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U.C.C. Revised Article 9: The Transition Rules

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As the effective date of U.C.C. Revised Article 9 approaches and for at least five years after that time, the transition from former Article 9 to the revised act will raise complex issues for attorneys and courts. The encompassing scope of Revised Article 9 means that not only transactions closing after July 1, 2001, but also those transactions already closed under former Article 9 must be brought eventually into compliance with the new act. This Article provides guidance through the maze of the transition rules of Revised Article 9 Part 7: Transition. Although few security interests will be lost as a result of the revision, sufficient potential exists for that catastrophe to warrant a systematic review of security agreements before the end of the one-year grace period for continued enforceability. Steps to perfect under Revised Article 9 may be taken without undue haste for security interests already perfected under former Article 9, thanks to the grace periods provided in the transition period. A strong warning is given, however, against the practice of indiscriminate pre-filing under Revised Article 9 at the time an initial filing is made under Former Article 9.

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INTRODUCTION

This Article is a practical guide through the transition to Revised Article 9 (Secured Transactions) of the Uniform Commercial Code (U.C.C.). Statutory instructions for the transition are given in Part 7 (Transition) of Revised Article 9.¹ Success in implementing the transition provisions, however, depends upon a mastery of the basic structure of secured transactions under both Revised and former Article 9. The new statute is replete with unfamiliar terms and new definitions for familiar terms, and the organization of Part 7 is not especially easy to follow. Moreover, even if Part 7 itself is understood, its implications for existing and new transactions are not readily discernible. During the transition, courts and practitioners will need substantial guidance to make sense of Part 7; because there are no cases, guidance must be sought in the secondary literature.

Many problems that will be encountered in the transition require reference to more than one statute, not only within Part 7, but also

¹. Rev. U.C.C. §§ 9-701 to 9-709 (2000). All references in this Article to sections of the Uniform Commercial Code are to the sections as they appear in the 2000 Official Text of the U.C.C.
within other parts of Revised Article 9 and former Article 9. For this reason, this Article is structured not as a section-by-section explication of Part 7, but as a transactional guide to the transition, focusing upon the cluster of statutes that provide the answers to the most pressing practical questions. Part I deals with the effect of Revised Article 9 on secured transactions already within former Article 9; Part II concerns the transition to Revised Article 9 for security interests and liens not within former Article 9; and Part III covers priorities during the transition. The transactions discussed here are assumed to be of the ordinary kind, subject to ordinary rules, not the special rules that govern a few kinds of collateral.2

Fortunately, as of the time of this writing, the enactments of Revised Article 9 have been remarkable in their uniformity. This uniformity justifies relying upon the uniform text of Revised Article 9 as the basis for the illustrations below. For example, the uniform effective date of July 1, 2001,3 is used throughout this Article. Of course, the reader should check the actual effective date in each state whose law may govern a real transaction.4 Because the U.C.C. is state law, it should be no surprise that the statutes enacted in each state sometimes depart from the uniform text. In extending the analysis suggested here to a real situation, it is always necessary to ascertain which state’s law governs each issue in each transaction and to apply the law as enacted by that state’s legislature.

The degree of uniformity achieved among the states enacting Revised Article 9 means that even those practitioners seeking to understand the law of only one state must master a nationwide perspective.5 In putting together new transactions, as well as in reviewing those transactions already closed, it will often be necessary

2. For example, the ordinary five-year lapse period for a financing statement, former U.C.C. § 9-403(2), rev. U.C.C. § 9-515(a), is used here in examples involving lapse, rather than the longer periods provided for transmitting utilities, former U.C.C. § 9-403(6), rev. U.C.C. § 9-515(f), and in Revised Article 9 for manufactured-home collateral. See rev. U.C.C. § 9-515(b).

3. The uniform effective date (July 1, 2001) has been adopted in North Carolina, N.C. GEN. STAT. § 25-9-701 (Supp. 2000), as well as in all other states to date.

4. The official comment to Revised 9-701 predicts "horrendous complications" if the effective dates for some jurisdictions vary from the uniform effective date. Rev. U.C.C. § 9-701 cmt. For example, the comment suggests, "the proper place in which to file to perfect a security interest (and thus the status of a particular security interest as perfected or unperfected) would depend on whether the matter was litigated in a State in which former Article 9 was in effect or a State in which this Article was in effect." Id.

5. For example, many security interests formerly governed by the law of North Carolina (or any other state) will fall under the law of a different state as of July 1, 2001, when Revised Article 9 becomes effective.
to search the law and the records of more than one state. Fewer filings will be made where the parties have their offices or where the collateral is located because those facts no longer control the place to file for most collateral. Although the new law initially will cause some confusion and frustration, its ultimate effect will likely be markedly beneficial. Revised Article 9's emphasis on uniformity is one of its most striking innovations; it is expected to lower the costs of secured transactions directly by reducing the number of filings and indirectly by increasing the certainty of result in complex transactions such as asset securitization. Thus, this Article eschews a focus limited by any one state's adopted version of Revised Article 9 in favor of the uniform act. It is intended to be equally useful for those practicing or seeking to understand the law in North Carolina or in any other jurisdiction. However, the few relevant non-uniform North Carolina amendments are discussed below. Although most obviously valuable to the legal community in North Carolina, this Article should add a dimension of clarity to the study of Revised Article 9 elsewhere as well.

In addition to looking beyond the boundaries of any one state, an understanding of Revised Article 9's transition rules requires mastering fundamental principles and methodologies of the rest of Article 9, both under the revised and former law. This Article provides an overview of Part 7 within the basic structure of the underlying law so that practitioners and courts may avoid the most likely pitfalls. The practical questions most practitioners will face are addressed in the order most likely to arise in real transactions so that planning may be implemented efficiently and confidently. Strategies are offered to avoid these dilemmas, and suggestions are made to resolve many of the anticipated problems.

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6. In North Carolina, the U.C.C., including Revised Article 9, has been adopted as Chapter 25 of the North Carolina General Statutes. A significant variant in North Carolina's adoption of Revised Article 9 concerns termination of financing statements. See infra Part I.C.4 (explaining North Carolina's non-uniform termination provision).

Because the Revised Article 9 statutes in North Carolina will carry forward former Article 9's numbering scheme, e.g., N.C. GEN. STAT. § 25-9-203 (Supp. 2000), the new statutes will be indistinguishable from former Article 9 by their numbering alone. For that reason, in order to reduce confusion in this discussion of transition rules, this Article refers to the old and new North Carolina statutes not by their formal citations, but by the label "revised" or "former."
I. FORMER ARTICLE 9 SECURITY INTERESTS AFTER REVISED ARTICLE 9'S EFFECTIVE DATE

The apparent complexity of Revised Article 9 produces anxiety for those who have already closed or are busy closing transactions under former Article 9. The discussion below provides guidance for secured transactions both old and new during the transition period. Although initially daunting, Revised Article 9 provides a great deal of protection both in substance and in timing to allow a much easier transition than might be thought at first glance. The extended discussion that follows provides detailed guidance on enforceability, continued perfection, and previously unperfected security interests, pointing out both opportunities and traps posed by the new statute.

A. General Principles

The most basic transition rule brings within Revised Article 9 all security interests within the new act's scope provisions, regardless of the transactions' timing, except for matters already in litigation on July 1, 2001. The potential difficulties posed by this all encompassing scope are lessened by generous grace periods that allow ample time to bring former Article 9 transactions into compliance with Revised Article 9. These grace periods include: (1) one year for enforceability, (2) up to five years for prior perfection by filing, and (3) one year for other non-filing methods of perfection. The aim of these rules is to enable the practitioner to comply with Revised Article 9 at what would have been a natural occasion for acting under the former law if such an occasion occurs within a reasonable time after Revised Article 9's effective date.

The need to continue, amend, or terminate former Article 9 financing statements provides an ideal opportunity for complying with Revised Article 9, and Part 7 provides the appropriate mechanisms. In those transactions for which there is no former Article 9 financing statement in the right office or jurisdiction under Revised Article 9, a special Revised Article 9 filing, popularly called an "in lieu initial financing statement," effects the transition.

9. Rev. U.C.C. § 9-705(c). Of course, the grace period extends only insofar as the filing would have continued effective under former Article 9.
Although pre-filing (before July 1, 2001) to continue or to establish perfection under Revised Article 9 is a good planning strategy and is usually permissible, it should not be undertaken as a blanket policy. Caution should be taken to ensure that perfection is achieved both under former Article 9 and, after July 1, 2001, under Revised Article 9. This dual perfection requires attention not only to the place of filing, but to content requirements as well. For example, if a former Article 9 financing statement was filed in the office where a Revised Article 9 filing would be made, it can be continued only by filing a continuation statement during the regular time within the six-month window before lapse would have occurred under former Article 9. Continuation in an office where no prior financing statement was filed requires a Revised Article 9 initial financing statement “in lieu” of a continuation statement under Revised 9-706. In contrast to continuation statements, these in lieu financing statements can be filed at any time. Content-compliance with Revised Article 9 may be ensured by delaying the pre-filing until the information required by Revised 9-706(c) can be added to the financing statement. Note that the duration of a Revised Article 9 initial financing statement filed “in lieu” of a continuation statement under Revised 9-706 is five years from its own filing date; unlike an ordinary continuation statement, lapse of an in lieu financing statement is not calculated from the filing date of the former Article 9 financing statement.

Like perfection, priorities established before the effective date of Revised Article 9 continue to be honored under the new law.\(^\text{1}\) Otherwise, Revised Article 9 governs priorities. The statute recognizes that even established priorities may give way to new action by a secured party under Revised Article 9. Because priority issues extend to all security interests within Revised Article 9, many of which were not previously covered by former Article 9, all priorities issues are covered together in Part III.

B. Continued Enforceability Under Revised Article 9

One question almost certain to arise during the transition is whether a security interest that already satisfies the requirements of former 9-203 remains enforceable under Revised Article 9 without the necessity of a new security agreement or amendment.

\(^{1}\) C.4.

Enforceability is the first concern with any security interest.\(^{13}\) Even as against the debtor, the secured party's right to the collateral in a secured transaction depends upon compliance with the statutory requirements for enforceability and attachment.\(^{14}\) As against other creditors and transferees of the collateral, the necessary perfection and priority is impossible to achieve without an enforceable and attached security interest.

Enforceability is achieved when three basic requirements have been satisfied:\(^{15}\) (1) a security agreement\(^{16}\) describing the collateral\(^{17}\) has been authenticated\(^{18}\) by the debtor,\(^{19}\) unless the statute provides an evidentiary alternative; (2) value\(^{20}\) has been given; and (3) the debtor has rights in the collateral. Of these basic requirements, the security agreement is the culprit for transition difficulties.

The basic rule is that Revised Article 9 provides a one-year grace period for continued enforceability of security interests previously enforceable under former Article 9.\(^{21}\) After one year, enforceability under the former Article 9 security agreement is lost unless Revised 9-203 has been satisfied. The practical risk that Revised Article 9 will undermine the enforceability of a prior security interest is negligible,

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13. Enforceability is addressed primarily in section 9-203 in both former and Revised Article 9.
14. Attachment is related to enforceability and occurs when the security interest "becomes enforceable against the debtor with respect to the collateral," unless an agreement between the parties postpones it. Former U.C.C. § 9-203(2); rev. U.C.C. § 9-203(a). Without compliance with Article 9, a seller has little chance to reclaim the goods upon the buyer's default, even if no third parties are involved. See U.C.C. § 2-702.
15. Former U.C.C. § 9-203(1); rev. U.C.C. § 9-203(b).
17. For the sufficiency of the security agreement's description, see former U.C.C. § 9-110; rev. U.C.C. § 9-108.
18. Former 9-203(1)(a) requires "signing," as defined in section 1-201(39). In contrast, Revised 9-203(b)(3)(A) requires "authentication," as defined in Revised 9-102(a)(7). The latter term is broader and explicitly permits an electronic record.
19. The definition of "debtor" is different in Revised Article 9 from its former Article 9 counterpart. Compare Rev. U.C.C. § 9-102(a)(28) ("'Debtor' means: (A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor; (B) a seller of accounts, chattel paper, payment intangibles, or promissory notes; or (C) a consignee."). with former U.C.C. § 9-105(1)(d) ("'Debtor' means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the paper ... ").
20. U.C.C. § 1-201(44).
21. Rev. U.C.C. § 9-703(b) (governing security interests perfected before the effective date); rev. U.C.C. § 9-704 (governing security interests unperfected before the effective date).
however, because almost all former Article 9 security interests will remain enforceable under Revised Article 9.

Nonetheless, when a former Article 9 financing statement uses a term defined in the former Article 9 statute to describe collateral, the security agreement may require amendment to conform to Revised Article 9’s requirements. Although the chance of a problem is small, the risk is not worth taking because the consequence—loss of the security interest—is disastrous for the secured party. Fortunately, the risk may be avoided by examining existing security agreements. Because the risk arises from the use of statutory descriptions, those security agreements in which collateral is described by type are most at risk. One danger is that although the revised statute generally endorses description by type,22 it is ineffective for certain consumer investment collateral and for commercial tort claims.23

A second risk of losing a previously enforceable security interest is one of interpretation. Like the risk described in the last paragraph, this danger is presented by the use of a former Article 9 statutory type to describe collateral in the security agreement. Definitions of types of collateral represent some of Revised Article 9’s most striking innovations; thus, the danger that a new Revised Article 9 definition may no longer cover the collateral is real. For example, compare the former Article 9 definitions of “accounts” and “general intangibles” to those in Revised Article 9. Under former Article 9, rights to payment not associated with goods and services are “general intangibles.” In Revised Article 9, many such rights to payment either fall within the expanded definition of “accounts” or are made separate categories of collateral altogether, reducing Revised Article 9 “general intangibles” to a much narrower category than under former Article 9. For instance, license fees for software are “general intangibles” under former Article 9, but “accounts” under Revised Article 9. Even the collateral previously within “accounts” has suffered some redefinition in Revised Article 9. For example, the right to proceeds under a letter of credit was an account24 prior to the revision of Article 5 in 1995, but is defined as a separate category of

23. Rev. U.C.C. § 9-108(e) (“A description only by type of collateral defined in [the Uniform Commercial Code] is an insufficient description of: (1) a commercial tort claim; or (2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.”) (alteration in original).
24. See George W. Hisert, Letters of Credit and Article 9: Mixing Oil and Water, 73 AM. BANKR. L.J. 183, 189 (1999). Under former Article 9, the security interest in a letter-of-credit right, however, could not be perfected except by possession. Former U.C.C. § 9-304(1).
collateral under Revised Article 9.25 The transition period would seem to be replete with potential for such interpretative problems.

Fortunately, however, as Revised Article 9-703's official comment affirms, the definitional changes pose less threat to the enforceability of existing security interests than might be imagined. Specifically, the comment points out that the ordinary rules of contract interpretation define an agreement's terms by reference to the law in effect at the time of execution, in this case former Article 9.26 Under this rule, courts will continue to give the terms in former Article 9 security agreements the meaning ascribed to them in former Article 9. The upshot is that no amendment of a security agreement should be necessary to ensure the continued enforceability of a security interest merely on account of a different definition in Revised Article 9. If the original security agreement satisfies Revised Article 9's substantive requirements, it will remain effective after July 1, 2001,27 with regard to the collateral described by reference to former Article 9's definitions.

The language of the original security agreement itself, however, may deny the secured party the advantage of the rule of interpretation that preserves the original meaning. If the security agreement defines the collateral by reference to the former Article 9 definition "as that definition may be amended from time to time,"28

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28. The comment to Revised 9-703 provides insight into the interpretation of pre-effective-date security agreements.

A pre-effective-date security agreement covers "all accounts" of a debtor. As defined under former Article 9, an "account" did not include a right to payment for lottery winnings. These rights to payment are "accounts" under this Article, however. The agreement of the parties presumptively created a security interest in "accounts" as defined in former Article 9. A different result might be appropriate, for example, if the security agreement explicitly contemplated future changes in the Article 9 definitions of types of collateral—e.g., "'Accounts' means 'accounts' as defined in the UCC Article 9 of [State X], as that definition may be amended from time to time." Whether a different approach is appropriate in any given case depends on the bargain of the parties, as determined by applying ordinary principles of contract construction.

Rev. U.C.C. § 9-703 cmt. 3, ex. 3. While the comment illustrates the potential for new collateral to be captured under an former Article 9 security agreement, such language carries equal potential for eliminating collateral from the security agreement's description. See also Harry C. Sigman & Edwin E. Smith, Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing, 55 BUS. LAW. 1065, 1072 (2000) [hereinafter Sigman & Smith, Soft Landing] (reaching similar conclusions). For further discussion of transition issues, see its companion article, Harry C. Sigman & Edwin E. Smith, Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing—Part II, 55 BUS. LAW. 1763 passim (2000).
the effect may be to opt out of the ordinary rule of interpretation. The intended protective effect of the drafting fails because such language indicates the parties' intention that the collateral's description should change with later amendments to the statute. Consider, for example, a 1994 security agreement that describes the collateral as "accounts." At the time of drafting under former Article 9, this type of collateral includes the right to proceeds of a letter of credit, but it does not under Revised Article 9. Under Revised Article 9, such collateral falls within "letter-of-credit" rights, a category that is sui generis. If the former Article 9 security agreement's description of collateral is simply "accounts," the security interest will remain enforceable even after the end of Revised 9-703's one-year grace period because "accounts" will carry its former 9-106 meaning under the common rule of interpretation. If, on the other hand, the security agreement describes the collateral as "'accounts' as that definition may be amended from time to time," the secured party may be held to have assumed the risk that the revisions of Articles 5 and 9 would give the term a narrower definition. In that event, unless the security agreement is amended within the one-year grace period of Revised 9-703 to include "letter-of-credit rights," it will no longer satisfy Revised 9-203's collateral description requirement. Unless the security interest is saved by satisfying an alternative to the security agreement requirement, such as automatic attachment under Revised Article 9, it may be lost altogether after June 30, 2002. Creditors should check statutory descriptions in closed transactions with care to evaluate the effect of the language by which the collateral is described.

In the process of reviewing existing documents to ensure continued enforceability of existing security interests, it may also be possible to take advantage of the opportunities offered by Revised Article 9's expanded scope. New types of collateral may be covered by a security agreement under Revised Article 9. The easy mechanisms of Article 9 become available on July 1, 2001, to finance such personal property as commercial tort claims, deposit accounts in

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29. U.C.C. § 5-116(2); former U.C.C. § 9-106.
32. Rev. U.C.C. § 9-703 cmt. 3, ex. 3.
34. If the right to letter-of-credit proceeds is a "supporting obligation" as defined in Revised 9-102(77) or proceeds of other collateral, the security interest will attach automatically under Revised 9-203.
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non-consumer transactions, health-care-insurance receivables, and electronic chattel paper. In closed transactions, secured parties and debtors may agree to amend security agreements to add these new types of collateral.

The risk attendant to collateral descriptions makes clear that between now and June 30, 2002, new and closed transactions should be reviewed for compliance with the enforceability provisions of both former Article 9 and Revised Article 9. In the unusual event that amendments are necessary to ensure continued enforceability of former Article 9 security interests, they may be made at any time before the expiration of the one-year grace period. Attention should also be given to the possibility of including new types of collateral permitted by Revised Article 9 to be covered in security agreements.

After ensuring enforceability, the next step is to ascertain whether perfection continues or may be established for the first time for transactions falling within Revised Article 9. The three Subparts which follow address security interests perfected under former Article 9 by filing, those perfected under former Article 9 by methods other than filing, and those not yet perfected when Revised Article 9 becomes effective.

C. Continued Perfection by Former Article 9 Financing Statement Under Revised Article 9

Because Revised Article 9 applies to everything within its scope, regardless of the timing of the transaction, security interests already perfected under former Article 9 must comply with Revised Article 9. One principal concern during the transition is the fate of security interests perfected under former Article 9 prior to July 1, 2001. The answer depends primarily upon the method of perfection under former Article 9.

Filing is the most common method of perfection and the one that poses the most complex practical transition problems. What must be done to continue perfection by filing depends upon whether the prior filing is already in the correct place for a Revised Article 9 financing statement. The discussion below is accordingly subdivided into four parts. The first Section concerns former Article 9 financing statements already filed in the jurisdiction and office specified by Revised Article 9; the second Section addresses financing statements for which Revised Article 9's place-of-filing rules have not yet been

The most crucial point of the discussion below is that former Article 9 perfection by filing remains effective under Revised Article 9, with a generous time allowance to comply with both the content and the place-of-filing requirements of the new act. The drafters worked to make the transition as natural and easy as possible, setting generous time limits so that ordinarily nothing need be done until the usual time for continuation. Thus, security interests already perfected by filing under former Article 9 remain perfected after the effective date of Revised Article 9 until the time the existing financing statement would lapse under former Article 9. This grace period, however, is limited to a maximum of five years (i.e., no later than June 30, 2006). Methods to continue, amend, or terminate former Article 9 financing statements are discussed below, as well as the question of pre-filing.\textsuperscript{38} North Carolina's non-uniform termination provision is also examined.

1. Prior Financing Statement Already Filed in the Jurisdiction and Office Specified by Revised Article 9

Under Revised Article 9, most financing statements are filed centrally\textsuperscript{39} (in the Secretary of State’s office in North Carolina, for example) in the state where the debtor is located.\textsuperscript{40} Under former 9-401, many former Article 9 financing statements will already have been filed in that office and jurisdiction. If the former Article 9 filing fully complies with Revised Article 9 with regard to content as well as place of filing, nothing further need be done. Such a financing statement perfects the security interest under Revised Article 9 just as it did under former Article 9.\textsuperscript{41} For example, suppose that a secured party has a security interest in accounts receivable collateral of a debtor that is a North Carolina registered corporation with its only places of business in North Carolina. Under former Article 9, an effective filing was made, which included a financing statement filed in the North Carolina Secretary of State’s office.\textsuperscript{42} The central

\textsuperscript{38} See infra Part I.E.

\textsuperscript{39} Rev. U.C.C. § 9-501.

\textsuperscript{40} Rev. U.C.C. § 9-301.

\textsuperscript{41} Rev. U.C.C. § 9-703(a).

\textsuperscript{42} Former U.C.C. § 9-401. The filing was made in the right state under former Article 9 because for purposes of former Article 9, the debtor is located in North Carolina. \textit{Id.} § 9-103(3)(d). Under the facts given above, it is likely that the collateral itself is also
filing is already in the right state and office for Revised Article 9. Assuming that the financing statement's contents and those of the security agreement also satisfy Revised Article 9, it will continue under Revised 9-703(a) to perfect the security interest after July 1, 2001, without further action, whether or not a dual filing was also made under former Article 9 in the Register of Deeds office.

To ensure perfection under Revised Article 9, the former Article 9 financing statement must satisfy the new act's content, as well as its place-of-filing requirements. Of particular concern are collateral descriptions by statutory type for which definitions have changed in Revised Article 9. Errors or omissions here are likely to be fatal to perfection. For example, collateral described as "general intangibles" in the former Article 9 financing statement may need amendment to include collateral classified as "accounts" under Revised Article 9. Of paramount importance is the debtor's name as it appears in the financing statement. If the debtor is a registered organization, its name must mirror exactly the public record. Unlike security interests, financing statements are not contracts. Because they are designed to give notice to those who were not parties to the transaction, the contents of financing statements are not saved by rules of interpretation. It is therefore essential that they be brought into compliance with the requirements of Revised Article 9.

located in North Carolina at all times relevant to the choice-of-law rule of former 9-103(1). Because North Carolina adopted the third alternative to former 9-401, a dual filing is likely required for this debtor. If the secured party made a local filing or filed not only in North Carolina but in some other state in which collateral might be located, the additional filings will have no effect upon the sufficiency of the central North Carolina filing to satisfy Revised Article 9 after July 1, 2001.

43. Rev. U.C.C. § 9-301.
45. See former U.C.C. § 9-401.
47. Rev. U.C.C. § 9-502. Compliance with Revised Article 9's content requirements is essential to perfection unless a safe harbor provision applies. See rev. U.C.C. § 9-506(c) (allowing errors or omissions in the debtor's name provided that the error or omission does not render the financing statement materially misleading). Revised 9-502's basic content requirements are supplemented by Revised 9-516(b), which details content required to avoid rejection by the filing office. See also rev. U.C.C. § 9-520(a) (permitting a filing office to refuse to accept a record for filing that does not comply with Revised U.C.C. § 9-516(b)); id. § 9-338 (subordinating a financing statement that incorrectly reports the basic information required in Revised U.C.C. § 9-516(b)(5)).
Although the burden of reviewing closed transactions may be irksome, the method of compliance is relatively easy. Amendments that are necessary to comply with Revised Article 9 must be made before the lapse of the former Article 9 financing statement. Generally, these amendments should be made before or at the time the first continuation statement is filed under Revised Article 9 during the six-month window just before lapse. The continuation statement itself may serve as the vehicle for amendment. Of course, reviewing closed transactions in a systematic manner long before the lapse date may be preferable. If errors or omissions are found, former Article 9 financing statements may be amended at any time before or after July 1, 2001, to comply with Revised Article 9. However, if the description of collateral is amended before July 1, 2001, to conform to Revised Article 9's different definitions, care should be taken that former Article 9 perfection is not lost by premature deletion of a former Article 9 collateral description. The Revised Article 9 term might be added without deleting the former Article 9 description. It should also be remembered that amendment under former Article 9 requires signatures of both the debtor and the secured party.

The former Article 9 filing which is already in the right place for Revised Article 9 is continued under the law in effect at the time the continuation statement is filed. If the lapse date is before July 1, 2001, a former Article 9 continuation statement should be filed; the financing statement will then remain effective under Revised Article 9 until the next time for continuation, so long as that date occurs before June 30, 2006. After July 1, 2001, timely continuation of a former Article 9 financing statement already located in the right jurisdiction and office for Revised Article 9 is accomplished by filing an ordinary Revised Article 9 continuation statement in compliance with Revised 9-515. There is nothing special about such a filing during the transition. Like all continuation statements, it must be filed within the six-month window before lapse to be effective.

50. See rev. U.C.C. § 9-512 cmt. 2. Under Revised Article 9, continuation statements are a subcategory of amendments. Revised U.C.C. § 9-102(a)(27).
52. Rev. U.C.C. § 9-705(c). Note that the definition of "financing statement" under Revised 9-102(a)(39) includes not only the initial financing statement but all amendments including continuation statements. The definition removes any ambiguity about the effect of Revised 9-705(c) on former Article 9 financing statements, which were continued prior to July 1, 2001.
53. Rev. U.C.C. § 9-705(d), (f); id. § 9-515.
54. Revised 9-705(d)'s specification of "timely filing" is a reminder of the necessity of
duration of the Revised Article 9 continuation statement derives from that of the original financing statement: it extends a financing statement's effectiveness five years beyond its previous lapse date.⁵⁵

Likewise, for financing statements already in the right office but due to lapse soon after July 1, 2001, it may be convenient to effect continuation under former Article 9 in the months preceding Revised Article 9's effective date to avoid undue haste later.⁶⁶ Oddly, the express language of Revised 9-706 indicates that pre-filing a Revised Article 9 continuation statement may be excepted from the general endorsement of pre-filing in Revised 9-705(b).⁵⁷ This exception may be an oversight and in many cases it will make no difference whether the continuation statement that is filed is on a Revised Article 9 form or a former Article 9 form. Nevertheless, in transactions with consumers and farmers and in states requiring dual filing under former Article 9,⁵⁸ there is some danger associated with the ambiguity about pre-filing continuation statements. In such transactions, a continuation statement filed before July 1, 2001, in the central office alone will not satisfy the local filing requirement of former Article 9. If such a continuation statement is also ineffective under Revised Article 9 because pre-filing is unauthorized, the filing will fail altogether to continue the former Article 9 financing statement, which will eventually lapse. Another difficulty is that former Article 9 requires the secured party's signature,⁵⁹ while Revised Article 9 does not. A pre-filed continuation statement may be ineffective if unsigned even though it otherwise complies with both former Article 9 and Revised Article 9. While arguments may be made for the effectiveness of pre-filed unsigned Revised Article 9 initial financing statements, the statutory language suggests that continuation statements filed before July 1, 2001, should meet all of former Article 9's requirements in order to preserve the safety of Revised 9-705(c)'s

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⁵⁵ Rev. U.C.C. § 9-510(c).
⁵⁶ Rev. U.C.C. § 9-515(e).
⁵⁷ The next continuation, which will be made under Revised Article 9, would not then be for five more years.
⁵⁸ Revised 9-706 allows the secured party to file an in lieu initial financing statement before the act's effective date to continue the effectiveness of a pre-effective-date financing statement. Moreover, Revised 9-705(d) expressly contemplates filing the Revised Article 9 continuation statement "after this [Act] takes effect."
⁵⁹ In these transactions, jurisdictions that adopted the second or third alternative to former 9-401 often require a local filing.
⁶⁰ Former U.C.C. § 9-403(3).
generous allowance for continued effectiveness in the event the filings fail to qualify as Revised Article 9 continuation statements.

2. Prior Financing Statements Not in the Right Place for Filing Under Revised Article 9

Because Revised Article 9 applies even to transactions closed before its effective date,\(^6^0\) it may awaken some anxiety about those transactions closed or due to close before July 1, 2001. Concern is especially keen when the former Article 9 filing is not in the office or jurisdiction provided in Revised Article 9. The solution to this problem may seem especially elusive to those searching the statute, buried as it is in the heart of Revised 9-705.\(^6^1\) Nevertheless, once found, the news is heartening, as the following discussion indicates.

Revised Article 9 provides a liberal grace period to allow secured creditors time to satisfy the new place-of-filing rules. Compliance may be achieved efficiently and without haste, usually in the process of continuing the prior financing statement. Perhaps the provision of greatest practical significance in the transition, Revised 9-705(c) provides:

This [Act] does not render ineffective an effective financing statement that, before this [Act] takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [former Section 9-103]. However, except as otherwise provided in subsections (d) and (e) and Section 9-706, the financing statement ceases to be effective at the earlier of:

1. the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

2. June 30, 2006.\(^6^2\)

The applicability of this statute rests not merely upon prior filing, but upon prior filing that has perfected the security interest. Revised 9-705(c) constitutes an exception to the general one-year grace period for prior perfection under Revised 9-703(b). Because Revised 9-705(c) governs the majority of security interests, which are perfected by filing, this exception may apply much more frequently than the general rule. The grace period for prior perfection by filing provided by Revised 9-705(c) ordinarily extends until lapse would

\(^{60}\) Rev. U.C.C. § 9-702.

\(^{61}\) Rev. U.C.C. § 9-705(c).

\(^{62}\) Id.
have occurred under former Article 9, usually five years from the
time of filing the original financing statement or the last continuance
under former Article 9. The goal is to permit Revised Article 9
compliance without disrupting the ordinary cycle of business. The
secured party may make the transition to Revised Article 9 at the
time a continuation statement would have been filed under former
Article 9. Only in those few jurisdictions where the duration of a
financing statement is more than five years must the secured party
take any special care to act before June 30, 2006, when the grace
period ends absolutely.

One difficulty with this liberal time frame for readjusting the
place of filing is that during the transition, searching creditors not
only must look in the Revised Article 9 office and jurisdiction, but
also must search for a former Article 9 filing that still might be
effective. The search must encompass local filing offices for those
transactions triggering local filing requirements under former 9-401.
Moreover, termination rules under Revised 9-707 may require a
search for termination statements in both former Article 9 and
Revised Article 9 filing offices, even if they were filed after July 1,

The secured party whose former Article 9 financing statement is
filed in a completely different jurisdiction or office than is mandated
by Revised Article 9 cannot continue its effectiveness after July 1,
2001, by an ordinary Revised Article 9 continuation statement
because there is no financing statement to continue in the Revised
Article 9 place of filing. The existing financing statement must be
effectively relocated to the Revised Article 9 jurisdiction or office in
order that it may be continued there. This relocation is done by filing
an initial financing statement under Revised Article 9, in which
appropriate reference is made to the former Article 9 financing
statement so that the latter may easily be found. The new financing
statement is an "initial" one because it is the first to be located in the
Revised Article 9 office or jurisdiction. When a Revised Article 9
financing statement serves this special role during the transition, it is

63. Former U.C.C. § 9-403(2).
64. Rev. U.C.C. § 9-705(c)(2).
66. See rev. U.C.C. § 9-301 (establishing that the financing statement generally is filed
where the debtor is located); id. § 9-501 (creating a central office filing system).
67. Rev. U.C.C. § 9-705(d) cmt. 5.
69. Rev. U.C.C. § 9-706(c).
often referred to as an "in lieu initial financing statement," because it is filed "in lieu of [a] continuation statement." The in lieu initial financing statement may be filed at any time before or after Revised Article 9's effective date. Moreover, unlike a continuation statement, its timing is not restricted to the six-month window just before lapse of the original financing statement.

Because the in lieu initial financing statement is a first-time filing in the Revised Article 9 office or jurisdiction, its duration is unrelated to the duration of the former Article 9 filing. Although it continues the effect of the prior filing, the Revised Article 9 in lieu initial financing statement lapses five years after it is filed, not five years from the time the old financing statement would have lapsed. In this respect, it is quite unlike a continuation statement. The secured party should mark the new lapse time.

An in lieu initial financing statement does not continue the effectiveness of a former Article 9 financing statement unless it complies with Part 5 of Revised Article 9. Thus, the secured party must take care not only to file in the right place under Revised Article 9, but also to comply with the content requirements of Revised 9-502. To do so, it will often be necessary to make amendments before or during the process of continuing a former Article 9 financing statement. The debtor's name is a critical component of the financing statement and should be checked for accuracy against the public record if the debtor is a registered entity. If collateral is described by type in the former Article 9 financing statement, amendment may be necessary to incorporate a

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70. This language appears in the caption of Revised 9-706. See rev. U.C.C. § 9-706(a) ("Initial financing statement in lieu of continuation statement.").
71. Revised 9-706(b) applies either the duration of a financing statement under former 9-403 if the in lieu initial financing statement is filed before July 1, 2001, or the duration of a 9-515 initial financing statement if it is filed after July 1, 2001. Under the uniform version of both statutes for ordinary collateral and ordinary debtors, the duration is five years from filing.
72. Compare rev. U.C.C. § 9-515(e) ([U]pon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing.), with rev. U.C.C. § 9-706(b) (setting the duration of the in lieu initial financing statement by the duration of an "initial financing statement" under Revised Article 9 or former Article 9, whichever was in effect at the time of filing). For the in lieu initial financing statement, the duration runs from the time of the new filing, whether before or after Revised Article 9's effective date. For a true continuation statement, the duration of its effect runs from the prior filing's lapse date.
73. Rev. U.C.C. § 9-706(c)(1).
74. Id.
new definition in Revised Article 9. If a necessary amendment is not made by the time the prior financing statement would have lapsed under former Article 9, perfection by filing will be lost.

Revised 9-707 clarifies the method by which such amendments are made. Before July 1, 2001, amendments may be made to the former Article 9 financing statement under former 9-402(4). Under this provision, signatures of both debtor and secured party are required. Such amendments should be undertaken cautiously with an eye towards avoiding loss of perfection under former Article 9 in the rush to satisfy the new act. In amending a description of collateral to conform to a new Revised Article 9 definition, for example, deleting the former Article 9 collateral description prior to July 1, 2001, could spell immediate catastrophe.\(^{76}\)

The in lieu initial financing statement might be a safe alternative vehicle for amendment.\(^{77}\) If it is filed after July 1, 2001, no signature is required.\(^{78}\) Because the pre-filed in lieu initial financing statement is not effective until July 1, 2001,\(^{79}\) there are no concerns about amendment resulting in inadvertent loss of former Article 9 perfection. Of course, it may be preferable to review closed transactions in a systematic manner long before the date the prior financing statement would have lapsed under former Article 9. Fortunately, the in lieu initial financing statement may be pre-filed. As mentioned earlier, all filings made before July 1, 2001, are best signed by the debtor.\(^{80}\)

\(^{76}\) Compare, e.g., rev. § 9-102(a)(42) (defining “general intangibles”), with former § 9-106 (defining “general intangibles”).

\(^{77}\) Revised 9-707(c)(3) explicitly clarifies this alternative, although it was implicit before that provision was added to Revised Article 9 in the spring of 2000. The addition of Revised 9-707 required the renumbering of the two subsequent statutes in Part 7, making some secondary commentary published at or shortly after the renumbering potentially confusing to readers. This Article uses the final numbering, as does the North Carolina adoption of Revised Article 9. Revised 9-707(c) provides additional, though probably unnecessary, guidance on later amendment. Because of the mandate of Revised 9-706(c)(1) that the in lieu initial financing statement satisfy Part 5 of Revised Article 9, amendments necessary to satisfy Revised 9-502 may safely be made no later than the filing of the in lieu initial financing statement. The risk is of lost perfection unless the safe harbor of Revised 9-506(c) applies.

\(^{78}\) Rev. U.C.C. § 9-502.

\(^{79}\) Note, however, that the duration of the in lieu initial financing statement runs from the date it was filed, even if it was before July 1, 2001. Rev. U.C.C. § 9-706(b)(1), (2).

\(^{80}\) Although Revised 9-502 dispenses with any signature requirement, its substantive effect prior to July 1, 2001, is at best debatable.
3. Advisability of Pre-filing at Same Time as Former Article 9 Filing

In transactions closing before July 1, 2001, it might be thought wise to pre-file a Revised Article 9 initial financing statement concurrently with filing a former Article 9 financing statement. But this practice is problematic if used as a wholesale strategy because the potential for inadvertent lapse of perfection is great. Many Revised Article 9 filings made at the same time as former Article 9 filings may prove ineffective, either because their timing is flawed or because they fail to satisfy the content requirements of Revised 9-706(c). This misfortune can be avoided, however, if one approaches the transition methodically.

The first step to ensure an easy transition to Revised Article 9 in transactions closing before Revised Article 9’s effective date is to draft security agreements and financing statements that satisfy both former Article 9’s requirements and Revised Article 9’s requirements for content and formalities. This safeguard avoids the necessity of later amendments, while supporting former Article 9 perfection prior to July 1, 2001.

The financing statement(s) then should be filed in the jurisdiction and office(s) provided by former Article 9. Doing so achieves immediate perfection, which of course is unavailable under Revised Article 9 before its effective date. The first Revised Article 9 filing, however, is not independent of its former Article 9 roots. Its function is to continue the effectiveness of the former Article 9 financing statement. In order to do so, the Revised Article 9 filing must comply either with Revised 9-705(d)–(f) or Revised 9-706, whichever is applicable, to be effective.

If the former Article 9 filing is in the right place under Revised Article 9, it might be thought useful to file a Revised Article 9 continuation statement immediately. But this strategy is not useful

81. See former U.C.C. § 9-203; former U.C.C. § 9-402.
82. Rev. U.C.C. §§ 9-203; 9-502 to 9-506; see also rev. U.C.C. § 9-516 (setting forth the steps necessary to constitute filing and the effectiveness thereof). The National Financing Statement (Form UCC1) is especially appropriate for this purpose because it provides signature lines necessary to satisfy former Article 9 as well as spaces for the information called for by the new act. See former U.C.C. § 521(a).
83. This situation holds true even if a dual filing has been made in a local office as well.
84. In North Carolina, for example, section 25-9-401 of the North Carolina General Statutes currently requires dual filing in the Secretary of State’s office and in the Register of Deeds office in the county where the debtor is located in most transactions. See N.C. GEN. STAT. § 25-9-401(1) (1999), amended by N.C. GEN. STAT § 25-9-401 (Supp. 2000).
because no Revised Article 9 continuation statement may be filed except during the six-month window prior to lapse.\textsuperscript{85} If a continuation statement is filed earlier, the Revised Article 9 filing is wholly ineffective.\textsuperscript{86}

If there is no former Article 9 financing statement where a Revised Article 9 filing must be made, pre-filing under Revised Article 9 is permissible.\textsuperscript{87} But such a filing is not a true continuation statement because there is no prior filing in the same office as required by Revised 9-705(d). It might be an in lieu initial financing statement,\textsuperscript{88} but not if it fails to provide certain information about the former Article 9 financing statement as required by Revised 9-706(c).\textsuperscript{89} It cannot function as an ordinary initial financing statement even after July 1, 2001, because an earlier filing already perfected the security interest. The sole consequence of such a pre-filing is to create a trap for the filing party when the former Article 9 financing statement lapses without effective transition to Revised Article 9. In short, pre-filing an in lieu initial financing statement should be delayed until the information to satisfy Revised 9-706(c) can be obtained from the filing office. Note that a new lapse date will run from the date of filing the in lieu initial financing statement, not from the date of the prior former Article 9 filing.\textsuperscript{90}

4. Amendment and Termination

All amendments except for continuation are covered by Revised 9-707, a last-minute addition to Part 7. This section includes termination, a special kind of amendment under Revised Article 9. When the new section was added to the uniform text of Revised Article 9 in the spring of 2000, it resulted in the renumbering of the two subsequent sections of Part 7.

Under the uniform version of Revised 9-707, if the former Article 9 financing statement is already in the right jurisdiction and office for a Revised Article 9 filing, a Revised Article 9 amendment or termination statement should be filed in that office.\textsuperscript{91} It is

\begin{itemize}
  \item \textsuperscript{85} Rev. U.C.C. § 9-515(d).
  \item \textsuperscript{86} Rev. U.C.C. § 9-510(c).
  \item \textsuperscript{87} Rev. U.C.C. § 9-705(b).
  \item \textsuperscript{88} For a full discussion of the in lieu initial financing statement, see supra Part I.C.2.
  \item \textsuperscript{89} Rev. U.C.C. § 9-706(c).
  \item \textsuperscript{90} Rev. U.C.C. § 9-706(b).
  \item \textsuperscript{91} Rev. U.C.C. § 9-707(c)(1).
\end{itemize}
permissible to make amendments in a Revised Article 9 continuation statement, if the continuation statement is being filed at the time.\textsuperscript{92}

If the former Article 9 financing statement is filed in a different place (state or office), amendment or termination may be accomplished by an in lieu initial financing statement filed as a continuation statement.\textsuperscript{93} Its effect is to relocate the filing to the proper Revised Article 9 jurisdiction and office while simultaneously amending or terminating the filing. In the alternative, amendment or termination can be made in a separate filing accompanying the in lieu initial financing statement\textsuperscript{94} or in a subsequent filing.\textsuperscript{95} By satisfying Revised 9-706(c) as mandated in Revised 9-707(c), filing an in lieu initial financing statement also effectively continues the pre-effective date financing statement filed elsewhere under former Article 9. Not unexpectedly then, a new lapse date results under Revised 9-706(b). One further caution is necessary: if amendment is required to comply with Revised Article 9, it must be made before the former Article 9 financing statement would have lapsed to avoid losing perfection under Revised Article 9.

The procedure for amendment applies to termination as well. However, Revised Article 9 also provides an alternative method to terminate a former Article 9 financing statement when it is not being continued under the new law. Revised 9-707(b) provides that “the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.” Revised 9-707(e) permits (although it does not require) a termination statement to be filed in the office of the original filing. For example, a former Article 9 financing statement filed in Minnesota may be terminated there even if filings made under Revised Article 9 would be made in Tennessee. This alternative termination method is permitted, however, only if the original financing statement has not yet been relocated to the Revised Article 9 jurisdiction and office by filing an in lieu initial financing statement.\textsuperscript{96}

\textsuperscript{92} Rev. U.C.C. § 9-512 cmt. 2.
\textsuperscript{93} Rev. U.C.C. §§ 9-706, 9-707(c)(3).
\textsuperscript{94} Rev. U.C.C. § 9-707(c)(2).
\textsuperscript{95} Id.
\textsuperscript{96} Rev. U.C.C. § 9-707(e) (permitting the alternative method of termination “unless an initial financing statement that satisfies Section 9-706(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 as the office in which to file a financing statement”).
Dual filings present a bit of a dilemma not expressly answered by the Revised 9-707(e), although some states, including North Carolina, have eliminated this problem by adopting non-uniform amendments. Recognizing a single termination statement in the former Article 9 central office as effective to terminate a dual filing would be most consistent with the policies of the new act. Given the diminished role of local offices under Revised Article 9, it would seem less likely that a single local filing in a county office should suffice. Of course, if the local filing is the only one made under former Article 9, it may be terminated in that local office in states with the uniform version of the statute.

Revised 9-707(e)’s potential to provoke local county filings in offices not set up to receive them after July 1, 2001, makes this subsection especially likely to be varied by non-uniform amendment. Those seeking to file or to find termination statements should therefore be alert. In North Carolina, the Registers of Deeds strongly objected to the burden of maintaining filing capability for non-land-based collateral after July 1, 2001. As a result, the North Carolina General Statutes Commission originally recommended that the legislature reject the Revised 9-707(e) alternative for terminating financing statements by filing in the former Article 9 office.\footnote{Because the alternative was thought too confusing, the statute also eliminated the option to incorporate termination language into the in lieu initial financing statement itself.} The extra cost of filing a Revised Article 9 initial financing statement merely to terminate a prior filing was recognized and eliminated by the Commission’s recommendation that only one fee be charged. Following these recommendations, the North Carolina General Assembly adopted a non-uniform termination provision.\footnote{As originally adopted in the summer of 2000, section 25-9-707(f) of the North Carolina General Statutes provides the following non-uniform method of termination:

If the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be terminated after July 1, 2001 only if:

(1) The pre-effective-date financing statement and a termination statement are filed in the office specified in G.S. 25-9-501; or
(2) A termination statement is filed in the office specified in G.S. 25-9-501 concurrently with the filing in that office of an initial financing statement that satisfies G.S. 25-9-706(c). Under this subsection, no separate fee shall be charged for the filing or indexing of the termination statement.


If this provision remains unchanged and if the law of North Carolina applies under Revised 9-301, a termination statement for a pre-effective-date financing statement filed before July 1, 2001, in the North Carolina Secretary of State’s office may be filed in the same office, just as under the uniform law. However, if the former Article 9 financing}
as of the time of this writing the North Carolina General Statutes Commission has approved a “clarifying amendment” reinstating Revised 9-707(e), which provides:

Whether or not the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this State may be terminated after this act takes effect by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies G.S. 25-9-706(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 of this Article as the office in which to file a financing statement. However, a termination statement may not be filed under this section in the register of deeds office unless it is the office specified in G.S. 25-9-501.

This amendment includes a non-uniform provision that permits termination statements to be filed in the Register of Deeds office only for land-related collateral, such as fixtures.

As part of the same “clarifying amendment,” the Commission also approved a new subsection to section 25-9-707, which states that “[n]o separate fee shall be charged for the filing or indexing of a concurrently filed termination statement under subdivision (c)(2) of this section.” The import of this new provision is to allow only one fee when an in lieu initial financing statement is filed merely for the purpose of relocating the financing statement in the Revised Article 9 office so that its effectiveness can be terminated at the same time.

The alternative of terminating in the former Article 9 office does not apply to financing statements that have already been relocated to the Revised Article 9 filing office. Part 7 no longer determines what and where to file in such cases, for the transition has been completed except for questions of priorities. Once an in lieu initial financing statement has been filed, that financing statement is the subject of a

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statement was filed only in a North Carolina Register of Deeds office, while Revised Article 9 requires a North Carolina central office filing (e.g., for consumer goods), two concurrent filings are necessary under North Carolina's Revised 9-707(f) for termination: an in lieu initial financing statement and a termination statement. These filings must be made in the Secretary of State's office. No separate fee is charged for the termination statement.

99. It is hoped that the amendment may be enacted by the General Assembly in time to become effective on July 1, 2001.

100. S. 257, 2d Sess., § 6 (2001) (amending Revised 9-707(e)).

101. Id.
termination statement. Accordingly, the method is to file an ordinary Revised Article 9 termination statement.\(^{102}\)

Thus, during the transition, a searching creditor might find a financing statement apparently still in effect by virtue of the absence of a termination statement in either the central filing office of another state specified in Revised Article 9 or the North Carolina Register of Deeds office where an original dual filing was located. For former Article 9 filings made in North Carolina, the search should include both the Revised Article 9 central filing office and the North Carolina Secretary of State’s office if any central filing was made originally. Except for the land-related collateral for which local filing continues under Revised Article 9, no new termination statements will be filed in the Register of Deeds office in North Carolina after July 1, 2001. In other states, the search should be broadened to include the local office in which a former Article 9 filing was made, especially for consumer and farm-related collateral.

\begin{itemize}
\item[D.] \textit{Continued Perfection by Other Former Article 9 Methods}
\end{itemize}

Security interests perfected under former Article 9 by means other than filing also remain perfected under Revised Article 9, but the grace period for bringing such perfected security interests into conformity with Revised Article 9 is much shorter than the one-year grace period for those security interests perfected by filing.\(^{103}\) The sting of this rule is lessened by recognizing that many transactions perfected by possession, control, or automatic perfection before July 1, 2001, already comply with Revised Article 9’s requirements for enforceability and perfection and thus remain undisturbed by the new law.\(^{104}\) For example, a security interest in ordinary goods continues perfected under Revised Article 9 if the secured party already has actual possession of the goods and retains it.\(^{105}\) Likewise, control of investment property under former Article 9 continues

\[\text{References:} \]

\(^{102}\) Rev. U.C.C. § 9-513 (stating when a termination statement must be filed and the effectiveness of a properly filed termination statement).

\(^{103}\) Compare rev. U.C.C. § 9-703(b) (establishing a one-year grace period for the continued perfection of security interests perfected prior to the effective date but not by means that satisfy Revised Article 9), with rev. U.C.C. § 9-705(c) (setting June 30, 2006, as the latest date for the continued effect of prior perfection by filing).

\(^{104}\) Rev. U.C.C. § 9-703(a) (concerning priority over subsequent lien creditors); see also rev. U.C.C. §§ 9-301 to 9-316 (concerning the law governing perfection and priority and the means and effect of perfection generally); former U.C.C. §§ 9-301 to 9-318 (concerning methods of perfection and priority).

\(^{105}\) Rev. U.C.C. § 9-313(a).
effective to perfect under Revised Article 9, and automatic perfection remains effective for purchase-money security interests in consumer goods. Because Revised Article 9 makes some crucial changes in the method of perfecting security interests in certain kinds of collateral, perfection under former Article 9 may not satisfy Revised Article 9. If the non-filing method of perfection under former Article 9 is ineffective under Revised Article 9, the new act provides only a one-year grace period to re-perfect. Loss of perfection on July 1, 2002, is therefore a danger that requires some real diligence if the secured party depends upon possession, control, or automatic perfection. Because of the nature of the revisions, it is especially important, where former Article 9 perfection is by possession, to determine whether Revised Article 9 requires something more. If so, the new step must be taken by June 30, 2002. In some cases, Revised Article 9's expansive filing provisions will allow perfection by filing; it is permissible to pre-file under Revised Article 9. A pre-filed Revised Article 9 financing statement continues perfection without interruption if the Revised Article 9 requirements (e.g., enforceability) are otherwise met. As always when pre-filing, it is wise to have the debtor sign.

Another change worth noting concerns bailments. As a general rule, Revised Article 9 requires a record “authenticated” by the bailee acknowledging that it holds possession for the secured party’s benefit; mere notification to the bailee is ineffective to perfect. However, some exceptions exist, notably including goods for which the bailee has issued a negotiable or non-negotiable document. In such cases, notification to the bailee continues effective to perfect under Revised Article 9. The new requirement of acknowledgment

109. For example, negotiable instruments are no longer excepted from filing under Revised Article 9. Compare rev. U.C.C. § 9-312(a) (establishing the perfection of a security interest in negotiable instruments by filing), with former U.C.C. § 9-304(1) (requiring possession to perfect a security interest in a negotiable instrument).
110. Rev. U.C.C. § 9-705(b).
111. Rev. U.C.C. § 9-703(a) cmt. 1.
112. See infra Part I.E.
113. Rev. U.C.C. § 9-313(c).
114. Id.; see also id. § 9-312(c)–(d) (concerning perfection of a security interest in goods covered by a document).
115. Compare former U.C.C. § 9-304(3) (governing perfection of a security interest in goods in the possession of a bailee), with rev. U.C.C. § 9-312(d)(2) (same). Note,
by the bailee will undermine perfection of a security interest in a bailed instrument, for example, or a racing dog which is boarded at a kennel not belonging to the secured party, even though the bailee has been given notice of the secured party’s interest. Because many such arrangements are short-term, the one-year grace period provided in Part 7 may be adequate as a practical matter.

Another change, with perhaps more theoretical than practical likelihood to cause trouble, is Revised Article 9’s requirement of control rather than mere possession of a letter of credit to perfect an interest in letter-of-credit rights. In most jurisdictions, Revised Article 5 already will have awakened assignees of rights to payment under letters of credit to the necessity of obtaining the issuer’s consent.

For a letter of credit, as in some other cases, new automatic perfection rules under Revised 9-308 and Revised 9-309 may eliminate the necessity to take any new step under Revised Article 9. Automatic perfection for letter-of-credit rights that are “supporting obligations” may insulate secured parties from the danger of losing perfection, even if the control ordinarily necessary for perfection has not been achieved. Suppose, for example, that a security interest in a negotiable draft, supported by a written letter of credit, is perfected under former Article 9 by delivery of both the instrument and the credit to the secured party before July 1, 2001. Under Revised Article 9, possession is good perfection for an instrument, but not however, that perfection does not occur until the bailee receives notification. E.g., rev. U.C.C. § 9-312(d). Of course, possession of a negotiable document remains good perfection under Revised Article 9. See rev. U.C.C. §§ 9-312(c), 9-313(a). Other exceptions to the acknowledgment requirement of Revised 9-313(c) include certificated securities, Rev. U.C.C. § 9-313(a), (e), and a new provision in Revised 9-313(h) intended for (although not drafted exclusively for) the protection of the real estate mortgage warehouse lending industry. See rev. U.C.C. § 9-313 & cmt. 9.


117. Promulgated in 1995, Revised Article 5 has been adopted in all but a few states at the time of this writing.

118. See U.C.C. § 5-114(c) (“An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.”).

119. Rev. U.C.C. § 9-308(d) (providing for automatic perfection in supporting obligations); id. § 9-102(a)(77) (defining supporting obligations).

120. Rev. U.C.C. § 9-312(b)(2) (“Except as otherwise provided ... a security interest in a letter-of-credit right may be perfected only by control ... ”). There is some risk, however, of losing priority. See rev. U.C.C. § 9-329(1) (giving priority to security interests perfected by control).

for letter-of-credit rights.\footnote{122} The security interest in the letter of credit, however, remains perfected without further action\footnote{123} because the credit is a supporting obligation for the draft, for which a security interest has been perfected.

E. Perfection Under Revised Article 9 of Previously Unperfected Former Article 9 Security Interest

A secured party may pre-file a Revised Article 9 financing statement to perfect a security interest not yet perfected under prior law.\footnote{124} Assuming compliance with Revised Article 9, the pre-filed financing statement becomes effective to perfect the security interest on July 1, 2001.\footnote{125} It is crucial to make sure that Revised Article 9’s requirements for enforceability have been met. As for any pre-filing, the debtor should sign the Revised Article 9 financing statement to avoid a potentially litigable question under former Article 9 and Revised Article 9. While unlike former Article 9, Revised Article 9 does not require the debtor’s signature on a financing statement,\footnote{126} doubt may well arise about Revised Article 9’s substantive effect on pre-Revised Article 9 filings. For this reason, it may be convenient to use the National Financing Statement (Form UCC1), rather than the Revised Article 9 form, in pre-filing because it has a signature line as well as space for the information required by Revised Article 9.

II. PRIOR NON-U.C.C. (NON-FORMER ARTICLE 9) TRANSACTIONS

The expanded scope of Revised Article 9 presents new opportunities to reduce costs and to increase predictable outcomes for many transactions and kinds of collateral not formerly within the law of secured transactions. The first Subpart below addresses issues of enforceability; the second Subpart concerns continued perfection under Revised Article 9 of security interests and liens for which the non-Article 9 equivalent of perfection has been achieved before July 1, 2001; and the third Subpart focuses upon perfecting those not previously perfected.

\footnote{122. Rev. U.C.C. § 9-312(b)(2).}
\footnote{123. Rev. U.C.C. § 9-308(d).}
\footnote{124. Rev. U.C.C. § 9-705(b).}
\footnote{125. Rev. U.C.C. § 9-704(3)(A).}
\footnote{126. Compare former U.C.C. § 9-402(1) (requiring the debtor’s signature on financing statements), with rev. U.C.C. § 9-502 (requiring only the names of the debtor and the secured party and a description of the collateral), \textit{and id.} § 9-509(a) (requiring the debtor’s “authorization” to file a financing statement).}
A. **Enforceability of Prior Enforceable Non-Former Article 9 Transactions and Liens**

Recall that the basic rule is that Revised Article 9 applies to all transactions or liens within its scope, except for matters already in litigation. An exception, however, applies to maintain the enforceability of prior valid transactions or liens not within former Article 9 but which do fall within the new act. Such interests or liens can be terminated, completed, consummated, or enforced under either the old law or Revised Article 9. But this flexibility does not mean that the creditor may rest easy, for the continued enforceability is limited in duration to one year. Of course, this limitation does not apply if Revised Article 9 already has been satisfied at the time of its effective date. Otherwise, necessary steps must be taken to avoid losing the security interest after one year.

B. **Continued Perfection Under Revised Article 9 of Prior Perfected Non-Former Article 9 Transactions and Liens**

Non-former Article 9 transactions and liens that are perfected (i.e., would have priority as against a lien creditor) before July 1, 2001, and that already satisfy Revised Article 9 remain perfected under Revised Article 9. For example, suppose that before July 1, 2001, a creditor took assignment of a commercial deposit account as security for a debt under an agreement written and signed, accompanied by the bank’s written agreement to follow the creditor’s instructions regarding the funds’ disposition. Although the assignment is excluded from the scope of former Article 9, it is within Revised Article 9’s expanded scope. The security interest is already perfected under Revised Article 9 because Revised 9-203 is satisfied and the secured party already has control of the account.

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131. For prior perfected non-former Article 9 transactions and liens, Revised 9-703(b)(1) and (2) provide a one-year grace period for enforceability to be achieved under Revised 9-203. For prior unperfected non-former Article 9 transactions, one year’s grace is provided in Revised 9-704(1) and (2).
133. Former U.C.C. § 9-104(l).
Nothing at all need be done to ensure that it remain perfected after July 1, 2001.\textsuperscript{136}

Prior perfected non-former Article 9 transactions and liens which do not already satisfy Revised Article 9 are given a one-year grace period during which perfection under Revised Article 9 may be achieved without interruption of perfected status.\textsuperscript{137} If Revised Article 9 perfection is not achieved before or during that period, perfection is lost.\textsuperscript{138} For example, if a creditor has a security interest in a commercial tort claim enforceable before July 1, 2001, under non-U.C.C. law and has taken steps at common law to secure priority as against a lien creditor of the debtor, perfection continues until June 30, 2002. At any time before that date, the creditor may file a Revised Article 9 financing statement to continue perfection. If the creditor fails to do so, the security interest becomes unperfected on July 1, 2002.

C. Perfection Under Revised Article 9 of a Security Interest That Was Enforceable but Unperfected Under Prior Non-U.C.C. Law

As indicated above, enforceable non-U.C.C. security interests remain enforceable under Revised Article 9 until June 30, 2002,\textsuperscript{139} even though such security interests were unperfected under prior law. It is important to remember that enforceability survives only for a year unless Revised 9-203 is complied with within that year or unless automatic attachment occurs under Revised Article 9.

Assuming enforceability is maintained, perfection may be achieved under Revised Article 9 before or after July 1, 2001. If an appropriate Revised Article 9 perfection step is taken on or before July 1, 2001, perfection occurs on July 1, 2001.\textsuperscript{140} A perfection step taken after July 1, 2001, perfects the security interest at the time it is taken.\textsuperscript{141} If a financing statement is an effective means to perfect the security interest, it may be pre-filed.\textsuperscript{142} It is also useful, however, to remember that having the debtor sign may avoid difficulties about the applicability of Revised Article 9 provisions (which dispense with the signature requirement) before its effective date.

\begin{thebibliography}{9}
\bibitem{136} Rev. U.C.C. § 9-703(a).
\bibitem{137} Rev. U.C.C. § 9-703(b)(1).
\bibitem{138} Rev. U.C.C. § 9-703(b)(3).
\bibitem{139} See supra Part II.B.
\bibitem{140} Rev. U.C.C. § 9-704(3)(A).
\bibitem{141} Rev. U.C.C. § 9-516(a) (defining what constitutes filing); id. § 9-313(d) (defining the time of perfection by possession).
\bibitem{142} Rev. U.C.C. § 9-705(b).
\end{thebibliography}
In securing perfection, the secured party may find it useful to ensure priority as well, if possible. For example, if the collateral is a negotiable instrument, it is permissible to file a financing statement;\textsuperscript{143} but if possession is practicable, possession has the advantage of potential for gaining priority as well as perfection.\textsuperscript{144}

### III. PRIORITIES

Revised Article 9 will not upset priorities established under former Article 9 merely by dint of its effectiveness. Nevertheless, there is potential for action taken under Revised Article 9 to establish new priorities. Revised 9-709(a) provides the general rule that priorities are governed by Revised Article 9.\textsuperscript{145} This rule is consistent with the basic rule of Revised 9-702 that Revised Article 9 applies to all matters within its scope, regardless of their timing. Thus, a creditor with an unperfected security interest in collateral under former Article 9 will be junior to another creditor who files after July 1, 2001, to perfect a security interest in the same collateral.\textsuperscript{146}

When a security interest attaches after July 1, 2001, and is perfected by a pre-filed Revised Article 9 financing statement that would not have perfected the security interest under former Article 9, the basic priority rule of Revised 9-322(a) is adjusted by Revised 9-709(b), so that priority dates from July 1, 2001. For the purpose of determining the time of filing under the first-to-file-or-perfect priority rule of Revised 9-322(a), such a financing statement is treated as if it had not been filed until July 1, 2001, for collateral as to which attachment occurs on or after Revised Article 9's effective date.\textsuperscript{147} This provision carries implications for after-acquired

\begin{itemize}
  \item \textsuperscript{143} Rev. U.C.C. § 9-312(a).
  \item \textsuperscript{144} Rev. U.C.C. § 9-330(d).
  \item \textsuperscript{145} See rev. U.C.C. § 9-709(a). Revised Article 9 priorities will not affect matters already in litigation before July 1, 2001, which are placed beyond Revised Article 9's scope by Revised 9-702(c).
  \item \textsuperscript{146} Rev. U.C.C. § 9-709 cmt. 1, ex. 1; see also rev. U.C.C. § 9-322(a)(1) (establishing that, among competing perfected security interests, the first secured party to file or otherwise perfect the security interest has priority).
  \item \textsuperscript{147} As demonstrated in the comment to Revised 9-709, secured parties should be aware that financing statements ineffective under former Article 9 but effective under Revised Article 9 may become effective no earlier than the effective date of Revised Article 9.
\end{itemize}

In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its existing and after-acquired accounts in favor of SP-2, who files a financing statement covering "accounts." After this Article
collateral, but only if the pre-effective-date financing statement would not have perfected the security interest under former Article 9.

The rule of Revised 9-709(b) itself gives way when competing security interests are similarly situated. As between conflicting security interests, each of which is perfected by such a pre-filing, priority reverts to the first-to-file-or-perfect rule of Revised 9-322(a). The last sentence of Revised 9-709(b) suggests that a secured party with a security interest for which former Article 9 perfection is unavailable (e.g., health-care-insurance receivables) may gain some advantage by immediately pre-filing under Revised Article 9.

A much more important exception to the applicability of Revised Article 9’s priority rules is carved out in the second sentence of Revised 9-709(a): “[I]f the relative priorities of the claims were established before [Revised Article 9] takes effect, [former Article 9] determines priority.” This rule is designed to prevent Revised Article 9 from upsetting priorities merely by becoming effective. For example, two creditors (SP-1 and SP-2) have security interests in debtor’s accounts. SP-1 has mistakenly filed a financing statement only in the North Carolina Secretary of State’s office and so failed to perfect. SP-2 made the dual filing required by North Carolina’s former 9-401. Although Revised Article 9 renders effective the financing statement filed by SP-1, SP-2, whose priority was established under former Article 9, remains the senior creditor.

takes effect on July 1, 2001, one of D’s account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in Section 9-322(a), SP-1 would have priority in the instrument, which constitutes SP-2’s proceeds. SP-1’s filing in 1999 was earlier than SP-2’s in 2000. However, subsection (b) provides that, for purposes of Section 9-322(a), SP-1’s priority dates from the time this Article takes effect (July 1, 2001). Under Section 9-322(b), SP-2’s priority with respect to the proceeds (instrument) dates from its filing as to the original collateral (accounts). Accordingly, SP-2’s security interest would be senior.

148. Rev. U.C.C. § 9-709 cmt. 1 (“One consequence of the rule in subsection (a) is that the mere taking effect of this Article does not of itself adversely affect the priority of conflicting claims to collateral.”).
150. Other examples of the “established priorities” exception are provided in the official comments. Specifically, an example making clear the policy of the statute not to displace an established priority merely by the happenstance of the new act’s effectiveness is the fourth example in the first comment to Revised 9-709:

In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings (a “general intangible” as defined in former Article 9 but an “account” as defined in this Article). SP-1’s security interest is unperfected because its filed financing statement covers only “accounts.” In 2000, D creates a security interest in the
The comments acknowledge that formerly established priorities may give way to new actions under Revised Article 9, but they fail to provide much guidance for those wishing to take such action before Revised Article 9's effective date. For secured parties planning in advance of July 1, 2001, the omission is unfortunate. The statute is especially unclear when it comes to non-filing actions by a competing creditor and to the rule's effect on actions (whether before or after July 1, 2001) that would establish a new super-priority under Revised Article 9. For example, SP-1, the senior creditor, possesses a written letter of credit, which perfects its security interest in the proceeds under former Article 9. SP-2, whose security interest in the same collateral is unperfected, secures control of the letter-of-credit rights by obtaining the nominated bank’s written consent to its assignment of proceeds. If control is obtained after July 1, 2001, it seems likely that Revised Article 9 would give priority to SP-2, whose super-priority based upon control trumps SP-1’s prior and continued perfection by possession, unless the established priorities rule of Revised 9-709(a) is construed to make Revised Article 9’s super-priorities not applicable in such cases. The result should be the same if the bank’s consent is obtained before Revised Article 9’s effective date, whether or not the security interest was perfected or unperfected prior to July 1, 2001, and whether or not the consent was obtained fortuitously or for the purpose of priority under the new act.

Likewise, although pre-filing is given some attention in Revised 9-709’s comments, some questions are left unanswered. For example, it is useful to extend the reasoning of Example 3 to pre-filing. The example involves two previously unperfected security interests. The second to attach (SP-2’s) is perfected under Revised Article 9 by filing on August 1, 2001. Of course, by filing SP-2 wins the day under Revised 9-322(a)(1) in the example. If SP-2’s Revised Article 9 financing statement were filed before July 1, 2001, SP-2 ought to same right to payment in favor of SP-2, who files a financing statement covering “accounts and general intangibles.” Before this Article takes effect on July 1, 2001, SP-2’s security interest has priority over SP-1’s unperfected security interest under former 9-312(5). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Thus, SP-2’s priority is not adversely affected by this Article’s having taken effect.

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same right to payment in favor of SP-2, who files a financing statement covering “accounts and general intangibles.” Before this Article takes effect on July 1, 2001, SP-2’s security interest has priority over SP-1’s unperfected security interest under former 9-312(5). Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 continues to govern priority after this Article takes effect. Thus, SP-2’s priority is not adversely affected by this Article’s having taken effect.

Rev. U.C.C. § 9-709 cmt. 1, ex. 4.

prevail just the same, even if the filing did not result in perfection under former Article 9. If the pre-filed financing statement satisfies Revised Article 9's requirements, it defeats a competing unperfected security interest as of July 1, 2001; the affirmative act of filing displaces the arguable "established priority" based solely upon time of attachment.

Another example illustrating this point involves two secured parties both with former Article 9 security interests in a promissory note left in the possession of the debtor. In error, both parties file ineffectively. SP-1 files a former Article 9 financing statement covering "documents," but the note is neither a document nor in this case the proceeds of one. SP-2 files a former Article 9 financing statement covering "instruments," but filing is ineffective to perfect a security interest in instruments as original collateral under former Article 9. Because neither has a perfected security interest under former Article 9, the priority under former Article 9 goes to the first to attach (SP-1). SP-1's financing statement will not satisfy Revised Article 9 because its description of the collateral is incorrect. However, if the financing statement filed by SP-2 is in the right place and otherwise complies with Revised Article 9, it becomes effective to perfect SP-2's security interest on July 1, 2001. The filing establishes a new priority under Revised Article 9 in favor of SP-2, whose interest is the only one perfected. A well-reasoned result in cases like these must be the same regardless of the timing of the filing, whether made long before, just prior to, or after Revised Article 9's effective date. Making the result hang upon a factual determination of whether the filing was made erroneously or as a result of careful planning appears to be an undesirable policy.

Note the difference in these hypotheticals from those found in Example 4 of the official comment to Revised 9-709. In Example 4, the fortuitous change in definition of collateral classifications in Revised Article 9 made good perfection out of a previously ineffective former Article 9 filing. Under Revised 9-709, the statute cannot reset the priority previously established in favor of the other

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154. The reason for the lack of perfection under former Article 9 might be that the financing statement improperly describes the collateral, that filing is not a permissible method of perfection for the collateral under former Article 9, or that the filing is in the wrong place. Nevertheless, the reason should not matter.

155. Rev. U.C.C. § 9-705(b) (establishing the effectiveness of a pre-filed financing statement); id. § 9-704(3)(A) (concerning the perfection under Revised Article 9 of a prior security interest unperfected under former Article 9); id. § 9-312(a) (allowing perfection by filing).
party, whose security interest was perfected under former Article 9. In contrast, in the examples given above, both security interests were unperfected under former Article 9; thus, neither comes into Revised Article 9 with a status worthy of any particular protection. Priority established under former Article 9 by virtue of perfection survives Revised Article 9's effective date, while priority established merely by earlier attachment gives way to a junior creditor's affirmative perfection under Revised Article 9. It cannot make a difference whether the act leading to perfection is taken before or after July 1, 2001.

Finally, there is one kind of event that may occur under Revised Article 9 that is sure to displace priority previously established under former Article 9—lapse. Suppose, for example, that a senior creditor fails to continue the effectiveness of its former Article 9 financing statement before it would have lapsed under former 9-403. Assume further that the grace period of Revised 9-705 has ended, and the financing statement is no longer effective, nor is there any other perfection under Revised Article 9. The "established" priority rule of Revised 9-709 does not apply and Revised Article 9 now governs priorities.

CONCLUSION

As this Article makes clear, the transition to Revised Article 9 will rarely place a very great burden upon practitioners. For the commonplace former Article 9 security interest perfected by filing, a generous grace period permits the secured party to make necessary changes in the financing statement and to file it in the proper place under Revised Article 9 at the time continuation would be due under former Article 9. For less common methods of perfection, the grace period is only one year. Adjustments in perfection methods, however, are less likely to be a problem when former Article 9 perfection is by possession, control or automatic perfection than by filing.

It is most important that existing security agreements and financing statements be reviewed, not only in transactions closing before July 1, 2001, but also in those already closed. At least a year is allowed for such review under Revised Article 9's Part 7.

Priorities established under former Article 9 are protected under Revised Article 9 as an exception to the general rule that Revised Article 9's priorities govern after July 1, 2001. Nevertheless, the possibility exists that one secured party may gain advantage by taking
a step that gains a new priority or a super-priority under Revised Article 9.

Perhaps the greatest danger lies in the indiscriminate filing of financing statements under Revised Article 9 for security interests already perfected under former Article 9. As this Article points out, content and timing requirements as well as the effective lapse date vary depending upon whether the filing is a continuation statement or an initial financing statement filed in lieu of a continuation statement. Careful attention to the provisions of Part 7 will avoid some unwelcome surprises.