

2007 AMENDMENTS TO ARTICLES 1, 8 AND 9 OF THE DELAWARE UNIFORM COMMERCIAL CODE

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Introduction

No amendments to Article 1 of the Delaware Uniform Commercial Code, 6 *Del. C.* § 1-101 *et seq.* (the "Code"), were enacted in 2007. Several amendments, however, to Articles 8 and 9 of the Code, were contained in Delaware State Senate Bill No. 120 and became effective on July 5, 2007. *See* 76 *Del. Laws*, c. 92. These amendments address provisions in Articles 8 and 9 concerning control and related matters.

Control of uncertificated security and security entitlement [§ 8-106]. Senate Bill No. 120 added new provisions (c)(3), (d)(4), (h), and (i) to Section 8-106 of Article 8 of the Code.

Section 8-106(c)(3) provides an additional method (involving authentication of a record by the issuer, the registered owner, and the purchaser) by which a purchaser may obtain control of an uncertificated security for purposes of Article 8. Similarly, Section 8-106(d)(4) allows for an additional method by which a purchaser may obtain control of a security entitlement for Article 8 purposes; this means of obtaining control also entails authentication of a record, in this case by the securities intermediary, the entitlement holder, and the purchaser.

Section 8-106(i) clarifies the consequences of placing conditions on control of an uncertificated security or a security entitlement under Sections 8-106(c)(2), (c)(3), (d)(2), or (d)(4). This new subsection (i) of Section 8-106 indicates that a purchaser has "control," under subsection (c)(2), (c)(3), (d)(2), or (d)(4) of that Section, even if one or more conditions apply to a duty of the issuer or the securities intermediary to comply with instructions or entitlement orders originated by the purchaser (other than further consent by the registered owner or the entitlement holder).

Finally, new subsection (h) of Section 8-106 provides that, under subsection (c)(2), (c)(3), (d)(2), or (d)(4) of that Section, authentication of a record does not impose upon the issuer or securities intermediary any duty to which the issuer or securities intermediary has not expressly agreed in the record.

Control of deposit account [§ 9-104]. New subsections (a)(4), (a)(5), (c), (d), and (e) were added to Section 9-104 of Article 9 of the Code in 2007.

New subsections (a)(4) and (a)(5) of Section 9-104 afford two additional methods by which a secured party may obtain control of a deposit account for purposes of Article 9. The first additional method of obtaining control involves authentication of a record by the debtor, the secured party, and the bank; under the second additional method, the secured party has control of the deposit account if the name on the account is that of the secured party or is one indicating that the secured party has a security interest in the account.

Subsection (d), also added to Section 9-104 in 2007, clarifies the effect of conditions on control of a deposit account under subsections (a)(2) and (a)(4) of that Section. Under new Section 9-104(d), a secured party has control: under subsection (a)(2) of Section 9-104 even if any duty of the bank to comply with instructions originated by the secured party directing disposition of the funds in the deposit account is subject to one or more conditions (other than further consent by the debtor); and under new subsection (a)(4) of that Section even if the provisions addressing the disposition, or the right to direct the disposition, of funds in the deposit account are subject to one or more conditions (other than further consent by the debtor).

New Section 9-104(e) provides that the procedures and requirements for obtaining control under subsections (a)(4) and (a)(5) of that Section are not to be used in interpreting the sufficiency of a secured party's compliance with the procedures and requirements of subsections (a)(1), (a)(2) or (a)(3). Section 9-104(e) also provides that subsections (a)(4) and (a)(5) create no inference regarding the requirements for compliance with subsection (a)(1), (a)(2) or (a)(3).

Newly added subsection (c) of Section 9-104 clarifies the duties of the bank with which a deposit account is maintained. This new provision states that the authentication of a record by the bank under Section 9-104(a)(2) or (a)(4) does not impose any duty on the bank to which it has not expressly agreed in the record. Further, under new subsection (c), the naming of the deposit account in the name of the secured party or with an indication that the secured party has a security interest therein, under subsection (a)(5) of Section 9-104, does not impose on the bank any duty to which it has not expressly agreed.

Control of securities account [§ 9-106]. Pursuant to the 2007 amendments to Article 9 of the Code, Section 9-106 contains two new provisions regarding control of a securities account.

As amended, Section 9-106 provides an additional method by which a secured party may obtain control of a securities account for purposes of Article 9. Pursuant to new Section 9-106(d), a secured party has control of a securities account if the name on that account is the secured party's name or if the name indicates that the secured party has a security interest in the account.

New subsection (e) of Section 9-106 clarifies the duties of the securities intermediary. It provides that the naming of the securities account in the name of the secured party or with an indication that the secured party has a security interest in the account, under subsection (d) of that Section, does not impose upon the securities intermediary any duty to which it has not expressly agreed.