2001 revision of Article 1. The definition is unnecessary given the revised definition in Section 1-201(b)(20).~~

20. **“Lien Creditor.”** This definition is unchanged in substance from the corresponding definition in ~~former~~ pre-1998 Section 9-301.

21. **“New Value.”** ~~This Article deletes~~ The 1998 Revisions deleted ~~former~~ pre-1998 Section 9-108. Its broad formulation of new value, which embraced the taking of after-acquired collateral for a pre-existing claim, was unnecessary, counterintuitive, and ineffective for its original purpose of sheltering after-acquired collateral from attack as a voidable preference in bankruptcy. The new definition of “new value” derives from Bankruptcy Code Section 547(a). The term is used with respect to temporary perfection of security interests in instruments, certificated securities, or negotiable documents under Section 9-312(e) and with respect to chattel paper priority in Section 9-330.

\* \* \*

23. **“Proposal.”** This definition describes a record that is sufficient to propose to retain collateral in full or partial satisfaction of a secured obligation. See Sections 9-620, 9-621, 9-622. Consistent with the revised definition of “sign” in Section 1-201, the 2022 revision of the definition adopts the cognate term “signed” to replace the term “authenticated” used in the pre-2022 text.

24. **“Pursuant to Commitment.”** This definition is unchanged in substance from the corresponding definition in ~~former~~ pre-1998 Section 9-105. It is used in connection with special priority rules applicable to future advances. See Section 9-323.

\* \* \*

26. ~~**Terminology: “Assignment” and “Transfer.”**~~ In numerous provisions, this Article refers to the “assignment” or the “transfer” of property interests. These terms and their derivatives are not defined. This Article generally follows common usage by using the terms “assignment” and “assign” to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term “transfer” to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction (see Section 9-107, Comment 4), no significance should be placed on the use of one term or the other. Depending on the substance of the transaction, each term as used in this Article refers to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest, or both.

### **Section 9-104. Control of Deposit Account.**

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

\* \* \*

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

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

(4) another person, other than the debtor:

(A) has control of the deposit account and acknowledges that it has control on behalf of the secured party; or

(B) obtains control of the deposit account after having acknowledged that it will obtain control of the deposit account on behalf of the secured party.

\* \* \*

### **Official Comment**

1. **Source.** ~~New; derived~~ Derived from Section 8-106.

2. **Why “Control” Matters.** This section explains the concept of “control” of a deposit account. “Control” under this section may serve two functions. First, “control . . . pursuant to



the debtor's agreement" may substitute for ~~an authenticated~~ a signed security agreement as an element of attachment. See Section 9-203(b)(3)(D). Second, when a deposit account is taken as original collateral, the only method of perfection is obtaining control under this section. See Section 9-312(b)(1).

### 3. Requirements for "Control: In General." \* \* \*

\* \* \*

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

\* \* \*

**4. Control on behalf of another person.** Subsection (a)(4) provides for a secured party to obtain control of a deposit account by virtue of the acknowledgment by another person, other than the debtor, in control of the deposit account. It generally follows revisions to the corresponding provisions for control of electronic documents of title (Section 7-106(g)), control of a security entitlement (8-106(d)), control of an electronic copy of a record evidencing chattel paper (Section 9-105(g)), control of electronic money (Section 9-105A(e)), and control of controllable electronic records (Section 12-105(e)). For a brief discussion, see Section 12-105, Comments 8 and 9.

An acknowledgment by a person in control under subsection (a)(4) would not impose any duties on the bank with which the deposit account is maintained. Indeed, the bank may have no knowledge or involvement whatsoever with a control person's acknowledgment under that subsection. On the other hand, subsection (a)(4) should not be construed to permit the bank with which the deposit account is maintained to short-circuit subsection (a)(2), which provides for control through a control agreement among the debtor, the bank, and the control person. However, it would be possible for the bank, acting in a capacity other than as the depository bank (for example, as a secured party) to acknowledge that it has control on behalf of another purchaser under subsection (a)(4).

Section 9-107B(a) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the parties and to any other applicable law any duties of a person that does acknowledge that it has or will obtain control on behalf of another person and provides that a person making an acknowledgment is not

required to confirm the acknowledgment to another person.

**Section 9-105. ~~Control of Electronic Chattel Paper~~ Control of Electronic Copy of Record Evidencing Chattel Paper.**

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

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

~~(1) a single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided~~

~~in paragraphs (4), (5), and (6), unalterable;~~

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

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

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

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

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

**(a) [General rule: control of electronic copy of record evidencing chattel paper.] A**

purchaser has control of an authoritative electronic copy of a record evidencing chattel paper if a system employed for evidencing the assignment of interests in the chattel paper reliably establishes the purchaser as the person to which the authoritative electronic copy was assigned.

(b) **[Single authoritative copy.]** A system satisfies subsection (a) if the record or records evidencing the chattel paper are created, stored, and assigned in a manner that:

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

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

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

(4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the purchaser;

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

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

(c) **[One or more authoritative copies.]** A system satisfies subsection (a), and a purchaser has control of an authoritative electronic copy of a record evidencing chattel paper, if the electronic copy, a record attached to or logically associated with the electronic copy, or a system in which the electronic copy is recorded:

(1) enables the purchaser readily to identify each electronic copy as either an authoritative copy or a nonauthoritative copy;

(2) enables the purchaser readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as the assignee of the authoritative electronic copy; and

(3) gives the purchaser exclusive power, subject to subsection (d), to:

(A) prevent others from adding or changing an identified assignee of the authoritative electronic copy; and

(B) transfer control of the authoritative electronic copy.

(d) **[Meaning of exclusive.]** Subject to subsection (e), a power is exclusive under subsection (c)(3)(A) and (B) even if:

(1) the authoritative electronic copy, a record attached to or logically associated with the authoritative electronic copy, or a system in which the authoritative electronic copy is recorded limits the use of the authoritative electronic copy or has a protocol programmed to cause a change, including a transfer or loss of control; or

(2) the power is shared with another person.

(e) **[When power not shared with another person.]** A power of a purchaser is not shared with another person under subsection (d)(2) and the purchaser's power is not exclusive if:

(1) the purchaser can exercise the power only if the power also is exercised by the other person; and

(2) the other person:

(A) can exercise the power without exercise of the power by the purchaser; or

(B) is the transferor to the purchaser of an interest in the chattel paper.

(f) **[Presumption of exclusivity of certain powers.]** If a purchaser has the powers

specified in subsection (c)(3)(A) and (B), the powers are presumed to be exclusive.

(g) [Obtaining control through another person.] A purchaser has control of an authoritative electronic copy of a record evidencing chattel paper if another person, other than the transferor to the purchaser of an interest in the chattel paper:

(1) has control of the authoritative electronic copy and acknowledges that it has control on behalf of the purchaser; or

(2) obtains control of the authoritative electronic copy after having acknowledged that it will obtain control of the electronic copy on behalf of the purchaser.

### Official Comment

1. ~~Source.~~ New.

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

A secured party’s control of electronic chattel paper (i) may substitute for an authenticated security agreement for purposes of attachment under Section 9-203, (ii) is a method of perfection under Section 9-314, and (iii) is a condition for obtaining special, non-temporal priority under Section 9-330. Because electronic chattel paper cannot be transferred, assigned, or possessed in the same manner as tangible chattel paper, a special definition of control is necessary. In descriptive terms, this section provides that control of electronic chattel paper is the functional equivalent of possession of “tangible chattel paper” (a term also defined in Section 9-102).

3. ~~Development of Control Systems.~~ This Article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of electronic chattel paper in a commercial context. Systems that evolve for control of electronic chattel paper may or may not involve a third party custodian of the relevant records. As under UETA, a system must be shown to reliably establish that the secured party is the assignee of the chattel paper. Reliability is a high standard and encompasses the general principles of uniqueness, identifiability, and unalterability found in subsection (b) without setting forth specific guidelines as to how these principles must be achieved. However, the standards applied to determine whether a party is in control of electronic chattel paper should not be more stringent than the standards now applied to determine whether a

party is in possession of tangible chattel paper. For example, just as a secured party does not lose possession of tangible chattel paper merely by virtue of the possibility that a person acting on its behalf *could* wrongfully redeliver the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the possibility that the secured party's interest *could* be subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

This section and the concept of control of electronic chattel paper are not based on the same concepts as are control of deposit accounts (Section 9-104), security entitlements, a type of investment property (Section 9-106), and letter of credit rights (Section 9-107). The rules for control of those types of collateral are based on existing market practices and legal and regulatory regimes for institutions such as banks and securities intermediaries. Analogous practices for electronic chattel paper are developing nonetheless. The flexible approach adopted by this section, moreover, should not impede the development of these practices and, eventually, legal and regulatory regimes, which may become analogous to those for, e.g., investment property.

~~4. —“**Authoritative Copy**” of Electronic Chattel Paper. One requirement for establishing control under subsection (b) is that a particular copy be an “authoritative copy. Although other copies may exist, they must be distinguished from the authoritative copy. This may be achieved, for example, through the methods of authentication that are used or by business practices involving the marking of any additional copies. When tangible chattel paper is converted to electronic chattel paper, in order to establish that a copy of the electronic chattel paper is the authoritative copy it may be necessary to show that the tangible chattel paper no longer exists or has been permanently marked to indicate that it is not the authoritative copy.~~

1. **The Functions of Control.** A secured party can perfect a security interest in chattel paper by filing. See Section 9-312(a). Alternatively, a secured party can perfect a security interest in chattel paper by taking possession of all authoritative tangible copies of the record evidencing the chattel paper and obtaining control of all authoritative electronic copies of the record evidencing chattel paper. Section 9-314A. Possession and control also are conditions for achieving priority under Section 9-330(a), (b), and (c). A secured party's possession or control of chattel paper also may substitute for a signed security agreement for purposes of attachment under Section 9-203.

2. **Conditions for Obtaining Control: In General.** This section provides the requirements for obtaining control of chattel paper. As explained in the comment to the definition of “chattel paper,” the definitions of “electronic chattel paper” and “tangible chattel paper” have been deleted as unnecessary. See Section 9-102, Comment 5.b.

Subsections (a) and (b) are substantially unchanged under the 2022 Article 9 Revisions. Subsection (a), which derives from Section 16 of the Uniform Electronic Transactions Act, sets forth the general test for control. (The amendments to subsection (a) primarily reflect the changes to the definition of chattel paper in Section 9-102.) Subsections (b) and (c) set forth safe harbor tests that, if satisfied, establish control under the general test in subsection (a). *It is important to note that compliance with the conditions for control in subsection (c) would satisfy the conditions provided in subsection (b).* However, subsection (b) has been retained out of an

abundance of caution and to provide assurances of the continuing viability of pre-2022 systems for control of chattel paper evidenced by electronic records.

**3. Development of Control Systems and Application of Subsection (b).** This Article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of chattel paper in a commercial context. As under UETA and under the general standard for control under subsection (a), for control under subsection (b), as supplemented by subsection (g), a system must be shown to reliably establish that the secured party is the assignee of the chattel paper. Reliability is a high standard and encompasses the general principle of identifiability of an assignee of an authoritative copy as found in subsection (b), but without setting forth specific guidelines as to how compliance with this principle must be achieved. Under subsection (b), at any point in time, a party should be able to identify the single authoritative copy of the record or records evidencing the chattel paper which is unique and identifiable as the authoritative copy. This does not mean that once created that the authoritative copy need be static and never moved or copied from its original location. To the extent that backup systems exist which result in multiple copies, the key to this idea is that at any point in time, the one authoritative copy needs to be unique and identifiable. However, the standards applied to determine whether a party is in control of chattel paper should not be more stringent than the pre-2022 standards applied to determine whether a party is in possession of tangible chattel paper. For example, just as a secured party does not lose possession of tangible chattel paper merely by virtue of the possibility that a person acting on its behalf *could* wrongfully redeliver the chattel paper to the debtor, so control of chattel paper evidenced by an electronic copy of a record or records would not be defeated by the possibility that the secured party's control *could* be subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

**4. Subsection (c) Safe Harbor: In General.** The subsection (c) “safe harbor” generally follows Section 12-105 for control of controllable electronic records. See generally Section 12-105 and Comments. It differs from subsection (b), which (as explained above) is based on a “single authoritative copy” of an electronic record or records. Subsection (b) would be inapplicable when the relevant record is maintained on a blockchain or another distributed ledger. The utility of distributed ledger technology depends on there being multiple authoritative copies of a record. However, as with subsection (b), control under subsection (c) also meets the high standard of reliability under subsection (a) as to the identifiability of an assignee of authoritative copies. The conditions for “control” in subsection (c) are meant to reflect the functions that possession serves with respect to writings, but in a more accurate and technologically flexible way than does the definition in subsection (b).

Subsection (c), as supplemented by subsections (d) through (g), sets forth the requirements for a purchaser to have “control of an authoritative electronic copy of a record evidencing chattel paper.” However, for purposes of perfection of a security interest in the chattel paper under Section 9-314A and qualification for non-temporal priority under Section 9-330, the purchaser must obtain control of *each* authoritative electronic copy (i.e., *all* of the copies) of a record evidencing the chattel paper and take possession of each tangible copy (if any) of the record evidencing the chattel paper.

## **5. Control of Electronic Copy of Record Evidencing Chattel Paper under**

**Subsection (c).** Under subsection (c), to obtain control of an electronic copy of a record evidencing chattel paper a purchaser must be able to identify each electronic copy as authoritative or nonauthoritative and identify itself as the assignee of the authoritative copy. As to the means of identification, see Section 12-105, Comment 7. In addition, the purchaser must have the exclusive power to prevent others from adding or changing an identified assignee and to transfer control of the authoritative copy. However, once it is established that a person has received those powers, subsection (f) provides a presumption of exclusivity. Consequently, a person asserting control need not prove exclusivity in order to make out a *prima facie* case. Application of the presumption will be governed also by Section 1-206 (effects of a presumption under the UCC) and applicable non-UCC law (including rules of procedure and evidence). See generally Section 12-105, Comment 5. Subsection (d) contains two qualifications of the term “exclusive” as used in subsection (c)(3). A power can be “exclusive” under subsection (c)(3) even if one or both of these qualifications apply.

Subsection (e) provides that in certain circumstances a power is not shared within the meaning of subsection (d)(2), the relaxation of the exclusivity requirement provided by subsection (d)(2) does not apply, and, consequently, a purchaser’s power is not exclusive. Subsection (e) provides that a purchaser does not share an exclusive power with another person if the purchaser can exercise the power only with the other person’s cooperation (subsection (e)(1)) but the other person either (i) can exercise the power without the purchaser’s cooperation (subsection (e)(2)(A)) or (ii) is the transferor to the purchaser of an interest in the chattel paper (subsection (e)(2)(B)). It follows that a purchaser to which subsection (e) applies does not have control based on its exclusive powers (although it might have control through another person under subsection (g), discussed below, or if another person having control is acting as the person’s agent). As to the rationale for disqualifying a purchaser (which includes a secured party in a secured transaction) from sharing powers with a transferor to the purchaser, as provided in subsection (e)(2)(B), and from the benefit of shared control under subsection (d)(2), and for examples of the operation of subsection (e) (in the context of the similar provision in Section 12-105), see Section 12-105, Comments 5 and 9.

**6. Control Through Another Person.** Subsection (g) provides for a purchaser to obtain control of an electronic copy by virtue of the acknowledgment by another person in control of the electronic copy. It follows revisions to the corresponding provisions for control of electronic documents of title (Section 7-106(g)), control of a security entitlement (Section 8-106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of electronic money (Section 9-105A(e)), and control of controllable electronic records (Section 12-105(e)). For a brief discussion, see Section 12-105, Comment 8. For an acknowledgment by another person to be effective to confer control on a purchaser under subsection (g), the other person making the acknowledgment must be one “other than the transferor to the purchaser of an interest in the chattel paper.” The rationale for this limitation is discussed in Section 12-105, Comment 9.

Section 9-107B(a) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the parties and to any



other applicable law any duties of a person that does acknowledge that it has or will obtain control on behalf of another person and provides that a person making an acknowledgment is not required to confirm the acknowledgment to another person. For example, subsection (g) would apply to give control to a person, Alpha, when another person, Beta, has control of each authoritative electronic copy of a record evidencing chattel paper and acknowledges that it has control on behalf of Alpha. However, under Section 107B(a), Beta is not required to so acknowledge. And under Section 107B(b), even if Beta does so acknowledge, Beta owes no duty to Alpha unless Beta agrees or other law so provides and Beta is not required to confirm its acknowledgment to any other person.

7. **References to “Secured Party” Changed to “Purchaser.”** References to a “secured party” in the pre-2022 text of this section have been changed to refer to a “purchaser.” This change aligns the text with the priority rules of Section 9-330(a), (b), and (c).

### **Section 9-105A. Control of Electronic Money.**

(a) [General rule: control of electronic money.] A person has control of electronic money if:

(1) the electronic money, a record attached to or logically associated with the electronic money, or a system in which the electronic money is recorded gives the person:

(A) power to avail itself of substantially all the benefit from the electronic money; and

(B) exclusive power, subject to subsection (b), to:

(i) prevent others from availing themselves of substantially all the benefit from the electronic money; and

(ii) transfer control of the electronic money to another person or cause another person to obtain control of other electronic money as a result of the transfer of the electronic money; and

(2) the electronic money, a record attached to or logically associated with the electronic money, or a system in which the electronic money is recorded enables the person readily to identify itself in any way, including by name, identifying number, cryptographic key,

office, or account number, as having the powers under paragraph (1).

(b) [Meaning of exclusive.] Subject to subsection (c), a power is exclusive under subsection (a)(1)(B)(i) and (ii) even if:

(1) the electronic money, a record attached to or logically associated with the electronic money, or a system in which the electronic money is recorded limits the use of the electronic money or has a protocol programmed to cause a change, including a transfer or loss of control; or

(2) the power is shared with another person.

(c) [When power not shared with another person.] A power of a person is not shared with another person under subsection (b)(2) and the person's power is not exclusive if:

(1) the person can exercise the power only if the power also is exercised by the other person; and

(2) the other person:

(A) can exercise the power without exercise of the power by the person; or

(B) is the transferor to the person of an interest in the electronic money.

(d) [Presumption of exclusivity of certain powers.] If a person has the powers specified in subsection (a)(1)(B)(i) and (ii), the powers are presumed to be exclusive.

(e) [Control through another person.] A person has control of electronic money if another person, other than the transferor to the person of an interest in the electronic money:

(1) has control of the electronic money and acknowledges that it has control on behalf of the person; or

(2) obtains control of the electronic money after having acknowledged that it will obtain control of the electronic money on behalf of the person.

## **Official Comment**

**1. “Control” of Electronic Money: In General.** A security interest in electronic money as original collateral may be perfected only by control pursuant to this section. Section 9-312(b)(4). These requirements for obtaining control generally track those in Section 12-105 for controllable electronic records. See generally Section 12-105, Comments.

**2. Control on Behalf of Another Person.** Subsection (e) provides for a person to obtain control of electronic money by virtue of the acknowledgment by another person in control of the electronic money. It follows revisions to the corresponding provisions for control of electronic documents of title (Section 7-106(g)), control of a security entitlement (Section 8-106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of an electronic copy of a record evidencing chattel paper (Section 9-105(g), and control of controllable electronic records (Section 12-105(e)). For a brief discussion, see Section 12-105, Comment 8.

Section 9-107B(a) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the parties and to any other applicable law any duties of a person that does acknowledge that it has or will obtain control on behalf of another person and provides that a person making an acknowledgment is not required to confirm the acknowledgment to another person.

### **Section 9-107A. Control of Controllable Electronic Record, Controllable Account, or Controllable Payment Intangible.**

**(a) [Control under Section 12-105.]** A secured party has control of a controllable electronic record as provided in Section 12-105.

**(b) [Control of controllable account and controllable payment intangible.]** A secured party has control of a controllable account or controllable payment intangible if the secured party has control of the controllable electronic record that evidences the controllable account or controllable payment intangible.

## **Official Comment**

**1. Perfection by Control or Filing and Priority for Controllable Electronic Records.** Perfection by filing and perfection by control are alternative methods of perfection for a controllable electronic record. See Sections 9-312, 9-314. Under this section, a secured party has control of a controllable electronic record as provided in Section 12-105. Under Section 9-326A, a security interest in a controllable electronic record that is perfected by control has

priority over a security interest perfected by another method.

**2. Perfection by Control or Filing and Priority for Controllable Account or Controllable Payment Intangible.** Perfection by filing and perfection by control also are alternative methods of perfection with for a controllable account or controllable payment intangible. See Sections 9-312, 9-314. Under this section, a secured party would obtain control of a controllable account or controllable payment intangible by obtaining control of the controllable electronic record that evidences the controllable account or controllable payment intangible. Under Section 9-326A, a security interest in a controllable account or controllable payment intangible that is perfected by control has priority over a security interest perfected by another method.

By definition, a controllable account would be an Article 9 “account,” and a controllable payment intangible would be an Article 9 “payment intangible.” Section 9-102. The fact that an account or payment intangible is a controllable account or controllable payment intangible does not affect a secured party’s alternative of perfection by filing. Moreover, that fact does not affect the applicability of other provisions of Article 9, including the provisions governing an account debtor’s agreement not to assert defenses (Section 9-403) and the statutory overrides of legal and contractual restrictions on the assignability of accounts and payment intangibles (Sections 9-406 and 9-408).

#### **Section 9-107B. No Requirement to Acknowledge or Confirm; No Duties.**

**(a) [No requirement to acknowledge.]** A person that has control under Section 9-104, 9-105, or 9-105A is not required to acknowledge that it has control on behalf of another person.

**(b) [No duties or confirmation.]** If a person acknowledges that it has or will obtain control on behalf of another person, unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the other person and is not required to confirm the acknowledgment to any other person.

#### **Official Comment**

**1. Source.** Section 9-107B derives from Sections 8-106(g) and 9-313(f) and (g).

**2. Purpose.** Subsection (a) makes clear that a person that has control under the specified sections has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has control on behalf of another person are not standardized. Accordingly, subsection (b) leaves to the agreement of the parties and to any other applicable law any duties of a person that does acknowledge that it has or will obtain control on behalf of any other person.

## Section 9-108. Sufficiency of Description.

\* \* \*

### Official Comment

\* \* \*

**5. Consumer Investment Property; Commercial Tort Claims.** Subsection (e) requires greater specificity of description in order to prevent debtors from inadvertently encumbering certain property. Subsection (e) ~~requires~~ provides that a description by defined “type” of collateral alone of a commercial tort claim or, in a consumer transaction, of a security entitlement, securities account, or commodity account, is not sufficient. For example, “all existing and after-acquired investment property” or “all existing and after-acquired security entitlements,” without more, would be insufficient in a consumer transaction to describe a security entitlement, securities account, or commodity account. The reference to “*only* by type” in subsection (e) means that a description is sufficient if it satisfies subsection (a) and also contains a descriptive component beyond the “type” alone. For example, a description such as “all goods now or hereafter sold by secured party to debtor” would suffice, but note that Section 9-204(b)(1) would apply except in the case of a purchase-money security interest. See Section 9-204, Comment 3. Moreover, if the collateral consists of a securities account or commodity account, a description of the account is sufficient to cover all existing and future security entitlements or commodity contracts carried in the account. See Section 9-203(h), (i).

Under Section 9-204, an after-acquired collateral clause in a security agreement will not reach future commercial tort claims. It follows that when an effective security agreement (or amendment) covering a commercial tort claim as original collateral is entered into the claim already will exist. Subsection (e) does not require a description to be ~~specific~~. specific, so long as it extends beyond the “type.” For example, a description such as “all tort claims arising out of the explosion of debtor’s factory” would suffice, even if the exact amount of the claim, the theory on which it may be based, and the identity of the tortfeasor(s) are not described. (Indeed, those facts may not be known at the time.)

The enhanced specificity (beyond the “type”) that subsection (e) requires does not apply to the attachment of security interests in commercial tort claims or collateral in consumer transactions that are identifiable proceeds of other collateral. A security interest automatically attaches to such property under Sections 9-203(f) and 9-315(a)(2). This point is confirmed by Section 9-204(b.1).

## Section 9-109. Scope.

\* \* \*

### Official Comment

\* \* \*

**4. Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes, and Other Receivables. \* \* \***

Subsection (a)(3), ~~expands added by the 1998 Revisions, expanded~~ the scope of this Article by including the sale of a “payment intangible” (defined in Section 9-102 as “a general intangible under which the account debtor’s principal obligation is a monetary obligation”) and a “promissory note” (also defined in Section 9-102). To a considerable extent, this Article affords these transactions treatment identical to that given sales of accounts and chattel paper. In some respects, however, sales of payment intangibles and promissory notes are treated differently from sales of other receivables. See, e.g., Sections 9-309 (automatic perfection upon attachment), 9-408 (effect of restrictions on assignment). By virtue of the 1998 expanded definition of “account” (defined in Section 9-102), this Article ~~now~~ covers sales of (and other security interests in) “health-care-insurance receivables” (also defined in Section 9-102). Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of “security interest” (Section ~~1-201(37)~~ 1-201(b)(35)) delineates how a particular transaction is to be classified. That issue is left to the courts.

\* \* \*

**6. Consignments.** Subsection (a)(4) ~~is new~~ was added by the 1998 Revisions. \* \* \*

\* \* \*

Sometimes parties characterize transactions that secure an obligation (other than the bailee’s obligation to returned bailed goods) as “consignments.” These transactions are not “consignments” as contemplated by Section 9-109(a)(4). See Section 9-102. This Article applies also to these transactions, by virtue of Section 9-109(a)(1). They create a security interest within the meaning of the first sentence of Section ~~1-201(37)~~ 1-201(b)(35).

\* \* \*

**16. Deposit Accounts. \* \* \***

\* \* \* To perfect a security interest in a deposit account as original collateral, a secured party (other than the bank with which the deposit account is maintained) must obtain “control” of the account either by obtaining the bank’s ~~authenticated~~ signed agreement or by becoming the bank’s customer with respect to the deposit account. See Sections 9-312(b)(1), 9-104. Either of these steps requires the debtor’s consent.

\* \* \*

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

\* \* \*

(b) **[Enforceability.]** Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

\* \* \*

(3) one of the following conditions is met:

(A) the debtor has ~~authenticated~~ signed a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

\* \* \*

(C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; ~~or~~

(D) the collateral is controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, ~~electronic chattel paper, electronic documents, electronic money,~~ investment property, or letter-of-credit rights, ~~or electronic documents,~~ and the secured party has control under Section 7-106, 9-104, ~~9-105,~~ 9-105A, 9-106, ~~or 9-107,~~ or 9-107A pursuant to the debtor's security agreement; or

(E) the collateral is chattel paper and the secured party has possession and control under Section 9-314A pursuant to the debtor's security agreement.

\* \* \*

### Official Comment

\* \* \*

3. **Security Agreement; Signed.** Under subsection (b)(3), enforceability requires the debtor's security agreement and compliance with an evidentiary requirement in the nature of a Statute of Frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives, under which the debtor must ~~authenticate~~ sign a security agreement that provides a description of the collateral. Under Section 9-102, a "security agreement" is "an agreement that creates or provides for a security interest." Neither that definition nor the requirement of paragraph (3)(A) rejects the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown in fact to have been given as security. Under this Article, as under prior law, a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security. Similarly, a self-styled "lease" may serve as a security agreement if the agreement creates a security interest. See Section 1-203 (distinguishing security interest from lease). Consistent with the revised definition of "sign" in Section 1-201, the cognate terms "signed" and "signing" replace the references to "authenticated" and "authentication" in the pre-2022 text of this Section.

4. **Possession, Delivery, or Control Pursuant to Security Agreement.** The other alternatives in subsection (b)(3) dispense with the requirement of ~~an authenticated~~ a signed security agreement and provide alternative evidentiary tests. Under paragraph (3)(B), the secured party's possession substitutes for the debtor's ~~authentication~~ signed security agreement under paragraph (3)(A) if the secured party's possession is "pursuant to the debtor's security agreement." That phrase refers to the debtor's agreement to the secured party's possession for ~~the purpose of creating~~ in connection with the creation of a security interest. The phrase should not be confused with the phrase "debtor has ~~authenticated~~ signed a security agreement," used in paragraph (3)(A), which contemplates the debtor's ~~authentication~~ signing of a record. In the unlikely event that possession is obtained without the debtor's agreement, possession would not suffice as a substitute for ~~an authenticated~~ a signed security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party's possession is maintained without the agreement of a subsequent debtor (e.g., a transferee). Possession as contemplated by Section 9-313 is possession for purposes of subsection (b)(3)(B), even though it may not constitute possession "pursuant to the debtor's agreement" and consequently might not serve as a substitute for ~~an authenticated~~ a signed security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a certificated security to the secured party under Section 8-301 pursuant to the debtor's security agreement is sufficient as a substitute for ~~an authenticated~~ a signed security agreement. Similarly, under subsection (b)(3)(D), control of controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, electronic money, investment property, a deposit account, electronic chattel paper, or a letter-of-credit right, or electronic documents rights satisfies the evidentiary test if control is pursuant to the debtor's security agreement, and under subsection (b)(3)(E), possession and control of chattel paper under Section 9-314A satisfies the evidentiary test if pursuant to the debtor's security agreement.

\* \* \*

8. **Proceeds and Supporting Obligations.** Under subsection (f), attachment of a security interest in original collateral also is attachment of a security interest in identifiable proceeds as provided in Section 9-315(a)(2). It is not necessary for a security agreement to



mention “proceeds” or otherwise to describe collateral consisting of proceeds. See also Section 9-108, Comment 5. Also under subsection (f), a security interest in a “supporting obligation” (defined in Section 9-102) automatically follows from a security interest in the underlying, supported collateral. This result was implicit under ~~former~~ pre-1998 Article 9. Implicit in subsection (f) is the principle that the secured party’s interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest. Complex issues may arise, however, if a supporting obligation supports many separate obligations of a particular account debtor and if the supported obligations are separately assigned as security to several secured parties. The problems may be exacerbated if a supporting obligation is limited to an aggregate amount that is less than the aggregate amount of the obligations it supports. This Article does not contain provisions dealing with competing claims to a limited supporting obligation. As under ~~former~~ pre-1998 Article 9, other law, including the law of suretyship, and the agreements of the parties will control.

\* \* \*

#### **Section 9-204. After-Acquired Property; Future Advances.**

\* \* \*

(b) **[When after-acquired property clause not effective.]** A Subject to subsection (b.1),  
a security interest does not attach under a term constituting an after-acquired property clause to:

\* \* \*

**(b.1) [Limitation on subsection (b).]** Subsection (b) does not prevent a security interest from attaching:

(1) to consumer goods as proceeds under Section 9-315(a) or commingled goods under Section 9-336(c);

(2) to a commercial tort claim as proceeds under Section 9-315(a); or

(3) under an after-acquired property clause to property that is proceeds of consumer goods or a commercial tort claim.

\* \* \*

#### **Official Comment**

\* \* \*

3. **After-Acquired Consumer Goods.** Subsection (b)(1) makes ineffective an after-acquired property clause covering consumer goods (defined in Section ~~9-109~~ 9-102(a)(23)), except as accessions (see Section 9-335), acquired more than 10 days after the secured party gives value. Subsection (b)(1) is unchanged in substance from the corresponding provision in ~~former pre-1998~~ Section 9-204(2). However, a term granting a security interest in consumer goods that will be purchase-money collateral in the transaction is not “a term constituting an after-acquired property clause.” Consequently, subsection (b)(1) does not prevent the security interest from attaching to the purchase-money collateral even if the collateral is not an accession and the debtor acquires rights in the collateral more than 10 days after the secured party gives value.

4. **Commercial Tort Claims.** Subsection (b)(2) provides that an after-acquired property clause in a security agreement does not reach future commercial tort claims. In order for a security interest in a tort claim as original collateral to attach, the claim must be in existence when the security agreement is ~~authenticated~~ signed. In addition, the security agreement must describe the tort claim with greater specificity than simply “all tort claims.” See Section 9-108(e).

4A. **Proceeds and Commingled Goods.** Subsection (b.1) clarifies and makes explicit what is implicit in the pre-2022 text of subsection (b). Subsection (b) does not prevent a security interest from attaching to consumer goods as proceeds or as commingled goods, to commercial tort claims as proceeds, or under an after-acquired property clause to proceeds of consumer goods or commercial tort claims. This clarification corrects and rejects the erroneous holdings of several cases addressing commercial tort claims that are proceeds. As to proceeds, this result also follows from Section 9-203(f).

\* \* \*

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

\* \* \*

(c) **[Duties and rights when secured party in possession or control.]** Except as otherwise provided in subsection (d), a secured party having possession of collateral or control of collateral under Section 7-106, 9-104, 9-105, 9-105A, 9-106, ~~or~~ 9-107, or 9-107A:

\* \* \*

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

\* \* \*

(b) **[Duties of secured party after receiving demand from debtor.]** Within 10 days after receiving ~~an authenticated~~ a signed demand by the debtor:

(1) a secured party having control of a deposit account under Section 9-104(a)(2) shall send to the bank with which the deposit account is maintained ~~an authenticated statement~~ a signed record that releases the bank from any further obligation to comply with instructions originated by the secured party;

\* \* \*

~~(3) a secured party, other than a buyer, having control of electronic chattel paper under Section 9-105 shall:~~

~~(A) communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;~~

~~(B) if the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and~~

~~(C) take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party; and~~

(3) a secured party, other than a buyer, having control under Section 9-105 of an authoritative electronic copy of a record evidencing chattel paper shall transfer control of the electronic copy to the debtor or a person designated by the debtor;

(4) a secured party having control of investment property under Section 8-

106(d)(2) or 9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained ~~an authenticated~~ a signed record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party;

(5) a secured party having control of a letter-of-credit right under Section 9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party ~~an authenticated~~ a signed release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party; ~~and~~

~~(6) a secured party having control of an electronic document shall:~~

~~(A) give control of the electronic document to the debtor or its designated custodian;~~

~~(B) if the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and~~

~~(C) take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party.~~

(6) a secured party having control under Section 7-106 of an authoritative electronic copy of an electronic document of title shall transfer control of the electronic copy to the debtor or a person designated by the debtor;

(7) a secured party having control under Section 9-105A of electronic money shall

transfer control of the electronic money to the debtor or a person designated by the debtor; and

(8) a secured party having control under Section 12-105 of a controllable electronic record, other than a buyer of a controllable account or controllable payment intangible evidenced by the controllable electronic record, shall transfer control of the controllable electronic record to the debtor or a person designated by the debtor.

### Official Comment

\* \* \*

**2. Scope and Purpose.** This section imposes duties on a secured party who has control of a deposit account, an electronic copy of a record evidencing chattel paper, investment property, a letter-of-credit right, ~~or an electronic documents document~~ of title, electronic money, or a controllable electronic record. The duty to terminate the secured party's control is analogous to the duty to file a termination statement, imposed by Section 9-513. Under subsection (a), it applies only when there is no outstanding secured obligation and the secured party is not committed to give value. The requirements of this section can be varied by agreement under Section 1-102(3). For example, a debtor could by contract agree that the secured party may comply with subsection (b) by releasing control more than 10 days after demand. Also, duties under this section should not be read to conflict with the terms of the collateral itself. For example, if the collateral is a time deposit account, subsection (b)(2) should not require a secured party with control to make an early withdrawal of the funds (assuming that were possible) in order to pay them over to the debtor or put them in an account in the debtor's name.

Note that subsection (b)(8) addresses secured parties that have control of a controllable electronic record. That control may have been obtained for the purpose of perfecting a security interest in a controllable account or controllable payment intangible evidenced by the controllable electronic record, even if the secured party did not have a security interest in the controllable electronic record itself.

This section does not explicitly impose duties on a secured party whose control is based on the acknowledgment under Section 7-106(g), 9-104(a)(4), or 9-105A(e) or under 9-107A and 12-105(e) by another person having control. Such a secured party would have control only while the other, acknowledging person retains control. This result necessarily follows because such a secured party's control derives solely from the other person's continued control. See, e.g., Section 9-314, Comment 2. Upon compliance with this section by an acknowledging person having control, the control of a person having control through such person's acknowledgment would cease.

\* \* \*

5. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces references to “authenticated” in the pre-2022 text of this section.

**Section 9-209. Duties of Secured Party if Account Debtor Has Been Notified of Assignment.**

\* \* \*

(b) [Duties of secured party after receiving demand from debtor.] Within 10 days after receiving ~~an authenticated~~ a signed demand by the debtor, a secured party shall send to an account debtor that has received notification under Section 9-406(a) or 12-106(b) of an assignment to the secured party as assignee ~~under Section 9-406(a) an authenticated~~ a signed record that releases the account debtor from any further obligation to the secured party.

\* \* \*

**Official Comment**

\* \* \*

3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces references to “authenticated” in the pre-2022 text of this section.

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

(a) [Definitions.] In this section:

\* \* \*

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

(3) “Request regarding a list of collateral” means a record ~~authenticated~~ signed by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) “Request regarding a statement of account” means a record ~~authenticated~~ signed by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

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

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

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

(c) **[Request regarding list of collateral; statement concerning type of collateral.]** A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor ~~an authenticated~~ a signed record including a statement to that effect within 14 days after receipt.

(d) **[Request regarding list of collateral; no interest claimed.]** A person that receives a request regarding a list of collateral, claims no interest in the collateral when it receives the

request, and claimed an interest in the collateral at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor ~~an authenticated~~ a signed record:

\* \* \*

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

\* \* \*

### Official Comment

\* \* \*

**8. “Signed” and “Signing” Replaces “Authenticated” and “Authenticating.”**  
Consistent with the revised definition of “sign” in Section 1-201, the cognate terms “signed” and “signing” replace references to “authenticated” and “authenticating” in the pre-2022 text of this section.

### **Section 9-301. Law Governing Perfection and Priority of Security Interests.**

Except as otherwise provided in Sections 9-303 through ~~9-306~~ 9-306B, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

\* \* \*

(3) Except as otherwise provided in paragraph (4), while negotiable tangible documents, goods, instruments, or tangible 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.

\* \* \*

### Official Comment

\* \* \*

**2. Scope of This Subpart.** \* \* \* In transactions to which the Hague Securities Convention applies, the requirements for foreclosure and the like, the characterization of a transfer as being outright or by way of security, and certain other issues will generally be governed by the law specified in the account agreement. See PEB Commentary No. 19, ~~dated April 11, 2017~~. And, another jurisdiction's law may govern other third-party matters addressed in this Article. See Section 9-401, Comment 3.

\* \* \*

**5. Law Governing Perfection: Exceptions.** The general rule is subject to several exceptions. It does not apply to goods covered by a certificate of title (see Section 9-303), deposit accounts (see Section 9-304), investment property (see Section 9-305), ~~or~~ letter-of-credit rights (see Section 9-306), chattel paper (see Section 9-306A), or controllable accounts, controllable electronic records, or controllable payment intangibles (see Section 9-306B). Nor does it apply to possessory security interests, i.e., security interests that the secured party has perfected by taking possession of the collateral (see paragraph (2)), security interests perfected by filing a fixture filing (see subparagraph (3)(A)), security interests in timber to be cut (subparagraph (3)(B)), or security interests in as-extracted collateral (see paragraph (4)). No exception is made for electronic money and the general rule applies (unless preempted by federal law).

a. **Possessory Security Interests.** Paragraph (2) applies to possessory security interests and provides that perfection and priority is governed by the local law of the jurisdiction in which the collateral is located. This is the rule of ~~former~~ pre-1998 Section 9-103(1)(b), except paragraph (2) eliminates the troublesome “last event” test of former law.

\* \* \*

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

(a) **[Law of bank's jurisdiction governs.]** The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security

interest in a deposit account maintained with that bank even if the transaction does not bear any relation to the bank's jurisdiction.

\* \* \*

### Official Comment

\* \* \*

4. **No Relation to Bank's Jurisdiction Required.** As to the final clause of subsection (a), see Section 8-110, Comment 5A.

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

(a) [**Governing law: general rules.**] Except as otherwise provided in subsection (c), the following rules apply:

\* \* \*

(5) Paragraphs (2), (3), and (4) apply even if the transaction does not bear any relation to the jurisdiction.

\* \* \*

### Official Comment

\* \* \*

#### **3. Investment Property: Exceptions.** \* \* \*

The Hague Securities Convention generally preserves these rules for perfection by filing. However, if the debtor is located in a non-U.S. jurisdiction, or if the account agreement designates the law of a non-U.S. jurisdiction, then filing may be appropriate only in a different jurisdiction or altogether unavailable. See Convention articles 12(2)(b) and 4(1), respectively, and PEB Commentary No. 19, ~~dated April 11, 2017~~, particularly footnote 25.

\* \* \*

6. **No Relation of Transaction to Issuer's, Securities intermediary's, or Commodity Intermediary Jurisdiction Required.** As to subsection (a)(5), see Section 8-110, Comment 5A.

**Section 9-306A. Law Governing Perfection and Priority of Security Interests in Chattel Paper.**

(a) [Chattel paper evidenced by authoritative electronic copy.] Except as provided in subsection (d), if chattel paper is evidenced only by an authoritative electronic copy of the chattel paper or is evidenced by an authoritative electronic copy and an authoritative tangible copy, the local law of the chattel paper's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the chattel paper, even if the transaction does not bear any relation to the chattel paper's jurisdiction.

(b) [Chattel paper's jurisdiction.] The following rules determine the chattel paper's jurisdiction under this section:

(1) If the authoritative electronic copy of the record evidencing chattel paper, or a record attached to or logically associated with the electronic copy and readily available for review, expressly provides that a particular jurisdiction is the chattel paper's jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that jurisdiction is the chattel paper's jurisdiction.

(2) If paragraph (1) does not apply and the rules of the system in which the authoritative electronic copy is recorded are readily available for review and expressly provide that a particular jurisdiction is the chattel paper's jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that jurisdiction is the chattel paper's jurisdiction.

(3) If paragraphs (1) and (2) do not apply and the authoritative electronic copy, or a record attached to or logically associated with the electronic copy and readily available for review, expressly provides that the chattel paper is governed by the law of a particular jurisdiction, that jurisdiction is the chattel paper's jurisdiction.

(4) If paragraphs (1), (2), and (3) do not apply and the rules of the system in which the authoritative electronic copy is recorded are readily available for review and expressly provide that the chattel paper or the system is governed by the law of a particular jurisdiction, that jurisdiction is the chattel paper's jurisdiction.

(5) If paragraphs (1) through (4) do not apply, the chattel paper's jurisdiction is the jurisdiction in which the debtor is located.

(c) [Chattel paper evidenced by authoritative tangible copy.] If an authoritative tangible copy of a record evidences chattel paper and the chattel paper is not evidenced by an authoritative electronic copy, while the authoritative tangible copy of the record evidencing chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(1) perfection of a security interest in the chattel paper by possession under Section 9-314A; and

(2) the effect of perfection or nonperfection and the priority of a security interest in the chattel paper.

(d) [When perfection governed by law of jurisdiction where debtor located.] The local law of the jurisdiction in which the debtor is located governs perfection of a security interest in chattel paper by filing.

### **Official Comment**

1. **Source.** Section 9-306A(a) and (b) derive from Sections 8-110(e) and 9-305 on law governing perfection and priority of security interests in investment property (as do Sections 9-306B and 12-107).

2. **Applicability of this Section.** This section determines the law governing perfection and priority of security interests in chattel paper. Subsections (a) and (b) apply to chattel paper that is evidenced only by an authoritative electronic copy of the chattel paper or by an authoritative electronic copy and an authoritative tangible copy. Subsection (c) applies to chattel paper that is evidenced by an authoritative tangible copy but not evidenced by an authoritative electronic copy. Subsection (d) applies to perfection by filing for all chattel paper.

3. **Authoritative Electronic Copy: Chattel Paper's Jurisdiction.** Subsection (a) specifies the law governing perfection and priority of security interests in chattel paper evidenced by an authoritative electronic copy of the chattel paper, even if it is also evidenced by an authoritative tangible copy. Subject to subsection (d) on perfection by filing, the law governing perfection and priority is the local law of the chattel paper's jurisdiction. Drawing on Sections 8-110 and 9-305, it is the authoritative electronic copy itself, records attached thereto or associated therewith, or the system in which the authoritative electronic copy is recorded that determines the chattel paper's jurisdiction and, therefore, the governing law. Subsection (b) provides a "waterfall" of rules based on provisions that identify a particular jurisdiction as the chattel paper's jurisdiction or alternatively that provide the governing law of the chattel paper or of the system in which the electronic copy is recorded. When no such identification or provision is made, it is the debtor's location, determined under Section 9-307, that is the chattel paper's jurisdiction. As to the final clause of subsection (a), see Section 8-110, Comment 5A.

4. **Rationale for Subsection (a).** A buyer of, or secured lender against, chattel paper may arrange for authoritative electronic copies of chattel paper that it wishes to have assigned to it to be originated in or submitted into a system for the control and assignment of the chattel paper. The secured parties and lessors that will be assigning the chattel paper may be located in many different jurisdictions. As to assignments of the chattel paper by these secured parties and lessors (assignor-debtors), but for this section perfection and priority would be governed by the law of each assignor-debtor's location under Section 9-301(1). Under this section, however, the law of a single jurisdiction—the chattel paper's jurisdiction—could govern perfection and priority with respect to all of the assignments. By avoiding the application of the laws of multiple jurisdictions to perfection and priority, this rule could substantially reduce transaction costs.

5. **Authoritative tangible copy.** Subsection (c) ties the choice-of-law rules to the location of the authoritative tangible copy when no authoritative electronic copy exists. In that circumstance, the local law of the jurisdiction where the authoritative tangible copy is physically located governs perfection of a security interest in the chattel paper by possession, under Section 9-314A, and priority. Like its predecessor, subsection (c) assumes that all the authoritative tangible copies are located in the same jurisdiction. However, assuming the secured party is in possession of all the tangible copies, even if the copies are located in more than one jurisdiction the situation is unlikely to be problematic.

6. **Perfection by filing.** Subsection (d) provides that the local law of the jurisdiction where the debtor is located governs perfection by filing for all chattel paper.

## **Section 9-306B. Law Governing Perfection and Priority of Security Interests in Controllable Accounts, Controllable Electronic Records, and Controllable Payment Intangibles.**

(a) **[Governing law: general rules.]** Except as provided in subsection (b), the local law of the controllable electronic record's jurisdiction specified in Section 12-107(c) and (d) governs

perfection, the effect of perfection or nonperfection, and the priority of a security interest in a controllable electronic record and a security interest in a controllable account or controllable payment intangible evidenced by the controllable electronic record.

**(b) [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 a controllable account, controllable electronic record, or controllable payment intangible by filing; and

(2) automatic perfection of a security interest in a controllable payment intangible created by a sale of the controllable payment intangible.

### **Official Comment**

**1. Perfection by control and priority.** Subsection (a) deals with perfection of a security interest in a controllable account, controllable electronic record, or controllable payment intangible other than by filing—i.e., perfection by control under Section 12-105—and priority. For these purposes the governing law is that of the controllable electronic record’s jurisdiction under Section 12-107(c) and (d).

**2. Perfection by filing.** Under subsection (b) the local law of the jurisdiction of the debtor’s location governs perfection of a security interest in a controllable account, controllable electronic record, or controllable payment intangible by filing (but not priority, as to which subsection (a) would apply). Because controllable electronic records are general intangibles and controllable accounts and controllable payment intangibles are subsets of accounts and payment intangibles, this provision does not change prior law.

**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.**

\* \* \*

**(b) [Exceptions: filing not necessary.]** The filing of a financing statement is not necessary to perfect a security interest:

\* \* \*

(8) in controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, ~~electronic chattel paper~~, electronic documents, investment property, or letter-of-credit rights which is perfected by control under Section 9-314;

(8.1) in chattel paper which is perfected by possession and control under Section 9-314A;

\* \* \*

### Official Comment

\* \* \*

3. **Exemptions from Filing.** Subsection (b) lists the security interests for which filing is not required as a condition of perfection, because they are perfected automatically upon attachment (subsections (b)(2) and (b)(9)) or upon the occurrence of another event (subsections (b)(1), (b)(5), and (b)(9)), because they are perfected under the law of another jurisdiction (subsection (b)(10)), or because they are perfected by another method, such as by the secured party's taking possession or control (subsections (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), ~~and~~ (b)(8), and (b)(8.1)).

\* \* \*

**Section 9-312. Perfection of Security Interests in Chattel Paper, Controllable Accounts, Controllable Electronic Records, Controllable Payment Intangibles, Deposit Accounts, Negotiable 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~~, controllable accounts, controllable electronic records, controllable payment intangibles, instruments, ~~or investment property, or negotiable documents~~ 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:

\* \* \*

(2) 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 tangible money may be perfected only by the secured party's taking possession under Section 9-313; and

(4) a security interest in electronic money may be perfected only by control under Section 9-314.

\* \* \*

(e) [**Temporary perfection: new value.**] A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under ~~an authenticated~~ a signed security agreement.

\* \* \*

### Official Comment

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**4A. Controllable Accounts, Controllable Electronic Records, and Controllable Payment Intangibles.** Consistent with the treatment of chattel paper, instruments, investment property, and negotiable documents, under subsection (a) a security interest in controllable accounts, controllable electronic records, and controllable payment intangibles may be perfected by filing. A security interest in that collateral also may be perfected by control. Section 9-314.

\* \* \*

**6A. Money.** Under subsection (b)(3), a security interest in tangible money may be perfected only by possession under Section 9-313. Similarly, under subsection (b)(4), a security interest in electronic money may be perfected only by control under Section 9-314.

**7. Goods Covered by Document of Title.** \* \* \*.



\* \* \*

Subsection (d) takes a different approach to the problem of goods covered by a nonnegotiable document. Here, title to the goods is not looked on as being locked up in the document. For example, a transferee that takes delivery of a nonnegotiable document receives, under Section 7-504(a), “the title and rights” of the transferor, but the transferee would not thereby become a “person entitled under the document” with a right to receive delivery of the goods from the bailee. ~~and the~~ The secured party may perfect its security interest directly in the goods by filing as to them. The subsection provides two other methods of perfection: issuance of the document in the secured party’s name (as consignee of a straight bill of lading or the person to whom delivery would be made under a non-negotiable warehouse receipt) and receipt of notification of the secured party’s interest by the bailee. Issuance (or reissuance) of the nonnegotiable document in the secured party’s name would allow the secured party to become a “person entitled under the document.” However, the bailee’s receipt of notification would not confer on the secured party the status of a person entitled unless the notification resulted from an instruction under the document. See Section 7-102(a)(9) (defining “person entitled under the document”) and Comment 6. Perfection under subsection (d) occurs when the bailee receives notification of the secured party’s interest in the goods, regardless of who sends the notification. Receipt of notification is effective to perfect, regardless of whether the bailee responds. Unlike ~~former pre-1998~~ Section 9-304(3), from which it derives, subsection (d) does not apply to goods in the possession of a bailee who has not issued a document of title. Section 9-313(c) covers that case and provides that perfection by possession as to goods not covered by a document requires the bailee’s acknowledgment.

Subsection (a) makes clear that a security interest in negotiable documents (and other collateral mentioned there) may be perfected by filing, but it makes no mention of nonnegotiable documents. However, under the general rule of Section 9-310, a security interest in a nonnegotiable document can be perfected by filing. A security interest in an electronic document, negotiable or nonnegotiable, can be perfected by control under Section 7-106. Section 9-314(a). But a security interest in a nonnegotiable tangible document cannot be perfected by possession. Section 9-313(a). Although a perfected security interest in a nonnegotiable document might provide useful benefits for the secured party, it would not perfect a security interest in the goods. And by perfecting a security interest in the nonnegotiable document the secured party would not thereby become a “person entitled under the document.” Indeed, unless the secured party also took delivery of the document (i.e., possession or control under Section 1-201(b)(15)), it would not obtain the rights of a transferee under Section 7-504(a).

#### **8. Temporary Perfection Without Having First Otherwise Perfected.**

Subsection (e) follows ~~former pre-1998~~ Section 9-304(4) in giving perfected status to security interests in certificated securities, instruments, and negotiable documents for a short period (reduced from 21 to 20 days, which is the time period generally applicable in this Article), although there has been no filing and the collateral is in the debtor’s possession or control. The 20-day temporary perfection runs from the date of attachment. There is no limitation on the purpose for which the debtor is in possession, but the secured party must have given “new value” (defined in Section 9-102) under ~~an authenticated~~ a signed security agreement.

\* \* \*

10. **“Signed” Replaces “Authenticated.”** Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

### **Section 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 ~~tangible negotiable documents~~, goods, instruments, negotiable tangible documents, or tangible 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.

\* \* \*

(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~~ signs 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~~ signed a record acknowledging that it will hold possession of the 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~~ not earlier than the time the secured party takes possession and continues only while the

secured party retains possession.

\* \* \*

## Official Comment

\* \* \*

### 2. Perfection by Possession. \* \* \*

This section permits a security interest to be perfected by the taking of possession only when the collateral is goods, instruments, ~~tangible~~ negotiable tangible documents, or tangible money, ~~or tangible chattel paper~~. Accounts, commercial tort claims, deposit accounts, investment property, letter-of-credit rights, letters of credit, and oil, gas, or other minerals before extraction are excluded. (But see Comment 6, below, regarding certificated securities.) A security interest in accounts and payment intangibles—property not ordinarily represented by any writing whose delivery operates to transfer the right to payment—may under this Article be perfected only by filing. This rule would not be affected by the fact that a security agreement or other record described the assignment of such collateral as a “pledge.” Section 9-309(2) exempts from filing certain assignments of accounts or payment intangibles which are out of the ordinary course of financing. These exempted assignments are perfected when they attach. Similarly, under Section 9-309(3), sales of payment intangibles are automatically perfected.

Perfection by possession of chattel paper evidenced by an authoritative tangible record (formerly defined as “tangible chattel paper”) has been removed from this section. Instead, perfection by possession and control of chattel paper is governed by Section 9-314A.

\* \* \*

### 4. Goods in Possession of Third Party: Perfection. \* \* \*

Notification of a third person does not suffice to perfect under Section 9-313(c). Rather, perfection does not occur unless the third person ~~authenticates~~ signs an acknowledgment that it holds possession of the collateral for the secured party’s benefit. Compare Section 9-312(d), under which receipt of notification of the security party’s interest by a bailee holding goods covered by a nonnegotiable document is sufficient to perfect, even if the bailee does not acknowledge receipt of the notification. A third person may acknowledge that it will hold for the secured party’s benefit goods to be received in the future. Under these circumstances, perfection by possession occurs when the third person obtains possession of the goods.

\* \* \*

5. No Relation Back; time of perfection and continuation of perfection. Former Section 9-305 provided that a security interest is perfected by possession from the time possession is taken “without a relation back.” As the Comment to ~~former~~ pre-1998 Section 9-305 observed, the relation-back theory, under which the taking of possession was deemed to relate

back to the date of the original security agreement, has had little vitality since the 1938 revision of the Federal Bankruptcy Act. The theory is inconsistent with ~~former pre-1998~~ Article 9 and with this Article. See Section 9-313(d). Accordingly, this Article deletes the quoted phrase as unnecessary. ~~Where~~ Under Subsection (d), where a pledge (perfection by possession) transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected. The only exceptions to this rule are the short, 20-day periods of perfection provided in Section 9-312(e), (f), and (g), during which a debtor may have possession of specified collateral in which there is a perfected security interest. Also under subsection (d), perfection continues only while the secured party retains possession. However, if a secured party's possession is based on an acknowledgment under Section 9-313(c) by another person in possession, the secured party remains perfected by possession only while the other person retains possession. This result necessarily follows because such a secured party's possession derives solely from the other person's continued possession.

\* \* \*

**9. Delivery to Third Party by Secured Party.** ~~New subsections~~ Subsections (h) and (i) address the practice of mortgage warehouse lenders. These lenders typically send mortgage notes to prospective purchasers under cover of letters advising the prospective purchasers that the lenders hold security interests in the notes. These lenders relied on notification to maintain perfection under ~~former pre-1998~~ 9-305. Requiring them to obtain authenticated signed acknowledgments from each prospective purchaser under subsection (c) could be unduly burdensome and disruptive of established practices. Under subsection (h), when a secured party in possession itself delivers the collateral to a third party, instructions to the third party would be sufficient to maintain perfection by possession; an acknowledgment would not be necessary. Under subsection (i), the secured party does not relinquish possession by making a delivery under subsection (h), even if the delivery violates the rights of the debtor. That subsection also makes clear that a person to whom 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 law other than this Article provides otherwise.

**10. "Signs" and "Signed" Replaces "Authenticates" and "Authenticated."**  
Consistent with the revised definition of "sign" in Section 1-201, the cognate terms "signs" and "signed" replace the references to "authenticates" and "authenticated" in the pre-2022 text of this section.

#### **Section 9-314. Perfection by Control.**

(a) **[Perfection by control.]** A security interest in ~~investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, or electronic documents~~ controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, electronic money, investment property, or letter-of-credit rights may be perfected by

control of the collateral under Section 7-106, 9-104, ~~9-105~~, 9-105A, 9-106, ~~or 9-107~~, or 9-107A.

(b) **[Specified collateral: time of perfection by control; continuation of perfection.]** A security interest in ~~deposit accounts, electronic chattel paper, letter-of-credit rights, or electronic documents,~~ controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, electronic money, or letter-of-credit rights is perfected by control under Section 7-106, 9-104, ~~9-105~~, 9-105A, ~~or 9-107~~, or 9-107A ~~when not earlier than the time~~ 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 not earlier than~~ the time the secured party obtains control and remains perfected by control until:

\* \* \*

### Official Comment

\* \* \*

2. **Control.** This section provides for perfection by control with respect to ~~investment property, deposit accounts, controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, electronic money, investment property, and~~ letter-of-credit rights, electronic chattel paper, and electronic documents. Concerning how a secured party takes control of these types of collateral, see Sections 7-106, 9-104, 9-105A, through 9-107, and 9-107A, and Section 7-106 Comments. Subsection (b) explains when a security interest is perfected by control and how long a security interest remains perfected by control. Like Section 9-313(d) and for the same reasons, subsection (b) makes no reference to the doctrine of “relation back.” See Section 9-313, Comment 5. As to an electronic document that is reissued in a tangible medium, (see Section 7-105), a secured party that is perfected by control in the electronic document should file as to the document before relinquishing control in order to maintain continuous perfection in the document. See Section 9-308. If a secured party’s control is based on an acknowledgment under Section 7-106(g), 9-104(a)(4), or 9-105A(e) or under 9-107A and 12-105(e) by another person having control, the secured party remains perfected by control only while the other person retains control. This result necessarily follows because such a secured party’s control derives solely from the other person’s continued control.

Perfection by control of chattel paper evidenced by an authoritative electronic record (formerly defined as “electronic chattel paper”) has been removed from this section. Instead, perfection by possession and control of chattel paper is governed by Section 9-314A.

**3. Investment Property.** Subsection (c) provides a special rule for investment property. Once a secured party has control, its security interest remains perfected by control until the secured party ceases to have control and the debtor receives possession of collateral that is a certificated security, becomes the registered owner of collateral that is an uncertificated security, or becomes the entitlement holder of collateral that is a security entitlement. The result is particularly important in the “repledge” context. See Section 9-207, Comment 5. In a transaction in which a secured party who has control grants a security interest in investment property or sells outright the investment property, by virtue of the debtor’s consent or applicable legal rules, a purchaser from the secured party typically will cut off the debtor’s rights in the investment property or be immune from the debtor’s claims. See Section 9-207, Comments 5 and 6. If the investment property is a security, the debtor normally would retain no interest in the security following the purchase from the secured party, and a claim of the debtor against the secured party for redemption (Section 9-623) or otherwise with respect to the security would be a purely personal claim.

If the investment property transferred by the secured party is a financial asset in which the debtor had a security entitlement credited to a securities account maintained with the secured party as a securities intermediary, the debtor’s claim against the secured party could arise as a part of its securities account notwithstanding its personal nature. (This claim would be analogous to a “credit balance” in the securities account, which is a component of the securities account even though it is a personal claim against the intermediary.) In the case in which the debtor may retain an interest in investment property notwithstanding a repledge or sale by the secured party, subsection (c) makes clear that the security interest will remain perfected by control. Notwithstanding subsection (c), if a secured party’s control is based on an acknowledgment under Section 8-106(d)(3) by another person having control, the secured party remains perfected by control only while the other person retains control. This result necessarily follows because such a secured party’s control derives solely from the other person’s continued control. Although Section 8-106(d)(3) was amended by the 2022 Article 9 Revisions, this result also applied to a secured party in control under pre-2022 subsection (d)(3).

**3A. Shared control between debtor and secured party (and other transferor and transferee) and control through another person.** Sections 7-106 (control of electronic documents), 9-105 (control of authoritative electronic records evidencing chattel paper), 9-105A (control of electronic money), and 12-105 (control of controllable electronic records, on which control of controllable accounts and controllable payment intangibles under Section 9-107A depends) contemplate the possibility that both a debtor and a secured party may have control of the relevant collateral by sharing an exclusive power. Such shared control between a debtor and secured party does not necessarily impair perfection of a security interest under this section or Section 9-314A. On shared exclusive powers, see generally Section 12-105, Comment 5. However, if a secured party can exercise a power only if the power is exercised also by the debtor, the power would not be shared and, consequently, the secured party would not have control based on the exclusive power. This result follows from Section 12-105(c) and

corresponding subsections in the other provisions on control cited above. Under Section 12-105(c), because a debtor would be a “transferor of an interest” in a controllable electronic record or a controllable account or payment intangible evidenced by the record, the debtor’s “blocking power” (i.e., the secured party can exercise the power only if the debtor also exercises the power) with respect to the secured party’s exercise of the power would disqualify the secured party from sharing (and, consequently, enjoying) the exclusive power and perfection by control based on exclusive powers. Similarly, a purchaser in that situation would be disqualified from having control and thereby from enjoying the status and benefits of a qualifying purchaser (Section 12-102(a)(2)) under Section 12-104(e) and (g) if the purchaser takes from a transferor of an interest and the transferor has such a blocking power (whether or not the transferor is a debtor).

Section 12-105(e) contains a similar limitation in connection with control through another person. An acknowledging person must be one “other than the transferor of an interest in the electronic record.” The same or a similar limitation is found in the other provisions relating to control through another person. See Sections 7-106(g) (control of electronic document of title); 8-106(d)(3) (control of a security entitlement); 9-104(a)(4) (control of deposit accounts); 9-105(g) (control of authoritative electronic copy of record evidencing chattel paper); 9-105A(e) (control of electronic money).

For a discussion of the rationale for these limitations on sharing exclusive control and control through another person, see Section 12-105, Comment 9.

\* \* \*

### **Section 9-314A. Perfection by Possession and Control of Chattel Paper.**

(a) [Perfection by possession and control.] A secured party may perfect a security interest in chattel paper by taking possession of each authoritative tangible copy of the record evidencing the chattel paper and obtaining control of each authoritative electronic copy of the electronic record evidencing the chattel paper.

(b) [Time of perfection; continuation of perfection.] A security interest is perfected under subsection (a) not earlier than the time the secured party takes possession and obtains control and remains perfected under subsection (a) only while the secured party retains possession and control.

### **(c) [Application of Section 9-313 to perfection by possession of chattel paper.]**

Section 9-313(c) and (f) through (i) applies to perfection by possession of an authoritative

tangible copy of a record evidencing chattel paper.

### **Official Comment**

**1. “Authoritative copy.”** To perfect a security interest in chattel paper other than by filing, this section provides that a secured party must obtain control of all authoritative electronic copies and take possession of all authoritative tangible copies.

Like the pre-2022 text, Section 9-105(b) distinguishes between authoritative and nonauthoritative copies of electronic chattel paper and refers to copies that are “authoritative.” And, like its predecessor, Section 9-105(b) does not define the term “authoritative.” However, it also applies this concept to tangible records that evidence chattel paper.

To show that it has possession of all authoritative tangible copies of a record evidencing chattel paper and all authoritative electronic copies of a record evidencing chattel paper, a purchaser can produce the tangible copies in its possession and prove control of the electronic copies and provide evidence that these are authoritative copies. The purchaser need not prove a negative—i.e., that no other tangible or electronic authoritative copies exist—to make a prima facie case. The purchaser’s possession of the authoritative tangible copies and control of the authoritative electronic copies gives the purchaser the power to prevent others from taking possession or control of the copies and the power to transfer possession and control of the copies.

Perfection of a security interest in chattel paper by taking possession of the collateral generally has been understood to mean taking possession of the wet-ink “original.” Experience has shown that the concept of an original breaks down when one allows for the possibility of the same monetary obligation being evidenced by different media over time, such as where electronic records evidencing the chattel paper are “papered out” (replaced with tangible records evidencing the same chattel paper) or tangible records are “converted” to electronic records.

Whether an electronic or tangible copy of a record evidencing chattel paper is authoritative depends on the facts and circumstances. The determination should turn on whether the copy provides reasonable notice to third parties that it is one that must be subject to control or possession for purposes of perfection and priority. To accommodate current practices and future technology, parties are allowed considerable flexibility in determining the method used to establish whether a particular copy is authoritative, provided that third parties are able to reasonably identify the authoritative copies that must be possessed or controlled to achieve perfection. For example, the parties could develop a system or protocol where each tangible or electronic copy is “watermarked” as authoritative or nonauthoritative or where the terms of the records themselves describe how to determine which copies are authoritative and which are not.

**2. Time of perfection; continuation of perfection.** Subsection (b) is modeled on Sections 9-313(d) and 9-314(b). If a secured party’s possession or control is based on the acknowledgment under Section 9-313(c) or 9-105(g) by another person in possession or control, the secured party remains perfected by possession or control only while the other person retains possession or control. This result necessarily follows because such a secured party’s possession or control derives solely from the other person’s continued possession or control.



3. **Applicability of Section 9-313.** Subsection (c) makes specified subsections of Section 9-313 applicable to possession of authoritative tangible copies of records evidencing chattel paper.

4. **Shared control.** As to the sharing of powers over an authoritative electronic copy of a record evidencing chattel paper (see Section 9-105(c)(2)) by a debtor and a secured party (or by another transferor and transferee) and control through another person (see Section 9-105(g)), see Sections 9-314, Comment 3A; 12-105, Comment 9.

## **Section 9-316. Continued Perfection of Security Interest Following Change in Governing Law.**

(a) **[General rule: effect on perfection of change in governing law.]** A security interest perfected pursuant to the law of the jurisdiction designated in Section 9-301(1), ~~or~~ 9-305(c), 9-306A(d), or 9-306B(b) remains perfected until the earliest of:

\* \* \*

(f) **[Change in jurisdiction of chattel paper, controllable electronic record, bank, issuer, nominated person, securities intermediary, or commodity intermediary.]** A security interest in chattel paper, controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the chattel paper's jurisdiction, the controllable electronic record's jurisdiction, the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

\* \* \*

### **Official Comment**

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4. **Possessory Security Interests.** Subsection (c) deals with continued perfection of possessory security interests. It applies not only to security interests perfected solely by the secured party's having taken possession of the collateral. It also applies to security interests

perfected by a method that includes as an element of perfection the secured party's having taken possession, such as perfection by taking delivery of a certificated security in registered form, see Section 9-313(a), ~~and perfection by obtaining control over a certificated security.~~ See, see Section 9-314(a), and perfection by taking possession of and control over authoritative copies of records evidencing chattel paper, see Section 9-314A(a).

\* \* \*

6. **Controllable Accounts, Controllable Electronic Records, Controllable Payment Intangibles, Chattel Paper, Deposit Accounts, Letter-of-Credit Rights, and Investment Property.** Subsections (f) and (g) address changes in the jurisdiction of a bank, controllable electronic record, chattel paper, issuer of an uncertificated security, issuer of or nominated person under a letter of credit, securities intermediary, and commodity intermediary. The provisions are analogous to those of subsections (a) and (b).

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## **Section 9-317. Interests That Take Priority Over or Take Free of Security**

### **Interest or Agricultural Lien.**

\* \* \*

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

\* \* \*

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

\* \* \*

(f) **[Buyers of chattel paper.]** A buyer, other than a secured party, of chattel paper takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and:

(1) receives delivery of each authoritative tangible copy of the record evidencing the chattel paper; and

(2) if each authoritative electronic copy of the record evidencing the chattel paper can be subjected to control under Section 9-105, obtains control of each authoritative electronic copy.

(g) **[Buyers of electronic documents.]** A buyer of an electronic document takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and, if each authoritative electronic copy of the document can be subjected to control under Section 7-106, obtains control of each authoritative electronic copy.

(h) **[Buyers of controllable electronic records.]** A buyer of a controllable electronic record takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and obtains control of the controllable electronic record.

(i) **[Buyers of controllable accounts and controllable payment intangibles.]** A buyer, other than a secured party, of a controllable account or a controllable payment intangible takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and obtains control of the controllable account or controllable payment intangible.

### **Official Comment**

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**6. Purchasers Other Than Secured Parties.** Subsections (b), (c), ~~and (d)~~, and (f) through (i) afford priority over an unperfected security interest to certain ~~purchasers~~ buyers

(other than secured parties) of collateral. They derive in part from ~~former~~ pre-1998 Sections 9-301(1)(c), 2A-307(2), and 9-301(d). ~~Former~~ Pre-1998 Section 9-301(1)(c) and (1)(d) provided that unperfected security interests are “subordinate” to the rights of certain purchasers. But, as ~~former~~ pre-1998 Comment 9 suggested, the practical effect of subordination in this context is that the purchaser takes free of the security interest. To avoid any possible misinterpretation these subsections (b) and (d) of this section now use the phrase “takes free.”

Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (~~tangible chattel paper~~, tangible documents, instruments, and security certificates). To obtain priority, a buyer must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection. Even if the buyer gave value without knowledge and before perfection, the buyer would take subject to the security interest if perfection occurred before physical delivery of the collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all security interests created by the lessor, even if perfected. See Section 9-321.

\* \* \*

Subsection (b) no longer applies to chattel paper. The take-free rule in subsection (f) for buyers of chattel paper reflects the corresponding 2022 changes in the definition of chattel paper and in the methods of perfection. See Sections 9-102(a)(11) (defining “chattel paper”); 9-314A (perfection by possession and control). Note that subsection (f) applies only to a buyer of chattel paper “other than a secured party” and most buyers of chattel paper are secured parties. See Sections 9-102(a)(73) (defining “secured party” as including a person to which chattel paper has been sold); 9-109(a)(3) (Article 9 applies to a sale of chattel paper); 1-201(b)(35) (defining “security interest” to include the interest of a buyer of chattel paper). However, Article 9 does not apply to “a sale of . . . chattel paper . . . as part of a sale of the business out of which . . . [the chattel paper] arose” and, accordingly, subsection (f) could apply to a buyer of chattel paper in a such a sale of business transaction. Subsection (f) provides that such a buyer of chattel paper takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and receives delivery of each authoritative tangible copy of the record evidencing the chattel paper and, if the chattel paper can be subjected to control, the buyer obtains control of each authoritative electronic copy.

Although chattel paper has been removed from subsection (b), the phrase “other than a secured party” has been retained because buyers of instruments that are promissory notes, but not buyers of other instruments, are secured parties. See Sections 9-109(a)(3) (Article 9 applies to a sale of a promissory note); 1-201(b)(35) (defining “security interest” to include the interest of a buyer of a promissory note).

The rule of subsection (b) obviously is not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer or no means of taking control of the collateral as a functional equivalent of a delivery. Therefore, with respect to such intangibles (including accounts other than controllable accounts, ~~electronic chattel paper~~, electronic documents not subject to control,

general intangibles other than controllable payment intangibles, and investment property other than certificated securities), subsection (d) gives priority to any buyer who gives value without knowledge, and before perfection, of the security interest. Buyers of electronic money also are excluded from the application of subsection (d) because transferees of electronic money which obtain control take free of security interests under Section 9-332(c), which provides a standard more generous to transferees than subsection (d). A licensee of a general intangible takes free of an unperfected security interest in the general intangible under the same circumstances (to the extent of the licensee's rights under the license). Note that a licensee of a general intangible in ordinary course of business takes rights under a nonexclusive license free of security interests created by the licensor, even if perfected. See Section 9-321.

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

**6A. [Buyers of Electronic Documents, Controllable Electronic Records, Controllable Accounts, and Controllable Payment Intangibles.]** Subsection (g) provides a take-free rule for electronic documents, subsection (h) so provides for controllable electronic records, and subsection (i) so provides for controllable accounts and controllable payment intangibles. Subsection (g) conditions the take-free rule on the buyer obtaining control of authoritative electronic copies of the document only if the authoritative electronic copies can be subjected to control. Subsection (h) conditions the take-free rule for a buyer of a controllable electronic record on the buyer's obtaining control of the electronic record. Similarly, under subsection (i), the take-free rule for a buyer, other than a secured party, of a controllable account or controllable payment intangible is conditioned on the buyer's obtaining control of the account or payment intangible. Although in general a buyer of an account or a payment intangible is a secured party, there are limited exceptions. See Sections 1-201(b)(35) ("security interest" includes interest of buyer of accounts or payment intangibles); 9-109(d)(4) (inapplicability of Article 9 to sale of accounts or payment intangibles as a part of the sale of a business).

\* \* \*

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

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### **Official Comment**

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#### **6. Priority in Proceeds: General Rule. \* \* \***

**Example 5:** On April 1, Debtor ~~authenticates~~ signs a security agreement granting to A a security interest in all Debtor's existing and after-acquired inventory. The same day, A files a financing statement covering inventory. On May 1, Debtor ~~authenticates~~ signs a security agreement granting B a security interest in all Debtor's existing and future accounts. The same day, B files a financing statement covering accounts. On June 1, Debtor sells inventory to a customer on 30-day unsecured credit. When Debtor acquires the account, B's security interest attaches to it and is perfected by B's financing statement. At the very same time, A's security interest attaches to the account as proceeds of the inventory and is automatically perfected. See Section 9-315. Under subsection (b) of this section, for purposes of determining A's priority in the account, the time of filing as to the original collateral (April 1, as to inventory) is also the time of filing as to proceeds (account). Accordingly, A's security interest in the account has priority over B's. Of course, had B filed its financing statement before A filed (e.g., on March 1), then B would have priority in the accounts.

\* \* \*

### **Section 9-323. Future Advances.**

\* \* \*

(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:

\* \* \*

(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:

\* \* \*

### **Official Comment**

\* \* \*

**6. Competing Buyers and Lessees.** Under subsections (d) and (e), a buyer will not take subject to a security interest to the extent it secures advances made after the secured party has knowledge that the buyer has purchased the collateral or more than 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45-day period and without knowledge of the purchase. Subsections (f) and (g) provide an

analogous rule for lessees. Subsections (d) and (e) replace pre-1998 Section 9-307(3), and subsections (f) and (g) replace pre-1998 Section 2A-307(4). No change in meaning is intended.

Of course, a buyer in ordinary course who takes free of the security interest under Section 9-320 and a lessee in ordinary course who takes free under Section 9-321 are not subject to any future advances. However, the exceptions for a buyer in ordinary course of business and a lessee in ordinary course of business in the 1998 text of subsections (d) and (f) have been deleted. Even if such a buyer or lessee does not meet the requirements under Section 9-320 or 9-321 to take free of a security interest, it should be entitled to the benefits of those subsections, which apply to buyers generally. This change is consistent with the intended result under the 1998 text. Subsections (d) and (e) replace former Section 9-307(3), and subsections (f) and (g) replace former Section 2A-307(4). No change in meaning is intended.

#### **Section 9-324. Priority of Purchase-Money Security Interests.**

\* \* \*

(b) **[Inventory purchase-money priority.]** Subject to subsection (c) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in Section 9-330, and, except as otherwise provided in Section 9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

\* \* \*

(2) the purchase-money secured party sends ~~an authenticated~~ a signed notification to the holder of the conflicting security interest;

\* \* \*

(d) **[Livestock purchase-money priority.]** Subject to subsection (e) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and,

except as otherwise provided in Section 9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

\* \* \*

(2) the purchase-money secured party sends ~~an authenticated~~ a signed notification to the holder of the conflicting security interest;

\* \* \*

### **Official Comment**

\* \* \*

14. **“Signed” Replaces “Authenticated.”** Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in the pre-2022 text of this section.

### **Section 9-326A. Priority of Security Interest in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible.**

A security interest in a controllable account, controllable electronic record, or controllable payment intangible held by a secured party having control of the account, electronic record, or payment intangible has priority over a conflicting security interest held by a secured party that does not have control.

### **Official Comment**

1. **[Control priority.]** This section adopts an approach to priority in controllable accounts, controllable electronic records, and controllable payment intangibles that is similar to the approach of Sections 9-327 (deposit accounts) and 9-328 (investment property): A security interest perfected by control has priority over conflicting security interests that are not perfected by control.

2. **[Multiple persons having control.]** This section does not apply if more than one secured party has control of a controllable account, controllable electronic record, or controllable payment intangible, which may occur through shared control or a person in control acknowledging that it has control on behalf of another person. See Section 12-105(b)(2) (shared control), (e) (control through another person). In those situations, the residual first-to-file-or-perfect rule of Section 9-322(a)(1) would apply. However, affected persons may believe that the



application of that first-in-time rule is not appropriate in some circumstances.

**Example:** A person (A) has a security interest in a controllable electronic record perfected by control (other than through an acknowledgment by another person under Section 12—105(e)) and A acknowledges that it has control on behalf of another person (B). B has a security interest perfected by a financing statement filed before A obtained control. Under Section 9-322(a) (the first-to-file-or-perfect rule), by obtaining control through A’s acknowledgment B’s security interest would have priority over A’s previously senior security interest. To avoid that result, A might insist on B’s subordination as a condition to A’s acknowledgment. See Section 9-339 (subordination by agreement). In cases of multiple persons having control, it will be important for interested persons to adjust priorities by agreement, when appropriate. See also Section 12-105, Comment 5.

A secured party that relies on perfection by control resulting from the acknowledgment of another person under Section 12-105(e) need not prove a formal agency relationship with the acknowledging person. This is a principal rationale underlying the various provisions in Articles 7, 8, 9, and 12 which provide for a person to obtain control through another person’s control and acknowledgment. However, a person obtaining control through an acknowledgment necessarily must rely on the integrity of the acknowledging person. In the case of perfection by control in the Example, the acknowledging person presumably also has control for the benefit of the debtor. The secured party’s (B’s) control, and perfection, depends on the acknowledging person’s (A’s) continued control. The secured party’s (B’s) perfection would be lost if the acknowledging person (A) were to lose or give up control, as by transferring control to the debtor or any other person. See, e.g., Section 9-314, Comment 2.

An acknowledging person also might serially acknowledge over time that it holds for the benefit of multiple purchasers (secured parties or buyers). Putting aside perfection by filing as in the Example, secured parties so perfected would have priority based on priority of timing of control under Section 9-322(a). However, a transfer of control by the acknowledging person to a qualifying purchaser, or an acknowledgment by that the person that it has control on behalf of a buyer or secured party that is a qualifying purchaser, would allow the qualifying purchaser to take free of (or have priority over) earlier security interests or other interests. It follows that a first-to-control priority rule for security interests would not protect a secured party having control through another person’s acknowledgment from having its interest cut off or subordinated by a later-in-time qualifying purchaser. Such a “first-to-control” priority rule would be illusory inasmuch as purchasers relying on control through another person’s acknowledgment would have no reliable method of determining priority over subsequent transferees other than reliance on the acknowledging person’s integrity.

### **Section 9-330. Priority of Purchaser of Chattel Paper or Instrument.**

(a) **[Purchaser’s priority: security interest claimed merely as proceeds.]** A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely

as proceeds of inventory subject to a security interest if:

(1) in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value, ~~and~~ takes possession of each authoritative tangible copy of the record evidencing the chattel paper, ~~or~~ and obtains control ~~of~~ under Section 9-105 of each authoritative electronic copy of the record evidencing the chattel paper under Section 9-105; and

(2) the ~~chattel paper does~~ authoritative copies of the record evidencing the chattel paper do not indicate that ~~it~~ the chattel paper has been assigned to an identified assignee other than the purchaser.

(b) [**Purchaser's priority: other security interests.**] A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value, ~~and~~ takes possession of each authoritative tangible copy of the record evidencing the chattel paper, ~~or~~ and obtains control ~~of~~ under Section 9-105 of each authoritative electronic copy of the record evidencing the chattel paper under Section 9-105 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.

\* \* \*

(f) [**Indication of assignment gives knowledge.**] For purposes of subsections (b) and (d), if the authoritative copies of the record evidencing chattel paper or an instrument ~~indicates~~ indicate that ~~it~~ the chattel paper or instrument has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party.

#### Official Comment

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2. **Non-Temporal Priority.** This Article permits a security interest to be perfected in chattel paper either by filing or by the secured party's possession and control under Section 9-314A and in ~~or~~ instruments to be perfected either by filing or by the secured party's taking possession under Sections 9-312 and 9-313. This section enables secured parties and other purchasers of chattel paper (~~both~~ evidenced by either or both authoritative electronic and tangible records) and instruments to obtain priority over earlier-perfected security interests, thereby promoting the negotiability of these types of receivables.

3. **Chattel Paper.** \* \* \*

This section makes explicit the “good faith” requirement and retains the pre-1998 requirements of “the ordinary course of the purchaser’s business” and the giving of “new value” as conditions for priority. Concerning the last, this Article deletes ~~former~~ pre-1998 Section 9-108 and adds to Section 9-102 a completely different definition of the term “new value.” See Section 9-102, Comment 21 (discussing “new value”). Under subsection (e), the holder of a purchase-money security interest in inventory is deemed to give “new value” for chattel paper constituting the proceeds of the inventory. Accordingly, the purchase-money secured party may qualify for priority in the chattel paper under subsection (a) or (b), whichever is applicable, even if it does not make an additional advance against the chattel paper.

If a ~~possessory~~ security interest in ~~tangible~~ chattel paper ~~or a that is perfected by control security interest in electronic chattel paper by possession and control under Section 9-314A~~ does not qualify for priority under this section, it may be subordinate to a perfected-by-filing security interest under Section 9-322(a)(1).

4. **Possession and Control.** To qualify for priority under subsection (a) or (b), a purchaser must “take[ ] possession of each authoritative tangible copy of the record evidencing the chattel paper ~~or and~~ obtain[ ] control ~~of under Section 9-105 of each authoritative electronic copy of the record evidencing the chattel paper.~~” ~~When chattel paper comprises one or more tangible records and one or more electronic records, a purchaser may satisfy the possession or control~~ this requirement by taking possession of the tangible records under Section 9-313 and having control of the electronic records under Section 9-105. Note that possession and control are methods of perfection under Section 9-314A. In determining which of several related records constitutes chattel paper and thus is relevant to possession or control, the form of the records is irrelevant. Rather, ~~the touchstone is whether possession or control of the record would afford the~~ possession-and-control requirement is based on the premise that it affords public notice contemplated by the possession and control requirements. For example, because possession or control of an amendment extending the term of a lease would not afford the contemplated public notice, the amendment would not constitute a record evidencing chattel paper regardless of whether the amendment is in tangible form and the lease is in electronic form, the amendment is electronic and the lease is tangible, the amendment and lease are both tangible, or the amendment and lease are both electronic.

Two common practices have raised particular concerns with respect to the possession requirement. First, in some cases the parties create more than one copy or counterpart of chattel paper evidencing a single secured obligation or lease. This practice raises questions as to which counterpart is the “original” and whether it is necessary for a purchaser to take possession of all counterparts in order to “take possession” of the chattel paper. Second, parties sometimes enter into a single “master” agreement. The master agreement contemplates that the parties will enter into separate “schedules” from time to time, each evidencing chattel paper. Must a purchaser of an obligation or lease evidenced by a single schedule also take possession of the record evidencing the master agreement as well as the record evidencing the schedule in order to “take possession” of each authoritative tangible copy of the record evidencing the chattel paper?”

The problem raised by the first practice is easily solved. The parties may in the terms of their agreement and by designation on the chattel paper identify only one counterpart as the original, authoritative tangible copy of the chattel paper for purposes of taking the possession of the chattel paper requirement. Concerns about the second practice also are easily solved by careful drafting. Each schedule should provide that it incorporates the terms of the master agreement, not the other way around. This will make it clear that each schedule is a “stand alone” document.

A secured party may wish to convert tangible chattel paper evidenced by authoritative tangible copies to ~~electronic~~ chattel paper evidenced by electronic copies and vice versa. The priority of a security interest in chattel paper under subsection (a) or (b) may be preserved, even if the form of the chattel paper changes. The principle implied in the preceding paragraph, i.e., that not every copy of chattel paper is relevant, applies to “control” as well as to “possession.” When there are multiple copies of chattel paper, a secured party may take “possession” or obtain “control” of the chattel paper if it acts with respect to the copy or copies that are reliably identified as the authoritative copy or copies ~~that are relevant for purposes of possession or control~~. Concerning the identification of copies as authoritative or nonauthoritative, see Section 9-105(c) and Comment 3. This principle applies as well to chattel paper that has been converted from one form to another, even if the relevant copies are not the “original” chattel paper.

**5. Chattel Paper Claimed Merely as Proceeds.** ~~Subsection (a) revises the rule in former Section 9-308(b) to eliminate reference to what the purchaser knows. Instead~~ Under subsection (a), a purchaser who meets the possession-and-control, good faith, ordinary course, and new value requirements takes priority over a competing security interest claimed merely as proceeds of inventory unless the authoritative copies of the record evidencing the chattel paper itself indicate that it has been assigned to an identified assignee other than the purchaser. Thus subsection (a) recognizes the common practice of placing a “legend” on chattel paper to indicate that it has been assigned. This approach, under which the chattel paper purchaser who gives new value in ordinary course can rely on possession and control of unlegended, ~~tangible~~ chattel paper without any concern for other facts that it may know, comports with the expectations of both inventory and chattel paper financiers.

**6. Chattel Paper Claimed Other Than Merely as Proceeds.** ~~Subsection (b) eliminates the requirement that the purchaser take without knowledge that the “specific paper” is subject to the security interest and substitutes for it the requirement that the purchaser take~~ Under

subsection (b), a purchaser who meets the possession-and-control, good faith, ordinary course, and new value requirements takes priority over a competing security interest claimed other than merely as proceeds of inventory if it takes “without knowledge that the purchase violates the rights of the secured party.” This standard derives from the definition of “buyer in ordinary course of business” in Section 1-201(b)(9). The source of the purchaser’s knowledge is irrelevant. Note, however, that “knowledge” means “actual knowledge.” Section 1-202(b).

In contrast to a junior secured party in accounts, who may be required in some special circumstances to undertake a search under the “good faith” requirement, see Comment 5 to Section 9-331, a purchaser of chattel paper under this section is not required as a matter of good faith to make a search in order to determine the existence of prior security interests. There may be circumstances where the purchaser undertakes a search nevertheless, either on its own volition or because other considerations make it advisable to do so, e.g., where the purchaser also is purchasing accounts. Without more, a purchaser of chattel paper who has seen a financing statement covering the chattel paper or who knows that the chattel paper is encumbered with a security interest, does not have knowledge that its purchase violates the secured party’s rights. However, if a purchaser sees a statement in a financing statement to the effect that a purchase of chattel paper from the debtor would violate the rights of the filed secured party, the purchaser would have such knowledge. Likewise, under ~~new~~ subsection (f), if the authoritative copies of the chattel paper itself indicates indicate that it had been assigned to an identified secured party other than the purchaser, the purchaser would have wrongful knowledge for purposes of subsection (b), thereby preventing the purchaser from qualifying for priority under that subsection, even if the purchaser did not have actual knowledge. In the case of authoritative tangible copies of a record evidencing chattel paper, the indication normally would consist of a written legend on the copies chattel paper. In the case of authoritative electronic copies of the record evidencing chattel paper, this Article leaves to developing market and technological practices the manner in which the ~~chattel paper~~ copies would indicate an assignment.

Subsections (a) and (f) each refer to the possibility that authoritative copies of records evidencing chattel paper may indicate that the chattel paper has been assigned to an identified assignee. Those subsections should be read and interpreted in a manner consistent with Section 9-105 on control of authoritative electronic copies of records evidencing chattel paper. Accordingly, references in subsections (a) and (f) to an indication in a record evidencing chattel paper also embrace, for authoritative electronic copies of such records, records attached to or logically associated with the authoritative electronic copies and systems in which the authoritative electronic copies are recorded. See Section 9-105(c) and (d)(1).

## **7. Instruments. \* \* \***

\* \* \*

The rule in subsection (d) is similar to the rules in subsections (a) and (b), which govern priority in chattel paper. The observations in Comment 6 concerning the requirement of good faith and the phrase “without knowledge that the purchase violates the rights of the secured ~~party~~ party,” including the operation of subsection (f) if an instrument indicates that it has been assigned to an identified secured party, apply equally to purchasers of instruments. However,

unlike a purchaser of chattel paper, to qualify for priority under ~~this section~~ subsection (d) a purchaser of an instrument need only give “value” as defined in Section ~~1-201~~ 1-204; it need not give “new value.” Also, the purchaser need not purchase the instrument in the ordinary course of its business.

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#### 10. **Assignment of Non-Lease Chattel Paper.**

\* \* \*

b. **Dealer’s Outright Sale of Chattel Paper to SP-2.** Article 9 also applies to a transaction whereby SP-2 buys the chattel paper in an outright sale transaction without recourse against Dealer. Sections ~~1-201(37)~~ 1-201(b)(35), 9-109(a). Although Dealer does not, in such a transaction, retain any residual ownership interest in the chattel paper, the chattel paper constitutes proceeds of the goods to which SP-1’s security interest will attach and continue following the sale of the goods. Section 9-315(a). Even though Dealer has not retained any interest in the chattel paper, as discussed above BIOCOP subsequently may return the goods to Dealer under circumstances whereby Dealer reacquires an interest in the goods. The priority contest between SP-1 and SP-2 will be resolved as discussed above; Section 9-330 makes no distinction among purchasers of chattel paper on the basis of whether the purchaser is an outright buyer of chattel paper or one whose security interest secures an obligation of Dealer.

11. **Assignment of Lease Chattel Paper.** As defined in Section 9-102, “chattel paper” includes not only ~~writings that evidence security interests in rights to payment secured by specific goods but also those that evidence rights to payment owed by a lessee under a true lease~~ lease of goods.

\* \* \*

**Section 9-331. Priority of Rights of Purchasers of Controllable Accounts, Controllable Electronic Records, Controllable Payment Intangibles, Instruments, Documents, Instruments, and Securities Under Other Articles; Priority of Interests in Financial Assets and Security Entitlements and Protection Against Assertion of Claim Under ~~Article 8~~ Articles 8 and 12.**

(a) **[Rights under Articles 3, 7, and 8, and 12 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, or a qualifying purchaser of a controllable account, controllable electronic record, or controllable payment

intangible. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, ~~and 8,~~ and 12.

(b) [**Protection under ~~Article 8~~ Articles 8 and 12.**] 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 or 12.

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### Official Comment

\* \* \*

3. \* \* \*

The state-law Uniform Electronic Transactions Act (UETA) and the federal Electronic Signature in Global and National Commerce Act, 15 U.S.C. §§ 7001 *et seq.* (E-SIGN), provide certain rules for records referred to and defined as “transferable records.” See UETA Section 16 and E-SIGN, 15 U.S.C. § 7021. When certain conditions have been met, those acts confer on a person the status of a “holder” (as defined in 1-201(b)(21), formerly Section 1-201(20)) of an “equivalent record” under pre-1998 Section 9-308 (now, in part, Section 9-330) and the rights and defenses of a “purchaser” under that section, among other effects. E-SIGN also refers to the rights and defenses of a purchaser under Section 9-330. As a matter of the application of the Uniform Commercial Code, those are not the only sections of the Uniform Commercial Code that would logically be affected by UETA and E-SIGN. For example, the rights of a holder in due course under Section 9-331(a) would also be covered by the application of those acts, when the conditions for applicability have been satisfied.

\* \* \*

### **Section 9-332. Transfer of Money; Transfer of Funds from Deposit Account.**

(a) [**Transferee of tangible money.**] A transferee of tangible money takes the money free of a security interest ~~unless the transferee acts~~ if the transferee receives possession of the money without acting in collusion with the debtor in violating the rights of the secured party.

(b) [**Transferee of funds from deposit account.**] A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account ~~unless the transferee acts~~ if the transferee receives the funds without acting in collusion with the debtor in violating the

rights of the secured party.

(c) [Transferee of electronic money.] A transferee of electronic money takes the money free of a security interest if the transferee obtains control of the money without acting in collusion with the debtor in violating the rights of the secured party.

### Official Comment

\* \* \*

**2. Scope of this Section.** This section affords broad protection ~~to for transferees who take of money and of funds from a deposit account and to those who take money.~~ to take free of a security interest.

**2A. Meaning of “Transfer.”** The term “transferee” is not defined; however, the debtor itself is not a transferee. Thus this section does not cover the case in which a debtor withdraws money (currency) from its deposit account or the case in which a bank debits an encumbered account and credits another account it maintains for the debtor.

A “transfer” of property occurs when the transferee has obtained a property interest in the relevant property. See Section 9-102, Comment 2.b.1 (“Several provisions of this Article and its official comments also refer to the ‘transfer’ of *property* interests.” (emphasis added)). Other law determines when the transferee has acquired a property interest. See Section 9-408, Comment 3 (“Other law determines whether a debtor has a property interest (‘rights in the collateral’) and the nature of that interest.”). Although the terms “transfer” and “transferee” are not defined in the UCC, the term “transfer” is broader in scope than “purchase,” which requires taking in a “voluntary transaction creating an interest in property.” Section 1-201(b)(29). For example, “transfer” includes an involuntary transfer such as the acquisition of a judicial lien by a lien creditor. See Section 9-102(a)(52) (defining “lien creditor”). However, many references to a “transfer” in the UCC and official comments relate to a voluntary transfer to a purchaser, as indicated by the context.

**2B. Transferees of Tangible Money.** Subsection (a) conditions the take-free rule on the transferee’s receipt of possession of tangible money. This reflects what had always been assumed under the pre-2022 text—that a transfer of an interest in tangible money which is not accompanied by a physical transfer of possession would not impair the rights of third parties.

**2C. Transferees of Funds from Deposit Account.** Subsection (b) reflects the corresponding change for a transfer of funds from a deposit account. To qualify for the take-free protection under subsection (b), the transferee must “receive[] the funds without acting in collusion . . .” The amendments to subsections (a) and (b) clarify what was implicit under the original text. Although “funds” is not defined in the UCC, if deposit accounts with a central bank or another bank were to become money, as defined in Section 1-201(b)(24), transfers from such deposit accounts would be covered by subsection (b) and not subsection (c) (discussed in



Comment 2.D.). See Section 9-102(a)(54A) (defining “money,” for purposes of Article 9, to exclude deposit accounts).

\* \* \*

**Example 2:** Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. At Bank B’s suggestion, Debtor moves the funds from the account at Bank A to Debtor’s deposit account with Bank B. Unless Bank B acted in collusion with Debtor in violating Lender’s rights, Bank B takes the funds (the credits running in favor of Bank B) free from Lender’s security interest. See subsection (b). However, inasmuch as the deposit account maintained with Bank B constitutes the proceeds of the deposit account at Bank A, Lender’s security interest would attach to that account as proceeds. See Section 9-315.

Subsection (b) also would apply if, in ~~the example~~ these examples, Bank A debited Debtor’s deposit account in exchange for the issuance of Bank A’s cashier’s check. Lender’s security interest would attach to the cashier’s check as proceeds of the deposit account, and the rules applicable to instruments would govern any competing claims to the cashier’s check. See, e.g., Sections 3-306, 9-322, 9-330, 9-331.

If Debtor withdraws ~~money (currency)~~ funds from an encumbered deposit account, receives the funds in the form of tangible money, and transfers the money to a third party, then subsection (a), to the extent not displaced by federal law relating to money, applies to the transfer. It contains substantially the same rule as subsection (b).

Subsection (b) applies to *transfers of funds from* a deposit account; it does not apply to *transfers of the deposit account* itself or of an interest therein. Because a deposit account is a monetary obligation (debt) of the depository bank to its depositor, a transfer of the deposit account itself does not transfer the funds credited to the deposit account. For example, this section does not apply to the creation of a security interest in a deposit account. Competing claims to the deposit account itself are dealt with by other Article 9 priority rules. See Sections 9-317(a), 9-327, 9-340, 9-341. Similarly, a corporate merger normally would not result in a transfer of funds from a deposit account. Rather, it might result in a transfer of the deposit account itself. If so, the normal rules applicable to transferred collateral would apply; this section would not.

The depositor’s creditors (whether secured parties or lien creditors) do not have any interest in any funds (or any other assets of the depository bank) as a result of having an interest in the deposit account (the right to payment of the bank’s obligation). Consequently, a transferee of funds that takes free of a security interest under subsection (b) does so whether the security interest in the deposit account from which the funds were transferred arises as original collateral or as proceeds.

A transferee of an interest in the deposit account, such as a garnishing lien creditor, does not take free of a security interest in a deposit account under subsection (b). A transferee takes free under subsection (b) only upon the actual receipt of funds from the deposit account. The

proper construction of subsection (b) rejects cases that treat garnishment of a deposit account as an immediate transfer of funds or an interest in funds credited to the deposit account.

The last event that provides a recovery for a creditor in a garnishment action virtually always would be a transfer of funds from a deposit account. However, this does not mean that a perfected security interest will always be cut off by a garnishing creditor. By intervening in the garnishment proceeding to assert its senior security interest before funds are disbursed, the secured party might assert and retain its priority. However, the relevant procedural law may not provide the secured party with adequate advance notice. In some cases, a control agreement that perfects a security interest in the deposit account may require the garnished bank to provide prompt notice to the secured party. But not all control agreements will so provide. Moreover, the secured party's priority is not absolute. See, e.g., Section 9-401, Comment 6 (explaining that the equitable doctrine of marshaling may be appropriate in the case of a lien creditor's interest in collateral when a senior secured party is oversecured).

**2D. Transferees of Electronic Money.** Because "electronic money" is new, no pattern of past practices or understandings exists. However, subsection (c) provides a take-free rule for electronic money that complements subsection (a) by conditioning the take-free rule on the transferee's obtaining control.

**2E. Temporal Aspect of Collusion Test.** For a transferee to take free of a security interest under this section the transferee must receive delivery of tangible money, receive funds from a deposit account, or obtain control of electronic money without acting in collusion. Whether the transferee is acting without collusion is determined as of the time of delivery to the transferee or receipt of funds or obtaining control by the transferee.

\* \* \*

**4. "Bad Actors."** To deal with the question of the "bad actor," this section borrows "collusion" language from Article 8. See, e.g., Sections 8-115, 8-503(e). This is the most protective (i.e., least stringent) of the various standards now found in the UCC. Compare, e.g., Section 1-201(b)(9) ("without knowledge that the sale violates the rights of another person," in the definition of "buyer in ordinary course of business"); Section 1-201(b)(20) (defining "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing"); Section 3-302(a)(2)(v) ("without notice of any claim").

\* \* \*

### **Section 9-334. Priority of Security Interests in Fixtures and Crops.**

\* \* \*

(f) [**Priority based on consent, disclaimer, or right to remove.**] A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or

owner of the real property if:

(1) the encumbrancer or owner has, in ~~an authenticated~~ a signed record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

\* \* \*

### **Official Comment**

\* \* \*

13. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

### **Section 9-341. Bank’s Rights and Duties with Respect to Deposit Account.**

Except as otherwise provided in Section 9-340(c), and unless the bank otherwise agrees in ~~an authenticated~~ a signed record, a bank’s rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by:

\* \* \*

### **Official Comment**

\* \* \*

6. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

### **Section 9-401. Alienability of Debtor’s Rights.**

\* \* \*

### **Official Comment**

\* \* \*

8. **Use of the Term “Assignment.”** “The term “assignment,” as used in this Article, refers to both an outright transfer of ownership and a transfer of an interest to secure an obligation. See Section 9-102, Comment 26 2.b.1; ~~to Section 9-102 and~~ PEB Commentary No. 21, ~~dated March 11, 2020.~~

### **Section 9-403. Agreement Not to Assert Defenses Against Assignee.**

\* \* \*

#### **Official Comment**

\* \* \*

3. **Conditions of Validation; Relationship to Article 3.** Subsection (b) validates an account debtor's agreement only if the assignee takes an assignment for value, in good faith, and without notice of conflicting claims to the property assigned or of certain claims or defenses of the account debtor. Like ~~former pre-1998~~ Section 9-206, this section is designed to put the assignee in a position that is no better and no worse than that of a holder in due course of a negotiable instrument under Article 3. However, ~~former pre-1998~~ Section 9-206 left open certain issues, e.g., whether the section incorporated the special Article 3 definition of "value" in Section 3-303 or the generally applicable definition in ~~Section 1-201(44)~~ Article 1 (Section 1-204). Subsection (a) addresses this question; it provides that "value" has the meaning specified in Section 3-303(a). Similarly, subsection (c) provides that subsection (b) does not validate an agreement with respect to defenses that could be asserted against a holder in due course under Section 3-305(b) (the so-called "real" defenses). In 1990, the definition of "holder in due course" (Section 3-302) and the articulation of the rights of a holder in due course (Sections 3-305 and 3-306) were revised substantially. This section tracks more closely the rules of Sections 3-302, 3-305, and 3-306.

\* \* \*

### **Section 9-404. Rights Acquired by Assignee; Claims and Defenses Against Assignee.**

(a) **[Assignee's rights subject to terms, claims, and defenses; exceptions.]** Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:

\* \* \*

(2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment ~~authenticated~~ signed by the assignor or the assignee.

\* \* \*

## Official Comment

\* \* \*

6. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

### **Section 9-406. Discharge of Account Debtor; Notification of Assignment; Identification and Proof of Assignment; Restrictions on Assignment of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes Ineffective.**

(a) **[Discharge of account debtor; effect of notification.]** Subject to subsections (b) through (i) and (l), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, ~~authenticated~~ signed by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) **[When notification ineffective.]** Subject to ~~subsection~~ subsections (h) and (l), notification is ineffective under subsection (a):

\* \* \*

(c) **[Proof of assignment.]** Subject to ~~subsection~~ subsections (h) and (l), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a).

(d) **[Term restricting assignment generally ineffective.]** In this subsection,

“promissory note” includes a negotiable instrument that evidences chattel paper. Except as otherwise provided in subsections (e) and (k) and Sections 2A-303 and 9-407, and subject to subsection (h), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

\* \* \*

(g) **[Subsection (b)(3) not waivable.]** Subject to ~~subsection~~ subsections (h) and (l), an account debtor may not waive or vary its option under subsection (b)(3).

\* \* \*

**(l) [Inapplicability of certain subsections.]** Subsections (a), (b), (c), and (g) do not apply to a controllable account or controllable payment intangible.

**Legislative Note:**

In 2018, a new subsection (k) was added to Section 9-406. A state that has not previously enacted that subsection should consider doing so in connection with the enactment of the 2022 Amendments.

**Official Comment**

\* \* \*

**2. Account Debtor’s Right to Pay Assignor Until Notification.** Subsection (a) provides the general rule concerning an account debtor’s right to pay the assignor until the account debtor receives appropriate notification. The revision makes clear that once the account debtor receives the notification, the account debtor cannot discharge its obligation by paying the assignor. It also makes explicit that payment to the assignor before notification, or payment to the assignee after notification, discharges the obligation. No change in meaning from ~~former~~ pre-1998 Section 9-318 is intended. Nothing in this section conditions the effectiveness of a notification on the identity of the person who gives it. An account debtor that doubts whether the right to payment has been assigned may avail itself of the procedures in subsection (c). See Comment 4. As to the rights and powers of an assignee generally, see Section 9-102(a)(7A) (defining “assignee”), (7B) (defining “assignor”), and Comment 2.b.1.

An effective notification under subsection (a) must be ~~authenticated~~ signed. This requirement normally could be satisfied by sending notification on the notifying person’s letterhead or on a form on which the notifying person’s name appears. In each case the printed name would be a symbol adopted by the notifying person for the purpose of identifying the

person and adopting the notification. See Section ~~9-102~~ 1-201(b)(37) (defining “~~authenticate~~” “sign”).

\* \* \*

**5. Contractual Restrictions on Assignment.** ~~Former~~ Pre-1998 Section 9-318(4) rendered ineffective an agreement between an account debtor and an assignor which prohibited assignment of an account (whether outright or to secure an obligation) or prohibited a security assignment of a general intangible for the payment of money due or to become due. Subsection (d) essentially follows ~~former~~ pre-1998 Section 9-318(4), but expands the rule of free assignability to chattel paper (subject to Sections 2A-303 and 9-407) and promissory notes and explicitly overrides both restrictions and prohibitions of assignment. The policies underlying the ineffectiveness of contractual restrictions under this section build on common-law developments that essentially have eliminated legal restrictions on assignments of rights to payment as security and other assignments of rights to payment such as accounts and chattel paper. Any that might linger for accounts and chattel paper are addressed by ~~new~~ subsection (f). See Comment 6.

The first sentence of subsection (d) ensures that the subsection applies to a negotiable instrument that would be a promissory note but for (i) the exclusion of writings that evidence chattel paper from the definition of “instrument” (Section 9-102(a)(47), as revised in 2022) and (ii) the definition of “promissory note” (Section 9-102(a)(65)) as a subset of “instrument.” That sentence also ensures that subsection (d) applies to an obligor on such a negotiable instrument, even though the obligor is not an “account debtor” (Section 9-102(a)(3)). The sentence restores the scope of subsection (d) to apply to all obligations and obligors on chattel paper, as was the case prior to the revision of the definition of “instrument.

\* \* \*

**10. Inapplicability to Certain Ownership Interests.** ~~This section does~~ Subsection (k) provides that subsections (d), (f), and (j) do not apply to a security interest in an ownership interest in a limited liability company, limited partnership, or general partnership, regardless of the name of the interest and whether the interest: (i) pertains to economic rights, governance rights, or both; (ii) arises under: (a) an operating agreement, the applicable limited liability company act, or both; or (b) a partnership agreement, the applicable partnership act, or both; or (iii) is owned by: (a) a member of a company or transferee or assignee of a member; or (b) a partner or a transferee or assignee of a partner; or (iv) comprises contractual, property, other rights, or some combination thereof. Ownership interests referred to in subsection (k) include interests in a series of a limited liability company, limited partnership, or general partnership, if the series is a “person” (Section 1-201(b)(27)).

**11. Controllable Accounts and Controllable payment intangibles.** For controllable accounts and controllable payment intangibles, subsection (l) recognizes that subsections (a), (b), (c) and (g) are replaced by analogous provisions in Section 12-106.

**12. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in

the pre-2022 text of this section.

**Section 9-408. Restrictions on Assignment of Promissory Notes, Health-Care-Insurance Receivables, and Certain General Intangibles Ineffective.**

\* \* \*

(g) [“Promissory note.”] In this section, “promissory note” includes a negotiable instrument that evidences chattel paper.

\* \* \*

***Legislative Note:*** \* \* \*

In 2018, a new subsection (f) was added to Section 9-408. A state that has not previously enacted that subsection should consider doing so in connection with the enactment of the 2022 Amendments.

**Official Comment**

\* \* \*

11. Subsection (g) ensures that this section applies to a negotiable instrument that would be a promissory note but for (i) the exclusion of writings that evidence chattel paper from the definition of “instrument” (Section 9-102(a)(47), as revised in 2022) and (ii) the definition of “promissory note” (Section 9-102(a)(65)) as a subset of “instrument.” See Section 9-406, Comment 5.

**Section 9-502. Contents of Financing Statement; Record of Mortgage as Financing Statement; Time of Filing Financing Statement.**

\* \* \*

**Official Comment**

\* \* \*

**3. Debtor’s Signature; Required Authorization.** \* \* \*

\* \* \*



Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this Article. See Sections 1-103 and 9-509, Comment 3. However, under Section 9-509(b), the debtor's ~~authentication~~ signing of (or becoming bound by) a security agreement *ipso facto* constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization. *Amendment approved by the Permanent Editorial Board for Uniform Commercial Code December 31, 2001.*

\* \* \*

**Section 9-508. Effectiveness of Financing Statement if New Debtor Becomes Bound by Security Agreement.**

\* \* \*

**Official Comment**

\* \* \*

**3. How New Debtor Becomes Bound.** Normally, a security interest is unenforceable unless the debtor has ~~authenticated~~ signed a security agreement describing the collateral. See Section 9-203(b). ~~New~~ Section 9-203(e) creates an exception, under which a security agreement entered into by one person is effective with respect to the property of another. This exception comes into play if a “new debtor” becomes bound as debtor by a security agreement entered into by another person (the “original debtor”). (The quoted terms are defined in Section 9-102.) If a new debtor does become bound, then the security agreement entered into by the original debtor satisfies the security-agreement requirement of Section 9-203(b)(3) as to existing or after-acquired property of the new debtor to the extent the property is described in the security agreement. In that case, no other agreement is necessary to make a security interest enforceable in that property. See Section 9-203(e).

\* \* \*

**Section 9-509. Persons Entitled to File a Record.**

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

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

\* \* \*

(b) [Security agreement as authorization.] By ~~authenticating~~ signing or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

\* \* \*

### Official Comment

\* \* \*

3. **Unauthorized Filings.** Records filed in the filing office do not require signatures for their effectiveness. Subsection (a)(1) substitutes for the debtor's signature on a financing statement the requirement that the debtor authorize in ~~an authenticated~~ a signed record the filing of an initial financing statement or an amendment that adds collateral. Also, under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment. A person who files an unauthorized record in violation of subsection (a)(1) is liable under Section 9-625(b) and (e) for actual and statutory damages. Of course, a filed financing statement is ineffective to perfect a security interest if the filing is not authorized. See Section 9-510(a). Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section. See Sections 1-103, 9-502, Comment 3. This Article applies to other issues, such as the priority of a security interest perfected by the filing of a financing statement. See Section 9-322, Comment 4. *Amendment approved by the Permanent Editorial Board for Uniform Commercial Code December 31, 2001.*

4. ***Ipsa Facto* Authorization.** Under subsection (b), the ~~authentication~~ signing of a security agreement *ipso facto* constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization. Similarly, a new debtor's becoming bound by a security agreement *ipso facto* constitutes the new debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement by which the new debtor has become bound. And, under subsection (c), the acquisition of collateral in which a security interest continues after disposition under Section 9-315(a)(1) *ipso facto* constitutes an authorization to file an initial financing statement against the person who acquired the collateral. The authorization to file an initial financing statement also constitutes an authorization to file a record covering actual proceeds of the original collateral, even if the security agreement is silent as to proceeds.

**Example 1:** Debtor ~~authenticates~~ signs a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory and accounts. The financing statement is authorized insofar as it covers inventory and unauthorized insofar as it covers accounts. (Note, however, that the

financing statement will be effective to perfect a security interest in accounts constituting proceeds of the inventory to the same extent as a financing statement covering only inventory.)

**Example 2:** Debtor ~~authenticates~~ signs a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory. Debtor sells some inventory, deposits the buyer's payment into a deposit account, and withdraws the funds to purchase equipment. As long as the equipment can be traced to the inventory, the security interest continues in the equipment. See Section 9-315(a)(2). However, because the equipment was acquired with cash proceeds, the financing statement becomes ineffective to perfect the security interest in the equipment on the 21st day after the security interest attaches to the equipment unless Secured Party continues perfection beyond the 20-day period by filing a financing statement against the equipment or amending the filed financing statement to cover equipment. See Section 9-315(d). Debtor's ~~authentication~~ signing of the security agreement authorizes the filing of an initial financing statement or amendment covering the equipment, which is "property that becomes collateral under Section 9-315(a)(2)." See Section 9-509(b)(2).

\* \* \*

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

\* \* \*

**9. "Signed" and "Signing" Replace "Authenticated" and "Authenticating."**  
Consistent with the revised definition of "sign" in Section 1-201, the cognate terms "signed" and "signing" replace the references to "authenticated" and "authenticating" in the pre-2022 text of this section.

#### **Section 9-513. Termination 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:

\* \* \*

(2) if earlier, within 20 days after the secured party receives ~~an authenticated~~ a signed demand from a debtor.

(c) [**Other collateral.**] In cases not governed by subsection (a), within 20 days after a secured party receives ~~an authenticated~~ a signed 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:

\* \* \*

### Official Comment

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#### 2. **Duty to File or Send.** \* \* \*

\* \* \*

References to a “termination statement” in this section and in Part 5 generally should be interpreted functionally, based on the purposes of the termination. A termination statement includes any amendment that meets the definition of that term by containing an indication that the amendment “is a termination statement” or that the identified financing statement “is no longer effective.” Section 9-102(a)(80). The amendment may terminate the effectiveness of a financing statement in whole or in part. For example, if a person did not authorize the filing of a financing statement against it as debtor, under subsection (a)(2) and (c)(4) the person may demand that the financing statement be terminated *as to that person*, even if the financing statement remains of record and effective as to one or more other persons named as debtors in the financing statement. Such a termination statement may take the form of an amendment that deletes the person as a debtor. Similarly, if a person authorized the filing of a financing statement as to some collateral but not as to other property identified as collateral on the financing statement, the person may demand that the financing statement be terminated *as to the unauthorized identified collateral*, even if the financing statement remains of record and effective as to other identified collateral. Such a termination statement may take the form of an amendment that deletes the unauthorized identified collateral from coverage of the financing statement. Even if such amendments do not indicate explicitly that they are termination statements, they would nonetheless indicate that the financing statement “is no longer effective” to the extent specified and fall within the definition of “termination statement.”

3. **“Bogus” Filings.** A secured party’s duty to send a termination statement arises when the secured party “receives” ~~an authenticated~~ a signed demand from the debtor. In the case of an

unauthorized financing statement, the person named as debtor in the financing statement may have no relationship with the named secured party and no reason to know the secured party's address. Inasmuch as the address in the financing statement is "held out by [the person named as secured party in the financing statement] as the place for receipt of such communications [i.e., communications relating to security interests]," the putative secured party is deemed to have "received" a notification delivered to that address. See Section 1-202(e). If a termination statement is not forthcoming, the person named as debtor itself may authorize the filing of a termination statement, which will be effective if it indicates that the person authorized it to be filed. See Sections 9-509(d)(2), ~~9-510(e)~~ 9-510(a).

\* \* \*

**6. "Signed" Replaces "Authenticated."** Consistent with the revised definition of "sign" in Section 1-201, the cognate term "signed" replaces the references to "authenticated" in the pre-2022 text of this section.

#### **Section 9-516. What Constitutes Filing; Effectiveness of Filing.**

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#### **Official Comment**

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**4. Method or Medium of Communication.** Rejection pursuant to subsection (b)(1) for failure to communicate a record properly should be understood to mean noncompliance with procedures relating to security, ~~authentication~~ signing, or other communication-related requirements that the filing office may impose. Subsection (b)(1) does not authorize a filing office to impose additional substantive requirements. See Section 9-520, Comment 2.

\* \* \*

#### **Section 9-601. Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.**

\* \* \*

(b) **[Rights and duties of secured party in possession or control.]** A secured party in possession of collateral or control of collateral under Section 7-106, 9-104, 9-105, 9-105A, 9-106, ~~or 9-107~~, or 9-107A has the rights and duties provided in Section 9-207.

\* \* \*

## Section 9-602. Waiver and Variance of Rights and Duties.

\* \* \*

### Official Comment

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5. **Certain Post-Default Waivers.** Section 9-624 permits post-default waivers in limited circumstances. These waivers must be made in agreements that are ~~authenticated~~ signed. Under Section 1-201, an “‘agreement’ means the bargain of the parties in fact.” In considering waivers under Section 9-624 and analogous agreements in other contexts, courts should carefully scrutinize putative agreements that appear in records that also address many additional or unrelated matters.

## Section 9-605. Unknown Debtor or Secondary Obligor.

~~A~~ (a) [In general: No duty owed by secured party.] Except as provided in subsection

(b), a secured party does not owe a duty based on its status as secured party:

\* \* \*

(b) [Exception: Secured party owes duty to debtor or obligor.] A secured party owes a duty based on its status as a secured party to a person if, at the time the secured party obtains control of collateral that is a controllable account, controllable electronic record, or controllable payment intangible or at the time the security interest attaches to the collateral, whichever is later:

(1) the person is a debtor or obligor; and

(2) the secured party knows that the information in subsection (a)(1)(A), (B), or (C) relating to the person is not provided by the collateral, a record attached to or logically associated with the collateral, or the system in which the collateral is recorded.

### Official Comment

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2. **Duties to Unknown Persons and Limitation of Liability.** This section relieves a secured party from duties owed to a debtor or obligor if the secured party does not know about the debtor or obligor. Similarly, it relieves a secured party from duties owed to a secured party or lienholder who has filed a financing statement against the debtor if the secured party does not know about the debtor. Section 9-628(a) and (b) provide analogous limitations of liability. For example, a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner has become the debtor. If so, the secured party owes no duty to the new owner (debtor) or to a secured party who has filed a financing statement against the new owner. ~~This section should be read in conjunction with the exculpatory provisions in Section 9-628.~~ Note that this section relieves a secured party not only from duties arising under this Article but also from duties arising under other law by virtue of the secured party's status as such under this Article, unless the other law otherwise provides.

This section should be read in conjunction with the limitations on liability contained in the exculpatory provisions in subsections (a), (b), and (c) of Section 9-628. Without this group of provisions, a secured party could incur liability to unknown persons and under circumstances that would not allow the secured party to protect itself. The broadened definition of the term "debtor" underscores the need for these provisions. For example, as noted above, a debtor may dispose of collateral subject to a security interest, resulting in the transferee becoming a debtor, but the secured party may have no knowledge of the disposition or that the transferee has become a debtor. In that situation the secured party will have no means of giving notice to or accounting to the transferee debtor. Sections 9-605 and 9-628 contemplate such situations by relieving the secured party of its duties to the debtor and limiting the secured party's liability to the debtor.

3. **Exceptions to Relief from Duties and Limitation of Liability.** In some cases, lenders may extend secured credit without knowing, or having the ability to discover, the identity of their borrowers. Pre-2022 Sections 9-605(a) and 9-628(a) and (b) would excuse these secured parties from having duties to their debtors and obligors, including, for example, the duty to notify the debtor or secondary obligor before disposing of the collateral and the duty to account to the debtor for any surplus arising from a disposition, and would limit the secured parties' liability to their debtors and obligors. In many cases these debtors and obligors may be aware that their identities are unknown to their secured parties. By failing to make their identities and contact information known, these debtors and obligors may be impairing the ability of their secured parties to comply with their duties under Article 9. However, such debtor complicity notwithstanding, if secured parties were relieved of their duties in these circumstances, it would conflict with the policy of Section 9-602, which prohibits a waiver or variance of many rights of debtors and obligors and duties of secured parties.

Sections 9-605(b) and 9-628(f) reflect the policy that a secured party should not be free to avoid statutory duties or absolve itself from liability to a debtor or obligor when the secured party knows that the collateral, records attached to or logically associated with the collateral, and the system in which the collateral is recorded do not provide the secured party with the information necessary to fulfill its statutory duties. As discussed in the following paragraph, the secured party's knowledge that it may not be able to comply with its duties enables the secured party to protect itself from being in breach of these duties. (A person has knowledge of or knows a fact if it has "actual knowledge." Section 1-202(b).) The exceptions from the exculpatory

protections otherwise afforded to secured parties are determined by the secured party's knowledge at the later of the time the secured party obtains control of a controllable account, controllable electronic record, or controllable payment intangible or the time that the security interest attaches to the collateral.

Obtaining control or attachment of the security interest serves as a rough proxy for the context in which a secured party may know that it may be unable to comply with its duties, usually because the transferor is pseudonymous. The carve-out from the exculpatory protection is limited to duties owed to and liability to a debtor—the transferor of a controllable account, controllable electronic record, or controllable payment intangible over which the secured party obtains control—or obligor. The secured party in such situations could protect itself by choosing not to enter into a transaction in which it might be unable to comply with its statutory duties or by conditioning its participation on disclosure of the debtor's or obligor's identity and contact information. Ideally, systems providing for the transfer of controllable electronic records would provide mechanisms that would permit compliance with such duties (such as methods of communication and making payments that would preserve a debtor's or obligor's pseudonymity, where that is desired). The amendments to Sections 9-605 and 9-628 provide incentives for system design that would allow for compliance with Article 9 duties.

Secured parties that enter into transactions with knowledge that they may not be able to comply with their Article 9 duties do so at their own peril. Of course, if a secured party possesses, or can obtain, the information necessary to comply with its duties, there is no need for the exculpation from those duties. Note, however, that the limitation on a secured party's relief from duties and liability relates only to secured transactions involving controllable accounts, controllable electronic records, or controllable payment intangibles. Designing systems for these assets that would afford secured parties with opportunities to comply with their Article 9 duties, as suggested above, could eliminate the risks to secured parties and also provide for the protection of debtors' and obligors' rights.

## **Section 9-608. Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus.**

(a) **[Application of proceeds, surplus, and deficiency if obligation secured.]** If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Section 9-607 in the following order to:

(A) the reasonable expenses of collection and enforcement 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;

(B) the satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives ~~an authenticated~~ a signed demand for proceeds before distribution of the proceeds is completed.

\* \* \*

### Official Comment

\* \* \*

6. **“Signed” Replaces “Authenticated.”** Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

### Section 9-610. Disposition of Collateral After Default.

\* \* \*

### Official Comment

\* \* \*

9. **“Recognized Market.”** A “recognized market,” as used in subsection (c)(2), ~~and Section 9-611(d), and Section 9-627(b)(1) and (2),~~ is one in which the items sold are fungible and ~~prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions, which generally produces market prices that are not lower than those that would be expected to result from, as applicable, (i)~~ commercially reasonable dispositions to persons other than the secured party, (ii) commercially reasonable dispositions made with otherwise required notifications to the debtor or other affected persons, or (iii) dispositions otherwise made in a commercially reasonable manner. (As used here, “fungible” items are those that are considered interchangeable in the relevant market and not only items that are strictly “identical” to the other items.) The intended goals of the recognized market exceptions are to ensure that neither the debtor nor other affected parties would be disadvantaged by the special treatment given to recognized markets and to facilitate the

efficiencies and cost savings that the special treatment may provide. The purpose of including in subsection (c)(2) collateral that is “the subject of widely distributed standard price quotations” and the criteria for determining whether price quotations meet this standard in subsection (c)(2) are the same as for a recognized market, although the availability of such standard price quotations may be based on, but distributed independently of, a “market” in which acquisitions and dispositions are made. Although a recognized market need not be subject to direct or indirect (e.g., self-regulatory) regulation or supervision, the existence of regulatory requirements or guidelines that are designed to arrive at prices consistent with those contemplated by subsection (c)(2) may provide useful guidance for applying the regulated market standard.

Traditionally, it has been understood that a market in which prices are individually negotiated is not a recognized market, even if the items are the subject of widely disseminated price guides (such as the Kelly Blue Book for automobiles) or are disposed of through specialized auctions (such as those conducted for dealers in livestock and automobiles). However, this does not suggest that, for example, dispositions at prices reflected in such guides or of livestock or automobiles at such auctions could not be commercially reasonable.

The New York Stock Exchange, NASDAQ, the Chicago Mercantile Exchange, and ICE Futures U.S., Inc. are examples of recognized markets. Such exchanges match buy and sell orders submitted by or on behalf of buyers and sellers that are not typically known to each other and do not involve individual negotiations. Other parties, such as inter-dealer brokers in the on-the-run U.S. Treasury market and broker-dealers in the equities market, often operate similar trading facilities that would likewise not involve known buyers or sellers or individual negotiations and may constitute recognized markets. These markets provide for robust trading with active bidding on fungible assets. There is no reason to believe that prices obtained on these markets would be less favorable to debtors, other obligors, and other interested persons than if collateral were disposed of in an off-market public or private disposition.

Trading environments generally referred to as “over-the-counter” or “OTC” markets, however, typically have involved prospective buyers and sellers that can know each other and have direct communication in order to make trades. Unlike typical exchanges, OTC markets normally do involve the individual negotiation of a price. See Carl S. Bjerre, *Investment Securities*, 71 Bus. Law. 1311, 1316-17 (2016) (contrasting exchanges and typical OTC markets for equity securities and explaining that OTC markets have tended to feature thinner markets with less liquidity and more variability of pricing).

In considering the recognized market exceptions, it is important to appreciate that recognized markets and other systems that produce equivalent “widely distributed standard price quotations” are not limited to traditional exchanges, such as those mentioned above. In particular, the exchange-OTC dichotomy no longer offers such a reliable, bright-line test for determining status as a recognized market or as a source of widely distributed standard price quotations. To be sure, some OTC markets do not qualify for the exceptions. However, recent years have witnessed a variety of new trading platforms, the use of new technologies, and new sources of providing and consuming information. There now exist markets, in particular for debt securities (including United States Treasury securities), that might be classified as OTC markets under the traditional taxonomy, but which qualify for the exceptions as recognized markets or as

sources of data for widely distributed standard price quotations. Market participants rely on prices provided by these markets to the same extent and for the same purposes (including in connection with default and enforcement of security interests) as they rely on prices generated by traditional securities and commodities exchanges. These prices are widely available from business publications and online sources as well as from private subscription-based service providers. It can safely be assumed that these financial markets and the data that they provide to the public will continue to evolve. The touchstone for determining whether a market structure is a recognized market or one that produces equivalent price quotations is a functional one. It is not based on the “type” of market (e.g., “exchange,” “OTC,” or other classification). It is based on whether the market or distribution of price quotations provides reliable and trusted data on prices consistent with the purposes of subsection (c)(2) and the corresponding provisions of Sections 9-611 and 9-627.

### **Section 9-611. Notification Before Disposition of Collateral.**

(a) [**“Notification date.”**] In this section, “notification date” means the earlier of the date on which:

(1) a secured party sends to the debtor and any secondary obligor ~~an authenticated~~ a signed notification of disposition; or

\* \* \*

(b) [**Notification of disposition required.**] Except as otherwise provided in subsection (d), a secured party that disposes of collateral under Section 9-610 shall send to the persons specified in subsection (c) a reasonable ~~authenticated~~ signed notification of disposition.

(c) [**Persons to be notified.**] To comply with subsection (b), the secured party shall send ~~an authenticated~~ a signed notification of disposition to:

\* \* \*

(3) if the collateral is other than consumer goods:

(A) any other person from which the secured party has received, before the notification date, ~~an authenticated~~ a signed notification of a claim of an interest in the collateral;

(B) any other secured party or lienholder that, 10 days before the

notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(i) identified the collateral;

(ii) was indexed under the debtor's name as of that date; and

(iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in Section 9-311(a).

\* \* \*

(e) [**Compliance with subsection (c)(3)(B).**] A secured party complies with the requirement for notification prescribed by subsection (c)(3)(B) if:

\* \* \*

(2) before the notification date, the secured party:

(A) did not receive a response to the request for information; or

(B) received a response to the request for information and sent ~~an~~

~~authenticated~~ a signed notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

### **Official Comment**

\* \* \*

2. **Reasonable Notification.** This section requires a secured party who wishes to dispose of collateral under Section 9-610 to send “a reasonable ~~authenticated~~ signed notification of disposition” to specified interested persons, subject to certain exceptions. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in

consumer-goods transactions).

\* \* \*

5. **Authentication Signature Requirement.** Subsections (b), and (c), and (e) explicitly provide that a notification of disposition notifications must be “authenticated.” “signed.” Some cases read ~~former~~ pre-1998 Section 9-504(3) as validating oral notification. Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in the pre-2022 text of this section.

\* \* \*

7. **Recognized Market; Perishable Collateral.** ~~New subsection~~ Subsection (d) makes it clear that there is no obligation to give notification of a disposition in the case of perishable collateral or collateral customarily sold on a recognized market (e.g., marketable securities). ~~Former Section 9-504(3) might be read (incorrectly) to relieve the secured party from its duty to notify a debtor but not from its duty to notify other secured parties in connection with dispositions of such collateral. As to what constitutes a recognized market, see Section 9-610, Comment 9.~~

\* \* \*

9. **Waiver.** A debtor or secondary obligor may waive the right to notification under this section only by a post-default ~~authenticated~~ signed agreement. See Section 9-624(a).

\* \* \*

## **Section 9-612. Timeliness of Notification Before Disposition of Collateral.**

\* \* \*

### **Official Comment**

\* \* \*

2. **Reasonable Notification.** Section 9-611(b) requires the secured party to send a “reasonable ~~authenticated~~ signed notification.” Under that section, as under ~~former~~ pre-1998 Section 9-504(3), one aspect of a reasonable notification is its timeliness. This generally means that the notification must be sent at a reasonable time in advance of the date of a public disposition or the date after which a private disposition is to be made. A notification that is sent so near to the disposition date that a notified person could not be expected to act on or take account of the notification would be unreasonable.

3. **Timeliness of Notification: Safe Harbor.** The 10-day notice period in subsection (b) is intended to be a “safe harbor” and not a minimum requirement. To qualify for the “safe harbor” the notification must be sent after default. A notification also must be sent in a

commercially reasonable manner. See Section 9-611(b) (“reasonable ~~authenticated~~ signed notification”). These requirements prevent a secured party from taking advantage of the “safe harbor” by, for example, giving the debtor a notification at the time of the original extension of credit or sending the notice by surface mail to a debtor overseas.

### **Section 9-613. Contents and Form of Notification Before Disposition of**

#### **Collateral: General.**

**(a) [Contents and form of notification.]** Except in a consumer-goods transaction, the following rules apply:

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

(A) describes the debtor and the secured party;

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

(C) states the method of intended disposition;

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

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

(2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) are nevertheless sufficient is a question of fact.

(3) The contents of a notification providing substantially the information specified in paragraph (1) are sufficient, even if the notification includes:

(A) information not specified by that paragraph; or

(B) minor errors that are not seriously misleading.

(4) A particular phrasing of the notification is not required.

(5) The following form of notification and the form appearing in Section ~~9-614(3)~~ 9-614(a)(3), when completed in accordance with the instructions in subsection (b) and

**NOTIFICATION OF DISPOSITION OF COLLATERAL**

To: \_\_\_\_\_ [Name of debtor, obligor, or other person to which the  
notification is sent]\_\_\_\_\_

From: \_\_\_\_\_ [Name, address, and telephone number of secured  
party]\_\_\_\_\_

Name of Debtor(s): \_\_\_\_\_ [Include only if debtor(s) are not an addressee]\_\_\_\_\_

[For a public disposition:]

We will sell [or lease or license, *as applicable*] the [describe collateral] [to the  
highest qualified bidder] in public as follows:

Day and Date: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

[For a private disposition:] \_\_\_\_\_

We will sell [or lease or license, *as applicable*] the [describe collateral] privately  
sometime after [day and date].

You are entitled to an accounting of the unpaid indebtedness secured by the property that  
we intend to sell [or lease or license, *as applicable*] [for a charge of \$ \_\_\_\_\_]. You may  
request an accounting by calling us at [telephone number]\_\_\_\_\_

## **NOTIFICATION OF DISPOSITION OF COLLATERAL**

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{1} Name of any debtor that is not an addressee: (Name of each debtor)

{2} We will sell (describe collateral) (to the highest qualified bidder) at public sale. A sale could include a lease or license. The sale will be held as follows:

(Date)

(Time)

(Place)

{3} We will sell (describe collateral) at private sale sometime after (date). A sale could include a lease or license.

{4} You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell or, as applicable, lease or license.

{5} If you request an accounting you must pay a charge of \$ (amount).

{6} You may request an accounting by calling us at (telephone number).

**[End of Form]**

**(b) [Instructions for form of notification.]** The following instructions apply to the form of notification in subsection (a)(5):

(1) The instructions in this subsection refer to the numbers in braces before items in the form of notification in subsection (a)(5). Do not include the numbers or braces in the notification. The numbers and braces are used only for the purpose of these instructions.

(2) Include and complete item {1} only if there is a debtor that is not an addressee of the notification and list the name or names.

(3) Include and complete either item {2}, if the notification relates to a public disposition of the collateral, or item {3}, if the notification relates to a private disposition of the collateral. If item {2} is included, include the words “to the highest qualified bidder” only if



applicable.

(4) Include and complete items {4} and {6}.

(5) Include and complete item {5} only if the sender will charge the recipient for an accounting.

### **Official Comment**

\* \* \*

2. **Contents of Notification.** To comply with the “reasonable ~~authenticated~~ signed notification” requirement of Section 9-611(b), the contents of a notification must be reasonable.  
\* \* \*

\* \* \*

3. **[Style Changes in Safe-Harbor Form and Medium Neutrality]** No change in substance is intended by the changes in style to the form provided in paragraph (5) of the pre-2022 text of this section. However, the presentation and explanation of how to use the form has been simplified and clarified.

### **Section 9-614. Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transaction.**

**(a) [Contents and form of notification.]** In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) the information specified in Section ~~9-613(1)~~ 9-613(a)(1);

(B) a description of any liability for a deficiency of the person to which the notification is sent;

(C) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 9-623 is available; and

(D) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed in accordance with the instructions in subsection (b), provides sufficient information:

~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[Name and address of secured party]~~

~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[Date]~~

#### **NOTICE OF OUR PLAN TO SELL PROPERTY**

~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[Name and address of any obligor who is also a debtor]~~

Subject: ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[Identification of Transaction]~~

We have your ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[describe collateral]~~, because you broke promises in our agreement.

~~[For a public disposition:]~~

We will sell ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[describe collateral]~~ at public sale. A sale could include a lease or license.

The sale will be held as follows:

Date: ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~

Time: ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~

Place: ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~

You may attend the sale and bring bidders if you want.

~~[For a private disposition:]~~

We will sell ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[describe collateral]~~ at private sale sometime after ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[date]~~. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you ~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~  
~~[will or will not, as applicable]~~ still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

~~You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].~~

~~If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] [or write us at [secured party's address]] and request a written explanation. [We will charge you \$        for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]~~

~~If you need more information about the sale call us at [telephone number] [or write us at [secured party's address]].~~

~~We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:~~

~~[Names of all other debtors and obligors, if any]~~

**{End of Form}**

(Name and address of secured party)

(Date)

### **NOTICE OF OUR PLAN TO SELL PROPERTY**

(Name and address of any obligor who is also a debtor)

Subject: (Identify transaction)

We have your (describe collateral), because you broke promises in our agreement.

{ 1 } We will sell (describe collateral) at public sale. A sale could include a lease or license. The sale will be held as follows:

(Date)

(Time)

(Place)

You may attend the sale and bring bidders if you want.

{2} We will sell (describe collateral) at private sale sometime after (date). A sale could include a lease or license.

{3} The money that we get from the sale, after paying our costs, will reduce the amount you owe. If we get less money than you owe, you (will or will not, as applicable) still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

{4} You can get the property back at any time before we sell it by paying us the full amount you owe, not just the past due payments, including our expenses. To learn the exact amount you must pay, call us at (telephone number).

{5} If you want us to explain to you in (writing) (writing or in (description of electronic record)) (description of electronic record) how we have figured the amount that you owe us, {6} call us at (telephone number) (or) (write us at (secured party's address)) (or contact us by (description of electronic communication method)) {7} and request (a written explanation) (a written explanation or an explanation in (description of electronic record)) (an explanation in (description of electronic record)).

{8} We will charge you \$ (amount) for the explanation if we sent you another written explanation of the amount you owe us within the last six months.

{9} If you need more information about the sale (call us at (telephone number)) (or) (write us at (secured party's address)) (or contact us by (description of electronic communication method)).

{10} We are sending this notice to the following other people who have an interest in

(describe collateral) or who owe money under your agreement:

(Names of all other debtors and obligors, if any)

**[End of Form]**

\* \* \*

**(b) [Instructions for form of notification.]** The following instructions apply to the form of notification in subsection (a)(3):

(1) The instructions in this subsection refer to the numbers in braces before items in the form of notification in subsection (a)(3). Do not include the numbers or braces in the notification. The numbers and braces are used only for the purpose of these instructions.

(2) Include and complete either item {1}, if the notification relates to a public disposition of the collateral, or item {2}, if the notification relates to a private disposition of the collateral.

(3) Include and complete items {3}, {4}, {5}, {6}, and {7}.

(4) In item {5}, include and complete any one of the three alternative methods for the explanation—writing, writing or electronic record, or electronic record.

(5) In item {6}, include the telephone number. In addition, the sender may include and complete either or both of the two additional alternative methods of communication—writing or electronic communication—for the recipient of the notification to communicate with the sender. Neither of the two additional methods of communication is required to be included.

(6) In item {7}, include and complete the method or methods for the explanation—writing, writing or electronic record, or electronic record—included in item {5}.

(7) Include and complete item {8} only if a written explanation is included in

item {5} as a method for communicating the explanation and the sender will charge the recipient for another written explanation.

(8) In item {9}, include either the telephone number or the address or both the telephone number and the address. In addition, the sender may include and complete the additional method of communication—electronic communication—for the recipient of the notification to communicate with the sender. The additional method of electronic communication is not required to be included.

(9) If item {10} does not apply, insert “None” after “agreement:”.

### **Official Comment**

\* \* \*

4. **[Style Changes in Safe-Harbor Form and Medium Neutrality]** No change in substance is intended by the changes in style to the form provided in paragraph (3) of the pre-2022 text of this section, except that in furtherance of medium neutrality references to “electronic record” and “electronic communication method” have been added to the form. However, the presentation and explanation of how to use the form has been simplified and clarified.

### **Section 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:

\* \* \*

(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~~ a signed 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~~ a signed demand for proceeds before distribution of the proceeds is completed.

\* \* \*

### Official Comment

\* \* \*

8. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

### Section 9-616. Explanation of Calculation of Surplus or Deficiency.

(a) [Definitions.] In this section:

(1) “Explanation” means a ~~writing~~ record that:

(A) states the amount of the surplus or deficiency;

(B) provides an explanation in accordance with subsection (c) of how the secured party calculated the surplus or deficiency;

(C) states, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and

(D) provides a telephone number or mailing address from which additional information concerning the transaction is available.

(2) “Request” means a record:

(A) ~~authenticated~~ signed by a debtor or consumer obligor;

(B) requesting that the recipient provide an explanation; and

(C) sent after disposition of the collateral under Section 9-610.

(b) **[Explanation of calculation.]** In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under Section 9-615, the secured party shall:

(1) send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

(A) before or when the secured party accounts to the debtor and pays any surplus or first makes ~~written~~ demand in a record on the consumer obligor after the disposition for payment of the deficiency; and

(B) within 14 days after receipt of a request; or

\* \* \*

(c) **[Required information.]** To comply with subsection (a)(1)(B), ~~a writing~~ an explanation must provide the following information in the following order:

\* \* \*

### Official Comment

\* \* \*

**2. Duty to Send Information Concerning Surplus or Deficiency.** This section reflects the view that, in every consumer-goods transaction, the debtor or obligor is entitled to know the amount of a surplus or deficiency and the basis upon which the surplus or deficiency was calculated. Under subsection (b)(1), a secured party is obligated to provide this information (an “explanation,” defined in subsection (a)(1)) no later than the time that it accounts for and pays a surplus or the time of its first ~~written attempt~~ demand in a record in an attempt to collect the deficiency. The obligor need not make a request for an accounting in order to receive an explanation. A secured party who does not attempt to collect a deficiency in ~~writing~~ a demand in a record or account for and pay a surplus has no obligation to send an explanation under subsection (b)(1) and, consequently, cannot be liable for noncompliance.



A debtor or secondary obligor need not wait until the secured party commences ~~written~~ collection efforts in a demand in a record in order to receive an explanation of how a deficiency or surplus was calculated. Subsection (b)(1)(B) obliges the secured party to send an explanation within 14 days after it receives a “request” (defined in subsection (a)(2)).

\* \* \*

**5. “Signed” Replaces “Authenticated”; Medium Neutrality.** Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section. In furtherance of medium neutrality, the reference in the pre-2022 text of this section to a “written demand” has been replaced by a reference to a “demand in a record” and the reference to a “writing” has been replaced by a reference to a “record.”

#### **Section 9-619. Transfer of Record or Legal Title.**

(a) [**“Transfer statement.”**] In this section, “transfer statement” means a record ~~authenticated~~ signed by a secured party stating:

\* \* \*

#### **Official Comment**

\* \* \*

**4. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

#### **Section 9-620. Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.**

(a) [**Conditions to acceptance in satisfaction.**] Except as otherwise provided in subsection (g), a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

\* \* \*

(2) the secured party does not receive, within the time set forth in subsection (d), a notification of objection to the proposal ~~authenticated~~ signed by:

(A) a person to which the secured party was required to send a proposal under Section 9-621; or

(B) any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;

\* \* \*

(b) [**Purported acceptance ineffective.**] A purported or apparent acceptance of collateral under this section is ineffective unless:

(1) the secured party consents to the acceptance in ~~an authenticated~~ a signed record or sends a proposal to the debtor; and

\* \* \*

(c) [**Debtor's consent.**] For purposes of this section:

(1) a debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record ~~authenticated~~ signed after default; and

(2) a debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record ~~authenticated~~ signed after default or the secured party:

(A) sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

(B) in the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

(C) does not receive a notification of objection ~~authenticated~~ signed by the

debtor within 20 days after the proposal is sent.

\* \* \*

(f) [**Compliance with mandatory disposition requirement.**] To comply with subsection (e), the secured party shall dispose of the collateral:

\* \* \*

(2) within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and ~~authenticated~~ signed after default.

\* \* \*

### Official Comment

\* \* \*

**3. Conditions to Effective Acceptance.** Subsection (a) contains the conditions necessary to the effectiveness of an acceptance of collateral. Subsection (a)(1) requires the debtor's consent. Under subsections (c)(1) and (c)(2), the debtor may consent by agreeing to the acceptance in writing after default. Subsection (c)(2) contains an alternative method by which to satisfy the debtor's-consent condition in subsection (a)(1). It follows the proposal-and-objection model found in ~~former~~ pre-1998 Section 9-505: The debtor consents if the secured party sends a proposal to the debtor and does not receive an objection within 20 days. Under subsection (c)(1), however, that silence is not deemed to be consent with respect to acceptances in partial satisfaction. Thus, a secured party who wishes to conduct a "partial strict foreclosure" must obtain the debtor's agreement in a record ~~authenticated~~ signed after default. In all other respects, the conditions necessary to an effective partial strict foreclosure are the same as those governing acceptance of collateral in full satisfaction. (But see subsection (g), prohibiting partial strict foreclosure of a security interest in consumer transactions.)

\* \* \*

**4. Proposals.** Section 9-102 defines the term "proposal." It is necessary to send a "proposal" to the debtor only if the debtor does not agree to an acceptance in ~~an authenticated a~~ signed record as described in subsection (c)(1) or (c)(2). Section 9-621(a) determines whether it is necessary to send a proposal to third parties. A proposal need not take any particular form as long as it sets forth the terms under which the secured party is willing to accept collateral in satisfaction. A proposal to accept collateral should specify the amount (or a means of calculating the amount, such as by including a per diem accrual figure) of the secured obligations to be satisfied, state the conditions (if any) under which the proposal may be revoked, and describe any other applicable conditions. Note, however, that a conditional proposal generally requires the debtor's agreement in order to take effect. See subsection (c).

**5. Secured Party's Agreement; No "Constructive" Strict Foreclosure.** The conditions of subsection (a) relate to actual or implied consent by the debtor and any secondary obligor or holder of a junior security interest or lien. To ensure that the debtor cannot unilaterally cause an acceptance of collateral, subsection (b) provides that compliance with these conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under subsection (b), acceptance does not occur unless, in addition, the secured party consents to the acceptance in ~~an authenticated~~ a signed record or sends to the debtor a proposal. For this reason, a mere delay in collection or disposition of collateral does not constitute a "constructive" strict foreclosure. Instead, delay is a factor relating to whether the secured party acted in a commercially reasonable manner for purposes of Section 9-607 or 9-610. A debtor's voluntary surrender of collateral to a secured party and the secured party's acceptance of possession of the collateral does not, of itself, necessarily raise an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation under this section.

\* \* \*

**10. Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes.** If the collateral is accounts, chattel paper, payment intangibles, or promissory notes, then a secured party's acceptance of the collateral in satisfaction of secured obligations would constitute a sale to the secured party. That sale normally would give rise to a new security interest (the ownership interest) under Sections ~~1-201(37)~~ 1-201(b)(35) and 9-109. In the case of accounts and chattel paper, the new security interest would remain perfected by a filing that was effective to perfect the secured party's original security interest. In the case of payment intangibles or promissory notes, the security interest would be perfected when it attaches. See Section 9-309. However, the procedures for acceptance of collateral under this section satisfy all necessary formalities and a new security agreement ~~authenticated~~ signed by the debtor would not be necessary.

\* \* \*

**13. "Signed" Replaces "Authenticated."** Consistent with the revised definition of "sign" in Section 1-201, the cognate term "signed" replaces the references to "authenticated" in the pre-2022 text of this section.

#### **Section 9-621. Notification Of Proposal to Accept Collateral.**

(a) [**Persons to which proposal to be sent.**] A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) any person from which the secured party has received, before the debtor consented to the acceptance, ~~an authenticated~~ a signed notification of a claim of an interest in the collateral;

\* \* \*

## Official Comment

\* \* \*

3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the pre-2022 text of this section.

### Section 9-624. Waiver.

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

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

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

## Official Comment

\* \* \*

3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in the pre-2022 text of this section.

**Section 9-627. Determination of Whether Conduct Was Commercially Reasonable.**

\* \* \*

## Official Comment

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4. **“Recognized Market.”** As in Sections 9-610(c) and 9-611(d), the concept of a “recognized market” in subsections (b)(1) and (2) is quite limited; it applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as (but not limited to) stock securities and commodities exchanges. See Section 9-610, Comment 9 (discussing standards for a “recognized market”).

## **Section 9-628. Nonliability and Limitation on Liability of Secured Party;**

### **Liability of Secondary Obligor.**

(a) **[Limitation of liability of secured party for noncompliance with article.]** ~~Unless~~  
Subject to subsection (f), unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

\* \* \*

(b) **[Limitation of liability based on status as secured party.]** ~~A~~ Subject to subsection (f), a secured party is not liable because of its status as secured party:

\* \* \*

**(f) [Exception: Limitation of liability under subsections (a) and (b) does not apply.]**  
Subsections (a) and (b) do not apply to limit the liability of a secured party to a person if, at the time the secured party obtains control of collateral that is a controllable account, controllable electronic record, or controllable payment intangible or at the time the security interest attaches to the collateral, whichever is later:

(1) the person is a debtor or obligor; and

(2) the secured party knows that the information in subsection (b)(1)(A), (B), or (C) relating to the person is not provided by the collateral, a record attached to or logically associated with the collateral, or the system in which the collateral is recorded.

### **Official Comment**

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2. **Exculpatory Provisions.** Subsections (a), (b), and (c) contain exculpatory provisions that should be read in conjunction with Section 9-605 and Comments. Without this group of provisions, a secured party could incur liability to unknown persons and under circumstances that would not allow the secured party to protect itself. The broadened definition of the term “debtor” underscores the need for these provisions. With respect to subsection (f), see Section 9-605, Comments 2 and 3.

\* \* \*

## **ARTICLE 12**

### **CONTROLLABLE ELECTRONIC RECORDS**

#### **Prefatory Note to Article 12**

1. **Introduction to Controllable Electronic Records.** Article 12, which deals with controllable electronic records, and the conforming amendments to Articles 1 and 9, in particular, are a major part of the effort to adapt the UCC to emerging technologies as they might affect electronic commerce.

Article 12 creates a legal regime that is meant to apply more broadly than to electronic (intangible) assets that are created using existing technologies such as distributed ledger technology (DLT), including blockchain technology, which records transactions in bitcoin and other digital assets. It also aspires to apply to electronic assets that may be created using technologies that have yet to be developed, or even imagined.

The adoption of DLT has underscored two important trends in electronic commerce. First, people have begun to assign economic value to some electronic records that bear no relationship to extrinsic rights and interests. For example, without any law or legally enforceable agreement, people around the world have agreed to treat virtual currencies such as bitcoin (or, more precisely “transaction outputs” generated by the Bitcoin protocol) as a medium of exchange and store of value. Second, people are using the creation or transfer of electronic records to transfer rights to receive payment, rights to receive performance of other obligations (e.g., services or delivery of goods), and other rights and interests in personal and real property.

These trends will inevitably result in disputes among claimants to electronic records and their related rights and other benefits. Uncertainty as to the criteria for resolving these claims creates commercial risk. The magnitude of these risks will grow as these trends continue.

As explained in more detail below, Article 12 is designed to reduce these risks by providing legal rules governing the transfer—both outright and for security—of interests in some, but not all, electronic records (*controllable electronic records*). These rules specify certain rights in a controllable electronic record that a purchaser would acquire. Many systems for transferring controllable electronic records are pseudonymous, so that the transferee of a controllable electronic record may be unable to verify the identity of the transferor or the source of the transferor’s title. Accordingly, the Article 12 rules would make controllable electronic

records negotiable, in the sense that a qualifying good faith purchaser for value could take a controllable electronic record free of third-party claims of a property interest in the controllable electronic record.

Experience with DLT and other records-management systems has established some general functions required for electronic records to serve as an effective and reliable means of transferring economic value.

- The electronic record must have some “use” or benefit that one person can enjoy and can exclude all others from enjoying, e.g., the power to “spend” a bitcoin (or, more precisely, the power to include an unspent transaction output (a UTXO) in a message that the Bitcoin protocol will record to its blockchain).
- A person must be able to transfer to another person this exclusive power to use and the exclusive power to transfer the electronic record. To remain exclusive, the transfer must divest the transferor of the power to use the electronic record.
- A person must be able to demonstrate to others that the person has the power to use and transfer control of the electronic record.

As discussed in the Comments to Section 12-105, these functions form the basis of the Article 12 concept of *control*. To receive the benefits of negotiability and take free of third-party claims of a property interest in a controllable electronic record, a person must have control of the controllable electronic record. In addition, control serves as a method of perfection of a security interest in a controllable electronic record and as a condition for achieving a non-temporal priority of a security interest. In this context, it may be useful to think of control as the functional analogue of possession of tangible personal property such as goods. Note that the concept of control allows for certain exceptions to the exclusivity of powers.

Article 12 governs certain rights (primarily property rights) of transacting parties and other persons that might be affected by the transactions. Article 12 does not govern assets other than controllable electronic records except, in coordination with Article 9, controllable accounts and controllable payment intangibles evidenced by controllable electronic records (discussed below). Like the UCC in general, Article 12 is not a regulatory statute. The fact that an asset is or is not a controllable electronic record under the UCC would not necessarily affect the application of laws regulating, for example, banking, securities, commodities, money transmission, and taxation.

## **2. Scope of Article 12.**

Article 12 applies to *controllable electronic records*. Controllable electronic records are a subset of what often are referred to as digital assets. Article 12 is designed to work for both technologies that are known and those that may be developed in the future. Whether an asset is a controllable electronic record (and therefore within the scope of Article 12) depends on whether the characteristics of the asset and the protocols of any system on which the asset is recorded make it suitable for the application of Article 12’s substantive rules. The nature of electronic



commerce is constantly changing. For this reason, the technology on which an asset depends, the type of asset, and the prevailing use of the asset should all be irrelevant to whether the asset is a controllable electronic record.

To determine whether Article 12 applies to a particular asset, for example, bitcoin, one must determine whether the asset falls within the definition of *controllable electronic record*. A controllable electronic record is a *record*, as the UCC defines the term. A record is information that is retrievable in perceivable form. Section 1-201(b)(31) (defining “record”). A controllable electronic record is a record that is stored in an electronic medium and that can be subjected to *control*, as defined in Section 12-105. Sections 1-201(b)(16A) (defining “electronic”); 12-102(a)(1) (defining “controllable electronic record”). An electronic record that cannot be subjected to control under Section 12-105 is outside the scope of Article 12. As already mentioned, Article 12 addresses primarily certain property rights in controllable electronic records. Of course, that an electronic record is not subject to control does not imply that it does not have commercial utility. Businesses generate and sell or license large quantities of electronic records that do not require the attributes of negotiability that Article 12 affords to controllable electronic records.

The meaning of control in the UCC depends on the type of property involved. See Sections 7-106 (electronic documents of title); 8-106 (four different types of investment property, each with a different definition of “control”); 9-104 (deposit accounts); 9-105 (chattel paper); 9-105A (electronic money). The Comments to Section 12-105 explain the requirements for obtaining control of a controllable electronic record. For present purposes of exposition, it is sufficient to think of bitcoin and other virtual currencies as prototypical controllable electronic records. The provisions under other law that govern control and other matters for other types of electronic records (some of which are modified by these amendments) are not addressed by Article 12.

### **3. Substantive Provisions of Article 12.**

The principal function of Article 12 is to specify certain rights of a *purchaser* of a controllable electronic record. A purchaser is a person that acquires an interest in property by a voluntary transaction, such as a sale. Section 1-201(b)(29) (defining “purchase”), (30) (defining “purchaser”). Purchasers include both buyers and secured parties. Law other than Article 12 would determine whether a person acquires any rights in a controllable electronic record and so would be eligible to be a purchaser. Section 12-104(c).

Section 12-104 adopts the “shelter” principle, under which a purchaser of a controllable electronic record acquires whatever rights the transferor had or had power to transfer. Section 12-104(d). A similar rule appears in Articles 2, 3, 7, and 8. See Sections 2-403(1) (goods); 3-203(b) (negotiable instruments); 7-504(a) (documents of title); 8-302(a) (certificated and uncertificated securities).

The ability to take a controllable electronic record free of third-party property claims appears to be necessary for a controllable electronic record to have commercial utility. As is the case with Articles 2, 3, 7, and 9, Article 12 would facilitate commerce by affording to certain

good-faith purchasers for value (buyers as well as secured parties) greater rights than their transferors had or had power to transfer. (Article 8 also provides for certain purchasers for value to take greater rights than their transferors had, but does not contain an explicit good-faith requirement. See Section 8-303.) Article 12 refers to these purchasers as *qualifying purchasers*. Qualifying purchasers are purchasers that obtain control of a controllable electronic record for value, in good faith, and without notice of any claim of a property interest in the controllable electronic record. Section 12-102(a)(2). Like a holder in due course of a negotiable instrument, a qualifying purchaser of a controllable electronic record takes the controllable electronic record free of property claims. Section 12-104(e).

Consider an example in which *B* contracts to buy bitcoin from *S*.

- Law other than Article 12 generally would determine whether *S* is the owner of the bitcoin.
- Law other than Article 12 would resolve issues concerning the formation of the contract of sale between *B* and *S* and the obligations of the parties under the contract.
- Except to the extent provided by Article 12, law other than Article 12 would determine what steps are necessary for *B* to acquire rights in the bitcoin.
- By acquiring rights in the bitcoin by sale, *B* would become a purchaser of the bitcoin within the meaning of UCC Article 1.
- Article 12 provides that if *B* becomes a purchaser, *B* will acquire whatever rights *S* had or had power to transfer. As a general matter, law other than Article 12 would define these rights. *B* would acquire these rights regardless of whether *B* obtained control of the bitcoin.

In this example, law other than Article 12 includes UCC Article 9, which determines the steps necessary for a security interest to attach to a controllable electronic record. More generally, Article 9 governs any conflict between Article 9 and Article 12. Section 12-103(a).

Now assume that *O* is the owner of the bitcoin and that *S* is a hacker, who acquired control of the bitcoin illegally from *O*.

- Just as a buyer of goods can obtain possession from a seller that has no rights in the goods, *B* can obtain control of the bitcoin, even if *S* “stole” it from *O*.
- If *B* obtains control of the bitcoin for value, in good faith, and without notice of any claim of a property interest, *B* would be a qualifying purchaser.
- Even if *B* would not have acquired any rights in the bitcoin under non-Article 12 law (for example, because *S*, a “thief,” had no rights to give), as an Article 12 qualifying purchaser, *B* would acquire the bitcoin free of all claims of a property

interest in the bitcoin. *S*'s control of the bitcoin gave *S* the power to transfer rights to a qualifying purchaser, such as *B*. Even if *O* could locate *B*, *B* would defeat *O*'s claim of ownership and own the bitcoin free and clear. (The same result would obtain if *B* bought a negotiable instrument from a thief under circumstances where *B* became a holder in due course. This distinguishes "negotiable" property from property such as goods, as to which a buyer from a thief normally obtains no rights.)

#### 4. **Rights or Property Linked to a Controllable Electronic Record.**

##### a. **General Rules.**

Recall that a controllable electronic record is a record, i.e., information. Some records have what one might call "inherent value" solely because the market treats them as having value. Bitcoin would be an example of such a record. Bitcoin can be exchanged (sold) for cash or other valuable assets. Or, the owner of bitcoin can hold the bitcoin as an investment.

The value of many records, however, is as evidence of the rights of the parties to a transaction or of the rights of a party in other property. In these situations, it is essential to differentiate between the *record* and the *rights* that are evidenced by the record.

Suppose, for example, that *S* and *B* enter into a written contract for the sale of 100 air purifiers. The contract provides that at a specified time in the future, *S* is to deliver the goods and *B* is to pay for them. *B* may sell (assign) to *P* the right to receive delivery of the goods from *S*. *P* has acquired a valuable asset, i.e., the right to receive delivery.

In contrast, if *B* sells to *P* only the paper (record) on which the contract is written, *P* might or might not acquire the right to delivery of the goods, depending on whether applicable law treats the sale of the paper as an assignment of the right to delivery (as can be the case with a negotiable document of title under UCC Article 7). *P* would become the owner of the paper in any event, but the paper itself may be of little value.

If the contract for the sale of air purifiers were electronic rather than written, the same analysis would apply. The right evidenced by the electronic record (i.e., *B*'s right to receive delivery from *S*) would be the valuable asset, not the record itself.

Suppose that the contract of sale between *B* and *S* is evidenced by a controllable electronic record that *B* sells to *P*. Under Section 12-104(d), *P* would acquire all rights *in the controllable electronic record* that the transferor (*B*) had or had power to transfer. If *P* obtains control of the controllable electronic record for value, in good faith, and without notice of any claim of a property right in the controllable electronic record, *P* will become a qualifying purchaser and, as such, would acquire its rights *in the controllable electronic record* free of any claim of a property right under Section 12-104.

But the controllable electronic record itself may or may not be a valuable asset. In this example, unlike bitcoin, the record would have value to *P* only if by virtue of acquiring rights in

the controllable electronic record, *P* would also acquire the right to receive delivery of the goods from *S*.

Except to the extent provided by Article 12, that Article leaves to other law the question whether *P*'s acquisition of rights in the controllable electronic record gives *P* the right to receive delivery of the goods. Section 12-104(f). We would typically expect that under other law *P* would not acquire the right to receive the goods merely by acquiring rights in the controllable electronic record, any more than *P* would have acquired the right to receive the goods if the record were in paper form, the paper were physically delivered to *P*, and *P* acquired rights in the paper.

Suppose, however, that other law does provide that, by acquiring the controllable electronic record, *P* would acquire the right to receive delivery of the goods from *S*. Suppose also that *P* becomes a qualifying purchaser of the controllable electronic record. As we have seen, as a qualifying purchaser, *P* would take its rights in the controllable electronic record free of property claims. But even though under non-Article 12 law *P* would (as posited) acquire the right to receive delivery of the goods, *P* would not acquire that right free of property claims unless non-Article 12 law also were to provide otherwise. Section 12-104(f).

**b. Exceptions: Controllable Accounts and Controllable Payment Intangibles.**

As a general rule, Article 12 applies to records and not to rights evidenced by records (or to rights that records are purported to evidence). And, in general, law other than Article 12 would govern what steps must be taken or conditions must be satisfied for a person to acquire an interest in a controllable electronic record and the rights, if any, that the person acquires in other property (including a right to payment or performance of an obligation) as a result of acquiring an interest in the record. This "other" law includes UCC Article 9.

Article 12 provides an important exception to this general rule. The exception concerns rights to payment (specifically, accounts and payment intangibles) that are evidenced by a controllable electronic record and as to which the obligor (account debtor) undertakes to pay the person that has control of the controllable electronic record. These rights to payment are referred to as "controllable accounts" and "controllable payment intangibles." See Section 9-102(a)(27A) (defining "controllable account") and (27B) (defining "controllable payment intangible"). A qualifying purchaser of a controllable account or controllable payment intangible takes free of property claims and is protected from certain actions. See Section 12-104(a) through (e), (g), and (h), and Comments 6 through 10. As to the feasibility and rationale for this exception for controllable accounts and controllable payment intangibles, see Section 12-104, Comments 9 and 10.

The 2022 Article 9 Revisions amend several sections of Article 9 to deal with various aspects of security interests in controllable accounts, controllable electronic records, and controllable payment intangibles. See Sections 9-101, Comment 4.a.; 9-102, Comment 5.d.1.

**5. Governing Law for Article 12.**

Section 12-107 provides rules on governing law. The general rule under subsection (a) is that the local law of a “controllable electronic record’s jurisdiction” governs matters covered by Article 12. The controllable electronic record’s jurisdiction is determined by an express provision in the record or in the system in which the record is recorded. If not so designated, it is determined based on the designation of the law governing the record or the system generally. Absent any such designations, at the bottom of this “waterfall” of alternatives, the governing law will be that of the District of Columbia. Subsection (b) provides an exception for the rights and duties of account debtors under Section 12-106 if an agreement between the account debtor and an assignor of the record provides for the law of another jurisdiction to govern those rights and duties.

The law of the controllable electronic record’s jurisdiction also governs perfection and priority of security interests in controllable electronic records, controllable accounts, and controllable payment intangibles. Perfection by filing, however, is governed by the law of the location of the debtor. See Section 9-306B.

### **Section 12-101. Title.**

This article may be cited as Uniform Commercial Code—Controllable Electronic Records.

### **Official Comment**

**Subsection headings.** Subsection headings are not a part of the official text itself and have not been approved by the sponsors. See Section 1-107, Comment 1.

### **Section 12-102. Definitions.**

#### **(a) [Article 12 definitions.]**

In this article:

(1) “Controllable electronic record” means a record stored in an electronic medium that can be subjected to control under Section 12-105. The term does not include a controllable account, a controllable payment intangible, a deposit account, an electronic copy of a record evidencing chattel paper, an electronic document of title, electronic money, investment property, or a transferable record.

(2) “Qualifying purchaser” means a purchaser of a controllable electronic record or an interest in a controllable electronic record that obtains control of the controllable electronic

record for value, in good faith, and without notice of a claim of a property right in the controllable electronic record.

(3) “Transferable record” has the meaning provided for that term in:

(A) Section 201(a)(1) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7021(a)(1)[, as amended]; or

(B) [cite to Uniform Electronic Transactions Act Section 16(a)].

(4) “Value” has the meaning provided in Section 3-303(a), as if references in that subsection to an “instrument” were references to a controllable account, controllable electronic record, or controllable payment intangible.

(b) [Definitions in Article 9.] The definitions in Article 9 of “account debtor”, “controllable account”, “controllable payment intangible”, “chattel paper”, “deposit account”, “electronic money”, and “investment property” apply to this article.

(c) [Article 1 definitions and principles.] Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

*Legislative Note: It is the intent of this act to incorporate future amendments to the federal law cited in subsection (a)(3)(A). A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “[as amended]”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

*In subsection (a)(3)(B), the state should cite to the state’s version of the Uniform Electronic Transactions Act Section 16(a) or comparable state law.*

### **Official Comment**

1. **Source.** Subsection (a)(2), defining “qualifying purchaser,” derives from Section 3-302(a)(2), which defines “holder in due course” of a negotiable instrument.

2. **“Controllable electronic record.”** To be a “controllable electronic record” (CER) within the scope of Article 12, an electronic record must be susceptible of control under Section 12-105. Unlike “transferable records” under the Electronic Signatures in Global and National Commerce Act (E-SIGN) or a “transferable record” under the Uniform Electronic

Transactions Act (UETA), a record can be a CER under Article 12 in the absence of an agreement to that effect.

This definition uses the term “record,” defined in Section 1-201 to include “information . . . that is stored in an electronic or other medium and is retrievable in perceivable form.” The term “electronic” also is defined in Section 1-201. These broad definitions of “record” and “electronic” necessarily produce an expansive meaning of “electronic record.” An electronic record would include, for example, music stored on compact disks, email messages, digital photos, personal and other information stored on a social media platform, and all types of databases stored on in an electronic medium. But most of these electronic records typically would not fall within the definition of a CER in subsection (a)(1), which includes only those electronic records “that can be subjected to control under Section 12-105.” See generally Prefatory Note 2.

Consider, for example, a so-called “page” on a social media platform. Generalizations about social media/social networking platforms are difficult and these systems no doubt will continue to evolve. But these platforms typically involve licensing arrangements with users that do not permit the users (or anyone) to acquire the exclusive powers contemplated by the definition of “control” in Section 12-105. Consequently, these electronic records are not controllable electronic records as defined.

The provisions of Article 12 also do not apply to certain specified types of electronic records, and the definition has been limited accordingly. For example, the definition does not include a “transferable record” under E-SIGN or UETA. It also does not include “investment property,” as defined in Section 9-102(a)(49). For this reason, the rights of an entitlement holder in a controllable electronic record that is a financial asset with respect to which the entitlement holder has a security entitlement are excluded from the definition (although the entitlement holder’s securities intermediary may hold directly an interest in a controllable electronic record that it has credited to a securities account). See Sections 8-102(a)(9) (defining “financial asset”), (a)(14) (defining “securities intermediary”), (a)(17) (defining “security entitlement”), and Comment 9; 9-102(a)(49) (defining “investment property”). See also Section 8-103(h), clarifying that a controllable electronic record is not a “financial asset” except pursuant to Section 8-102(a)(9)(iii).

A controllable electronic record is not itself a “security,” defined in part in Section 8-102(a)(15) as “an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer.” It also is not “a share or similar equity interest,” an “investment company security,” or “an interest in a partnership or limited liability company.” See Section 8-103(a), (b), and (c). For a discussion of the roles that controllable electronic records may play in transactions involving uncertificated securities, see Section 8-102, Comment 18.

3. **“Qualifying purchaser.”** The conditions for becoming a qualifying purchaser were drawn from Article 3. More specifically, the conditions for becoming a qualifying purchaser were drawn from Section 3-302(a)(2), which defines “holder in due course” of a negotiable instrument. Among these conditions is that a person take the instrument “for value.”

See subsection (a)(4) (defining “value”) and Comment 5. To meet the requirements for a qualifying purchaser under subsection (a)(2) there must be a time at which all of the requirements are satisfied. For example, if a purchaser obtains notice of a claim of a property right before giving value or satisfying the requirements for control, the purchaser cannot be a qualifying purchaser.

Under Section 12-104(a), not only a purchaser of a controllable electronic record but also a purchaser of a controllable account or controllable payment intangible may be a qualifying purchaser. Moreover, a purchaser of a controllable account or a controllable payment intangible may be a qualifying purchaser even if the purchaser does not also purchase the controllable electronic record that evidences the account or payment intangible. For example, a secured party having a security interest in all of a debtor’s accounts and payment intangibles would be a purchaser of those rights to payment, which would include the debtor’s controllable accounts and payment intangibles. If the secured party were to obtain control of the debtor’s controllable account or payment intangible, it would become a qualifying purchaser if it also met the other conditions for that status. However, to obtain control of the controllable account or controllable payment intangible, a requirement for qualifying purchaser status, the purchaser must obtain control of the controllable electronic record evidencing the controllable account or controllable payment intangible. Section 12-104(b); see also Section 9-107A. A person need not be a purchaser, however, to obtain control of a controllable electronic record.

4. **“Transferable record.”** This definition facilitates the exclusion of transferable records from the definition of controllable electronic record.

5. **“Value.”** This definition adopts the concept of value in Section 3-303, which is narrower than the generally applicable concept in Section 1-204. Comment 10 to Section 12-104 explains the difference between the two concepts.

### **Section 12-103. Relation to Article 9 and Consumer Laws.**

(a) **[Article 9 governs in case of conflict.]** If there is conflict between this article and Article 9, Article 9 governs.

(b) **[Applicable consumer law and other laws.]** A transaction subject to this article is subject to any applicable rule of law that establishes a different rule for consumers and [insert reference to (i) any other statute or regulation that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit and (ii) any consumer-protection statute or regulation].

### **Official Comment**



**Source.** Subsection (a) follows Section 3-102(b). Notwithstanding subsection (a), as is the case with respect to Article 3, Article 9 explicitly defers to Article 12 in some instances. See, e.g., Section 9-331. Subsection (b) is copied from Section 9-201(b). To the extent that Article 9 contains provisions described in subsection (b), subsections (a) and (b) are not mutually exclusive.

**Section 12-104. Rights in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible.**

**(a) [Applicability of section to controllable account and controllable payment intangible.]** This section applies to the acquisition and purchase of rights in a controllable account or controllable payment intangible, including the rights and benefits under subsections (c), (d), (e), (g), and (h) of a purchaser and qualifying purchaser, in the same manner this section applies to a controllable electronic record.

**(b) [Control of controllable account and controllable payment intangible.]** To determine whether a purchaser of a controllable account or a controllable payment intangible is a qualifying purchaser, the purchaser obtains control of the account or payment intangible if it obtains control of the controllable electronic record that evidences the account or payment intangible.

**(c) [Applicability of other law to acquisition of rights.]** Except as provided in this section, law other than this article determines whether a person acquires a right in a controllable electronic record and the right the person acquires.

**(d) [Shelter principle and purchase of limited interest.]** A purchaser of a controllable electronic record acquires all rights in the controllable electronic record that the transferor had or had power to transfer, except that a purchaser of a limited interest in a controllable electronic record acquires rights only to the extent of the interest purchased.

**(e) [Rights of qualifying purchaser.]** A qualifying purchaser acquires its rights in the

controllable electronic record free of a claim of a property right in the controllable electronic record.

(f) [Limitation of rights of qualifying purchaser in other property.] Except as provided in subsections (a) and (e) for a controllable account and a controllable payment intangible or law other than this article, a qualifying purchaser takes a right to payment, right to performance, or other interest in property evidenced by the controllable electronic record subject to a claim of a property right in the right to payment, right to performance, or other interest in property.

(g) [No-action protection for qualifying purchaser.] An action may not be asserted against a qualifying purchaser based on both a purchase by the qualifying purchaser of a controllable electronic record and a claim of a property right in another controllable electronic record, whether the action is framed in conversion, replevin, constructive trust, equitable lien, or other theory.

(h) [Filing not notice.] Filing of a financing statement under Article 9 is not notice of a claim of a property right in a controllable electronic record.

### **Official Comment**

1. **Source.** Subsection (d) derives from Section 2-403(1) (concerning the rights of a purchaser).

Subsection (e) derives from Sections 3-306 (concerning the rights of a holder in due course of an instrument) and 8-303 (concerning rights of a protected purchaser of a security).

Subsection (g) derives from Section 8-502 (protecting entitlement holders).

Subsection (h) derives from Section 9-331(c) (filing under Article 9 does not provide notice for purposes of protections of purchasers under other articles).

2. **Applicability of section to controllable accounts and controllable payment intangibles.** Under subsection (a), the provisions of this section apply to controllable accounts and controllable payment intangibles in the same manner that they apply to controllable

electronic records. For example, a qualifying purchaser of a controllable account that obtains control of the controllable electronic record that evidences the account (and who thereby obtains control of the account under subsection (b) and Section 9-107A) would take the account free of conflicting claims of a property right in the account under subsection (e). Under subsection (b), for purposes of determining whether a purchaser of a controllable account or controllable payment intangible obtains control, the purchaser obtains control by obtaining control of the controllable electronic record that evidences the account or payment intangible. Unless otherwise specified or the context otherwise requires, references to a controllable electronic record in the official comments in this Article also refer to a controllable account or controllable payment intangible.

**3. Applicability of other law.** As a general matter, subsection (c) leaves to other law the resolution of questions concerning the transfer of rights in a controllable electronic record, such as the acts that must be taken to effectuate a transfer of rights and the scope of the rights that a transferee acquires. Subsections (d) through (h) contain important exceptions to subsection (c).

**Example 1:** A creates a controllable electronic record. Although the system in which the electronic record is recorded may determine how the electronic record can be used and control may be transferred, other law would determine what rights A has in the controllable electronic record. If, for example, A created the electronic record in the scope of its employment, A's rights would be subject to the terms of A's employment contract.

A and B agree to the sale of the controllable electronic record to B. Other law would determine what steps need to be taken for B to acquire rights in the controllable electronic record. Once B acquires those rights under other law, B would be a purchaser (as defined in Section 1-201), whose rights also would be determined by subsection (d) (i.e., the shelter principle, discussed below in Comment 4). However, even if B did not acquire rights under other law, if B met the requirements for a qualifying purchaser, its rights would be determined by subsections (e) and (g). See Comments 7 and 8, below.

The “law other than this article” that may apply to the transfer of rights in a controllable electronic record under subsection (c) includes UCC Article 9. Section 9-203 would apply, for example, to determine whether a purported secured party acquired an enforceable security interest in a controllable electronic record.

**4. Purchaser and transferor under subsection (d): shelter principle and resulting controllable electronic records.** Subsection (d) sets forth the familiar “shelter” principle, under which a purchaser of a controllable electronic record acquires whatever rights the transferor had or had power to transfer. However, in some cases the controllable electronic record that is acquired by the purchaser will not be the “same” controllable electronic record that was transferred by the transferor. Such a transfer might involve the elimination of a “transferred” controllable electronic record and the resulting and corresponding derivative creation and acquisition of a new controllable electronic record. An example of such a resulting controllable electronic record is the unspent transaction output (UTXO) generated by a transaction in bitcoin.

The Bitcoin protocol operates by allowing users to “spend” their UTXOs to create one or more new UTXOs for the same amount of bitcoin, so each transfer produces new UTXOs controlled by the transferees (one of which may be the transferor—spender—of the bitcoin). Subsection (d) should be construed broadly to encompass such transfers and resulting derivative controllable electronic records acquired by a purchaser. Because subsection (d) addresses the rights of a purchaser in the “purchased” asset and not the “transferred” asset, this construction is wholly consistent with the statutory text.

Notwithstanding the broad subsection (d) shelter principle, which provides that a purchaser acquires “all rights” of the transferor, those rights are subject to the reach of Section 1-304. Under that section a contract or duty under the UCC imposes an overarching “obligation of good faith in its performance and enforcement.” Section 1-304. In this context, “performance and enforcement” include the exercise of rights under the UCC, such as the rights conferred on a purchaser by the subsection (d) shelter principle. See Section 1-304, Comment 2. For example, consider a qualifying purchaser of a controllable electronic record, controllable account, or controllable payment intangible who then sells that asset to a person who is not a qualifying purchaser. If the second purchaser had previously engaged in fraudulent or illegal activity in connection with the purchased asset or an asset to which the purchased asset is attributable, the purchaser’s exercise of rights under subsection (d) as to the purchased asset may be in breach of its obligation of good faith. Section 3-203(b) states this result directly with respect to a transferee of a negotiable instrument if the transferee previously engaged in fraud or illegality with respect to the same instrument. Section 3-203(b). The same result would apply under subsection (d). Subsection (d) relies on the application of the general obligation of good faith under Section 1-304 to reach the appropriate result. However, unlike negotiable instruments, many controllable electronic records are fungible. For this reason, in some cases it might not be possible to establish that an acquired controllable electronic record has a sufficient nexus with a transferee’s earlier fraud or illegality.

5. **Nonpurchaser having control.** Under Section 12-105, a person may have control of a controllable electronic record even if the person has no property interest in the controllable electronic record. A person that has control of, but no property interest in, a controllable electronic record would not be a purchaser of the controllable electronic record and so would not be eligible to be a qualifying purchaser under this section.

**Example 2:** Debtor granted to Secured Party a security interest in all Debtor’s existing and after-acquired accounts, chattel paper, and payment intangibles. Secured Party perfected its security interest in a specific controllable account by obtaining control of the controllable electronic record that evidences the controllable account. See Section 9-107A.

Because Debtor’s security agreement does not cover controllable electronic records, Secured Party would have no interest in the controllable electronic record. Accordingly, Secured Party would not be a purchaser of the controllable electronic record. However, as a purchaser of the controllable accounts and controllable payment intangibles, Secured Party could benefit from the take-free rule in subsection (e) (discussed in Comment 7).

**6. Distinction between controllable electronic record and controllable account or controllable payment intangible evidenced by the controllable electronic record.** Even though a controllable electronic record evidences a controllable account or controllable payment intangible, the controllable electronic record is distinct from the account or payment intangible that it evidences. The account or payment intangible is connected with (or “tethered” to) the electronic record by virtue of the relevant account debtor’s obligation to pay the person in control of the controllable electronic record. Moreover, control of the controllable account or payment intangible is achieved only by obtaining control of the controllable electronic record that evidences the account or payment intangible. Example 2 explains that a purchaser may obtain a property interest in the controllable account or controllable payment intangible even if it does not acquire any interest in the controllable electronic record that evidences the account or payment intangible. (On the other hand, merely obtaining control of a controllable electronic record does not result in the acquisition of an interest in the record.) This approach is intended to avoid a trap for the unwary purchaser that obtains an interest in the account or payment intangible (which is the asset that has stand-alone value) but might fail to acquire an interest in the related controllable electronic record. However, good practice may encourage a purchaser to acquire an interest in the controllable electronic record as well, which would eliminate any potential confusion.

**7. The take-free rule.** Subsection (e) makes controllable electronic records and, under subsection (a), controllable accounts and controllable payment intangibles, highly negotiable. Subsection (e) derives from Section 3-306, under which a holder in due course takes a negotiable instrument free of a claim of a property right in the instrument. A qualifying purchaser of a controllable electronic record, controllable account, or controllable payment intangible takes free of all claims of a property right in the purchased controllable electronic record, account, or payment intangible.

**Example 3:** Hacker, a thief, “steals” and obtains control of a controllable electronic record. Hacker then sells the controllable electronic record to Buyer, who obtains control and otherwise meets the requirements for a qualifying purchaser (by obtaining control and purchasing for value, in good faith, and without notice of a claim of a property right).

As a general matter, law other than Article 12 would determine whether any particular transaction creates a property interest in a controllable electronic record. Section 12-104(c). However, even if under other applicable law Hacker has no rights in, and no right to transfer, the “stolen” controllable electronic record, subsection (e) enables Buyer, a qualifying purchaser, to take the controllable electronic record (or any purchased controllable account or controllable payment intangible evidenced by the controllable electronic record) free of claims of a property right—including that of the rightful owner.

As Example 3 illustrates, a person in control of a controllable electronic record, such as Hacker, has the power, even if not the right, to transfer rights in the record to a qualifying purchaser. Of course, if the qualifying purchaser is a secured party whose security interest secures an obligation, the purchaser would take free of the conflicting property right only to the extent of the obligation secured. See Section 12-104(d) (purchaser of a limited interest); cf. Section 3-302(e). Moreover, even if a secured party were not a qualifying purchaser of a controllable

electronic record, controllable account, or controllable payment intangible, its security interest in the collateral over which it obtained control would, however, have priority over a conflicting security interest that was perfected by a method other than control. Section 9-326A.

**8. Subsection (g)—the “no-action” rule.** Subsection (g) applies in the situation (explained in Comment 4) in which the “resulting” controllable electronic record (or controllable account or controllable payment intangible) purchased by a qualifying purchaser is not the “same” record, account, or payment intangible that was transferred. In such a situation, a person claiming a property right in the transferred asset may assert a claim against a purchaser of the “resulting” asset even though the claimant is *not* asserting a claim of a *property right* in the purchased asset. If the claim is based on both the purchaser’s purchase of the acquired asset and the claimant’s claim of a property right in the transferred asset, subsection (g) protects the qualifying purchaser from liability to the claimant based on any theory. The qualifying purchaser’s protection from the assertion of such a claim does not depend on any proof that the purchased asset is somehow “traceable” to the transferred asset.

If instead, such a claimant were to assert a claim based on a property right in the purchased asset, then the qualifying purchaser would take free of that claim under subsection (e). Subsection (e) applies whether or not the acquired asset is the same asset that was transferred.

**9. “Tethered” assets.** Certain controllable electronic records may carry with them rights to other assets, for example, goods or rights to payment. By its terms, the take-free rule in subsection (e) applies to controllable electronic records (and, under subsection (a), controllable accounts and controllable payment intangibles evidenced by a controllable electronic record). One might argue that the inclusion of controllable accounts and controllable payment intangibles in the scope of subsection (e) is unnecessary. By taking a controllable electronic record free of property claims, the argument would be that a person takes not only the controllable electronic record itself but also all rights that are “carried” in the controllable electronic record free and clear.

Subsection (f) defeats that argument. It limits the application of the take-free rule in subsection (e) to controllable electronic records and, through the application of subsection (a), controllable accounts and controllable payment intangibles evidenced by a controllable electronic record. Under subsection (f), except as provided in subsections (a) and (e), a qualifying purchaser takes rights to payment (other than controllable accounts and controllable payment intangibles), rights to performance, and interests in property that are evidenced by a controllable electronic record subject to third-party property claims, unless law other than Article 12 provides to the contrary. The reference in subsection (f) to “law other than this article” contemplates that another article of the UCC might provide a contrary rule for some types of property that might be tethered to a controllable electronic record.

The treatment of controllable accounts and controllable payment intangibles in Articles 9 and 12 is feasible because Article 9 already provides the legal framework for assignments of accounts and payment intangibles. In addition, because accounts and payment intangibles are rights to payment of monetary obligations, tethering of an account or payment intangible to a controllable electronic record is straightforward. The account debtor is obligated to pay the

person that has control of the relevant controllable electronic record (subject to the qualifications imposed by Section 12-106).

**10. Creating the functional equivalent of a negotiable instrument.** Two defining characteristics of an Article 3 negotiable instrument are that a holder in due course (i) takes free of claims of a property or possessory right to the instrument (Section 3-306) and (ii) takes free of most defenses and claims in recoupment (Section 3-305). Article 3 applies only to written instruments. Article 12 and the revisions to Article 9 provide a method for reaching a similar result with respect to controllable accounts and controllable payment intangibles.

As regards the first characteristic, a qualifying purchaser could acquire the controllable account or controllable payment intangible free of any claim of a property interest. As regards the second characteristic, the definition of “qualifying purchaser” omits some of the conditions for becoming a holder in due course. For example, to qualify as a holder in due course, a holder must take “without notice that any party has a defense or claim in recoupment . . . .” Section 3-302(a)(2)(vi). A controllable electronic record is information; there are no parties to a controllable electronic record. However, there are parties to a controllable account or controllable payment intangible. Accordingly, Sections 9-404 and 9-403 would determine whether a purchaser of the controllable account or controllable payment intangible takes free of a defense. Section 9-403 ordinarily would give effect to the account debtor’s agreement not to assert claims or defenses.

Section 9-403 adopts the meaning of value in Section 3-303, as does Article 12. The concept of value in Section 3-303 is narrower than the concept in Section 1-204, which applies generally to UCC transactions. Under Section 1-204, a person gives value for rights if the person acquires them in return for a promise. However, under Section 3-303, if a negotiable instrument is issued or transferred for a promise of performance, the instrument is transferred for value only to the extent that the promise has been performed.

### **Section 12-105. Control of Controllable Electronic Record.**

**(a) [General rule: control of controllable electronic record.]** A person has control of a controllable electronic record if the electronic record, a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded:

(1) gives the person:

(A) power to avail itself of substantially all the benefit from the electronic record; and

(B) exclusive power, subject to subsection (b), to:

(i) prevent others from availing themselves of substantially all the

benefit from the electronic record; and

(ii) transfer control of the electronic record to another person or cause another person to obtain control of another controllable electronic record as a result of the transfer of the electronic record; and

(2) enables the person readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as having the powers specified in paragraph (1).

(b) **[Meaning of exclusive.]** Subject to subsection (c), a power is exclusive under subsection (a)(1)(B)(i) and (ii) even if:

(1) the controllable electronic record, a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded limits the use of the electronic record or has a protocol programmed to cause a change, including a transfer or loss of control or a modification of benefits afforded by the electronic record; or

(2) the power is shared with another person.

(c) **[When power not shared with another person.]** A power of a person is not shared with another person under subsection (b)(2) and the person's power is not exclusive if:

(1) the person can exercise the power only if the power also is exercised by the other person; and

(2) the other person:

(A) can exercise the power without exercise of the power by the person; or

(B) is the transferor to the person of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record.



(d) [Presumption of exclusivity of certain powers.] If a person has the powers specified in subsection (a)(1)(B)(i) and (ii), the powers are presumed to be exclusive.

(e) [Control through another person.] A person has control of a controllable electronic record if another person, other than the transferor to the person of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record:

(1) has control of the electronic record and acknowledges that it has control on behalf of the person; or

(2) obtains control of the electronic record after having acknowledged that it will obtain control of the electronic record on behalf of the person.

(f) [No requirement to acknowledge.] A person that has control under this section is not required to acknowledge that it has control on behalf of another person.

(g) [No duties or confirmation.] If a person acknowledges that it has or will obtain control on behalf of another person, unless the person otherwise agrees or law other than this article or Article 9 otherwise provides, the person does not owe any duty to the other person and is not required to confirm the acknowledgment to any other person.

### **Official Comment**

1. **Why “control” matters.** Control serves two major functions in Article 12. An electronic record is a “controllable electronic record” and is subject to the provisions of this Article only if it can be subjected to control under this section. See Section 12-102(a)(1) (defining “controllable electronic record”). And only a person having control of a controllable electronic record is eligible to become a qualifying purchaser and so to take free of claims of a property interest in the controllable electronic record, or any controllable account or controllable payment intangible evidenced by the controllable electronic record, and to be protected by the “no-action” rule. See Section 12-104(e) and (g).

Article 9 provides that obtaining control of a controllable electronic record is one method by which to perfect a security interest in the controllable electronic record or in any controllable account or controllable payment intangible evidenced by the controllable electronic record. See

Sections 9-107A; 9-314. Moreover, a security interest perfected by control has priority over a conflicting security interest that was perfected by a method other than control and “control . . . pursuant to the debtor’s agreement” may substitute for an authenticated a signed security agreement as an element of attachment. See Sections 9-326A; 9-203(b)(3)(D).

2. **Powers and sources of powers; inability to exercise a power.** This section conditions control on a person’s having the three powers specified in subsection (a)(1). A person would have the powers described in that subsection if the controllable electronic record, a record attached to or logically associated with the controllable electronic record, or any system in which it is recorded gives the person those powers. This description of the source of the relevant powers should be construed broadly and functionally. For example, a person would have a power even if the characteristics of the particular purchaser disable the person from exercising the power. This would be the case, for example, when the purchaser holds the private key required to access the benefit of the controllable electronic record but lacks the hardware required to use it. In addition, a system in which the person in control is identified is a permissible source of a power even if it is related to but not precisely the “same” system in which the controllable electronic record is recorded. Moreover, this broad and functional construction is particularly important for references to “a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded,” as used in Section 12-105(a) and (b) (and elsewhere). For example, overly literal or technical interpretations of the terminology “attached to” or “logically associated” are inappropriate. The statutory language must be adapted and applied in a functional manner to technology, systems, and infrastructure that may be developed and employed in the future. The goal is to embrace records and systems that are connected to a particular electronic record in such a manner that the information contained in or the functions performed by those “attached” or “associated” records are appropriately and reasonably attributable to and identifiable as connected with the electronic record itself. See also, e.g., Sections 7-106, 9-105, 9-105A, 9-306A, 9-605, 9-628, and 12-107.

3. **“Benefit.”** Subsection (a)(1)(A) and (a)(1)(B)(i) condition control of a controllable electronic record on a person’s relationship to the benefit of the controllable electronic record.

As used in this section, the “benefit” of a controllable electronic record refers to the rights that are afforded by the controllable electronic record and the uses to which the controllable electronic record can be put. These, in turn, depend on the characteristics of the controllable electronic record in question. For example, the benefit afforded by control of a bitcoin is that it can be held or disposed of (sold or spent). And control of a controllable electronic record evidencing a controllable account or controllable payment intangible affords the benefit of the right to collect from the account debtor (obligor).

The system in which a controllable electronic record is recorded may limit the benefit from the controllable electronic record that is available to those who interact with the system. In determining whether a person has the power to avail itself of substantially all the benefit from a controllable electronic record under subsection (a)(1)(A), or to prevent others from availing themselves of substantially all the benefit from a controllable electronic record under subsection (a)(1)(B)(i), only the benefit that the system makes available (subject to the system’s inherent

limitations) should be considered.

**4. Power to retrieve information.** By definition, the information constituting an electronic record must be “retrievable in perceivable form.” Section 1-201(b)(31) (defining “record”). The power to retrieve the record in perceivable form is included in the benefit of a controllable electronic record. “Perceivable form” means that the contents of the record are intelligible; the ability to perceive the indecipherable jumble of an encrypted record does not give a person the power to retrieve the record in perceivable form.

To have control of a controllable electronic record under subsection (a)(1)(A), a person must have at least the nonexclusive power to avail itself of this benefit. If a person also has the exclusive power to decrypt the encrypted record, the person will have the exclusive power to prevent others from availing themselves of substantially all the benefit from the controllable electronic record and thereby will satisfy the condition in subsection (a)(1)(B)(i).

**5. Exclusive powers.** Unlike the power in subsection (a)(1)(A), the powers in subsection (a)(1)(B)(i) and (a)(1)(B)(ii) must be held exclusively by the person claiming control in order to establish control. However, once it is established that a person has received those powers, subsection (d) provides a presumption of exclusivity. Consequently, a person asserting control need not prove exclusivity in order to make out a *prima facie* case. Application of the presumption will be governed also by Section 1-206 (effects of a presumption under the UCC) and applicable non-UCC law (including rules of procedure and evidence). In addition, subsection (b) contains two qualifications of the term “exclusive” as used in subsection (a)(1)(B). A power can be “exclusive” under subsection (a)(1)(B) even if one or both of these qualifications apply.

Subsection (b)(1) takes account of the fact that the powers of a purchaser of a controllable electronic record necessarily are subject to the attributes of the controllable electronic record, records associated with the controllable electronic record, and the protocols of any system in which the controllable electronic record is recorded. For example, a transfer of control resulting from a program that is a part of a system’s protocol is inherent in the controllable electronic record and does not impair the exclusivity of the power of the person in control of the record. Subsection (b)(1) also contemplates that the potential for the system to otherwise modify (or even destroy) controllable electronic records would not impair the exclusivity.

**Example 1:** Pursuant to the governance apparatus of a system (Propofolium) for a cryptocurrency (propofol), an upgrade to the system was made that modified the consensus mechanism for determining the effectiveness of transfers of propofols within the system. Although this change did not divest any holder of propofols of its control, it prospectively modified the system for all propofols. The adoption of this change and the potential for such a change (or any other change) are functions of the attributes of the system and, consequently, of all propofols. Neither this change nor such potential impaired the exclusivity, for purposes of subsection (a)(1)(B), of the powers of a person in control of propofols.

Subsection (b)(2) allows for a power to be shared with another person without impairing

the exclusivity of the power. One effect of subsection (b)(2) is that, under a multi-signature (multi-sig) agreement, any person that is readily identifiable under subsection (a)(2) and shares the relevant power would be eligible to have control, even if the action of another person is a condition for the exercise of the power. For example, a person in control may agree that another person's action on the relevant system would be required to effect a transfer of control without impairing the requisite exclusivity.

**Example 2:** Pursuant to a multi-sig arrangement, control of propofols (in the system described in Example 1) is shared by Campbell, Elizabeth, Mia, and Natasha. Under the multi-sig arrangement, the exercise of powers over the propofols requires action by three of the four persons having control. None of the participants acting alone has the power to exercise the relevant powers. Subsection (b)(2) makes clear that all four participants have control over the propofols and exclusivity is not impaired by the shared control under the multi-sig arrangement.

Although all four persons in Example 2 have control, that may leave many questions as to the rights of the four as among themselves. For example, if more than one of the four were secured parties, it would be important for them to settle by agreement issues such as relative priorities and enforcement rights. Similar situations can arise in other contexts and with respect to other types of collateral.

A multi-sig arrangement for a controllable electronic record, such as that described in Example 2, may provide enhanced security. For example, if the power of one participant is compromised by a "hacker," the required actions by the other participants would prevent the hacker from exercising unauthorized power over the record. Although the hacker might possess the power along with the remaining multi-sig participants, those participants would continue to have control. A multi-sig structure also may protect against the misuse of a record by ensuring that actions by multiple persons are required for exercising power over the record.

Subsection (c) provides that in certain circumstances a power is not shared within the meaning of subsection (b)(2), the relaxation of the exclusivity requirement provided by subsection (b)(2) does not apply, and, consequently, a person's power is not exclusive. Subsection (c) provides that a person does not share an exclusive power with another person if the person can exercise the power only with the other person's cooperation (subsection (c)(1)) but the other person either (i) can exercise the power without the person's cooperation (subsection (c)(2)(A)) or (ii) is the transferor to the person (transferee) of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record (subsection (c)(2)(B)). It follows that a person to which subsection (c) applies does not have control based on its exclusive powers (although it might have control through another person under subsection (e), discussed below, or if another person having control is acting as the person's agent).

Comment 9 addresses the rationale for disqualifying the transferee from a transferor under subsection (c)(2)(B) from the benefit of sharing a power under subsection (b)(2).

The following examples illustrate the application of subsection (c):

**Example 3:** Under a multi-sig arrangement, exercise by any two of Campbell, Elizabeth, and Mia is required to exercise a power with respect to a controllable electronic record (CER). None of the three can exercise a power without the cooperation of another, so all three have control because they share the power. Even if Campbell were the transferor of the CER to Elizabeth, Elizabeth's power is shared, and therefore treated as exclusive, because Campbell cannot block Elizabeth's exercise of the power if Mia acts with Elizabeth. It follows that subsection (c)(1) does not apply, subsection (b)(2) does apply, and Elizabeth shares the power with Campbell. (The same result would apply with respect to Mia's power if Campbell were the transferor of the CER to Mia.)

**Example 4:** Under a multi-sig arrangement, exercise by both Campbell and Elizabeth are required to exercise a power, so subsection (c)(1) applies with respect to each person. However, neither Campbell nor Elizabeth can exercise the power without cooperation of the other and neither is the transferor to the other, so subsection (c)(2)(A) and (2)(B) does not apply with respect to either person. It follows that Campbell and Elizabeth each share the power.

**Example 5:** The facts are the same as in Example 4, but Campbell is the transferor of an interest in the CER to Elizabeth. Elizabeth does not share the power with Campbell and Elizabeth's power is not exclusive because subsection (c)(1) and (2)(B) applies.

**Example 6:** Under a multi-sig arrangement, Mia or Natasha can exercise a power only with the exercise by Campbell, but Campbell can exercise the power unilaterally without the exercise by either Mia or Natasha. Neither Mia nor Natasha shares the power with Campbell because subsection (c)(1) and (2)(A) apply, so neither Mia's nor Natasha's power is treated as exclusive. Campbell's power is exclusive *in fact* and Campbell need not rely on subsection (b)(2) for shared power.

**Example 7:** Under a multi-sig arrangement, Mia can exercise a power only with exercise by Elizabeth or Natasha, but Elizabeth and Natasha each can exercise the power unilaterally without the exercise by the other or by Mia. Elizabeth and Natasha share the power, but Mia does not share the power with Elizabeth or Natasha. Mia's power is not exclusive because subsection (c)(1) and (2)(A) applies.

Although the presumption in subsection (d) is not expressly made subject to subsection (c), it is functionally so. Under Section 1-206, once evidence is introduced that subsection (c) applies and that, accordingly, a person relying on the presumption cannot rely on the relaxation of the exclusivity requirement provided by subsection (b)(2), the presumption would no longer apply.

6. **Transfer of control.** The power to transfer control of a controllable electronic record under subsection (a)(1)(B)(ii) includes the power to cause another person to obtain control of another derivative and resulting controllable electronic record that results from the transfer of the controllable electronic record. See Section 12-104, Comment 4.

7. **Readily identify itself.** Subsection (a)(2) provides that a person does not have

control of a controllable electronic record unless the controllable electronic record, a record attached to or logically associated with the controllable electronic record, or any system in which the controllable electronic record is recorded enables the person readily to identify itself as the person having the requisite powers. The identification need not be by a “name,” but also may be by “identifying number, cryptographic key, office, or account number”—language derived from Section 3-110(c). The reference to “office” means a public office. See Section 3-110, Comment 3. This subsection does not obligate a person to identify itself as having control. However, to prove that it has control, a person would need to prove that the relevant records or any system in which the controllable electronic record is recorded readily identifies the person as such. Consistent with the subsection (d) presumption of exclusivity, proof that a person has the powers specified in section (a)(1) does not require proof of exclusivity—i.e., proof of a negative (that no one else has such powers). The means of identification mentioned in subsection (a)(2) derive from Section 3-110(c). Subsection (a)(2) adds “cryptographic key” as an example of a way in which a person may be identified.

**8. Control through another person.** Neither Article 12 nor any other provision of the UCC would restrict or render ineffective any agreement of a person in control of a controllable electronic record to hold control on behalf of another person. This result is implicit from subsection (b)(2) dealing with sharing of control. It also would follow under principles of agency. But such an arrangement should be effective regardless of any agency or fiduciary relationship.

This concept is expressly addressed in Section 8-106(d)(3), on control of a security entitlement, which achieves perfection of a security interest under Sections 9-106(a) and 9-314(a). It also applies to perfection by possession under Section 9-313(c) if a person other than the debtor or the secured party (or the secured party’s agent) is in possession of collateral. Under those provisions, however, effectiveness is conditioned in some circumstances on an “acknowledgment” by the person in control or possession. Under Section 9-313(c) the acknowledgment must be in a signed record. These provisions appear to derive from practices involving bailees of tangible property, such as goods, chattel paper, and certificated securities. See Section 9-313, Comment 4.

Subsection (e) likewise provides for control by a person through another person’s acknowledgement that it has control on behalf of the person. Subsection (e) is patterned on Section 9-313(c), but like Section 8-106(d)(3), subsection (e) omits the requirement in Section 9-313(c) that an acknowledgment be made in a signed record. Although best practices might suggest the wisdom of relying on a signed record to evidence such an acknowledgment, subsection (e) would permit proof by other means. Under subsection (e) for an acknowledgment by another person to be effective to confer control on a person, the other person making the acknowledgment must be one “other than the transferor of an interest in the electronic record” to the person. The rationale for this limitation is discussed in Comment 9. Control based on an acknowledgment under subsection (e) by another person having control continues only while the other person retains control. This result necessarily follows because such control derives solely from the other person’s continued control.

The combined operation of subsections (b)(2) and (e) ensure that the continuance of

various existing practices would not prevent or cause the loss of control. For example, a person in control may wish to grant another person the power to approve or disapprove a transfer of control on the system. Alternatively, a person in control may wish to permit a system administrator, the system itself, or a prearranged operation to transfer control to another person under specified conditions without participation by the person in control. And, of course, a person in control may wish to delegate the power to transfer control to an agent or fiduciary.

Provisions substantially similar to subsection (e) are included in Section 7-106 (control of electronic documents of title), Section 8-106(d)(3) (control of security entitlement), 9-104 (control of deposit accounts), 9-105 (control of authoritative electronic copies of records evidencing chattel paper), and 9-105A (control of electronic money).

**9. Shared powers under subsection (b)(2) and control through another person under subsection (e): Limitations related to transferors and transferees of interests in controllable electronic records.** Subsection (c)(2)(B) disqualifies a transferee (which includes a secured party in a secured transaction) of an interest in a controllable electronic record (or controllable account or controllable payment intangible) from the benefit of a shared power under subsection (b)(2) when the transferor retains a blocking power (i.e., when the transferee cannot exercise the power unless the transferor also exercises the power). In similar fashion, under subsection (e), an acknowledgment by a transferor of an interest in a controllable electronic record (or controllable account or controllable payment intangible) that the transferor has control for the benefit of a person is ineffective to confer control on the person. Each of these limitations is premised on the view that the transferor has not been divested sufficiently of its powers over the relevant controllable electronic record so as to warrant treating the transferee as a secured party having a security interest perfected by control or as having the requisite control to be a qualifying purchaser.

Subsection (c)(1) and (c)(2)(B) contemplates that the transferor has retained a blocking power over the transferee's exercise of a power. Subsection (e) contemplates that the transferor remains in control and has merely acknowledged that its control is for the transferee's benefit and that the acknowledgement is ineffective to confer control on the transferee. Although the concept of shared control is newly introduced in the UCC, holding possession or control for another is not. Section 9-313(c) expressly provides in this context that an acknowledging person having possession of goods must be a person "other than the debtor" for a secured party to take possession through the acknowledging person. The official comments to Section 8-106 are to the same effect in the context of control of a security entitlement. See Section 8-106(d)(3), Comment 4A and pre-2022 Comment 4. The same policy that underpins the inapplicability of this method of control to an acknowledgment by a debtor applies as well to a transferor that is not an Article 9 debtor. Control is intended to be a proxy for and a functional equivalent of the transfer of physical possession of goods. In general, a person can obtain control through control by an agent, but under subsection (e) an acknowledgment by a debtor or transferor (even "as agent") that acknowledges control on behalf of a secured party or other transferee would be ineffective. This corresponds to the policy underlying Section 9-313 that "the debtor cannot qualify as an agent for the secured party for purposes of the secured party's taking possession." Section 9-313, Comment 3.

Notwithstanding these limitations, they would not impair the continued perfection by control upon a secured party's assignment of a perfected-by-control security interest in a controllable electronic record to a successor secured party. The following example illustrates.

**Example 8:** Debtor (D) buys a CER and obtains control. D then grants a security interest in the CER to Secured Party A (SPA) to secure D's obligation to SPA and transfers to SPA control of the CER (*not* pursuant to shared control with D or pursuant to subsection (e)). SPA then assigns to Secured Party B (SPB) the secured obligation owed by D to SPA.

As to perfection of the security interest granted by D, perfection by control is not affected even if SPA retains powers over the CER (as between SPA and SPB) following the assignment to SPB. The security interest remains perfected. This is consistent with the policy underlying 9-310(c)—an assignment of a security interest should not require the assignee to refile or take an assignment of record of a filed financing statement in favor of the assignor for protection against a debtor's creditors and transferees.

The economic interest being assigned by SPA to SPB in Example 8 is primarily the *right to payment or performance* of the obligation of D that is secured by the CER. If the transfer of the secured obligation by SPA to SPB itself creates a security interest securing an obligation (e.g., owed by SPA to SPB), then SPB should perfect the security interest granted by SPA (which is distinct from the security interest in the CER granted by D and assigned by SPA to SPB). The method of perfection will depend on the nature of the secured obligation—the type of collateral—being assigned. Is the right to payment an instrument, an account, or a payment intangible? Or is performance of the secured obligation pursuant to another type of general intangible? SPB should file a financing statement against SPA, as debtor, or take possession of the instrument, if applicable. However, as to the underlying collateral securing the assigned obligation—the CER—attachment and perfection of SPB's security interest in the obligation of D owed to SPA would also constitute attachment and perfection as to the security interest in the CER securing that obligation. Sections 9-203(g); 9-308(e); see also 1 Restatement (Second) of Contracts § 340, Comment b (“b. Security follows the debt. Where a secured claim is assigned, the collateral is ordinarily assigned as well.”).

If the transfer by SPA to SPB is an outright transfer (a sale) of an account, a payment intangible, or a promissory note, the transfer creates a security interest and the analysis in the preceding paragraph applies (except that the security interest arising from the sale of a payment intangible or promissory note is automatically perfected under Section 9-309(a)(3) and (4)). If the transfer is a sale of another type of general intangible or instrument that is secured by the CER, then non-Article 9 law applies to the transfer. However, the same result may occur under the common-law rule that the collateral (the CER) follows a secured obligation that is transferred. See Sections 9-203, Comment 9; 9-308, Comment 6.

For obvious business reasons, SPB may not wish to allow SPA to remain in control of the CER and may require SPA to transfer control to it as a condition to the transaction. Alternatively, SPB may obtain control through sharing powers with SPA or through SPA's acknowledgement pursuant to subsection (e). It is true that SPA's assignment to SPB of D's



secured obligation carried with it the collateral—the CER—securing the obligation. But such a derivative acquisition (through the operation of Sections 9-203(g) and 9-308(e)) by SPB would not be a transfer by SPA of “an interest in” the CER within the meaning of the limitations imposed in subsections (c)(2)(B) or (e). The operation of these rules, providing that collateral follows the transfer of a secured obligation, are based on the premise that any necessary public notice provided in connection with the assignment of the obligation provides, in turn, sufficient public notice with respect to the underlying collateral. It follows that the policy to be implemented by subsections (c)(2)(B) and (e) is not implicated by such an assignment.

**10. No requirement to acknowledge, no duties, and no requirement to confirm acknowledgment.** Subsections (f) and (g) derive from Section 9-313(f) and (g). Subsection (f) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, subsection (g) leaves to the agreement of the parties and to any other applicable law (other than this Article or Article 9) any duties of a person that does acknowledge that it has or will obtain control on behalf of another person and provides that a person making an acknowledgment is not required to confirm the acknowledgment to another person.

For example, subsection (e) would apply to give control to a person, Alpha, when another person, Beta, has control of a controllable electronic record and acknowledges that it has control on behalf of Alpha. However, under subsection (f), Beta is not required to so acknowledge. And under subsection (g), even if Beta does so acknowledge, Beta owes no duty to Alpha unless Beta agrees or other law so provides, and Beta is not required to confirm its acknowledgment to any other person.

## **Section 12-106. Discharge of Account Debtor on Controllable Account or Controllable Payment Intangible.**

**(a) [Discharge of account debtor.]** An account debtor on a controllable account or controllable payment intangible may discharge its obligation by paying:

(1) the person having control of the controllable electronic record that evidences the controllable account or controllable payment intangible; or

(2) except as provided in subsection (b), a person that formerly had control of the controllable electronic record.

**(b) [Content and effect of notification.]** Subject to subsection (d), the account debtor may not discharge its obligation by paying a person that formerly had control of the controllable

electronic record if the account debtor receives a notification that:

(1) is signed by a person that formerly had control or the person to which control was transferred;

(2) reasonably identifies the controllable account or controllable payment intangible;

(3) notifies the account debtor that control of the controllable electronic record that evidences the controllable account or controllable payment intangible was transferred;

(4) identifies the transferee, in any reasonable way, including by name, identifying number, cryptographic key, office, or account number; and

(5) provides a commercially reasonable method by which the account debtor is to pay the transferee.

(c) **[Discharge following effective notification.]** After receipt of a notification that complies with subsection (b), the account debtor may discharge its obligation by paying in accordance with the notification and may not discharge the obligation by paying a person that formerly had control.

(d) **[When notification ineffective.]** Subject to subsection (h), notification is ineffective under subsection (b):

(1) unless, before the notification is sent, the account debtor and the person that, at that time, had control of the controllable electronic record that evidences the controllable account or controllable payment intangible agree in a signed record to a commercially reasonable method by which a person may furnish reasonable proof that control has been transferred;

(2) to the extent an agreement between the account debtor and seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation

is effective under law other than this article; or

(3) at the option of the account debtor, if the notification notifies the account debtor to:

(A) divide a payment;

(B) make less than the full amount of an installment or other periodic payment; or

(C) pay any part of a payment by more than one method or to more than one person.

(e) **[Proof of transfer of control.]** Subject to subsection (h), if requested by the account debtor, the person giving the notification under subsection (b) seasonably shall furnish reasonable proof, using the method in the agreement referred to in subsection (d)(1), that control of the controllable electronic record has been transferred. Unless the person complies with the request, the account debtor may discharge its obligation by paying a person that formerly had control, even if the account debtor has received a notification under subsection (b).

(f) **[What constitutes reasonable proof.]** A person furnishes reasonable proof under subsection (e) that control has been transferred if the person demonstrates, using the method in the agreement referred to in subsection (d)(1), that the transferee has the power to:

(1) avail itself of substantially all the benefit from the controllable electronic record;

(2) prevent others from availing themselves of substantially all the benefit from the controllable electronic record; and

(3) transfer the powers specified in paragraphs (1) and (2) to another person.

(g) **[Rights not waivable.]** Subject to subsection (h), an account debtor may not waive or

vary its rights under subsections (d)(1) and (e) or its option under subsection (d)(3).

(h) [Rule for individual under other law.] This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

### **Official Comment**

1. **Source.** These provisions derive from Section 3-602, which governs the discharge of a person obligated on a negotiable instrument, and Section 9-406(a), (b) and (c), which governs the discharge of an account debtor, including a person obligated on an account or payment intangible.

2. **The basic rules.** This section applies only to an account debtor that has undertaken to pay the person that has control of the controllable electronic record that evidences the obligation to pay. See Section 9-102 (defining “controllable account” and “controllable payment intangible”). Section 9-406 would continue to apply in other respects and to all other account debtors. As to the relationship between this section and Section 9-406, see Comment 5.

Under subsection (a)(1), an account debtor may discharge its obligation on the controllable account or controllable payment intangible by paying the person that has control of the related controllable electronic record at the time of payment. Subsections (a)(2) and (b) would remove from an account debtor the burden of determining who has control of the related controllable electronic record at any given time—a burden that, with respect to some controllable electronic records, an account debtor may be unable to satisfy. Under subsection (a)(2), subject to subsection (b), an account debtor may discharge its obligation by paying a person that formerly had control of the related controllable electronic record, which presumably would include the initial obligee.

Subsection (b) reflects the fact that a person to which control has been transferred may not wish to take the risk that the account debtor will discharge its obligation by paying the transferor. Subsection (b) protects the transferee by providing that, if the account debtor receives an effective notification that control has been transferred, the account debtor may discharge its obligation by paying in accordance with the notification and may not discharge its obligation by paying a person that formerly had control. The notification must be signed by a person formerly having control or by the transferee.

To be effective under subsection (b), a notification must reasonably identify the controllable account or controllable payment intangible, notify the account debtor that control of the controllable electronic record that evidences the controllable account or controllable payment intangible was transferred, identify the transferee in any reasonable way, and provide a commercially reasonable method by which the account debtor is to make payments to the transferee. A change in the identity of the person to which the account debtor must make payment should not, and typically will not, impose a significant burden on the account debtor.

However, one can imagine a method of making payment that would be burdensome, for example, making a payment through a trading platform or payment service with which the account debtor does not have an account. For this reason, the designated method of making payment must be “commercially reasonable.”

3. “Reasonable proof.” As noted above, this section derives in large part from Section 9-406, which provides for notification that an account or payment intangible has been assigned. Experience suggests that account debtors that have received notification of an assignment under Section 9-406 typically make payments in accordance with the notice. Recognizing that an account debtor may be uncertain whether a notification is legitimate, Section 9-406 affords to an account debtor the right to request proof that the account or payment intangible was assigned. See generally, Section 9-406, Comment 4.

Subsection (e) contains a similar provision. On the account debtor’s request, the person giving the notification must seasonably furnish reasonable proof that control of the controllable electronic record has been transferred. If the person does not comply with the request, the account debtor may ignore the notification and discharge its obligation by a paying a person formerly in control.

“Reasonable proof” requires evidence that would be understood by a typical account debtor to whom it is proffered as demonstrating to a reasonably high probability that control of the controllable electronic record has been transferred to the transferee. Subsection (f) provides a safe harbor for providing reasonable proof. It enables a person to satisfy the account debtor’s request by demonstrating that the transferee has the power to avail itself of substantially all the benefit from the controllable electronic record, to prevent others from availing themselves of substantially all the benefit from the controllable electronic record, and to transfer these powers to another person. This demonstration would not necessarily prove that a person actually has control of a controllable electronic record because it need not show that the transferee held the last two powers exclusively. Nevertheless, such a demonstration would constitute “reasonable proof” under subsection (f). A person that has control should have little difficulty providing this proof, as a person cannot have control unless it can readily identify itself as having the requisite powers. See Section 12-105(a)(2). Reasonable proof that is seasonably furnished by a person other than the person that gave the notification would constitute compliance with the account debtor’s request.

Subsection (e) requires that reasonable proof be provided “using the agreed method.” Subsection (f) requires that a person use “the agreed method” to demonstrate that the transferee has the specified powers. “Agreed method” refers to the commercially reasonable method to which the parties agreed, in a signed record, before the notification was sent. If parties did not so agree, the notification is ineffective under subsection (d)(1).

An account debtor may agree to participate in a system providing for the control of controllable accounts or controllable payment intangibles. If the system is programmed to provide for notification to the account debtor upon the transfer of control, the account debtor’s agreement and the operation of the system may satisfy the requirements of subsections (d)(1), (e), and (f).

4. **Additional considerations for account debtors.** The requirement in subsection (e) that reasonable proof be furnished using the “agreed method” provides considerable protection for account debtors upon receipt of a notification of assignment and making a request for proof. There are, however, other considerations that are of importance to account debtors but are beyond the scope of the frameworks provided by Articles 9 and 12. One such consideration is the potential involvement of pseudonymous payees, which may raise issues such as compliance with anti-money laundering regulations and sanctions compliance. These are examples of issues that a well-structured program for controllable accounts and controllable payment intangibles might address.

5. **Relationship to Section 9-406.** Section 9-406 governs the discharge of the obligation of an account debtor. Section 9-406 carves out of its scope transactions to the extent covered by this section. See Section 9-406(l).

### **Section 12-107. Governing Law.**

(a) **[Governing law: general rule.]** Except as provided in subsection (b), the local law of a controllable electronic record’s jurisdiction governs a matter covered by this article.

(b) **[Governing law: Section 12-106.]** For a controllable electronic record that evidences a controllable account or controllable payment intangible, the local law of the controllable electronic record’s jurisdiction governs a matter covered by Section 12-106 unless an effective agreement determines that the local law of another jurisdiction governs.

(c) **[Controllable electronic record’s jurisdiction.]** The following rules determine a controllable electronic record’s jurisdiction under this section:

(1) If the controllable electronic record, or a record attached to or logically associated with the controllable electronic record and readily available for review, expressly provides that a particular jurisdiction is the controllable electronic record’s jurisdiction for purposes of this article or [the Uniform Commercial Code], that jurisdiction is the controllable electronic record’s jurisdiction.

(2) If paragraph (1) does not apply and the rules of the system in which the controllable electronic record is recorded are readily available for review and expressly provide

that a particular jurisdiction is the controllable electronic record's jurisdiction for purposes of this article or [the Uniform Commercial Code], that jurisdiction is the controllable electronic record's jurisdiction.

(3) If paragraphs (1) and (2) do not apply and the controllable electronic record, or a record attached to or logically associated with the controllable electronic record and readily available for review, expressly provides that the controllable electronic record is governed by the law of a particular jurisdiction, that jurisdiction is the controllable electronic record's jurisdiction.

(4) If paragraphs (1), (2), and (3) do not apply and the rules of the system in which the controllable electronic record is recorded are readily available for review and expressly provide that the controllable electronic record or the system is governed by the law of a particular jurisdiction, that jurisdiction is the controllable electronic record's jurisdiction.

(5) If paragraphs (1) through (4) do not apply, the controllable electronic record's jurisdiction is the District of Columbia.

(d) [Applicability of Article 12.] If subsection (c)(5) applies and Article 12 is not in effect in the District of Columbia without material modification, the governing law for a matter covered by this article is the law of the District of Columbia as though Article 12 were in effect in the District of Columbia without material modification. In this subsection, "Article 12" means Article 12 of Uniform Commercial Code Amendments (2022).

(e) [Relation of matter or transaction to controllable electronic record's jurisdiction not necessary.] To the extent subsections (a) and (b) provide that the local law of the controllable electronic record's jurisdiction governs a matter covered by this article, that law governs even if the matter or a transaction to which the matter relates does not bear any relation

to the controllable electronic record's jurisdiction.

(f) **[Rights of purchasers determined at time of purchase.]** The rights acquired under Section 12-104 by a purchaser or qualifying purchaser are governed by the law applicable under this section at the time of purchase.

### **Official Comment**

1. **Source.** The provisions of Section 12-107 (as well as Sections 9-306A and 9-306B) derive from Sections 8-110 and 9-305 on law governing perfection and priority of security interests in investment property and the relevance of a securities intermediary's jurisdiction and a commodity intermediary's jurisdiction.

2. **The basic rule: Law governing matters covered by Article 12.** Subsection (a) states the basic rule that the local law of the controllable electronic record's jurisdiction governs the matters covered by this Article. The "matters covered by" this Article are relatively narrow and discrete, albeit enormously important. If the choice-of-law rule provided by this section points to a jurisdiction that has adopted Article 12, those matters would include the interpretation and application of Article 12, including its definitions. In general, issues that would be determined by the provisions of this Article are to be determined under the law that is applicable as determined by this section. These include the rights of purchasers and property claimants more generally with respect to controllable electronic records, controllable accounts, and controllable payment intangibles to the extent dealt with by this Article—issues addressed by section 12-104. The rights and obligations of account debtors, to the extent dealt with by section 12-106, are also matters covered. Matters not covered by this Article, including matters as to which this Article expressly provides are covered by other law, are not within the scope of this section.

3. **Practical considerations on determination of governing law.** This section relating to the law governing the matters covered by this Article must confront substantial practical considerations. These considerations arise primarily from two factors. First, as described below, this section relies primarily on a "waterfall" of alternatives for determining a controllable electronic record's jurisdiction. The first four elements of the waterfall require for their applicability express provisions of a controllable electronic record, an attached or logically associated record, or the system in which a controllable electronic record is recorded. However, many controllable electronic records and systems existing at the time of the 2022 Amendments do not contain these provisions. As explained in Comment 6, the expectation is that over time electronic records and related systems will adopt these provisions in reliance on this section, thereby satisfying at least one of the first four elements of the waterfall. Second, in the absence of these provisions, at the bottom of the waterfall the controllable electronic record's jurisdiction is the District of Columbia. See Comment 6.

4. **Governing law for Section 12-106.** Subsection (b) provides an exception to the general rule of subsection (a) that "the local law of a controllable electronic record's jurisdiction



governs the matters covered by this Article.” The exception recognizes that an account debtor’s rights and duties generally are governed by the law applicable to the underlying obligation of the account debtor, and not by the law applicable to the agreement between the assignor (debtor) and the assignee (secured party)—a security agreement. See Section 9-401, Comment 3. Subsection (b) recognizes that an effective agreement (i.e., one effective under Section 1-301(a)) between the account debtor and assignor may choose a different law to cover the matters covered by Section 12-106 (i.e., the account debtor’s rights and duties addressed in that section). Such an agreement may, of course, address matters other than those covered by Section 12-106 (for example, an agreement that all obligations of the account debtor are governed by the laws of State X).

**5. Determination of controllable electronic record’s jurisdiction.** The basic rule that the law of a controllable electronic record’s jurisdiction governs the matters covered by Article 12 may be viewed as a rough proxy for the traditional role of the location of tangible asset (e.g., goods) in determining the applicable law (*lex rei sitae*). Drawing on the analogous provisions in Sections 8-110 and 9-305 in the context of a security entitlement or securities account or a commodity contract or commodity account, under subsection (c) it is the controllable electronic record itself, records attached thereto or associated therewith, or the system in which the controllable electronic record is recorded that determines the controllable electronic record’s jurisdiction and, thereby, the governing law. Subsection (c) provides a “waterfall” of rules based on provisions that identify a particular jurisdiction as the controllable electronic record’s jurisdiction or alternatively that provide the governing law for a controllable electronic record or the system in which the record is recorded. As to subsection (e), see Section 8-110, Comment 5A.

Paragraphs (1) through (4) of the subsection (c) waterfall each relies on information available from a controllable electronic record, an attached or logically associated record, or rules of a system in which the record is recorded. A controllable electronic record’s jurisdiction is determined by one of these sources that “expressly provide[s]” that a jurisdiction is the controllable electronic record’s jurisdiction or that a particular jurisdiction’s law is the governing law. These paragraphs refer to attached or logically associated records or system rules that are “readily available.” They also assume that the controllable electronic record is itself readily available to anyone choosing to deal with the record. These provisions are based on the assumption that the relevant express provision will be available to an interested person without the imposition of unreasonable burdens.

**6. Bottom of the waterfall: District of Columbia.** Many controllable electronic records, attached or logically associated records, and systems in which controllable electronic records are recorded that exist at the time of the 2022 Amendments do not identify the “controllable electronic record’s jurisdiction” or the governing law (some permissioned systems being exceptions). (It is anticipated that, upon widespread adoption of Article 12 and accompanying amendments, systems will adapt and the first four elements of the waterfall will become more generally applicable for identifying a controllable electronic record’s jurisdiction.) Consequently, subsection (c)(5) addresses an issue that does not normally exist in the context of Sections 8-110 and 9-305. It might be thought that the logical choice for the residual rule for designating the controllable electronic record’s jurisdiction at bottom of the waterfall would be,

the location of the debtor. That approach would follow the role of the location of a debtor under Sections 9-301 and 9-307. However, that location may not readily be determined by parties to a transaction, primarily because in many cases involving controllable electronic records the transferor is not known to or easily discoverable by a purchaser. See Prefatory Note 1 to Article 12. Consequently, Subsection (c)(5) resolves this issue by providing that the controllable electronic record's jurisdiction is the District of Columbia.

**7. District of Columbia as controllable electronic record's jurisdiction.** The designation of the District of Columbia as the controllable electronic record's jurisdiction follows Section 9-307(c), which designates the District of Columbia as the location of a debtor that otherwise would be located in a jurisdiction whose law does not provide for a generally applicable system of public notice (such a filing or registration) for nonpossessory security interests. This designation also assumes that the District of Columbia will have adopted Article 12 and the conforming amendments to Articles 1 and 9 in substantially the uniform version—i.e., without material modification of the official text. This is a plausible assumption based on the history of adoptions in that jurisdiction. Because the controllable electronic record's jurisdiction does not govern perfection of a security interest by filing, the designation of the District of Columbia at the bottom of the waterfall will not confer on that jurisdiction any economic benefits of fees for filing of financing statements. See Section 9-306B(b). Subsection (d) addresses the unlikely situation that the District of Columbia does not adopt Article 12 without material modification of the official text or later adopts materially non-uniform amendments. Subsection (d) is patterned loosely (but as closely as feasible) on the TRADES Regulations, 31 CFR § 357.11(e), for U.S. Treasury securities.

The term “Article 12” is defined in subsection (d) as the officially promulgated 2022 version of Article 12 and conforming amendments. In determining whether the District of Columbia has enacted Article 12 without material modification, a court or other tribunal should consider the materiality of any provision in the context of the issue or issues before it. A modification of a provision that would be material in another context should be disregarded if it has no bearing on the issue or issues before the tribunal. In connection with any future revision of the Article 12 official text, it will be important for transitional provisions to address the situations in which the District of Columbia may or may not have adopted the revised official text.

**8. Relevant time for determination of governing law.** Subsection (f) provides that the rights of purchasers are governed by the applicable law as of the time of purchase. Note that Sections 8-110 and 9-305 do not contain an analogous rule with respect to a securities intermediary's jurisdiction. However, Section 8-110(c) does provide a similar rule for the delivery of a security certificate and adverse claims. As to the timing of the determination of the governing law for other issues under Article 12, such as the rights and duties of account debtors under Section 12-106, the section does not specify a time. As with most statutory provisions relating to governing law, courts are free to determine the appropriate relevant time taking into account the relevant facts and the nature of the issues involved.

**ARTICLE A**  
**TRANSITIONAL PROVISIONS FOR UNIFORM COMMERCIAL CODE**  
**AMENDMENTS (2022)**

**Prefatory Note to Article A—Transitional Provisions**

The Uniform Commercial Code Amendments (2022) (2022 Amendments) pose special challenges. The amendments add a new Article 12, covering new classes of property, and provide extensive revisions to Article 9. They also include amendments to every other UCC article (save Article 6). Earlier transitional provisions do not provide an adequate template for addressing such a broad set of amendments. However, this article draws substantially on Article 9, Part 7, the transitional provisions applicable to the 1998 Article 9 Revisions. In particular, the substantial amendments to Article 9 and the new Article 12 contained in the 2022 Amendments require that special attention be given to post-effective date perfection and priority issues.

A uniform law as complex as the 2022 Amendments necessarily gives rise to difficult problems and uncertainties during the transition to the new law. As is customary for uniform laws, these amendments are based on the general assumption that all States will have enacted substantially identical versions. While always important, uniformity is particularly important to the success of these amendments, especially those to Article 9 and the new Article 12 and conforming amendments to other articles relating to each.

Article 9, Part 7, provided that several material changes in the law would be given effect one year after a “uniform” effective date. (As it turned out, all but a few states enacted the 1998 Article 9 Revisions with the uniform effective date.). However, for practical reasons many states may wish to provide an effective date for this act that is consistent with their usual timing for effectiveness of legislation. Consequently, this article does not provide for a uniform effective date but does provide for a uniform adjustment date (Adjustment Date), which is July 1, 2025, on which several material provisions (in particular, new priority rules that would override pre-effective-date established priorities) would apply. However, if the uniform Adjustment Date would be less than one year after the effective date for a state’s adoption of these amendments, then the state should adopt an Adjustment Date that is one year after the state’s effective date. The minimum of a one-year period between the effective date and the Adjustment Date is important. It is intended primarily to provide sufficient time for a person to achieve perfection or priority of a security interest under the 2022 Amendments following the effective date, or for a person with an established priority in property to protect its priority before the priority might otherwise be lost on the Adjustment Date.

The law, other than the Uniform Commercial Code, of a state adopting the 2022 Amendments determines the time of day on the state’s effective date on which the amendments take effect.

**Legislative Note:** *A state should codify Parts 1, 2 and 3 of this article as a part of the state’s [Uniform Commercial Code].*

*In its codification of this article a state should provide a title that is conducive to its usual methods of codification, which is likely to ensure that it is called to the attention of users of the state's [Uniform Commercial Code], and which will avoid misunderstandings as to the relationship of this article to the other provisions of the state's [Uniform Commercial Code]. The designation of "Article" indicates that this article is a part of the state's [Uniform Commercial Code] as are the other articles. A state that uses a designation other than "article" may adopt for this article that other designation (such as "division"). Alternatively, a state may wish to adopt for this article a distinctive designation, such as "annex," which would distinguish its focus on transitional provisions from the content of other articles.*

## **PART 1**

### **GENERAL PROVISIONS AND DEFINITIONS**

#### **Section A-101. Short Title.**

This article may be cited as Transitional Provisions for Uniform Commercial Code Amendments (2022).

#### **Section A-102. Definitions.**

**(a) [Article A Definitions.]** In this article:

(1) "Adjustment date" means July 1, 2025, or the date that is one year after [the effective date of this [act]], whichever is later.

(2) "Article 12" means Article 12 of [the Uniform Commercial Code].

(3) "Article 12 property" means a controllable account, controllable electronic record, or controllable payment intangible.

**(b) [Definitions in other articles.]** The following definitions in other articles of [the Uniform Commercial Code] apply to this article.

"Controllable account". Section 9-102.

"Controllable electronic record". Section 12-102.

"Controllable payment intangible". Section 9-102.

"Electronic money". Section 9-102.

“Financing statement”. Section 9-102.

(c) [Article 1 definitions and principles.] Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

### **Official Comment**

**Subsection headings.** Subsection headings are not a part of the official text itself and have not been approved by the sponsors.

## **PART 2**

### **GENERAL TRANSITIONAL PROVISION**

#### **Section A-201. Saving Clause.**

Except as provided in Part 3, a transaction validly entered into before [the effective date of this [act]] and the rights, duties, and interests flowing from the transaction remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by law other than [the Uniform Commercial Code] or, if applicable, [the Uniform Commercial Code], as though this [act] had not taken effect.

### **Official Comment**

1. **Source.** This Section is drawn from pre-2022 Section 10-102(2) (now withdrawn).

2. **In general: Prospective application.** This section is a savings clause that provides in general for the prospective application of the 2022 Amendments and the preservation of the validity of pre-effective-date transactions and the rights, duties, and interests flowing from those transactions. Part 3 provides important exceptions to this prospective application for Articles 9 and new Article 12.

#### 3. **Prospective application: Examples.**

“Conspicuous.” 2022 section 1-201(b)(10) provides a revised definition of “conspicuous” and revised Comment 10 provides extensive new commentary. The revised definition applies to a record that becomes a part of the relevant transaction after the effective date.

“Hybrid transaction” and “hybrid lease.” The 2022 revisions of Sections 2-102 and 2A-

102 address a sale of goods that is a part of a “hybrid transaction” and a lease of goods that is part of a “hybrid lease.” See Sections 2-106(5) (defining “hybrid transaction) and 2A-103(1)(h.1) (defining “hybrid lease”). These revisions apply to transactions entered into after the effective date.

4. **Revisions reflecting continuation of pre-effective-date precedents.** Several revisions are intended to clarify and reaffirm understandings of pre-effective-date interpretations of the Uniform Commercial Code and are intended to modify some pre-effective-date judicial interpretations. Examples include (i) the amendment to Section 3-104, which clarifies that neither a choice-of-law nor a choice-of-forum clause prevents a promise from being a negotiable instrument, (ii) the amendments to Section 4A-201, which indicate that a security procedure may impose an obligation on both the receiving bank and the customer and may involve the use of symbols, sounds, or biometrics, (iii) the clarifying revision of Section 5-116, (iv) the new definitions of “assignee” and “assignor” in Section 9-102(a)(7A) and (7B), and (v) clarification in Section 9-204(b.1) as to the attachment of a security interest in consumer goods as proceeds or commingled goods and in a commercial tort claim as proceeds. However, this transitional rule will be important in situations in which the controlling pre-effective-date case law is not consistent with the amended provisions.

### **PART 3**

## **TRANSITIONAL PROVISIONS FOR ARTICLES 9 AND 12**

### **Section A-301. Saving Clause.**

(a) **[Pre-effective-date transaction, lien, or interest.]** Except as provided in this part, Article 9 as amended by this [act] and Article 12 apply to a transaction, lien, or other interest in property, even if the transaction, lien, or interest was entered into, created, or acquired before [the effective date of this [act]].

(b) **[Continuing validity.]** Except as provided in subsection (c) and Sections A-302 through A-306:

(1) a transaction, lien, or interest in property that was validly entered into, created, or transferred before [the effective date of this [act]] and was not governed by [the Uniform Commercial Code], but would be subject to Article 9 as amended by this [act] or Article 12 if it had been entered into, created, or transferred on or after [the effective date of this [act]], including the rights, duties, and interests flowing from the transaction, lien, or interest, remains

valid on and after [the effective date of this [act]]; and

(2) the transaction, lien, or interest may be terminated, completed, consummated, and enforced as required or permitted by this [act] or by the law that would apply if this [act] had not taken effect.

(c) **[Pre-effective-date proceeding.]** This [act] does not affect an action, case, or proceeding commenced before [the effective date of this [act]].

### **Official Comment**

1. **Source.** This section derives from Section 9-702.

2. **Pre-effective-date transactions, liens, and interests.** Subsection (a) contains the general rule that Article 9 as amended by this act (2022 Article 9) and Article 12 generally apply to transactions, liens (including security interests), and interests in property, even if entered into, created, or acquired before the effective date. Thus, for example, secured transactions entered into under Article 9 before amendment by this act (as used in these official comments to Article A, “pre-2022 Article 9”) must be terminated, completed, consummated, and enforced under this act. However, other provisions in this part provide exceptions to this general rule.

3. **Pre-effective-date transactions not governed by pre-effective-date Uniform Commercial Code.** Subsection (b) is an exception to the general rule. It applies to valid, pre-effective-date transactions, liens, and other interests in property that were not governed by the pre-2022 Uniform Commercial Code but would be governed by this act if they had been entered into or created after this act takes effect. Under subsection (b), these valid transactions, such as the sale of a controllable electronic record, retain their validity under this act and may be terminated, completed, consummated, and enforced as required or permitted by the law that would apply had this act not taken effect or, to the extent not inconsistent with that law, this act.

4. **Judicial proceedings commenced before effective date.** As is usual in transitional provisions, subsection (c) provides that this act does not affect litigation pending on the effective date.

### **Section A-302. Security Interest Perfected Before Effective Date.**

(a) **[Continuing perfection: perfection requirements satisfied.]** A security interest that is enforceable and perfected immediately before [the effective date of this [act]] is a perfected security interest under this [act] if, on [the effective date of this [act]], the requirements for enforceability and perfection under this [act] are satisfied without further action.

**(b) [Continuing perfection: enforceability or perfection requirements not satisfied.]**

If a security interest is enforceable and perfected immediately before [the effective date of this [act]], but the requirements for enforceability or perfection under this [act] are not satisfied on [the effective date of this [act]], the security interest:

(1) is a perfected security interest until the earlier of the time perfection would have ceased under the law in effect immediately before [the effective date of this [act]] or the adjustment date;

(2) remains enforceable thereafter only if the security interest satisfies the requirements for enforceability under Section 9-203, as amended by this [act], before the adjustment date; and

(3) remains perfected thereafter only if the requirements for perfection under this [act] are satisfied before the time specified in paragraph (1).

**Official Comment**

1. **Source.** This section derives from Section 9-703.

2. **Perfected security interests under pre-2022 Article 9 and 2022 Article 9.** This section deals with security interests that are perfected under pre-2022 Article 9 immediately before this act takes effect. Subsection (a) provides, not surprisingly, that if the security interest would be a perfected security interest under 2022 Article 9 (i.e., if the transaction satisfies 2022 Article 9's requirements for enforceability (attachment) and perfection), no further action need be taken for the security interest to be a perfected security interest.

**Example 1:** A pre-effective-date security agreement and financing statement covered “all accounts and general intangibles now owned or hereafter acquired.” After the effective date the debtor acquired controllable accounts, controllable electronic records, and controllable payment intangibles. The security interest in the after-acquired collateral is enforceable and perfected under both pre-2022 and 2022 Article 9. The controllable accounts are accounts, the controllable electronic records and controllable payment intangibles are general intangibles, and filing is an appropriate method of perfection for that collateral under both versions of Article 9.

Other examples of methods of perfection under pre-2022 Article 9 that also would achieve perfection under 2022 Article 9 include filing a financing statement and perfection by control in



electronic documents under pre-2022 and amended Section 7-106, in chattel paper under pre-2022 Section 9-105, and in chattel paper evidenced by authoritative electronic records under 2022 Section 9-105.

**3. Security interests enforceable and perfected under pre-2022 Article 9 but unenforceable or unperfected under 2022 Article 9.** Subsection (b) deals with security interests that are enforceable and perfected under pre-2022 Article 9 immediately before this act takes effect but do not satisfy the requirements for enforceability (attachment) or perfection under 2022 Article 9. These security interests are perfected security interests until the earlier of the time perfection would have ceased under the law in effect immediately before this act takes effect and the adjustment date. If the security interest satisfies the requirements for attachment and perfection within that period, the security interest remains continuously perfected thereafter. If the security interest satisfies only the requirements for attachment within that period, the security interest becomes unperfected on the adjustment date.

**Example 2:** A pre-effective-date security agreement signed by Debtor in favor of Secured Party covers, among other things, “all money . . . and general intangibles now owned or hereafter acquired.” Secured Party filed a proper financing statement in the appropriate filing office covering “All personal property.” Debtor owns electronic money, spitcoin, issued by the government of El Cuspidouro. Under pre-2022 Article 9 the electronic money might be characterized as a general intangible if “money” were to be construed (at least for purposes of Article 9) to include only tangible money as to which perfection is possible only by possession. See pre-2022 Section 9-312(b)(3). Alternatively, even if the spitcoin is money, perfection might be possible by filing under the baseline rule of Section 9-310, inasmuch as the spitcoin (an intangible) cannot be possessed. Assume, therefore, that under pre-2022 Article 9 Secured Party’s security interest in the spitcoin is perfected by filing. Assume also that spitcoin can be subjected to control under Section 9-105A. As to the spitcoin owned by the debtor before the effective date, under subsection (b) the security interest would remain perfected until the adjustment date but would become unperfected under 2022 Article 9 on the adjustment date unless earlier perfected by control. This is so because a security interest in electronic money that can be subject to control under Section 9-105A, such as spitcoin, may be perfected only by control under 2022 Article 9. Sections 9-312(b)(4); 9-314(a). The security interest in any spitcoin acquired by the debtor after the effective date would be unperfected until the secured party obtains control.

**Example 3:** Secured Party has a pre-effective-date security interest in a security entitlement perfected by control pursuant to Sections 9-106 and 8-106(d)(3), based on control held by Kontroal Phreeque LLC (KP) on behalf of Secured Party. Even in the highly unlikely event that following the effective date the secured party could not prove that KP acknowledged its control on behalf of the secured party in conformity with 2022 Section 8-106(d)(3), its security interest would nevertheless remain perfected beyond the adjustment date. Perfection by control for a security entitlement under Section 9-106 depends on control under 8-106 and, under Section A-301(a), Part 3 of this article, including subsection (b), does not apply to transactions under Article 8 because Section A-301(a) applies only to Articles 9 and 12. The rules under pre-effective date Article 8

continue to apply to the pre-effective date transaction. As to financial assets acquired and becoming a part of the security entitlement after the effective date, however, 2022 Articles 8 and 9 would apply. Secured Party could perfect its security interest in those financial assets through a complying acknowledgment by KP or by filing. This means for a securities account involving active trading, for example, the secured party should ensure compliance with the 2022 Article 8 control requirements at or before the effective date so as to ensure perfection in post-effective date-acquired financial assets.

**4. Interpretation of pre-effective-date security agreements.** Section 9-102 defines “security agreement” as “an agreement that creates or provides for a security interest.” Under Section 1-201(b)(3), an “agreement” is a “bargain of the parties in fact.” If parties to a pre-effective-date security agreement describe the collateral by using a term defined in pre-2022 Article 9 in one way and defined in 2022 Article 9 in another way, in most cases it should be presumed that the bargain of the parties contemplated the meaning of the term under pre-2022 Article 9. Definitions of terms relating to collateral which have been amended in 2022 Article 9 are “account,” “chattel paper,” “instrument,” “money,” and “general intangible.” A different result might be appropriate, for example, if a security agreement explicitly contemplated future changes in the Article 9 definitions of types of collateral—for example, “‘Accounts’ means ‘accounts’ as defined in the Uniform Commercial Code Article 9 of [State X], *as that definition may be amended from time to time.*” Whether a different interpretive approach is appropriate in any given case depends on the bargain of the parties, as determined by applying ordinary principles of contract law.

### **Section A-303. Security Interest Unperfected Before Effective Date.**

A security interest that is enforceable immediately before [the effective date of this [act]] but is unperfected at that time:

(1) remains an enforceable security interest until the adjustment date;

(2) remains enforceable thereafter if the security interest becomes enforceable under Section 9-203, as amended by this [act], on [the effective date of this [act]] or before the adjustment date; and

(3) becomes perfected:

(A) without further action, on [the effective date of this [act]] if the requirements for perfection under this [act] are satisfied before or at that time; or

(B) when the requirements for perfection are satisfied if the requirements are satisfied after that time.

## Official Comment

1. **Source.** This Section derives from Section 9-704.

2. **Pre-effective-date enforceable but unperfected security interests.** This section deals with security interests that are enforceable but unperfected (i.e., subordinate to the rights of a person who becomes a lien creditor) under pre-2022 Article 9 or other applicable law immediately before this act takes effect. These security interests remain enforceable until the adjustment date, and thereafter if the appropriate steps for attachment under 2022 Article 9 are taken before the adjustment date. See Section A-304(c) (This section's treatment of enforceability is the same as that of Section A-302.) The security interest becomes a perfected security interest on the effective date if, at that time, the security interest satisfies the requirements for perfection (which include the requirements for attachment) under 2022 Article 9. If the security interest does not satisfy the requirements for perfection until sometime thereafter, it becomes a perfected security interest at that later time.

**Example 1:** Prior to the effective date Debtor obtained a loan from Secured Party and signed a security agreement covering "all cryptocurrencies now owned or hereafter acquired." The security interest attached to various cryptocurrencies owned by Debtor, including 1,000 happicoins held by debtor on the happicoins blockchain platform. Debtor then transferred the 1,000 happicoins to Secured Party on the blockchain. Although the happicoins are general intangibles, Secured Party failed to file a financing statement necessary to perfect its security interest under pre-2022 Article 9.

Under 2022 Article 9, the happicoins would be controllable electronic records and the transfer of the happicoins to Secured Party would give Secured Party "control" of the happicoins as provided in Section 12-105. Before 2022 Article 9 (i.e., including 2022 Sections 9-107A and 9-314) and Article 12 became effective, Secured Party's security interest was unperfected as noted above. Upon the effective date, however, the security interest became perfected by control as a result of the pre-effective-date transfer of control to Secured Party.

**Example 2.** Prior to the effective date Debtor obtained a loan from Secured Party and signed a security agreement covering certain specified deposit accounts and "all documents and chattel paper now owned or hereafter acquired by Debtor." The security interest attached to the deposit accounts and to various documents and chattel paper owned by Debtor. Persons in control of certain electronic chattel paper, electronic documents, and deposit accounts included in the collateral acknowledged that they had control of that collateral on behalf of Secured Party. Assuming that an agency relationship cannot be established between these acknowledging persons and Secured Party, it is perhaps arguable that Secured Party's security interest in the relevant collateral was unperfected because Secured Party did not have control under pre-2022 Sections 7-106, 9-104, and 9-105. However, because the pre-effective-date acknowledgments would give Secured Party control under the relevant 2022 sections, its security interest, even if not perfected pre-effective date, became perfected by control on the effective date.

### **Section A-304. Effectiveness of Actions Taken Before Effective Date.**

**(a) [Pre-effective-date action; attachment and perfection before adjustment date.]** If action, other than the filing of a financing statement, is taken before [the effective date of this [act]] and the action would have resulted in perfection of the security interest had the security interest become enforceable before [the effective date of this [act]], the action is effective to perfect a security interest that attaches under this [act] before the adjustment date. An attached security interest becomes unperfected on the adjustment date unless the security interest becomes a perfected security interest under this [act] before the adjustment date.

**(b) [Pre-effective-date filing.]** The filing of a financing statement before [the effective date of this [act]] is effective to perfect a security interest on [the effective date of this [act]] to the extent the filing would satisfy the requirements for perfection under this [act].

**(c) [Pre-effective-date enforceability action.]** The taking of an action before [the effective date of this [act]] is sufficient for the enforceability of a security interest on [the effective date of this [act]] if the action would satisfy the requirements for enforceability under this [act].

### **Official Comment**

**1. Source.** Subsections (a) and (b) of this Section derive from Section 9-705. Subsection (c) is new.

**2. General.** This section addresses primarily the situation in which the perfection step or requirement for enforceability is taken under pre-2022 Article 9 or other applicable law before the effective date of this act, but the security interest does not attach until after that date.

**3. Perfection other than by filing.** Subsection (a) applies when the perfection step is a step other than the filing of a financing statement. If the step that would be a valid perfection step under pre-2022 Article 9 or other law is taken before this act takes effect, and if a security interest attaches before the adjustment date, then the security interest becomes a perfected security interest upon attachment. However, the security interest becomes unperfected on the adjustment date unless the requirements for attachment and perfection under 2022 Article 9 are satisfied within that period.

**4. Perfection by filing: ineffective filings made effective.** Subsection (b) deals with financing statements that were filed under pre-2022 Article 9 and which would not have perfected a security interest under the pre-2022 Article, but which would perfect a security interest under 2022 Article 9. Under subsection (b), such a financing statement is effective to perfect a security interest to the extent it complies with 2022 Article 9. Subsection (b) applies regardless of the reason for the filing. When this act takes effect, the filing becomes effective to perfect a security interest assuming the filing satisfies the perfection requirements under 2022 Article 9.

**Example 1.** Prior to the effective date Debtor obtained a loan from Secured Party and signed a security agreement covering, among other collateral, “money,” “accounts,” “chattel paper,” and “general intangibles.” Secured Party filed a financing statement covering “all assets.” If, under the applicable pre-2022 Article 9 as interpreted by the courts, electronic currency was “money” as defined in pre-2022 Section 1-201 even though as an intangible it could not be possessed, then under the applicable pre-2022 Section 9-312(b)(3), filing a financing statement was not an effective method of perfection. Assume, however, that under 2022 Articles 1 and 9, the electronic currency is not “money,” and is instead a general intangible. Under 2022 Article 9, filing is an effective method of perfection. Upon the effective date of 2022 Article 9, the security interest became perfected by the pre-effective-date filed financing statement.

**Example 2.** Prior to the effective date Debtor obtained a loan from Secured Party and signed a security agreement covering, among other collateral, “accounts,” “chattel paper,” and “general intangibles.” Secured Party filed a financing statement covering “accounts.” Under the applicable pre-2022 Article 9, a certain right to payment was chattel paper because it was a lease of specific goods, even though the transaction also covered, and the lessee’s monetary obligation also related to, various other assets and various services. Because the filed financing statement covered only accounts, the security interest in the chattel paper was unperfected. Under 2022 Article 9, however, the right to payment was an “account,” and not chattel paper, assuming that the lessee’s right to possession and use of the goods was not “the predominant purpose of the transaction.” Section 9-102(a)(11)(B)(ii). On that assumption, upon the effective date the security interest became perfected by the pre-effective-date filed financing statement covering accounts.

**5. Enforceability of security interest: unenforceable security interest made enforceable.**

**Example 3.** Under the facts of Example 1, Section A-303, Comment 2, instead of signing a security agreement Debtor agreed orally to grant to Secured Party a security interest in the happicoins. It follows that under pre-2022 Article 9 Secured Party’s security interest was unenforceable and did not attach to the happicoins for want of a signed security agreement. Pre-2022 Section 9-203(b)(3)(A). However, upon the effective date of 2022 Article 9, Secured Party had control of the happicoins under 2022 Article 9. Sections 12-105. At that time the security interest became enforceable and attached under Sections 9-107A and 9-203(b)(3)(D) and also was perfected by control.

### **Section A-305. Priority.**

**(a) [Determination of priority.]** Subject to subsections (b) and (c), this [act] determines the priority of conflicting claims to collateral.

**(b) [Established priorities.]** Subject to subsection (c), if the priorities of claims to collateral were established before [the effective date of this [act]], Article 9 as in effect before [the effective date of this [act]] determines priority.

**(c) [Determination of certain priorities on adjustment date.]** On the adjustment date, to the extent the priorities determined by Article 9 as amended by this [act] modify the priorities established before [the effective date of this [act]], the priorities of claims to Article 12 property and electronic money established before [the effective date of this [act]] cease to apply.

### **Official Comment**

1. **Source.** This section derives from Section 9-709.

2. **Law governing priority and established priorities.** Ordinarily, 2022 Article 9 determines the priority of conflicting claims to collateral under subsection (a). However, when the relative priorities of the claims were established before the effective date, pre-2022 Article 9 governs under subsection (b). Subsection (c) provides an exception to subsection (b).

**Example 1.** In 2021, prior to the effective date, Debtor obtained a loan from Secured Party and signed a security agreement covering “all cryptocurrency and money now owned or hereafter acquired.” The security interest attached to various cryptocurrencies owned by Debtor, including 1,000 happicoins held by Debtor on the happicoins blockchain platform. Secured Party promptly filed a financing statement covering “all general intangibles, including cryptocurrencies.” In 2022, also prior to the effective date, Debtor obtained a loan from Lender and signed a security agreement covering “all cryptocurrency.” Although the happicoins are general intangibles, Lender failed to file a financing statement. Because the priorities of the claims were established before the effective date, pre-2022 Article 9 governs. Secured Party’s perfected security interest has priority over Lender’s unperfected security interest under pre-2022 Section 9-322(a)(2).

**Example 2.** The facts are the same as in Example 1, except that Debtor transferred control of the 1,000 happicoins to Lender on the blockchain in 2022 *before* the effective date. Because Lender failed to file a financing statement and control was not a method of perfection under pre-2022 Article 9, Lender’s security interest was unperfected immediately prior to the effective date. However, because under 2022 Article 9 the happicoins are controllable electronic records and Lender has “control” of the happicoins

under Section 12-105, Lender’s security interest became perfected on the effective date. Nevertheless, because the priorities of Secured Party’s and Lender’s security interests were established before the effective date, Secured Party’s security interest continues to have priority after the effective date. (However, see Example 4 for the shift of priority on the adjustment date.)

**Example 3.** The facts are the same as in Example 1, except that in 2023, after the effective date, Debtor transferred control of the 1,000 happicoins to Lender on the blockchain. Under 2022 Article 9, the happicoins were controllable electronic records and the transfer of control of the happicoins gave Lender “control” of the happicoins as provided in Section 12-105. The affirmative step of transferring control established anew the relative priority of the conflicting claims after the effective date. 2022 Article 9 determines priority and Lender’s security interest has priority under Section 9-326A (without any deferral until the adjustment date). Moreover, Lender also may have priority over other property claims as a qualifying purchaser under Section 12-104(e).

One consequence of the rule on established priorities in subsection (b) is that the mere taking effect of this act does not of itself adversely affect the priority of conflicting claims to collateral, as Example 2 illustrates. However, as Example 3 illustrates, relative priorities that are “established” before the effective date do not necessarily remain unchanged following the effective date. Of course, unlike priority contests among security interests, some priorities are established permanently, for example, the rights of a buyer of property who took free of a security interest under pre-2022 Article 9.

### **3. Modification of established priorities on adjustment date.**

Subsection (c) provides an exception to the respect that subsection (b) affords to pre-effective-date established priorities, but only for security interests in Article 12 property—controllable accounts, controllable electronic records, and controllable payment intangibles—and electronic money.

**Example 4.** The facts are the same as in Example 2. Lender’s security interest became perfected by control on the effective date, Secured Party’s established priority continued to apply under subsection (b). Under subsection (c), however, on the adjustment date the priorities shifted. Secured Party’s established priority ceased to apply and Lender’s perfection by control gave Lender priority under 2022 Section 9-326A.

### **4. Transfers of collateral after the effective date.**

**Example 5.** The facts are the same as in Example 2. In 2023, after the effective date, Debtor acquired an additional 500 happicoins. The security interests of both Secured Party and Lender attached to the happicoins pursuant to the after-acquired property clauses in their respective security agreements. Secured Party’s security interest was perfected by its earlier financing statement filing. Lender then perfected its security interest by Debtor’s transfer of control of the happicoins to Lender. Lender’s security interest in the additional happicoins perfected by control gave Lender priority as to those happicoins under Section 9-326A. Unlike the situation in Example 2, however, as to the

newly acquired happicoins the priorities were not established prior to the effective date. Before the effective date neither creditor could have had a “perfected” security interest in happicoins in which Debtor had not yet acquired rights.

**Example 6.** The facts are the same as in Example 1. In 2023, *after* the effective date, Debtor transferred 750 spitcoins, an electronic money, to Beier. Beier then obtained control of the spitcoins under Section 9-105A. Secured Party’s security interest in the spitcoins, which were either money not capable of being possessed or general intangibles under pre-2022 Article 9, are assumed to be perfected by filing. See Section A-302, Comment 3, Example 2. Because there was no wrongful collusion with Debtor (indeed, Beier had no knowledge or notice of Secured Party’s security interest), Beier took the spitcoin free of Secured Party’s security interest under Section 9-332(c).

### **Section A-306. Priority of Claims When Priority Rules of Article 9 Do Not**

#### **Apply.**

(a) [Determination of priority.] Subject to subsections (b) and (c), Article 12 determines the priority of conflicting claims to Article 12 property when the priority rules of Article 9 as amended by this [act] do not apply.

(b) [Established priorities.] Subject to subsection (c), when the priority rules of Article 9 as amended by this [act] do not apply and the priorities of claims to Article 12 property were established before [the effective date of this [act]], law other than Article 12 determines priority.

(c) [Determination of certain priorities on adjustment date.] When the priority rules of Article 9 as amended by this [act] do not apply, to the extent the priorities determined by this [act] modify the priorities established before [the effective date of this [act]], the priorities of claims to Article 12 property established before [the effective date of this [act]] cease to apply on the adjustment date.

#### **Official Comment**

1. **Source.** This section derives from Section 9-709 and, in part, from Section 8-510.
2. **Applicability of this section to Article 12 property.** Although this section applies to Article 12 property (controllable accounts, controllable electronic records, and controllable payment intangibles) when the priority rules of Article 9 do not apply, it applies



primarily to controllable electronic records. Its application to controllable accounts and controllable payment intangibles is quite limited because Article 9 applies to most sales of accounts and payment intangibles (as well as to the use of that property to secure an obligation). Section 9-109(a)(3). There is a very limited exclusion from the scope of Article 9 for a sale of accounts and payment intangibles in connection with a sale of the business out of which they arose. Section 9-109(d)(4).

3. **Law governing priority and established priorities.** Ordinarily, when the priority rules of Article 9 do not apply, Article 12 determines the priority of conflicting claims to Article 12 property under subsection (a). However, when the relative priorities of the claims were established before the effective date, under subsection (b) law other than Article 12 governs. Subsection (c) provides an exception to subsection (b).

4. **Law governing priority and established priorities.**

**Example 1.** In 2021, prior to the effective date, Aiko owned 500 happicoins (a cryptocurrency consisting of controllable electronic records) over which Aiko had control (within the meaning of Section 12-105, which was not yet effective) on the happicoins blockchain. In December 2021 Aiko sold the 500 happicoins to Barbara for \$10,000 cash. Aiko provided Barbara with a signed memorandum acknowledging the sale and Aiko's receipt of the purchase price and agreeing to hold the happicoins for Barbara pending Barbara's further instructions.

In January 2022 (also prior to the effective date), Aiko sold the same 500 happicoins to Molly for \$12,000 cash. Aiko provided Molly with a signed memorandum similar to the one Aiko had provided to Barbara. Assume that, under the non-Uniform Commercial Code applicable law, Barbara remained the owner of the happicoins and under that law Molly obtained no interest in the happicoins pursuant to the purported sale because Aiko had retained no interest and had nothing to transfer to Molly. Because the priorities of the claims of Aiko, Barbara, and Molly were established before the effective date, under subsection (a) those priorities remained in effect after the effective date and Barbara remains the owner of the happicoins.

**Example 2.** The facts are the same as in Example 1, except that *before* the effective date, Aiko transferred control of the happicoins to Molly on the happicoins blockchain. Again, assume that under the non-Uniform Commercial Code applicable law that transfer of control had no legal effect. After the effective date the relative priorities are unchanged from those described in Example 1 because the relative priorities were established before the effective date and subsection (b) applies.

**Example 3.** The facts are the same as in Example 1, except that *after* the effective date, Aiko transferred control of the happicoins to Molly on the happicoins blockchain. Under Article 12, the happicoins were controllable electronic records and the transfer of control of the happicoins gave Molly "control" of the happicoins as provided in Section 12-105. Because (it is assumed) Molly met the requirements for a "qualifying purchaser" under Section 12-104(e), Molly acquired the happicoins free of Barbara's property claim. The

affirmative step of transferring control after the effective date established anew the relative priority of the conflicting claims after the effective date. Under Section A-301(a), Article 12 applies to the pre-effective-date transactions and property interests and subsection (a) of this section applies.

**5. Modification of established priorities on adjustment date.** Subsection (c) provides an exception to the respect that subsection (b) affords to pre-effective-date established priorities.

**Example 4.** The facts are the same as in Example 2. However, on the adjustment date the established priorities change. Because (it is assumed) Molly met the requirements for a “qualifying purchaser” under Section 12-104(e), on the adjustment date Molly acquired the happicoins free of Barbara’s property claim. Under Section A-301(a), Article 12 applies to the pre-effective-date transactions and property interests and subsection (a) of this section applies.

**6. Transfers after the effective date.**

**Example 5.** The facts are the same as in Example 1, except that *after* the effective date Aiko sold the happicoins to Jacob, for value, and also transferred control of the happicoins to Jacob on the happicoins blockchain. Because (it is assumed) Jacob met the requirements for a “qualifying purchaser” under Section 12-104(e), Jacob acquired the happicoins free of both Barbara’s and Molly’s property claims. Note that Jacob took the happicoins free of conflicting claims in the post-effective date acquisition immediately upon acquisition as a qualifying purchaser. Jacob’s priority was established after the effective date and was not deferred until the adjustment date, as was the case for Molly’s rights in Example 4.

## **PART 4**

### **EFFECTIVE DATE**

#### **Section A-401. Effective Date.**

This [act] takes effect on . . .