The 2010 Amendments to the Uniform Text of Article 9

By Alvin C. Harrell

I. Introduction

The latest project to revise the uniform text of Uniform Commercial Code (UCC) Article 9 (Secured Transactions) formally began in 2008 when the Uniform Law Commission (ULC) and the American Law Institute (ALI) established a Joint Review Committee (JRC) to consider the possible need for such revisions. The vehicle was the JRC rather than a Drafting Committee because no decision had been made on what issues to cover, and because it was intended that no policy issues were to be decided. The scope of the JRC’s mandate was to address ambiguities and propose clarifications as needed. There was a stated preference for making changes to Official Comments rather than the statutory text where possible.

As a result, the 2010 changes to the uniform text of Article 9 (the 2010 Amendments) are mostly narrow. Since the state legislatures generally enact only the text of Article 9 (though sometimes with non-uniform amendments) and not the Comments, this article focuses on the 2010 Amendments to that uniform text. However, in some instances the only changes appear in the 2010 changes to the Official Comments; therefore, some attention is directed at these as well. Moreover, the JRC’s emphasis on the 2010 Comments means that the Comments (along with any supplementary, state-specific Comments that may be added, e.g., by state Bar Association legislative review committees) may take on increased importance. In addition, some changes that were considered but not adopted are noted.

II. The Debtor’s Name

A. Individual Debtor’s Name on Financing Statement

This is one of the most litigated perfection issues under current Article 9. As a result, the JRC devoted considerable attention to the matter. The basic thrust of Alternative A in the 2010 Amendments is to provide a statutory requirement based on the individual debtor’s name as shown on an unexpired state-issued driver’s license. If the debtor does not have a driver’s license, the financing statement is sufficient for perfection “only if it provides the individual name of the debtor or the surname and first personal name of the debtor…”

2 See revised § 9-503(a)(4), Alternative A in the uniform text, as provided in Oklahoma House Bill No. 1833 (1st Session, 53rd Legislature, 2011). This bill failed to pass but is expected to be reintroduced in the next session.
3 See revised § 9-503(a)(5). Again, this is uniform text Alternative A, as provided in Oklahoma House Bill No. 1833. See also § 9-503, revised cmt. 2.d. As an interesting adjacent to these section 9-503 changes, the 2010 Amendments include revisions to section 9-502(c) (recording a mortgage in the real property records as a financing statement). These 2010 Amendments provide that: (1) the record (mortgage) filed pursuant to this subsection “need not indicate” that it is to be filed in the real property records; and (2) the record (mortgage) sufficiently provides the name of an individual debtor if it indicates the debtor’s “individual name” or “surname and first personal name of the debtor.”

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If the debtor is a decedent’s estate, the financing statement must provide the name of the decedent7 and indicate (“in a separate part of the financing statement”) that the collateral is being administered by a personal representative.8

If the state has issued more than one driver’s license or identification card as described in the revised section 9-503(a)(4),9 the secured party must use the “most recently” issued license or card.10

B. Name of Registered Organization

Although the 1998 revision of the uniform text of section 9-503 was focused on providing specific rules for “registered organizations,”11 a few problems in this area still surfaced. For example, what if the debtor’s name as shown in the records of the Secretary of State is different from that in the Articles of Incorporation? Or what if those records are not publicly available, or are available only in truncated form?

The 2010 Amendments to section 9-503(a)(1) specify that, if the debtor is a registered organization, the debtor’s name on the financing statement is sufficient only if it provides the name:

that is stated to be the registered organization’s name on the public organic record most recently filed with or issued or enacted by the registered organization’s jurisdiction of organization which pur-

ports to state, amend, or restate the registered organization’s name....12

This makes clear that the secured party cannot rely on secondary or truncated sources but may rely on a primary source such as a state-issued Certificate or Articles of Incorporation.

C. Trusts

Extensive attention was directed at trusts as debtors. Section 9-503(a)(3) was completely rewritten, to provide that, “for collateral held in a trust that is not a registered organization,” the name of the debtor is that specified in the “organic record of the trust”13 or, if no such name is specified, “the name of the settlor or testator....”14 In addition, “in a separate part of the financing statement,” there must be an indication that the collateral is held in trust, and/or information sufficient to distinguish the trust from other trusts of the same settlor or testator.15

The “name of the settlor or testator” is defined to mean the name specified in the trust’s organic record or, if the settlor is a registered organization, the name specified in the organization’s organic record.16

III. Other Filing Issues

A. Priority of an Unnecessary Filing

Although this issue may seem clear, apparently for some it is not, and there have been arguments that an automatically perfected security interest17 loses the priority based on that perfection if the secured party files an unnecessary financing statement. Some members of the JRC indicated a desire to clarify in the Comments that in this circumstance the time of filing is irrelevant to priority, unless the filing came first. However, this change was apparently not deemed necessary and was not included.

B. New Debtor

1. Introduction

This issue received considerable attention, as sections 9-508, 9-316 and 9-326 address issues that can be challenging when presented individually, and even more so in the aggregate. Significant clarifications are provided by the addition of new subsections 9-316(h) and (i) and revisions to section 9-326.

2. Section 9-316(h) and (i)

These new subsections provide that, for collateral that becomes subject to attachment of a security interest within four months after the location of the debtor changes, a financing statement filed in the debtor’s prior state before the change is effective to perfect the security interest.18 Moreover, if the security interest becomes perfected in the debtor’s new state before it would have become unperfected in the prior state or the expiration of four months after the change (whichever comes first), it remains perfected thereafter in the new state.19 If not, it becomes unperfected and “is deemed never to have been perfected as against a purchaser of the collateral for value.”20

If a financing statement naming the original debtor has been correctly filed in the prior state, and a “new debtor”21 is located in the new state, the financing statement is effective as to collateral owned or acquired by the new debtor...

6. (Continued from previous page)

name,” “even if the debtor is an individual to whom Section 9-503(a)(4) applies....” This recognizes that precise debtor names are not so important in the real estate records, which are commonly indexed by legal description, and therefore the precision otherwise required under § 9-503(a)(4) is not needed in this context.

7. The name of the decedent as shown on the order appointing the personal representative is sufficient. See revised § 9-503(f).

8. Revised § 9-503(a)(2); and § 9-506, revised cmt. 2. See also § 9-503, revised cmt. 2.c.

9. See supra this text and note 5.

10. Revised § 9-503(g).

11. See definition at current § 9-102(a)(70); id. § 9-503. The 2010 Amendments revise the definition of registered organization, and it is moved to § 9-102(a)(71). See also id. § 9-102(a)(68) (new definition of “Public organic record”).

12. Revised § 9-503(a)(1). See also supra note 11; and see the extensive additions to § 9-102, cmt. 11.

13. Revised § 9-503(a)(3)(A)(i). Presumably this means the trustees as named in the trust agreement. See also: supra note 11; extensive additions to § 9-102, revised cmt. 11; and infra Part III.G.


16. Id. § 9-503(b). See also supra note 11; extensive additions to § 9-102, revised cmt. 11.

17. See § 9-309.

18. “[A]s if the debtor had not changed its location.” Revised § 9-316(h)(1).

19. Id. § 9-316(h)(2).

20. Id.

21. See definition at § 9-102(a)(56); and id. § 9-203(d).
within four months after the new debtor became subject to the security interest under section 9-203(d), to the same extent as the original debtor would be bound. 22

If the security interest is reperfected in the new state before the expiration of that four month period or the time the security interest would have become unperfected in the prior state (whichever comes first), it remains perfected thereafter. 23 Otherwise, it becomes unperfected at the end of that period and is thereafter deemed “never to have been perfected” as against a purchaser for value. 24

These changes clarify perfection issues in circumstances where a debtor or new debtor acquires after-acquired property after the appropriate location of the debtor has changed pursuant to section 9-301. Arguably under current law there is no perfection in this circumstance by reason of a filing in the prior state, unless the secured party files in the new state. The 2010 Amendments at section 9-316(h) and (i) provide a limited perfection for after-acquired property (and collateral owned by the new debtor) during the usual four month grace period.

3. Section 9-326

Section 9-326 is heavily but not completely rewritten. Much of the change is stylistic, for purposes of consistency and clarity. As before, this section provides in essence that a security interest created by a new debtor, perfected by a filing that would be ineffective “but for the application of [sections 9-508 or of sections 9-316(i)(1)]]” will lose priority to a security interest perfected by some other means. 25 Thus, e.g., a security interest perfected against the new debtor by a filing against the original debtor in another state, pursuant to the four month grace period at new section 9-316(i)(1), will be subordinate to a competing security interest in the same collateral perfected directly against the new debtor in the new state. 26

However, as before this rule at section 9-326(a) is subject to section 9-326(b), which has only one, nonsubstantive change. Section 9-326(b) provides that the normal priority rules of Article 9 apply to the other security interests described at section 9-326(a). For example, the proposed 2010 Comments explain that a security interest perfected by a new initial financing statement against the new debtor would not be subordinated under section 9-326(a), even if filed to maintain a previous perfection against the original debtor pursuant to section 9-508(b). 27 Similarly, section 9-326(b) provides that section 9-326(a) does not subordinate a security interest perfected by a filing against the original debtor covering collateral transferred from the original debtor to the new debtor. 28

The Comment to revised section 9-326 updates the two examples in the old Comment to further clarify these issues by limiting the examples to same-jurisdiction scenarios. 29 The final paragraph of the Comment (added as part of the 2010 revisions) then explains that the results in those examples do not change if the original and new debtors are located in different states. 30

C. Location of Federally-Chartered and Foreign Debtors

1. Federal Entities

The location of the debtor, e.g., for purposes of the choice of law rules (for filing and perfection) at section 9-301, is determined under section 9-307. Federally-chartered entities are addressed at section 9-307(f). Section 9-307(f)(2) provides that a federally-chartered entity is located in the state that the entity so designates, if federal law permits such designation. The 2010 Amendments add a clause at the end of old section 9-307(f)(2) stipulating that this may occur by the entity indicating a main office, home office, or other comparable office. 31 Thus, a designation need not state that it is a designation as such. 32 This essentially elevates a part of old section 9-307 Comment 5 to the statutory text. 33

2. Foreign Corporations

The location of a foreign corporation is governed by section 9-307(c), which qualifies the general rule at section 9-307(b) by stating that the general rule applies only if the debtor is located in a jurisdiction with a filing system for providing notice and priority of nonpossessionary security interests. 34 If the jurisdiction where the debtor is located, pursuant to section 9-307(b), does not have such a filing system (and the other specialized rules at sections 9-307(e)–(j) do not apply), the debtor is deemed to be located in Washington, D.C. 35 These rules are unchanged in the 2010 Amendments. 36

However, these rules may raise issues regarding the adequacy of a filing system in a given country. Some members of the JRC suggested a need to clarify this further, e.g., by providing that a country’s filing system is adequate only if it applies to the specific type or types of collateral or transaction at issue. However, apparently the JRC concluded that this change is not needed (perhaps on grounds that it is already implicit in section 9-307(c)); there is no change to section 9-307(b) or (c) in the 2010 Amendments.

22. Revised § 9-316(i)(1).
23. Id. § 9-316(i)(2).
24. Id.
25. Note that revised § 9-316(i)(1) is new, as noted above.
26. See revised § 9-326(a).
27. Id. See also id. § 9-316(i)(2) (last sentence); supra this text Part III.B.2.
28. See revised § 9-326, revised cmt. 2.
29. Id.
30. Id.
31. Id.
33. Id. The 2010 Comments do not expressly address this change.
34. See id. and revised § 9-307, revised cmt. 5.
35. See § 9-307(c).
36. Id.
37. Id.
D. Assignments of Security Interests

It should be clear that an assignee of a perfected security interest need not refile (or otherwise reperfect) in order to maintain and assert the assignor’s perfection and priority. 38 Despite this clarity, at least one court has stumbled badly on this issue. 39 This made the issue an obvious prospect for the JRC to consider.

Nonetheless, the JRC did not make any revisions to section 9-310(c). The language seems very clear as is, and it is not apparent that saying more would be helpful. Nor is any change proposed for Comment 4, apparently for the same reason. In the meantime, subsequent courts have not repeated the Clark Contracting errors, so perhaps that problem will go away.

The JRC also decided not to address the issue of “trafficking in” financing statements, e.g., where a creditor takes assignment of a financing statement even though there is no security interest or to take advantage of the priority created by a future advances clause. This issue was left to the developing case law. 40

E. Form of Financing Statements

The statutory model forms that appear at section 9-521 are revised in the 2010 Amendments. Changes include deletion of the space previously provided for the debtor’s Social Security or tax identification number, for privacy reasons. Concern was expressed about the risks of nonuniformity, if the states enact the 2010 Amendments (with revised forms) at an uneven rate. But this is a risk that accompanies the use of statutory forms. Your author’s expectation is that the differences are likely to be modest and not cause problems, but as always the issue will warrant an analysis of the law in the state (or states) where the filing is to be made. 41

Additional, related revisions are made to section 9-516(b), which provides a kind of “safe harbor” that allows a financing statement to be considered “filed” (for perfection purposes) if it is properly submitted with all of the specified features. If, however, these specified features are not included, and the filing office refuses to accept the filing, then “[f]iling does not occur…”

Minor, conforming changes are made at section 9-516(b)(3)(B) and (C), changing references from “correction statement” to “information statement,” and from “last name” to “surname.” A larger change is made at section 9-516(b)(5)(B), requiring that the financing statement indicate whether the “name provided as the name of the debtor is the name of an individual debtor or an organization…” Previous language at section 9-516(b)(5)(C), requiring that a financing statement filed against an organization indicate the type of organization, jurisdiction of its organization, or an organizational number, is deleted. A significant part of old Comment 3 to section 9-516, relating to deleted section 9-516(b)(5)(C), is also deleted.

F. Location of a Trust

The JRC also decided not to make statutory revisions to address issues relating to the location of a trust. However, a new paragraph was added to Comment 2 (General Rules) for section 9-307 (Location of Debtor). This new Comment notes that a common law trust is not an entity as such; rather, it is a relationship between the trustee(s) and beneficiary (or beneficiaries). 42 Therefore, the trust itself is not the debtor as defined in section 9-102. 43 Instead, the “debtor” (defined essentially as the owners of the collateral under section 9-102(a)(28)) is the trustee (or trustees) of the trust, in that capacity. 44

G. Section 9-518—Claim Concerning Inaccurate or Wrongfully Filed Record

Section 9-518(a) is revised to change the former term “correction statement” to reference “an information statement.” Conforming changes are made throughout revised section 9-518 and elsewhere in the 2010 Amendments as needed. A new section 9-518(c) is added (“Statement by secured party of record”), allowing the secured party of record to file an information statement indicating that a record that has been filed (e.g., a termination statement) is not authorized under section 9-509(d).

Two alternatives are then offered in the 2010 Amendments, for a new section 9-518(d) (Alternatives A and B). Both alternatives essentially require the information statement filed pursuant to section 9-518(c) to: (1) identify the record to which it relates by file number; (2) indicate that it is an information statement; and (3) provide the basis for believing that the person who filed the record was not authorized under section 9-509(d). However, Alternative B additionally requires, for a filing in the real estate mortgage records pursuant to section 9-501(a)(1), the date and time of the initial financing statement filing and the information required for a real property-related filing under section 9-502(b).

Old section 9-518(c) is renumbered section 9-518(e) and is unchanged except for the change in terminology (to “information statement”) as noted above.

38 See § 9-310(c)
40 But see, e.g., Retenbach Constructors, Inc. v. CM Partnership, 639 S.E.2d 16 (N.C. Ct. App. 2007), and Wooding v. Cinted Employees Federal Credit Union, 872 N.E.2d 959 (Ohio Ct. App. 2007) (later reversed on appeal), for examples of some of the confusing issues that can arise. In re Brunch, 368 B.R. 80 (Bankr. D. Colo. 2006) offers a more conventional analysis.
41 The likelihood that, in many cases at least, only a single filing will be required under § 9-307 and § 9-501(a)(2) (which is unchanged) and the choice of law rules at § 9-301 (referencing the law of the debtor’s location in most instances; also unchanged) means that this burden should continue to be manageable.
42 See § 9-307, revised cmt. 2.
43 Id. See also Michael T. Maurer & John F. Freidman, Lending to Family Living Trusts, 52 Consumer Fin. L.Q. Rep. 198 (1998); supra this text Part III.C.
44 See § 9-307, revised cmt. 2. For example, John Doe, as Trustee of the Sally Doe Trust. The beneficiary would likewise be the “debtor” as to a security interest in the beneficial interest. Id.
Extensive new material is added to section 9-518 Comment 2 to explain these changes. This new material also notes that section 9-518 does not provide a mechanism allowing a secured party to correct an error in its own financing statement.

H. Priority Based on Unauthorized Filing

There is an interesting addition to section 9-322, Comment 4 (Competing Perfected Security Interests), explaining how the Article 9 “notice filing” system works. Under the basic, “first-in-time, first-in-right” priority system at section 9-322(a)(1), a financing statement that is ineffective for perfection when filed (e.g., because there has been no attachment under section 9-203), but subsequently becomes effective (e.g., due to a later attachment), is sufficient for priority as of the date of the filing (even though it was initially ineffective at that time due to a lack of attachment). This encourages early filings by parties contemplating a subsequent transaction, which serves a policy purpose by alerting interested parties of a possible need to inquire about a pending transaction.

Revised Comment 4 to section 9-322 points this out, and also notes that the same analysis applies to a financing statement that is initially unauthorized under section 9-509 but subsequently becomes authorized. The fact that the financing statement was unauthorized when filed does not change the analysis or result under section 9-322, and the Comment also notes that the same policy applies to the other Article 9 priority rules.

IV. Repossession and Sale of Collateral

A. Statutory Revision

Issues relating to the repossession and sale of collateral continue to be among the most-litigated under Article 9. Nonetheless, the governing law (generally, Article 9 Part 64 is generally quite clear, or at least as close to clarity as political considerations allow. Therefore, the 2010 Amendments include only one (relatively minor) change to the statutory text of Article 9 Part 6 (but somewhat more revisions to the Comments).

The change to the statutory text is at section 9-607(b)(2)(A), with the addition of language specifying that a secured party with a security interest in a mortgage loan can exercise the debtor’s right to nonjudicial foreclosure of the mortgage upon submission of a recordable sworn affidavit stating that a default has occurred “with respect to the obligation secured by the mortgage...” This is a modest clarification stating a point that seems obvious.

As noted below, revisions to the Comments are more extensive.

B. Private Sales

Questions have arisen as to whether an affiliate of the secured party can buy the collateral at a private sale. Under section 9-610(c)(2), the secured party can buy collateral at a private sale only if the collateral is a type “customarily sold on a recognized market” or pursuant to “widely distributed standard price quotations.” But this does not address the situation where the collateral is sold at a private sale to an affiliate of the secured party.

Comment 3 to section 9-602 is revised by adding a new paragraph specifying that a private sale of collateral pursuant to section 9-610(c) is equivalent to a “strict foreclosure” (i.e., retention of the collateral by the secured party) and therefore is governed by sections 9-620, 9-621, and 9-622, which require certain notices and consent by the debtor. Thus, the requirements can be waived only pursuant to section 9-624(b) (requiring an agreement entered into and authenticated by the debtor after default).

C. Notice of Disposition Sale

1. Section 9-611

There is no change to the text of section 9-611, but the last sentence of Comment 4 is revised to provide that the foreclosing secured party need not notify other secured parties whose financing statements are difficult to find because, e.g., of changes in the debtor’s location or changes due to the requirements for a name “that is sufficient as the name of the debtor under [s]ection 9-503(a).”

In addition, a new Comment 10 (Other Law) is added to section 9-611, noting that other state or federal laws may require additional notifications. The example cited is for enforcement of a ship mortgage for federally-documented vessels. New Comment 10 notes that other applicable law may govern the statutory interpretation of such requirements (citing UCC sections 1-103, 1-104 and 9-109(c)(1)).

2. Section 9-613

Again, this section is not changed, but a Comment is revised by the addition of a new paragraph. The addition to Comment 2 clarifies that section 9-613 applies to an electronic disposition sale, and that the requirement at section 9-613(1)(E) is satisfied if the notice states the time when the disposition begins and its electronic location (e.g., the Uniform Resource

45. See generally David B. McCrea & Alvin C. Harrell, Overview and Update on Vehicle Secured Transactions, Certificates of (Continued in next column)


47. This observation, of course, excludes issues arising under the Bankruptcy Code, which are generally not subject to resolution under state law. See, e.g., id.

48. See, e.g., § 9-612(b) (ten-day notice of a disposition sale is sufficient in non-consumer cases; no rule is provided for consumer transactions).

49. Revised § 9-607(b)(2)(A) (among other stated requirements).

50. See § 9-611, revised cmt. 4; supra this text Part II.

51. See § 9-611, cmt. 10.

52. Id.
D. Acceptance of Collateral in Satisfaction; Debtor Remedies

Cross-references in Comments 11 and 12 to section 9-620 (governing acceptance of collateral in satisfaction of debt) are changed to reflect section numbers in new UCC Article 1, on: variation by agreement (section 1-302); good faith (section 1-304); and the liberal administration of remedies (section 1-305).

Comment 2 to section 9-621 (notice of the secured party’s proposal to retain collateral) is revised to make clear that a competing secured party entitled to notice may recover a loss under section 9-625(b) only if the required notice was not sent.

The text of section 9-625 (remedies for a secured party’s failure to comply with Article 9) is revised slightly (though importantly), to change a reference in the bold subheading for section 9-625(c) from “consumer goods transaction” to cases where “the...collateral is consumer goods.”

V. Other Issues

A. Errors or Omissions in the Initial Financing Statement

Section 9-706 provides that an “initial financing statement” is sufficient to continue the effectiveness of a prior financing statement filed pursuant to the choice of law rules in old Article 9, where that choice of law is obsolete under the 1998 revisions. Comment 2 to section 9-706 is revised to make clear that the rules at section 9-506 governing errors and omissions that are not seriously misleading apply equally to initial financing statements.

B. Effective Date

Extensive new material is added at section 9-801 (Effective Date) and in the new Article 9 Part 8. In effect, these provisions carry forward the provisions of old Part 7 that are relevant to the transition to the 2010 Amendments. Sections 9-805 and 9-806 address transition issues relating to revision of the rules governing individual debtor names at revised section 9-503. An example is provided in the Comment to section 9-801, stating that the 2010 Amendments do not render ineffective a filing made properly under prior law, until such time as that filing would become ineffective under prior law. Upon lapse the old filing can be continued by filing a continuation statement, but this requires an amendment of the financing statement to conform the debtor’s name to the requirements of revised section 9-503. The Comment notes that there is no equivalent in the 2010 Amendments to the interstate choice of law transition issues created by the 1998 revisions to the uniform text.

There is also a Legislative Note to UCC Article 11, noting that Article 11 relates to transition issues in the 1972 uniform text revision, and these issues are now obsolete. The Legislative Note therefore recommends repeal of Article 11.

C. Article 8 Revisions

Comment 13 to section 8-102 (Article 8 definitions) is expanded with the addition of a new paragraph explaining that property is a “security,” as maintained in “registered form,” only if records are maintained by or on behalf of the issuer for purposes of registering transfers, and not if the records are maintained merely to register ownership or for other purposes. Nor is it relevant that an issuer has the capability to record transfers (“for such is always the case”), if the issuer does not in fact do so.

This Comment is intended to reject the holding in Highland Capital Management LP v. Schneider to the contrary, which has been nominated by some observers as one of the worst cases of the decade (for holding that promissory notes are securities).

D. Buyers of Commercial Tort Claims

The text of section 9-317(d) is revised slightly (but importantly), in essence to include buyers of commercial tort claims within the class of buyers for value and without notice who take priority over an unperfected security interest. Previously, section 9-317(d) extended this priority to buyers of “accounts, electronic chattel paper, electronic documents, general intangibles, or investment property.”

The 2010 Amendments rephrase this to include buyers of “collateral other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security….” thereby including buyers of all intangible collateral including commercial tort claims. Comment 6 to section 9-317 is also revised, to make clear that its related reference to various types of intangible collateral is not an exclusive listing. The exclusion of commercial tort claims under current section 9-317(d) is regarded as a typographical error, corrected in the 2010 Amendments.
E. Sections 9-406 and 9-408

Section 9-406(d) provides that a contract provision restricting assignment of the contract for purposes of creating or perfecting a security interest is generally ineffective. Section 9-406(e) is revised to specify that this does not apply to the sale of a payment intangible or promissory note, “other than a sale pursuant to a disposition under Section 9-610 or an acceptance of collateral under Section 9-620.”

Section 9-408(a) similarly prohibits enforcement of a contractual restriction on assignment of a promissory note, health-care-insurance receivable or general intangible for the purpose of creating or perfecting a security interest. Section 9-408(b) is then revised in the 2010 Amendments to specify that section 9-408(a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note, “other than a sale pursuant to a disposition under Section 9-610 or an acceptance of collateral under Section 9-620.”

F. Rights to Payment on Collateral

A question has arisen under current Article 9 as to whether the assignment of a right to payment on collateral (e.g., a right to collect the payment stream from chattel paper) creates an interest that is the same type of collateral (e.g., chattel paper) or something else (e.g., an account or payment intangible). This may affect whether and how the assignee gets perfection, and the relative priority of such an assignee as against a subsequent purchaser, e.g., of the chattel paper. The answer may depend on the nature of the interest acquired by the assignee of the payment stream.

This is addressed in the 2010 Amendments at Comments 5.a., b., and d. to section 9-102. Additions to Comment 5.a. specify that a right to payment arising out of the use of credit or charge card is an “account” (while recognizing that other, related payment rights such as transaction settlement charges are not). In Comment 5.b., the fourth paragraph (referring to alternative means of creating electronic chattel paper) is deleted as part of the 2010 Amendments.

The biggest changes are in Comment 5.d. (“‘General intangible’; ‘Payment Intangible’). The fourth paragraph is extensively revised, noting that a right to payment “is frequently buttressed by ancillary rights, such as rights arising from covenants…, and the lessor’s rights with respect to leased goods….” The existing text of the Comment then goes on to specify, in essence, that these rights are part of the payment rights to which they relate (e.g., chattel paper) and are not a separate property interest or type of collateral.

The 2010 Amendments to Comment 5.d. then add three explanatory sentences providing, i.e., that an assignment of the collateral carries with it these ancillary rights (e.g., assignment of a lessor’s right to payment “also transfers the lessor’s rights with respect to the leased goods under Section 2A-523.”). Thus, if the lessor’s rights are “evidenced by chattel paper, then an assignment of the lessor’s rights to payment constitutes an assignment of chattel paper.” Moreover, an agreement to the contrary may be effective between the parties but does not alter the statutory characterization of the collateral for purposes of Article 9.

G. Electronic Authentication

The definition of “Authenticate” at section 9-102(a)(7) is revised to mean: “to sign” (as before); or “with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process.” This is apparently intended to bring the Article 9 terminology more into line with the definition of “signed” in UCC Article 1 and the definition of “Electronic signature” in the Uniform Electronic Transactions Act (UETA).

H. Agency Law

The law of agency supplements the UCC, including Article 9. This may become relevant when determining perfection and priority for certain collateral by reason of “control.” Questions have arisen as to whether agency law supplements the “control” provisions of Article 9 or is displaced, e.g., by section 9-104. Along with this has come a related question as to whether UCC Article 8 section 8-106 (control of certain investment property) applies to control of a deposit account for purposes of Article 9, or whether the specific Article 9 equivalent provision at section 9-104 (Control of Deposit Account) is exclusive.

The 2010 Amendments to Comment 3 of section 9-104 address these issues. As to whether agency law supplements section 9-104, the addition of new language at Comment 3 is dispositive: “[t]he principles of agency apply.”

68. Id. § 9-317(e).
69. See § 9-408(a).
70. Revised § 9-408(b).
71. See definition at § 9-102(a)(11) (unchanged in the 2010 Amendments).
72. See definitions (also unchanged) at § 9-102(a)(2), (61).
73. See § 9-102, revised cmt. 5.a.
74. See § 9-102, revised cmt. 5.d.
75. Id.
76. Id.
77. Id. See generally § 1-302, and cmt. 1.
78. Revised § 9-102(a)(7).
79. See UCC Article 1 § 1-201(b)(37) and cmt. 37.
80. See UETA § 2(8).
81. See UCC Article 1 § 1-103(b).
82. See e.g.: § 9-404 (control of deposit account); § 9-105 (control of electronic chattel paper); § 9-106 (control of investment property); § 9-107 (control of letter-of-credit rights); § 9-203 (b)(3)(D) (attachment by control); § 9-312(b) (perfection); § 9-314 (perfection); §§ 9-327 – 9-329 (priority).
83. See Article 1 § 1-103(b).
84. See § 9-104, revised cmt. 3 (“Requirements for Control”) (as to Article 8, the existing Comment 3 states that section 9-104 (Continued on next page.)
As to Article 8, the existing Comment 3 states that section 9-104 is derived from section 8-106, and that section 8-106 defines “control” for purposes of investment property. Thus, existing Comment 3 already indicates that section 8-106 does not apply to deposit accounts.

The existing Comments to section 9-104 also emphasize a difference between sections 9-104 and 8-106: The latter does not require that a third party “control” agreement be authenticated by the securities intermediary, while section 9-104(a)(2) requires authentication by the debtor, the third party secured creditor, and the bank where the deposit account is maintained. This again indicates that different considerations are involved, indicating that section 8-106 does not apply to deposit accounts.

An example added to section 9-104 Comment 3 as part of the 2010 Amendments further illustrates the agency issue. In the example, Bank A (where the deposit account is maintained) serves as agent for Banks X, Y, and Z in making a secured loan to the owner of the deposit account. Because Bank A, as agent for Banks X, Y, and Z, is a secured party under section 9-102(a)(72) and has perfection by control under section 9-104(a)(1), the security interest of Banks X, Y, and Z is also perfected.

### 1. Control of Electronic Chattel Paper

Section 9-105 is significantly revised, splitting the previous initial paragraph into new subsections (a) and (b), and adding language at new section 9-105(a) stipulating that a secured party has control if “a system employed for evidencing the transfer of interests in the chattel paper was assigned.” This added language closely resembles provisions in the Uniform Electronic Transactions Act (UETA) and Electronic Signatures in Global and National Commerce Act (ENSIGN Act) governing electronic “transferable records.”

The 2010 Amendments then add language to create a new section 9-105(b) specifying that “[a] system satisfies [the test at section 9-105(a)], and a secured party has control of electronic chattel paper[,]” if the record in question is created, stored and assigned in accordance with the six (pre-existing) requirements at section 9-105. These 2010 Amendments effectively split the former first paragraph into two subsections and add clarifying language in the middle.

There are related, extensive revisions to the Comments for section 9-105. Old Comment 4 is deleted, revised, and moved to become new Comment 3.

The new Comment 3 reiterates (as did its predecessor) that Article 9 leaves the technological details of “control” to development in the marketplace, within the context of broad statutory parameters. However, the new Comment 3 also emphasizes the connection of these principles to the UETA, and to the nature of the “reliability” standard as encompassing principles of uniqueness, identifiability, and unalterability.

Like its predecessor at old Comment 4 (from which, as noted, it is derived), the second paragraph of new Comment 3 emphasizes that section 9-105 is “not based on the same concepts as [those governing] control of deposit accounts” (Section 9-104), security entitlements…(Section 9-106), and letter-of-credit rights (Section 9-107) because those rules “are based on existing market practices and legal and regulatory regimes for institutions such as banks and securities intermediaries.”

### J. Changes in Debtor’s Name

Section 9-507 covers situations where a financing statement is sufficient when filed, but subsequently becomes seriously misleading (i.e., due to a change in the debtor’s name). It states the general rules that post-filing changes do not impair the effectiveness of the filing, even if the information in the financing statement has become seriously misleading.

However, current section 9-507(c) provides that a subsequent change in the debtor’s name that renders the filed financing statement seriously misleading causes the financing statement to be ineffective as to collateral acquired by the debtor more than four months after the change. As to collateral acquired before the end of that four month period, the earlier financing statement remains effective despite being rendered seriously misleading by the change.

The 2010 Amendments include extensive clarifying revisions to section 9-507(c). Section 9-507(c) as revised provides that a financing statement which becomes insufficient as regards the debtor’s name under section 9-503 is nonetheless effective as to collateral acquired by the debtor before or within four months after the “filed financing statement becomes seriously misleading.”

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84. (Continued from previous page)

85. Id.

86. Id.

87. Id. (“Example”).

88. Revised § 9-105(a).

89. See UETA § 16(b); ESIGN Act, 15 U.S.C.A. § 7021(b); revised Article 9 § 9-105, revised cmt. 2 (change is derived from UETA § 16(b)).

90. Revised § 9-105(b) (1)-(6).

91. Revised § 9-105, revised cmt. 3. Old cmt. 3 becomes new cmt. 4.

92. Id.

93. Id.
VI. Conclusion

While numerous relatively minor, clarifying revisions are scattered throughout the 2010 Amendments (including the Comments), a list of the primary issues considered or addressed as part of the 2010 Amendments could include the following:

- problems with the debtor’s name, as required on the financing statement (especially but not limited to individual debtors);  
- other filing issues;  
- new debtors, especially in conjunction with an interstate transaction;  
- foreign and federal entities;  
- revisions to the uniform model forms;  
- the location of a trust;  
- disposition sales;  
- rejecting the Highland Capital case;  
- clarifications regarding anti-assignment clauses;  
- electronic authentication;  
- the role of agency law as to “control”;  
- control of electronic chattel paper;  
- certificate of title issues.

This is not a complete list, as other (primarily technical) amendments to the uniform text and revisions to the Comments have been made (including, e.g., updated cross-references and clarifications).

The 2010 Amendments all can be considered clarifications or logical updates, and should not be considered controversial by any knowledgeable person. Their early and uniform enactment should help to modernize, clarify, and simplify the UCC, our most important and foundationally state commercial law, consistent with the well-established goals of the UCC.

such institutions. Section 1046 of the Dodd-Frank Act specifically amended HOLA to provide that HOLA “does not occupy the field in any area of State law.” The net effect is to apply the “conflict preemption” standard to federal savings associations.

To implement this change, the Proposed Rule includes a new 12 C.F.R. section 7.4010(a) that references section 1046 of the Dodd-Frank Act and provides that state laws apply to federal savings associations and their subsidiaries to the same extent and in the same manner that those laws apply to national banks and their subsidiaries. A parallel new 12 C.F.R. section 34.6 will be added to Subpart A of 12 C.F.R. Part 34, which centers on real estate lending and appraisals. In the Supplementary Information to the Proposed Rule, the OCC noted that the affected OTS preemption regulations will be repealed.  

V. Visitorial Powers and the Enforcement of Preempted State Laws

Section 1047 of the Dodd-Frank Act codifies the holding of Cuomo v. Clearing House Ass’n, L.L.C., regarding exceptions to the exclusive visitorial powers of the OCC under the National Bank Act. As stated in the Supplementary Information, the OCC has concluded that “under Cuomo, a state attorney general may bring an action against a national bank in a court of appropriate jurisdiction to enforce non-preempted state laws, but is restricted in conducting non-judicial investigations or oversight of a national bank.” Section 1047 also amended the HOLA to provide that the same visitorial powers apply to federal savings associations and their subsidiaries, to the same

102. Revised § 9-507(a)(1).  
103. Id. § 9-507(c)(2).  
104. Id. Id. cmt. 4.  
105. See supra this text at Part II.  
106. See id. Part III.  
107. Id. Part III.B.  
108. Id. Part III.D.  
109. See id. Part III.F.  
110. Id. Part III.G.  
111. Id. Part IV.C.  
112. Id. Part V.C.  
113. Id. Part V.E.  
114. Id. Part V.G.  
115. Id. Part V.H.  
116. Id. Part V.I.  
118. See UCC Article 1 § 1-103(a).  
109. See 12 CFR § 560.2(a) (so-called “field” preemption).
112. 129 S. Ct. 2710 (2009).