

# AN INTRODUCTION TO SECURED TRANSACTIONS UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

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## I. SCOPE OF ARTICLE 9 OF THE UCC

Chapter 9a of title 70A of the Utah Code, Utah Code Ann. §§ 70A-9a-101 *et seq.*, governs:

- the creation, perfection and enforcement of a security interest in any personal property, fixtures, crops or farm products;
- the sale of accounts, chattel paper, payment intangibles and promissory notes;
- consignments; and
- certain security interests arising in connection with the sale or lease of goods.

See Utah Code Ann. § 70A-9a-109(1).

There are many transactions and types of collateral that do not fall within the scope of Article 9 of the Uniform Commercial Code (the “UCC”). Article 9 does not govern:

- liens or security interests in real property, including leases and rents (with certain narrow exceptions, including liens in fixtures);

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- tax liens;
- landlord's liens;
- mechanic's liens and other statutory liens;
- a transfer of an interest in or assignment of a claim under a policy of insurance;
- assignment of a judgment;
- rights of recoupment and setoff;
- tort claims (excepting only commercial tort claims); and
- an assignment of a right or claim to wages, salary or other compensation as an employee.

See Utah Code Ann. § 70A-9a-109(4). Please refer to the statute for a complete listing of the exceptions.

## **II. OBTAINING A SECURITY INTEREST – ATTACHMENT**

Section 70A-9a-203 governs the attachment and enforceability of a security interest in personal property. Generally, a security interest in personal property arises only when: (a) value has been given; (b) the debtor has rights in the collateral or the power to transfer rights in the collateral to a third party; (c) the debtor/grantor has granted the security interest by agreement; and (d) one of four evidentiary tests are satisfied. See Utah Code Ann. § 70A-9a-203(2).

There is no strict requirement that the security agreement must be a signed writing, but there still must be evidence of a manifest intent on the part of the debtor/grantor to give the secured party a security interest in the particular collateral. In other words, while there need not always be a written “authenticated” security agreement, there still must be a provable agreement pursuant to which the debtor/grantor intentionally grants the secured party a lien or other interest in the collateral for the purpose of securing a debt or obligation. For example, a pawnbroker may take an oral pledge of jewelry and, under appropriate circumstances, the pawnbroker's lien in the jewelry will be enforceable even in the absence of a signed, written security agreement. Nevertheless, best practices mandate the use of a written, signed security interest in almost all instances.

The alternative evidentiary tests, in the nature of a statute of frauds, that must be satisfied before the security interest “attaches” are: (i) the debtor must have signed or otherwise authenticated a security agreement that provides a description of the collateral; (ii) the collateral must be of the type identified in section 70A-9a-313 (*i.e.*, goods, instruments, money, tangible chattel paper and/or negotiable documents) and the secured party must hold possession of the collateral pursuant to the security agreement; (iii) the collateral must be a certificated security in registered form and the security certificate must have been delivered to the secured party pursuant to the security agreement; or (iv) the collateral must be a deposit account, electronic chattel paper, investment property or letter-of-credit rights and the secured party must have “control” pursuant to the security agreement.

#### **A. Value**

Value is defined in Utah Code Ann. § 70A-1-201(44) of the UCC. Please refer to the statute for the complete definition.

Necessarily then, the “value” requirement is satisfied in the following instances:

- where the secured party has loaned money;
- where the secured party has made a binding commitment to extend credit (whether or not the credit line is ever drawn upon);
- where the secured party is owed a pre-existing obligation or holds a pre-existing claim; and
- where the secured party provides “any consideration sufficient to support a simple contract,” *e.g.*, a promise, forbearance or forgiveness of debt.

Please note that there is no requirement that the debtor/grantor must receive the value. The statute requires only that “value has been *given*.” Utah Code Ann. § 70A-9a-203(2)(a) (emphasis added).

Although giving value is all that is required to satisfy the attachment requirements of the UCC, the failure of the grantor to receive value in exchange for the security interest may create problems for the secured lender under Utah’s Uniform Fraudulent Transfer Act and/or under federal bankruptcy law. See Utah Code Ann. § 25-6-1 *et seq.*; 11 U.S.C. § 548. More

specifically, if the grantor did not receive “reasonably equivalent value” in exchange for the security interest, then the lien may be “avoided” and/or set aside.

## **B. The Debtor Has Rights in the Collateral**

The secured party’s lien attaches only to the extent of the debtor/grantor’s rights in the collateral. This requirement merely acknowledges that the debtor/grantor can convey only what it has, and that the secured party can obtain no greater rights than the debtor initially holds or later acquires in the property.

Generally, the time of attachment is of little significance so long as the debtor does, at some point, acquire rights in the collateral. As discussed below, this is because priority among lien holders generally is governed by the date of filing or other perfection, rather than the date of attachment. In the case of certain statutory lien holders, however, such as the Internal Revenue Service, the date that the debtor/grantor acquires rights in the property (and that the security interest attaches) may be very significant.

## **C. A Proper, Authenticated Security Agreement**

Although an “authenticated security agreement” that provides a description of the collateral is only one of four alternative tests for the enforceability of a security interest, it is the alternative that will be applicable ninety to ninety-nine percent of the time. Accordingly, these materials will not discuss the creation of a security interest by possession or control. Indeed, it is difficult to imagine the transaction wherein an attorney should rely solely on possession or control to the exclusion of a properly authenticated, written security agreement.

### ***A. Security Agreement***

The existence of a security agreement is an inescapable and mandatory requirement for the creation of a security interest. Indeed, even security interests that attach or become enforceable through possession or control are fully dependent upon the existence of a security agreement.

“Security Agreement” is a defined term under the UCC. It “means an agreement that creates or provides for a security interest.” Utah Code. Ann. § 70A-9a-102(73). The *sin qua non* of a “security agreement” is that the document (or other evidence of agreement) must show, to an objective observer, that the debtor/grantor intended to transfer an interest in personal property *as*

*security* to the secured party. The following language may serve as evidence of such intent (defined terms are italicized in this example):

Grant of Security Interest. *Debtor* hereby grants to *Secured Party*, to secure the payment and performance in full of all of the *Obligations*, a security interest in the *Collateral*, and hereby mortgages, pledges and assigns the *Collateral* to *Secured Party* as collateral.

Although a typical security agreement is labeled “security agreement,” any writing that evidences an agreement to create or provide for a security interest will be sufficient, whatever its title. Indeed, documents which in form may appear to execute an absolute conveyance (*e.g.*, a bill of sale) may be shown to be, in fact, a security agreement. Likewise, documents which appear to reserve or retain ownership also may be determined to be a disguised security arrangement (*e.g.*, an equipment “lease”).

The UCC does not designate any magic words or precise form. Indeed, the drafters of the UCC did not intend that any specific words of grant be required. Nevertheless, there must be language in the instrument which leads to the logical conclusion that it was the intention of the parties that a security interest be created.

The courts do recognize magic words. Even unorthodox documents containing words such as “collateral,” “pledge,” “to secure,” “lien holder” or other assignment or conveyance language are likely to be upheld as adequate security agreements, even when not explicitly labeled as such. Without such language, however, borderline documents may fail. This is evidenced by the numerous cases that have held a financing statement alone insufficient to create an enforceable security interest. See, e.g., Mitchell v. Shepherd Mall State Bank, 458 F.2d 700, 704 (10th Cir. 1972) (“The function of a financing statement is to put third parties on notice that the secured party who has filed it may have a perfected security interest in the collateral described. Absent language which would constitute the debtor’s grant of a security interest, a financing statement cannot serve as a security agreement.”) (internal citations omitted); Equity Trader-1, LLC v. Cox (In re Equity Trader-1, LLC), Adversary Proceeding No. 02-2472, 2005 Bankr. LEXIS 107, at \*17 (Bankr. D. Utah Jan. 28, 2005) (“At a minimum, Cox must produce something with language that creates or grants a security interest in identified collateral. In the absence of a valid security agreement, a financing statement does not create an enforceable security interest.”) (internal citation omitted).

## ***B. Description of the Collateral***

Section 9a-203(2)(c)(i) requires that an authenticated security agreement “provide[] a description of the collateral.” Possession under (c)(ii) obviates the need to describe the collateral and, to a lesser extent, the same is true of subsection (c)(iv) with respect to deposit accounts and investment property.

Article 9 treats the sufficiency of the description in the security agreement separately from the sufficiency of the description (or “indication of collateral”) in the financing statement. The sufficiency of the collateral description in a security agreement is governed by section 70A-9a-108, while the sufficiency of the “indication” of collateral in a financing statement is governed by section 70A-9a-504. It is important to remember that while certain “super generic” descriptions are now acceptable in a financing statement, *e.g.*, “all assets” or “all personal property,” such broad, generic descriptions are not enforceable in the context of a security agreement.

The relevant test as to whether a collateral description in a security agreement is sufficient is whether “it reasonably identifies what is described.” Utah Code Ann. § 70A-9a-108(1). The statute specifically provides that a description of collateral “reasonably identifies the collateral” if it identifies the collateral by:

- (a) specific listing
- (b) category
- (c) except [for commercial tort claims, consumer goods, security entitlements, securities accounts and commodity accounts], a type of collateral defined in [the UCC];
- (d) quantity;
- (e) computational or allocational formula or procedure; or
- (f) except [for certain super generic descriptions], any other method, if the identity of the collateral is objectively determinable.

Utah Code Ann. § 70A-9a-108(2).

A description can be insufficient either because it is too narrow, and so excludes the collateral intended by the parties to be covered, or because it is too broad and so may include property not intended. Further, the statute explicitly proscribes, the use of super generic descriptions: “A description of collateral as

‘all the debtor’s assets’ or ‘all the debtor’s personal property’ or using words of similar import does not reasonably identify the collateral.” Utah Code Ann. § 70A-9a-108(3).

Parties to a commercial loan transaction most often will describe the collateral according to the collateral types specifically enumerated and defined in the UCC. These include the following:

- Accounts (a right to payment of money, whether or not earned by performance, (i) for property sold, leased, licensed, assigned or disposed of, (ii) for services rendered, (iii) etc., but specifically excluding health care insurance receivables), see Utah Code Ann. § 70A-9a-102(2)(a);
- Chattel Paper (records evidencing a monetary obligation to pay and a security interest in specific goods or a lease of specific goods), see Utah Code Ann. § 70A-9a-102(11);
- Consumer Goods (goods that are used or purchased primarily for personal, family or household purposes), see Utah Code Ann. § 70A-9a-102(23);
- Documents (document whose possession entitles the holder to possess and dispose of the goods it covers), see Utah Code Ann. § 70A-9a-102(30);
- Equipment (goods other than inventory, farm products or consumer goods), see Utah Code Ann. § 70A-9a-102(33);
- Farm Products (goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are (i) crops, (ii) livestock, (iii) supplies used or produced in a farming operation and (iv) unmanufactured products of crops or livestock), see Utah Code Ann. § 70A-9a-102(34);
- General Intangibles (catchall – all personal property that does not fall within one of twelve other enumerated categories<sup>2</sup> – includes software and other intellectual property, payment intangibles, licenses, trade names, URLs, telephone numbers,

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<sup>2</sup> As defined in the statute: “ ‘General intangible’ means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction.” Utah Code Ann. § 70A-9a-102(42)(a).

franchise rights, goodwill and choses in action), see Utah Code Ann. § 70A-9a-102(42);

- Goods (includes equipment, inventory, consumer goods and farm products – all tangible and moveable personal property, also included fixtures, standing timber, unborn offspring of animals, crops and manufactured homes), see Utah Code Ann. § 70A-9a-102(44);
- Health Care Insurance Receivables, see Utah Code Ann. § 70A-9a-102(46);
- Instruments (negotiable note or other evidence of right to receive payment of money), see Utah Code Ann. § 70A-9a-102(47);
- Inventory (goods that are (i) leased by a lessor, (ii) held for sale or lease or to be furnished under a contract of service, and/or (iii) consist of raw materials, work in process, or materials used or consumed in a business), see Utah Code Ann. § 70A-9a-102(48);
- Investment Property (a security, whether or not certificated, security entitlement, securities account, commodity contract or commodity account), see Utah Code Ann. § 70A-9a-102(49);
- Letter-of-credit right (a right to payment or performance under a letter of credit), see Utah Code Ann. § 70A-9a-102(51);
- Mortgage, see Utah Code Ann. § 70A-9a-102(55)
- Payment Intangible (a general intangible under which the account debtor's principal obligation is a monetary obligation), see Utah Code Ann. § 70A-9a-102(61);
- Proceeds (whatever is acquired upon the sale, lease, license, exchange or other disposition of collateral), see Utah Code Ann. § 70A-9a-102(64);
- Record (information inscribed on a tangible medium, or stored in an electronic medium by retrievable in perceivable form) , see Utah Code Ann. § 70A-9a-102(69); and
- Software, see Utah Code Ann. § 70A-9a-102(75).

### *C. Description of the Indebtedness*

A security interest is meaningless and unenforceable unless the indebtedness or obligations to be secured are sufficiently described. Such a description may narrowly refer to a single, specific promissory note, *e.g.*, “securing a note of even date, or may broadly describe all present and future obligations of the debtor to the secured party. An example of the latter, described through a broad definition of indebtedness, is as follows:

The term “Obligations” as used herein, means and includes all of the indebtedness, obligations and liabilities of Debtor to Secured Party, whether direct or indirect, joint or several, absolute or contingent, due or to become due, now existing or hereafter arising under or in respect of (a) the instruments, documents, promissory notes and guaranties identified or described on the attached Exhibit “A”, (b) this Agreement, (c) any and all other instruments or promissory notes executed by Debtor in favor of Secured Party, whether now existing or executed and delivered to Secured Party in the future, (d) any and all guaranties made by Debtor in favor of Secured Party, whether now existing or executed and delivered to Secured Party in the future, (e) any future agreements or documents executed by Debtor in favor of Secured Party, (f) the past, present or future acts or omissions of Debtor, and (g) otherwise.

Please note, however, that a broad definition may be more susceptible to challenge when the secured party seeks to enforce the security interest to collect an obligation that was not specifically described in the security agreement. Some courts have applied tests such as the “relationship of the loans” test and the “reliance on the security” test to determine whether the security interest secures an obligation that was not specifically described in the security agreement, and arguably not contemplated by the parties.

The intentions of the parties should control such inquiries. Under Utah law, the intentions of the parties are ascertained first and foremost from the plain language of the security agreement. “[I]f the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement.” Hall v. Process Instruments & Control, Inc., 866 P.2d 604, 606 (Utah App. 1993), aff’d, 890 P.2d 1024 (Utah 1995). “Extrinsic evidence is generally not admissible to vary unambiguous terms in a contract.” Eggett v.

Wasatch Energy Corp., 2004 UT 28, ¶ 13. “This rule ‘operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract.’ ” West One Trust Co. v. Morrison, 861 P.2d 1058, 1061 (Utah App. 1993). Accordingly, the plain language of the security agreement normally should control, unless there is some evidence of fraud, duress, mistake, bad faith and/or unconscionability.

#### ***D. Authentication***

“Authenticate” is a defined term in Article 9. It means: “(a) to sign; or (b) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.” Utah Code Ann. § 70A-9a-102(7).

### **III. ENSURING PRIORITY OF THE SECURITY INTEREST – PERFECTION**

Under Article 9, “perfection” is a complex term of art. Perfection is not necessary to enforce a security interest, but determines the priority of the security interest vis-à-vis other lien holders. Perfection also is necessary to enforce a security interest post-bankruptcy, because a trustee in bankruptcy has the rights of a hypothetical judgment lien creditor. Pursuant to section 544(a) of the Bankruptcy Code, the trustee has so-called “strong arm” powers, including the ability to avoid any unperfected lien.

Security interests are perfected in five ways, although not all alternatives are available for all collateral types and some methods of perfection are better in that they may afford better priority. The most common method for perfecting a security interest is the “filing” of a financing statement. A second method of perfection is “possession.” This method of perfection is not available for all types of collateral. Meanwhile, security interests in certain types of collateral may be perfected by either filing or possession, while others can be perfected only by possession. A third method for perfecting security interest in deposit accounts and certain other limited types of collateral is “control.” Fourth, some security interests are perfected “automatically.” Finally, security interests in certain types of registered or titled personal property can be perfected only by noting the lien on a certificate of title or registration.

The general policy underlying the concept of “perfection” is notice. Perfection generally requires some action, such as filing or possession, that would put a diligent searcher on notice of the secured party’s interest in the collateral.

## **A. Perfection by Filing**

Perfection by filing is the most common method of perfecting a security interest under Article 9. In many instances, it also should be the preferred method. Among other things, conflicting perfected security interest and agricultural liens rank according to priority in time of filing or perfection. See Utah Code Ann. § 70A-9a-322(1)(a). In short, the filing date will govern the secured creditors priority even if all of the requirements for “attachment” were not yet satisfied as of the date of filing. For example, a bank could obtain its priority by filing even though it does not make an advance (or provide other value) until later.

Filing is the only means to perfect a security interest in most accounts and general intangibles. Meanwhile, filing is a permissible (but not exclusive) means for perfecting a security interest in goods, chattel paper, negotiable documents, investment property and instruments. Filing, however, cannot be used to perfect a security interest in money, deposit accounts or letter-of-credit rights, unless those assets are proceeds.

The general rule is that, unless expressly provided otherwise, “a financing statement must be filed to perfect all security interests and agricultural liens.” Utah Code Ann. § 70A-9a-310(1). The exceptions to this general rule are all set forth in section 70A-9a-310(2). Further, sections 70A-9a-311 and -312 identify various types of collateral that are not susceptible of perfection by filing.

A financing statement is the “bikini” of Article 9. It identifies only the parties and the collateral, and omits all of the important terms of the parties agreement. Section 70A-9a-502 states the minimum data that must be included on a financing statement for it to be effective and section 70A-9a-516 provides certain further requirements.

### **A. *Where to File***

To determine where to file a financing statement, the secured party first must determine what state’s substantive law governs perfection and priority. Section 70A-9a-301(1) provides the general rule that, while a debtor is located in a particular jurisdiction, the local substantive law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral. See Utah Code Ann. §§ 70A-9a-301(1). In what jurisdiction the debtor is located, in turn, is governed by section 70A-9a-307. A registered organization that is organized under the law of a particular state is always deemed to be “located” in that state. See Utah Code Ann. §§ 70A-9a-307(5). An individual is deemed to be

located at the individual's principal residence. See Utah Code Ann. §§ 70A-9a-307(2)(a). If the debtor is an organization that is not organized under the laws of a state, then it is deemed to be located at its place of business or, if it has more than one place of business, at its chief executive office. See Utah Code Ann. §§ 70A-9a-307(2)(b) and (c).

There are several exceptions to the general rule that the law of the jurisdiction where the debtor is located governs. In the case of a possessory security interest, the law of the jurisdiction where the collateral is located governs. See Utah Code Ann. §§ 70A-9a-301(2).<sup>3</sup> Other exceptions are set forth in subsections (3) and (4) of section -301, and in sections 70A-9a-302 (agricultural liens), -303 (goods covered by a certificate of title), -304 (deposit accounts), -306 (investment property) and -306 (letter-of-credit rights).

If Utah law governs the perfection of a security interest the office in which to file a financing statement is (i) the Utah Division of Corporations and Commercial Code, or (ii) in the case of as-extracted collateral or timber or in the case of fixtures, in the Office of the Recorder in and for the county where the real property is located. See Utah Code Ann. § 70A-9a-501. If the law of another state governs perfection (because, for example, the debtor is a Colorado corporation), then the secured party must refer to the law of that state to determine where to file its financing statement.

### ***B. Minimum Filing Requirements***

Pursuant to section 70A-9a-502, a financing statement is sufficient only if it (a) provides the name of the debtor, (b) provides the name of the secured party and (c) indicates the collateral. See Utah Code Ann. § 70A-9a-502(1). Certain additional filing requirements apply if the collateral is as-extracted collateral (oil, gas and other minerals) or timber to be cut.

The statute explicitly provides that a financing statement may be filed before a security agreement is made or a security interest otherwise attaches. See Utah Code Ann. § 70A-9a-502(4).

Further, although they are not explicitly required by the statute in order to be "sufficient," section 70A-9a-516 identifies various defects that authorize a filing office to refuse to accept (or

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<sup>3</sup> Please note that the plain language of section 70A-9a-301(2) may support a broader interpretation of the statute. Under the broadest possible reading, the local law of the jurisdiction where the collateral is located will always govern, even if the debtor is "located" in another state. See Utah Code Ann. § 70A-9a-301(2). The comments to section 9-301, however, suggest that this subsection was intended to be limited to "possessory security interests." See UCC § 9-301, cmt. 5.a.

reject) a filing. Some of these additional requirements, which will be enforced at the discretion of the filing office, are as follows:

- The record must be communicated by a method or medium of communication authorized by the filing office.
- The applicable filing fee must be paid to the filing office.
- In the case of an initial financing statement, the record must provide a name for the debtor.
- In the case of an amendment or correction statement, the record (A) must identify the initial financing statement, and (B) must not identify or refer to an initial financing statement that has lapsed.
- In the case of an initial financing statement or amendment identifying an individual debtor, the record must identify the debtor's last name.
- In the case of a record filed or recorded in a county recorder's office, i.e., a fixture filing or a financing statement regarding as extracted collateral or timber to be cut, the record must provide a sufficient description of the real property to which it relates.
- In the case of an initial financing statement or an amendment that adds a secured party of record, the record must provide a name and mailing address for the secured party.
- In the case of an initial financing statement or an amendment that provides a name of a debtor, the record must (i) provide a mailing address for the debtor, (ii) indicate whether the debtor is an individual or an organization, and (iii) if the debtor is an organization, provide (A) a type of organization for the debtor, (B) a jurisdiction of organization for the debtor, and (C) an organizational identification number for the debtor or indicate that the debtor has none.
- The filing office must be able to read or decipher the information contained in the record.

**a. Name of the Debtor**

A financing statement must “sufficiently” provide the name of the debtor and the secured party. As to the name of the debtor, this is satisfied:

- if the debtor is a registered organization, only if the financing statement provides the *name* of the debtor *indicated on the public record* of the debtor’s jurisdiction of organization which shows the debtor to have been organized;
- if the debtor is a decedent’s estate, only if the financing statement provides the name of the decedent and indicates that the debtor is a decedent’s estate;
- if the debtor is a trust or a trustee of a trust, only if the financing statement, (i) provides the name specified for the trust in its organic documents or, if no name is specified, identifies the settlor and other information sufficient to distinguish the trust, and (ii) indicates, in the debtor’s name, that the debtor is a trust or a trustee of a trust;
- in other cases, (i) if the debtor has a name, only if it provides the individual or organizational name of the debtor, or (ii) if the debtor does not have a name, only if it provides the names of the partners, members, associates or other persons comprising the debtor.

See Utah Code Ann. § 70A-9a-503(1). The name of the debtor need not include trade names or alternative names of the debtor. See Utah Code Ann. § 70A-9a-503(2). On the other hand, a financing statement that provides only the debtor’s trade name is patently not sufficient. See Utah Code Ann. § 70A-9a-503(3).

A financing statement may provide the name of more than one debtor and/or the name of more than one secured party.

**b. Collateral Description**

The collateral description is sufficient (1) if it satisfies the requirements of section 70A-9a-108 (discussed above in connection with the prerequisites of an enforceable security agreement), or (2) if it indicates that the financing statement covers all assets or all personal property. See Utah Code Ann. § 70A-9a-504.

### ***C. Effect of Errors or Omissions***

The UCC provides that a financing statement substantially complying with the statutory requirements will be effective, even if it has minor errors or omissions, so long as the errors or omissions do not render the financing statement “seriously misleading.” See Utah Code Ann. § 70A-9a-506(1).

A financing statement that does not satisfy the requirements of section 70A-9a-503(1), regarding the name of the debtor, is presumed to be seriously misleading. See Utah Code Ann. § 70A-9a-506(2). This presumption can be rebutted only if the secured party demonstrates that “a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose” the financing statement. See Utah Code Ann. § 70A-9a-506(3).

### ***D. A Debtor Name Change***

If the debtor changes its name, and the financing statement would thereby be rendered “seriously misleading,” the secured party has four months within which to file an amendment to the financing statement that renders the financing statement not seriously misleading. See Utah Code Ann. § 70A-9a-507(3)(b).

### ***E. Authority to File***

A person may file a financing statement if (a) the debtor authorizes the filing in an authenticated record, or (b) the person holds an agricultural lien and the financing statement covers only collateral in which the person holds an agricultural lien. See Utah Code Ann. § 70A-9a-509(1). For this reason it is important to include a provision in the security agreement (an authenticated record) that expressly authorizes the secured party to file a financing statement. An exemplar of such a provision is as follows.

Authorization to File Financing Statements. Debtor hereby irrevocably authorizes Secured Party at any time and from time to time to file in any filing office in any Uniform Commercial Code jurisdiction any initial financing statements and amendments thereto that (a) identify or describe the Collateral, and/or (b) provide any other information required by part 5 of Article 9a (or Article 9, as applicable) of the Uniform Commercial Code of the State, or such other jurisdiction, for the sufficiency or filing office

acceptance of any financing statement or amendment, including whether Debtor is an organization, the type of organization and any organizational identification numbers issued to Debtor.

Debtor agrees to furnish any such information to Secured Party promptly upon Secured Party's request.

The statute further provides that, merely by authenticating or becoming bound by a security agreement, a debtor or new debtor authorizes the filing of a financing statement or amendment covering (a) the collateral described in the security agreement, and (b) proceeds. See Utah Code Ann. § 70A-9a-509(2). Nevertheless, it may be prudent to include a provision in the security agreement, as set forth above, expressly authorizing the secured party to file a financing statement. Further, if the secured party intends to file a financing statement with an "all assets" description, it had best obtain express authority from the debtor in the security agreement or in another authenticated record. Such express authority probably should be obtained anytime the collateral description in the financing statement is more broad than the description in the security agreement. Otherwise, the financing statement may be challenged on the basis that it was not authorized.

#### ***F. Duration and Effectiveness of Financing Statement***

Unless it is continued or earlier terminated, a financing statement is effective for five year after the date of filing. See Utah Code Ann. § 70A-9a-515(1). In connection with public-finance transactions and manufactured home transactions, the financing statement is effective for a period of 30 years. See Utah Code Ann. § 70A-9a-515(2). A financing statement may be continued by filing a continuation statement within six months before the expiration of the original five year period (or 30 year period). See Utah Code Ann. § 70A-9a-515(4). This will have the effect of continuing the financing statement for another five years commencing on the five year anniversary date of the initial financing statement. There is no limit on the number of times that a financing statement may be continued.

When a financing statement lapses, it ceased to be effective and the security interest becomes unperfected, unless it otherwise is perfected (by filing, control, etc.). Further, if a security interest becomes unperfected upon lapse of the financing statement, it is deemed never to have been perfected as against a purchaser of the collateral for value. See Utah Code Ann. § 70A-9a-515(3).

## **B. Perfection by Possession**

The pledge<sup>4</sup> is uniquely suited to certain kinds of collateral, and wholly unsuited to others. Section 70A-9a-313 of the UCC describes when possession of collateral by the secured party perfects the security interest without filing. The security interest in the following types of collateral may be perfected “by taking possession of the collateral”:

- Negotiable Documents;
- Goods (except goods covered by a certificate of title);
- Instruments;
- Money;
- Tangible Chattel Paper; and
- Certificated Securities.

Utah Code Ann. § 70A-9a-313(1).

When perfection of a security interest depends upon possession, “perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.” Utah Code Ann. § 70A-9a-313(4).

The term “possession” is not defined in the UCC. Instead, the drafters intended to adopt the general concept of possession as it was developed by the case law under former Article 9. The comments to the UCC, however, indicate that “in determining whether a particular person has possession, the principles of agency apply.” UCC § 9-313, cmt. 3. Of course, “[t]he debtor cannot qualify as an agent for the secured party for purposes of the secured party’s taking possession. And, under appropriate circumstances, a court may determine that a person in possession is so closely connected to or controlled by the debtor that the debtor has retained effective possession, even though the person may have agreed to take possession on behalf of the secured party.” Id.

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<sup>4</sup> The term “pledge” is usually used in modern commercial vernacular to describe security interest that are perfected by possession.

### **C. Perfection by Control**

Security interests in investment property (stocks, bonds, brokerage accounts, etc.) and electronic chattel paper may be perfected by control. With limited exceptions, a security interest in a deposit account or a letter-of-credit right can be perfected only by control.

Control may be considered the intangible's equivalent to possession. Although an intangible asset cannot be possessed, they sometimes can be put under the control of the secured party, to the exclusion of others.

Section 70A-9a-314 of the UCC describes when control of collateral by the secured party perfects the security interest. The method for obtaining control of investment property, deposit accounts, letter-of-credit rights and electronic chattel paper is governed by sections 70A-9a-104, -105, -106 and -107 of the UCC, respectively. Akin to perfection by possession, "a security interest in deposit accounts, electronic chattel paper or letter-of-credit rights is perfected by control when the secured party obtains control and remains perfected by control only while the secured party retains control." Utah Code Ann. § 70A-9a-314(2).

#### ***A. Control of a Deposit Account***

Section 70A-9a-104 governs whether a secured party has control over a deposit account.<sup>5</sup> Control of a deposit account can be taken in one of three ways:

- if the secured party is the bank with which the deposit account is maintained;
- the debtor, secured party and bank must have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor (*i.e.*, a control agreement); or
- the secured party must become the bank's customer with respect to the deposit account (with the right, although not necessarily the exclusive right, to withdraw funds from or to close the deposit account).

See Utah Code Ann. § 70A-9a-104(1).

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<sup>5</sup> Please note that perfection by control is not available for bank accounts evidenced by an instrument (*e.g.*, certain certificates of deposit), which by definition are "instruments" and not "deposit accounts."

To obtain and retain control of a deposit account, the secured party need not deprive the debtor the ability to access the account or to direct the disposition of the funds from the account. See Utah Code Ann. § 70A-9a-104(2). As a practical matter, however, the secured party may find that it is prudent to do so.

### ***B. Control of Electronic Chattel Paper***

Section 70A-9a-105 governs the means by which a secured party can obtain control over electronic chattel paper. To obtain such control, the record or records comprising the chattel paper must be created, stored and assigned in such a manner that: (1) a single authoritative copy of the record exists which is unique, identifiable and (subject to limited exceptions) unalterable; (2) the authoritative copy must identify the secured party as the assignee of the record or records; (3) the authoritative copy must be communicated to and maintained by the secured party or its designated custodian; (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party; (5) each copy of the authoritative copy and any copy of a copy must be readily identifiable as a copy that is not the authoritative copy; and (6) any revision of the authoritative copy must be readily identifiable as an authorized or unauthorized revision. See Utah Code Ann. § 70A-9a-105.

### ***C. Control of Investment Property***

Section 70A-9a-106 describes how a secured party can obtain control of investment property. With respect to certificated and uncertificated securities and securities entitlements,<sup>6</sup> the statute refers to Article 8, section 70A-8-105. That section provides in turn:

- control of a certificated security in bearer form is obtained when the certificated security is delivered to the secured party;
- control of a certificated security in registered form is obtained when the certificated security is delivered to the secured party *and* (a) the certificated is indorsed to the secured party or in blank by an effective indorsement or (b) the certificate is registered in the name of the secured party by original issue or registration of transfer by the issuer;

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<sup>6</sup> Most “securities” are stocks, bonds or mutual funds. Typically, “security entitlements” are rights the customer has against his or her broker (or securities intermediary), as represented by the statement the stockbroker provides the customer monthly or quarterly.

- control of an uncertificated security is obtained when (a) the uncertificated security is delivered to the secured party or (b) the issuer has agreed that it will comply with instructions originated by the secured party without further consent by the registered owner;
- control of a security entitlement is obtained when (a) the secured party becomes the entitlement holder, (b) the securities intermediary has agreed that it will comply with entitlement orders originated by the secured party without further consent by the entitlement holder or (c) the person in control of the security entitlement acknowledges that it holds control on behalf of the secured party.

See Utah Code Ann. § 70A-8-105.

Because of the realities of today's securities market, including "remote holding" (by the Deposit Trust Co. in Manhattan) of stock certificates, typically neither the stock broker nor the customer will possess the certificate. Also, the certificate itself will be registered in the name of an intermediary such as the Deposit Trust Corporation. Accordingly, most commonly a debtor's interest in a stock, bond or mutual fund will be in the nature of a security entitlement.

Section 70A-9a-106 directly governs the means of obtaining control over a commodity contract. Pursuant to the statute, the secured party obtains control if (a) the secured party is the commodity intermediary with which the commodity contract is carried or (b) the commodity customer, the secured party, and the commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party, without further consent by the commodity customer. See Utah Code Ann. § 70A-9-106(2).

#### ***D. Control of Letter of Credit Rights***

Pursuant to section 70A-9a-107, a secured party has control of a letter-of-credit right only to the extent that the issuer or nominated person has consented to an assignment of the proceeds of the letter of credit.

#### **D. Automatic Perfection**

Section 70A-9a-309 of the UCC identifies various security interests that are perfected automatically, "when they attach." Utah Code Ann. § 70A-9a-309. Foremost among these is a purchase money security interest in consumer goods (specifically excepting titled or registered

vehicles). Other examples involve the sale or assignment of accounts, payment intangibles or promissory notes or relate to investment property. For a complete listing of the types of collateral subject to automatic perfection, please refer to the statute.

#### **E. Perfection of Vehicles and Other Titled or Registered Property**

Section 70A-9a-311 of the UCC governs perfection of property that is subject to a federal or state certificate of title or registration statute. For example, a lien on an aircraft can be perfected only by filing appropriate documents with the Federal Aviation Administration. Likewise, there is some authority to suggest that a lien on patent rights must be filed or recorded with the United States Patent and Trademark Office. However, the extent to which the federal filing rules as to patents, copyrights and trademarks is, at best, unclear.

A lien on a motor vehicle or water craft titled or registered in the state of Utah must be perfected by complying with the registration requirements of the Department of Motor Vehicles. See Utah Code Ann. § 41-1a-601(1) (“a lien upon a vehicle, vessel, or outboard motor, except a lien dependent upon possession, is not valid against the creditors of an owner acquiring a lien by levy or attachment, or subsequent purchasers, or encumbrancers without notice until Sections 41-1a-602 through 41-1a-606 have been complied”).

If a lender seeks to perfect a lien on an auto dealer’s inventory of vehicles held for sale, however, the lien on inventory is perfected by filing a financing statement. It is neither perfected by possession of the certificates of title nor by registering the lien as a notation on the certificate of title.

#### **IV. DETERMINING PRIORITY**

Priority among conflicting security interests or liens in the same collateral generally is governed by section 70A-9a-322 of the UCC. The following general rules are specified by the statute:

- Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

- A perfected security interest has priority over a conflicting unperfected security interest.
- As between unperfected security interests, the first to attach or become effective has priority.

See Utah Code Ann. § 70A-9a-322.

Further, a lien creditor takes priority over the holder of a security interest if the lien attached before the earlier of (i) the date on which the security interest was “perfected” or (ii) the date on which both all of the requirements for a security interest to “attach” have been satisfied and a financing statement covering the collateral is filed. See Utah Code Ann. § 70A-9a-317(1)(b). Pursuant to section 544(a) of the Bankruptcy Code, a bankruptcy trustee or debtor-in-possession has the status of a judgment lien creditor whose lien has attached via execution or judicial attachment.

The following special priority rules, which are exceptions to the general rule stated in section 70A-9a-322, apply to security interests in particular types of collateral and/or in specialized types of security interests:

- A properly perfected purchase money security interest in goods (other than inventory or livestock) takes priority over all other security interests (whether or not perfected). See Utah Code Ann. § 70A-9a-324.
- A buyer in ordinary course of business takes free of a security interest created by the buyer’s seller, even if the security interest was perfected and the buyer knew of it. See Utah Code Ann. § 70A-9a-320(1).
- The priority of a lien securing future advances is subject to certain limitations, as more particularly described in section 70A-9a-323 (including, among other things, advances made more than 45 days after the lien of a lien creditor attaches).
- A security interest created by the debtor is subordinate to the security interest in the same collateral created by another person if (a) the debtor acquired the collateral subject to the security interest, (b) the security interest created by the other person was perfected when the debtor acquired the collateral, and (c) there is no period thereafter when the competing security interest is unperfected. See Utah Code Ann. § 70A-9a-325.

- The priority of security interests in deposit accounts is governed by section 70A-9a-327.
- The priority of security interests in investment property is governed by section 70A-9a-328.
- The priority of security interests in letter-of-credit rights is governed by section 70A-9a-329.
- Other special priority rules are set forth in section 70A-9a-330 through -340.