



# Ohio Legislative Service Commission

## Bill Analysis

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(As Introduced)

Rep. Coley

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## BILL SUMMARY

- Adopts the revisions to the general provisions and documents of title portions of the Uniform Commercial Code ("UCC") that were recommended by the National Conference of Commissioners on Uniform State Laws.
- Expands R.C. Chapter 1307. (UCC – Documents of Title) to cover electronic documents of title and makes conforming changes throughout the UCC to accommodate electronic documents of title.
- Defines the manner in which a person has control of an electronic document of title and incorporates perfection by control of such a document into the UCC – Secured Transactions Law.
- Permits a document of title to be issued in alternative mediums.
- Permits only tangible bills of lading to be issued in a set of parts.
- Defines rules to negotiate an electronic document of title.
- Renames "warehouseman" as "warehouse."
- Removes the ability of a warehouse to limit damages by setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouse is not liable.
- Grants a warehouse a lien of the goods covered by a storage agreement or the proceeds thereof, in addition to the lien the warehouse may have on goods in its possession.

- Makes a warehouse's lien on household goods for charges and expenses in relation to the goods also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit.
- Grants a carrier a lien on the proceeds of the goods in its possession.
- Allows an obligation to be issued as subordinated to performance of another obligation of the person obligated and allows a creditor to subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated.
- States that R.C. Chapters 1301. and 1307., with some exceptions, modify, limit, and supersede the federal "Electronic Signatures in Global and National Commerce Act."

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## **CONTENT AND OPERATION**

### **Overview of the bill**

The bill adopts the revisions to the general provisions (R.C. Chapter 1301.) and documents of title (R.C. Chapter 1307.) portions of the Uniform Commercial Code (UCC) that were recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and makes related changes in the UCC and the Revised Code. The bill, to the extent possible, attempts to make the language in R.C. Chapters 1301. and 1307. identical to the language recommended by the NCCUSL. As a result, the bill makes numerous non-substantive as well as substantive changes to Ohio law. This analysis addresses only the substantive changes made by the bill.

The bill renumbers the sections within R.C. Chapters 1301. and 1307. of the Revised Code. Both chapters under the bill use a numbering system analogous to the numbering system of the NCCUSL for those sections that are part of the UCC. The digits to the right of the decimal point are sequential and not supplemental to any preceding Revised Code section.<sup>1</sup> See Table I and Table II for the renumbering of the sections. Current R.C. 1301.16, 1301.18, and 1301.21 are not considered part of the UCC, and the bill relocates those sections to other chapters of the Revised Code.

The bill makes section captions part of R.C. Chapters 1301. and 1307.<sup>2</sup> Thus, the bill adds section captions to all of the sections in those chapters that are part of the UCC.

The bill applies to transactions entered into on or after the bill's effective date.<sup>3</sup>

### **Changes to R.C. Chapter 1301.--UCC – General Provisions**

The bill permits R.C. Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. to be cited as the "Uniform Commercial Code." Additionally, the bill permits

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<sup>1</sup> R.C. 1301.101(C) and 1307.101(B).

<sup>2</sup> R.C. 1.01 and 1301.107.

<sup>3</sup> Section 3.

R.C. 1301.101 to 1301.310 to be cited as "Uniform Commercial Code – General Provisions." Under the bill, the UCC – General Provisions apply to a transaction to the extent that it is governed by the rest of the UCC.<sup>4</sup>

### **Notice under the UCC**

The bill largely retains the requirements to constitute notice under the UCC, except that it removes the specification that the time and circumstances under which a notice or notification may cease to be effective are not determined by the provision of the UCC governing notice, and it specifies that a notice or notification be duly delivered *in a form reasonable under the circumstances* with respect to when a person "receives" it.<sup>5</sup>

### **Lease distinguished from security interest**

The bill relocates the provisions in the current definition of "security interest" under the UCC that specify the circumstances in determining whether a transaction generally creates a lease or a security interest. It specifies the same circumstances as in current law in determining whether a transaction *in the form of a lease* creates a lease or a security interest. Under current law, "reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the parties entered into the transaction. The bill specifies that "reasonably predictable" refers to *fair market rent, fair market value, or cost of performing under the lease agreement*. Current law defines "present value" for purposes of the provisions defining "security interest" under the UCC. The bill relocates this definition to the UCC – General Definitions section.<sup>6</sup>

### **Determination of value**

The bill relocates the provision in the current General Definitions section that specifies the circumstances under which a person gives "value" for rights with exceptions as provided with respect to negotiable instruments and bank collections under R.C. 1303.32 (holder in due course), 1304.20 (security interest in collecting banks in items, accompanying documents, and proceeds), and 1304.21 (when bank gives value for purposes of holder in due course). The bill provides for the same circumstances for giving value under current law but with exceptions as otherwise provided in

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<sup>4</sup> R.C. 1301.101(A) and (B) and 1301.102.

<sup>5</sup> R.C. 1301.01(Y) to (AA), renumbered R.C. 1301.202.

<sup>6</sup> R.C. 1301.01(KK)(2), (3), and (4)(a) and (b), renumbered R.C. 1301.203; R.C. 1301.01(KK)(4)(c), renumbered R.C. 1301.201(B)(28).

R.C. Chapters 1303. (Commercial Paper Law), 1304. (Bank Deposits and Collections Law), and 1305. (Letters of Credit Law).<sup>7</sup>

### **Course of performance, course of dealing, or usage of trade**

Under current law, where the contract for sale or a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement or lease agreement. Under continuing law, the express terms of the agreement or lease agreement and any such course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms controls course of performance and course of performance controls both course of dealing and usage of trade. Subject to the provisions of the Sales Law or the Leases Law, that course of performance is relevant to show a waiver or modification of any term inconsistent with such course of performance.<sup>8</sup>

The bill combines these concepts into the existing law provision under the UCC – General Provisions that defines course of dealing and usage of trade. Under the bill, a course of performance is a sequence of conduct between the parties to a particular transaction that exists if the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party, and the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection. The bill specifies that a *course of performance* (as added by the bill) or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties agreement. Current law requires that an applicable usage of trade in the place where any part of performance is to occur to be used in interpreting the agreement as to that part of the performance. The bill makes this permissive. The bill retains the above provision in current law pertaining to the relevance of a course of performance to show a waiver or modification of an inconsistent term and makes the provision subject only to the Sales Law (it removes a reference to the Leases Law). Finally, under the bill, if it is established that a usage of trade is embodied in a trade code or similar *record* (instead of writing under current law), the record's interpretation is a *question of law* (instead of "for the court").<sup>9</sup>

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<sup>7</sup> R.C. 1301.01(SS), renumbered R.C. 1301.204.

<sup>8</sup> R.C. 1302.11 and 1310.14, repealed by the bill.

<sup>9</sup> R.C. 1301.303(A), (C), (D), and (F) with conforming changes in R.C. 1302.05(A).

## **Waiver or renunciation of claim or right after breach**

Under current law, any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party. Under the bill, such a claim or right may be discharged in whole or in part without consideration by *agreement* of the aggrieved party in an *authenticated record*.<sup>10</sup>

## **Subordinated obligations**

Under the bill, an obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.<sup>11</sup>

## **Electronic Signatures in Global and National Commerce Act**

The bill states that the UCC – General Provisions modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act," 15 U.S.C. section 7001 *et seq.*, except that nothing in the UCC – General Provisions modifies, limits, or supersedes section 7001(c) of that act or authorizes electronic delivery of any of the notices described in section 7003(b) of that act.<sup>12</sup>

## **Severability and use of singular and plural and gender**

Under continuing law, if any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable. The bill adds this specific provision to the UCC – General Provisions.<sup>13</sup>

Also, for purposes of the Revised Code, the singular includes the plural, the plural includes the singular, and words of one gender include the other genders. The

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<sup>10</sup> R.C. 1301.306.

<sup>11</sup> R.C. 1301.310.

<sup>12</sup> R.C. 1301.108.

<sup>13</sup> R.C. 1.50, not in the bill and 1301.105.

bill adds these specific provisions, unless the statutory context otherwise requires, to the UCC – General Provisions.<sup>14</sup>

### **Definitions--UCC – General Provisions**

Under current law, the definitions found in R.C. 1301.01 (renumbered R.C. 1301.201 by the bill), apply to the remainder of the UCC unless the context otherwise requires and subject to additional definitions contained in the UCC. The bill states that unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in the UCC that apply to particular chapters or sections within the UCC, have the meanings stated.<sup>15</sup>

The bill adds or substantively modifies the definitions of the following terms:

--Agreement: under current law, "agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of dealing, usage of trade, or course of performance as provided in the UCC. Whether an agreement has legal consequences is determined by the UCC, if applicable; otherwise by the law of contracts. The bill distinguishes the definition of an agreement from a "contract" and removes the determination concerning whether an agreement has legal consequences. (R.C. 1301.201(B)(3).)

--Bank: the bill expands the definition of bank, which is currently defined as any person engaged in the business of banking, to specifically include a savings bank, savings and loan association, credit union, and trust company (R.C. 1301.201(B)(4)).

--Bearer: under current law, "bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or endorsed in blank. The bill expands this definition to include a person in control of a negotiable electronic document of title and specifies that an instrument must be a *negotiable* instrument and a document of title must be a *negotiable tangible* document of title. (R.C. 1301.201(B)(5).)

--Bill of lading: under current law, "bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill. The bill removes the specific inclusion of "airbill" in the definition, and excludes a warehouse receipt from the

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<sup>14</sup> R.C. 1.43 and 1301.106.

<sup>15</sup> R.C. 1301.201(A) and (B).

definition. The bill also applies the definition to a person who *directly or indirectly* engages in such activities. (R.C. 1301.201(B)(6).)

--Conspicuous: under current law, a term or clause is "conspicuous" when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is "conspicuous." Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. In a telegram, any stated term is "conspicuous." Whether a term or clause is "conspicuous" is for decision by the court. The bill adds that a term also is "conspicuous" if it is *displayed or presented* so that a reasonable person against which it is to operate ought to have noticed it. The bill removes the current law reference to "clause" and removes the current law examples of conspicuous language. Under the bill, conspicuous terms include the following (R.C. 1301.201(B)(10)):

- A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size;
- Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

--Consumer: the bill defines "consumer" as an individual who enters into a transaction primarily for personal, family, or household purposes (R.C. 1301.201(B)(11)).

--Contract: under the bill, a "contract," as distinguished from "agreement," means total legal obligation that results from the parties' agreement as *determined*, rather than affected, under current law, by the UCC, *as supplemented by any other applicable laws* (rather than rules of law) (R.C. 1301.201(B)(12)).

--Defendant: under current law, a defendant includes a person in the position of defendant in cross-action or counterclaim. The bill removes the reference to a defendant in a cross-action and adds a defendant in a *cross-claim or third-party claim*. (R.C. 1301.201(B)(14).)

--Delivery: the bill expands the definition of "delivery," which is currently defined with respect to instruments, documents of title, chattel paper, or certificated securities to mean voluntary transfer of possession, to include a definition of delivery with respect to an electronic document of title to mean a voluntary transfer of control. The bill specifies that a document of title must be tangible. It limits the definition by removing its application to certified securities. (R.C. 1301.201(B)(15).)

--Document of title: under current law, a "document of title" includes a bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and any other document that in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession that are either identified or are fungible portions of an identified mass. The bill includes a transport document in the definition. It changes references to "document" within the definition to "record" as defined by the bill, and expands the definition by also referring to the person *in control* of the *record* who is entitled to *control* the *record* and the goods the *record* covers, for the record to be a document of title. Additionally, the bill defines an "electronic document of title" as a document of title evidenced by a record consisting of information stored in an electronic medium. A "tangible document of title," under the bill, means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium. (R.C. 1301.201(B)(16).)

--Fault: the bill revises the definition of "fault," which is currently defined as a wrongful act, omission, or breach, to mean a *default*, breach, or wrongful act or omission (R.C. 1301.201(B)(17)).

--Fungible: under current law, "fungible" with respect to goods or securities, means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods that are not fungible are fungible for the purposes of the UCC to the extent that under a particular agreement or document unlike units are treated as equivalents. The bill removes securities from the definition and renames the term "fungible goods." Under the bill, "fungible goods" are goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit, or goods that by agreement are treated as equivalent. (R.C. 1301.201(B)(18).)

--Good faith: under current law, "good faith" means honesty in fact in the conduct or transaction concerned. A similar definition is found in each chapter of the UCC. Except for the Letters of Credit Law (R.C. Chapter 1305.), the bill redefines "good faith" to mean honesty in fact and the *observance of reasonable commercial standards of fair dealing*. (R.C. 1301.201(B)(20), with conforming changes in R.C. 1302.01(A)(2), 1303.01(A)(4), 1304.01(C)(5), 1304.51(A)(9), 1307.102(A)(6), 1307.404, 1308.01(A)(10), 1309.102(A)(43), 1310.01(C)(5), and 4517.01(BB).)

--Holder: under current law, "holder," with respect to a negotiable instrument means if the instrument is payable to bearer, a person who is in possession of the instrument or if the instrument is payable to an identified person, the identified person when in possession of the instrument. With respect to a document of title, "holder"

means the person in possession if the goods are deliverable to bearer or to the order of the person in possession. The bill defines "holder" to mean (R.C. 1301.201(B)(21)):

- The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
- The person in possession of a *negotiable tangible* document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
- *The person in control of a negotiable electronic document of title.*

--Honor: the bill eliminates the definition of "honor," which is currently defined as to pay or to accept and pay, or where a creditor so engages to purchase or discount a draft complying with the terms of the credit (R.C. 1301.01(U), repealed by the bill).

--Insolvent: under current law, a person is "insolvent" who either has ceased to pay the person's debts in the ordinary course of business or cannot pay the person's debts as they become due or is insolvent within the meaning of the federal bankruptcy law. The bill adds that a person is not insolvent if the person ceases to pay the person's debts in the ordinary course of business as a result of a bona fide dispute. (R.C. 1301.201(B)(23).)

--Money: under current law, "money" means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations. The bill requires that the medium of exchange be *currently* authorized or adopted. (R.C. 1301.201(B)(24).)

--Organization: under current law, an "organization" includes a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, or association, two or more persons having a joint or common interest, or any other legal or commercial entity. The bill redefines "organization" to mean a person other than an individual, and relocates the business entities in the current law definition to the definition of "person." (R.C. 1301.201(B)(25).)

--Person: under current law, a "person" is an individual or an organization. The bill relocates the business entities currently included in the definition of "organization" as described above, adds a limited liability company, governmental instrumentality, public corporation, and joint venture, and removes "two or more persons having a joint or common interest." (R.C. 1301.201(B)(27).)

--Purchase: the bill adds "lease" to the definition of "purchase," which currently includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property (R.C. 1301.201(B)(29)).

--Record: the bill defines "record" as information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form (R.C. 1301.201(B)(31)).

--Security interest: the bill largely retains the current law definition of "security interest," except that the bill specifies that, except for when a seller ships under reservation under R.C. 1302.49, the right of a seller or lessor of goods under the Sales Law and the Leases Law (R.C. Chapters 1302. and 1310.) to *retain or acquire possession of the goods* (as added by the bill) is not a security interest, but a seller or lessor may acquire a security interest by complying with the UCC – Secured Transactions Law. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under continuing law is limited *in effect* (added by the bill) to a reservation of a "security interest." The bill also removes the stipulation that a lease purchase agreement is never intended as security. (R.C. 1301.201(B)(35).)

--Send: the bill expands the current law definition of "send" to include a record. Thus, under the bill, "send" in connection with any writing, *record*, or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances or in any other way to cause to be received any *record* or notice within the time it would have arrived if properly sent. (R.C. 1301.201(B)(36).)

--Signed: under current law, "signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing. The bill defines "signed" to mean *using* any symbol executed or adopted with present intention to *adopt or accept* a writing. (R.C. 1301.201(B)(37).)

--State: the bill defines "state" as a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States (R.C. 1301.201(B)(38)). This definition is similar to the definition of "state" used for purposes of the Revised Code in R.C. 1.59(G), not in the bill.

--Surety: current law defines "surety" to include guarantor. The bill expands the definition of "surety" to also include any other secondary obligor. (R.C. 1301.201(B)(39).)

--Telegram: the bill eliminates the definition of "telegram," which currently includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like (R.C. 1301.01(OO), repealed by the bill).

--Warehouse receipt: under current law, a "warehouse receipt" is a written or electronic receipt issued by a person engaged in the business of storing goods for hire. The bill replaces a "written document or electronic receipt" with a "document of title." (R.C. 1301.201(B)(42).)

## **Changes to R.C. Chapter 1307.--UCC – Documents of Title**

Under the bill, R.C. Chapter 1307. may be cited as the "Uniform Commercial Code, Documents of Title."<sup>16</sup> The most significant change to the chapter made by the bill is the addition of electronic documents.

### **Electronic documents of title**

Current law regulates tangible documents of title, and the bill expands the UCC – Documents of Title to include electronic documents of title. Under the bill, a person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred. A system satisfies this requirement, and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:<sup>17</sup>

(1) A single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in (4), (5), and (6) below, unalterable;

(2) The authoritative copy identifies the person asserting control as: the person to which the document was issued or, if the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

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

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<sup>16</sup> R.C. 1307.101(A).

<sup>17</sup> R.C. 1307.106.

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

Under the bill, upon request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if the person entitled under the electronic document surrenders control of the document to the issuer, and the tangible document when issued contains a statement that it is issued in substitution for the electronic document. Upon issuance of a tangible document of title in substitution for an electronic document of title, the electronic document ceases to have any effect or validity, and the person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.<sup>18</sup>

Similarly, upon request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if the person entitled under the tangible document surrenders possession of the document to the issuer, and the electronic document when issued contains a statement that it is issued in substitution for the tangible document. Upon issuance of an electronic document of title in substitution for a tangible document of title, the tangible document ceases to have any effect or validity, and the person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.<sup>19</sup>

### **Due negotiation**

The bill limits current law's requirements for negotiability to *tangible* documents of title and specifies that the requirements apply to the document's original terms.<sup>20</sup> Under the bill, the following rules apply to a negotiable electronic document of title:<sup>21</sup>

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<sup>18</sup> R.C. 1307.105(A) and (B).

<sup>19</sup> R.C. 1307.105(C) and (D).

<sup>20</sup> R.C. 1307.501(A).

<sup>21</sup> R.C. 1307.501(B).

(1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

(2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

(3) A document is duly negotiated if it is negotiated in the manner stated in (1) or (2) above to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

The bill incorporates electronic documents of title into existing law by adding the provision that title and rights acquired by due negotiation are not impaired even if any person has been deprived of control of a negotiable electronic document of title by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion. It specifies that current law regarding nonimpairment of title and rights acquired by due negotiation applies to a *negotiable tangible* document.<sup>22</sup>

#### **Current law provisions expanded to cover electronic documents of title**

Under current law, where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor. The bill limits the provision regarding treating the insertion as authorized to negotiable *tangible* warehouse receipt and requires the purchaser to be a *good-faith* purchaser for value. The bill applies any other unauthorized alteration to both tangible and electronic warehouse receipts.<sup>23</sup>

Under current law, unless the bill of lading otherwise provides, the carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from any of the following:

- (1) The holder of a negotiable bill;

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<sup>22</sup> R.C. 1307.502(B).

<sup>23</sup> R.C. 1307.208.

(2) The consignor on a non-negotiable bill notwithstanding contrary instructions from the consignee;

(3) The consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill;

(4) The consignee of a nonnegotiable bill if the consignee is entitled as against the consignor to dispose of them.

The bill states that the carrier may take these actions upon instructions from the persons listed in (1) to (4) above *without liability for misdelivery*. Also, the bill adds that, for purposes of (3) above, the consignee is in possession of the *tangible* bill or in *control of the electronic bill*.<sup>24</sup>

Under continuing law, upon request of any person entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering the goods, the issuer may procure a substitute bill to be issued at any place designated in the request. The bill specifies that procurement of a substitute bill may occur upon surrendering of *possession or control* of any outstanding bill of lading (thus incorporating electronic documents of title) and is subject to the bill's requirements concerning issuing documents in alternative mediums as discussed under "**Electronic documents of title**" above.<sup>25</sup>

Under current law, neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods, and substitutes for lost, stolen, or destroyed documents. But the issuer is liable for damages caused by its overissue or failure to identify a duplicate document as such by conspicuous notation on its face. The bill limits the exception of issuing bills *of lading* in a set *of parts* to *tangible* bills (see "**Provisions limited to tangible documents of title**" below). Also, the bill adds an exception for substitute documents issued in an alternative medium. The bill also removes the requirement that the conspicuous notation be on the face of the document.<sup>26</sup>

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<sup>24</sup> R.C. 1307.303(A).

<sup>25</sup> R.C. 1307.305.

<sup>26</sup> R.C. 1307.402.

Unless the person claiming *the goods* (added by the bill) is one against which the document does not confer a right to the title of the goods, current law requires the person to surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated. The bill instead requires the person claiming under a document to surrender *possession or control* of any outstanding negotiable document covering the goods for cancellation or indication of partial deliveries, thus incorporating electronic documents.<sup>27</sup>

### **Lost, stolen, or destroyed documents of title**

If a document of title is lost, stolen, or destroyed, under continuing law a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with the order. Current law requires, if the document was negotiable, the claimant to post security approved by the court to indemnify any person that may suffer loss as a result of nonsurrender of the document. The bill prohibits a court, if the document was negotiable, from ordering delivery of the goods or issuance of a substitute document without the claimant's posting security unless it finds that any person that may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss.<sup>28</sup>

Under continuing law, a bailee that without court order delivers goods to a person claiming under a missing negotiable document of title is liable to any person injured thereby. If the delivery is not in good faith, the bailee is liable for conversion. Delivery in good faith is not conversion (1) if made in accordance with a filed classification or tariff or, (2) where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery which files a notice of claim within one year after the delivery. The bill eliminates (1) above, and the clause "where no classification or tariff is filed" in (2) above.<sup>29</sup>

### **Judicial process against goods covered by a document of title**

Under current law, unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of a bailee

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<sup>27</sup> R.C. 1307.403(C).

<sup>28</sup> R.C. 1307.601(A).

<sup>29</sup> R.C. 1307.601(B).

for which a negotiable document of title is outstanding unless the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until the document is surrendered to the bailee or impounded by the court. The bill requires the possession or control of the document to be surrendered, thus incorporating electronic documents. Additionally, the bill removes the requirement that the document be impounded to the court, and instead requires possession or control of the document be surrendered to the court.<sup>30</sup>

### **Provisions limited to tangible documents of title**

Current law prohibits a bill of lading from being issued in a set of parts except where customary in overseas transportation. The bill limits this prohibition to tangible bills of lading and changes the reference to "overseas transportation" to "international transportation." Additionally, current law requires that a bill of lading lawfully drawn in a set of parts have each part numbered. The bill requires a *tangible* bill of lading lawfully *issued* in a set of parts to have each part *contain an identification code*. The bill also limits current law's provisions relating to the negotiation and delivery of a bill of lading lawfully issued in a set of parts to a *tangible* bill of lading.<sup>31</sup>

Under continuing law, the indorsement of a document of title issued by a bailee does not make the indorser liable for any default by the bailee or previous indorsers. Additionally, the transferee of a negotiable document of title has a specifically enforceable right to have its transferor supply any necessary indorsement, but the transfer becomes a negotiation only as of the time the indorsement is supplied. The bill limits the applicability of both of these provisions to tangible documents of title.<sup>32</sup>

### **Negotiability and nonnegotiability of documents of title**

Under current law, a warehouse receipt, bill of lading, or other document of title is negotiable: (1) if by its terms the goods are to be delivered to bearer or to the order of a named person, or (2) where recognized in overseas trade, if it runs to a named person or assigns. Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

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<sup>30</sup> R.C. 1307.602.

<sup>31</sup> R.C. 1307.304, with conforming changes in R.C. 1302.36.

<sup>32</sup> R.C. 1307.505 and 1307.506.

The bill eliminates (2) above and removes the specific references to a warehouse receipt or bill of lading being negotiable. Thus, under the bill, a document of title (which includes a warehouse receipt and a bill of lading) is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person. The bill slightly alters the restriction on bills of lading, stating that it is not made negotiable by a provision that the goods are to be delivered only against an order *in a record*, thus incorporating electronic documents. The bill adds the provision that a document of title is nonnegotiable if, at the time it is issued, the document has a conspicuous legend, however expressed, that it is nonnegotiable.<sup>33</sup>

### **Form of warehouse receipts and irregularities in issuance**

Although, under continuing law, a warehouse receipt does not need to be in any particular form, current law requires a warehouse receipt to embody within its written or printed terms specified information, including the following information:

- (1) The location of the warehouse;
- (2) The consecutive number of the receipt;
- (3) A statement whether the goods received will be delivered to the bearer, to a specified person, or to order.

Because the bill allows warehouse receipts to be in electronic form, the bill removes the requirement that the information be embodied within the written or printed terms of the warehouse receipt. Additionally, the information must contain the location of the warehouse facility, because, under the bill, a "warehouse" is a person engaged in the business of storing goods for hire. Additionally, with respect to (2) above, the bill requires the receipt contain the unique identification code of the receipt, rather than the consecutive number as under current law. The bill, for purposes of (3) above, requires a statement whether the goods received will be delivered to the bearer, to a *named* person, or to a *named person or its* order.<sup>34</sup>

Current law applies the obligations imposed by the UCC – Documents of Title on an issuer to a document of title even if the issuer *may have* violated laws regulating the conduct of its business. The bill requires the issuer to have violated such laws.<sup>35</sup>

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<sup>33</sup> R.C. 1307.104.

<sup>34</sup> R.C. 1307.202(A) and (B)(1), (3), and (4).

<sup>35</sup> R.C. 1307.401(2).

## Duty of care and warehouse's or carrier's liability

Under current law, damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouse is not liable; provided, that the liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase must be permitted contrary to a lawful limitation of liability contained in the warehouse's tariff, if any. The bill retains the ability to limit damages by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, but it removes the ability to limit damages by setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouse is not liable. If the bailor makes a request for increase in liability, that request under the bill must be in a record. The bill removes the restriction on the increase in liability being contrary to a lawful limitation of liability contained in the warehouse's tariff, if any.<sup>36</sup>

Continuing law allows a warehouse receipt or tariff to include reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment. The bill removes the reference to tariffs, and allows a storage agreement to include that information.<sup>37</sup>

Under current law, damages may be limited by a provision that the carrier's liability must not exceed a value stated in the document if the carrier's rates are dependent upon the value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed the consignor is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use. Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff. Under the bill, damages may be limited by a term in a bill of lading or a *transportation agreement*. The bill also removes all references to tariffs, and allows reasonable provisions as to the time and manner of presenting claims and *commencing* actions

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<sup>36</sup> R.C. 1307.204(B).

<sup>37</sup> R.C. 1307.204(C).

based on the shipment to be included in a *transportation agreement* as well as a bill of lading.<sup>38</sup>

## Liens

Current law grants a warehouse a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in its possession for charges for storage or transportation and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouse also has a lien against the *person* for such charges and expenses whether or not the other goods have been delivered by the warehouse. The bill also grants a warehouse a lien of the goods covered by a *storage agreement* or the proceeds thereof. Also, the bill specifies in the second preceding sentence above, that the warehouse's lien is on the goods covered by the warehouse receipt or storage agreement or the proceeds thereof in its possession, rather than on the person as under current law.<sup>39</sup>

Under current law, a warehouse's lien for charges and expenses, or a security interest under continuing law is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under continuing law. The bill limits the effect of the lien or security interest; neither the lien nor security interest is effective against a person that before issuance of a document of title had a legal interest or a perfected security interest in the goods covered by it and that did not.<sup>40</sup>

(1) Deliver or entrust the goods or any document covering the goods to the bailor or the bailor's nominee with actual or apparent authority to ship, store, or sell; power to obtain delivery under continuing law; or power of disposition under other provisions of the UCC as adopted in Ohio, or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

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<sup>38</sup> R.C. 1307.309(B) and (C).

<sup>39</sup> R.C. 1307.209(A).

<sup>40</sup> R.C. 1307.209(C).

The bill makes a warehouse's lien on household goods for charges and expenses in relation to the goods also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. In this provision, "household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling.<sup>41</sup>

Current law lists requirements, which include notification of all persons known to claim an interest in the goods, that a warehouse must satisfy to enforce its lien on goods, other than goods stored by a merchant in the course of its business. The bill eliminates the requirement that the notification be delivered in person or sent by registered letter to the last known address of any person to be notified, but retains the remaining requirements.<sup>42</sup>

Under current law, a carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of the carrier's receipt of the goods for storage or transportation and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to continuing law. The bill also grants a carrier a lien on the proceeds of the goods in its possession.<sup>43</sup>

### **Termination of storage at warehouse's option**

Under current law, if a warehouse in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of its lien within the time prescribed in continuing law for notification, advertisement, and sale, the warehouse may specify in the notification any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting. The bill adds that the time period within which the goods are about to deteriorate or decline in value also must be within the time period for enforcing a lien. The bill also permits a warehouse to sell goods that are a hazard to other property or persons at a public or private sale without advertisement *or posting* (added by the bill).<sup>44</sup>

### **Addition of leases to certain provisions**

Current law requires a bailee to deliver the goods to a person entitled under a document of title if the person complies with the requirements in continuing law and unless and to the extent the bailee establishes that an exception applies. One exception

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<sup>41</sup> R.C. 1307.209(D).

<sup>42</sup> R.C. 1307.210(B).

<sup>43</sup> R.C. 1307.307(A).

<sup>44</sup> R.C. 1307.206(B).

is damage to or delay, loss, or destruction of the goods for which the bailee is not liable, but the burden of establishing negligence in such cases is on the person entitled under the document. Another exception is the exercise by a seller of its right to stop delivery pursuant to the provisions of the Sales Law. The bill eliminates the placement of the burden of establishing negligence. Also, the bill adds an exception of the exercise by a lessor of its right to stop delivery pursuant to the provisions of the Leases Law. The bill removes the reference to a *tariff regulating such right* in current law's exception of a diversion reconsignment, or other disposition pursuant to current law. The remaining exceptions remain substantively unchanged by the bill. The bill relocates the definition of "person entitled under the document" in this section to the general definitions section for the UCC – Documents of Title.<sup>45</sup>

Under current law, a document of title confers no right in goods against a person that before issuance of the document had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with actual or apparent authority to ship, store, or sell; with power to obtain delivery under continuing law; or with power of disposition under the Sales Law or the UCC – Secured Transactions Law, or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

The bill includes the power of disposition under the Leases Law to (1) above.<sup>46</sup>

Under continuing law, in the case of a transfer of a nonnegotiable document of title, until but not after the bailee receives notice of the transfer, the rights of the transferee may be defeated:

- By those creditors of the transferor which could treat the sale as void under the Sales Law; or
- By a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of the buyer's rights; or
- As against the bailee, by good-faith dealings of the bailee with the transferor.

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<sup>45</sup> R.C. 1307.403(A) and 1307.102(A)(9).

<sup>46</sup> R.C. 1307.503(A).

The bill also allows the rights to be defeated by those creditors of the transferor which could treat the transfer as void under the Leases Law. Also, a lessee from the transferor in ordinary course of business if the bailee has delivered the goods to the lessee or received notification of the lessee's rights may defeat those rights.<sup>47</sup>

A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver the goods to the consignee defeats the consignee's title to the goods if the goods have been delivered to a buyer in ordinary course of business or a *lessee in ordinary course of business*, as added by the bill, and, in any event, defeats the consignee's rights against the bailee. The bill allows a lessor under the Leases Law to stop the delivery of the goods pursuant to a nonnegotiable document of title in the same manner as a seller under continuing law.<sup>48</sup>

If, under current law, a person negotiates or transfers (changed by the bill to delivers) a document of title for value, otherwise than as a mere intermediary under continuing law, then unless otherwise agreed, the transferor, in addition to any warranty made in selling *or leasing* (added by the bill) the goods, warrants to its immediate purchaser only that the document is genuine, the transferor does not have knowledge of any fact that would impair the document's validity or worth, and the negotiation or delivery is rightful and fully effective with respect to the title to the document and the goods it represents. Whether a document of title is adequate to fulfill the obligations of a contract for sale, *a contract for lease* (added by the bill) or the conditions of a letter of credit is determined (instead of governed) by the Sales Law, the Letters of Credit Law, or the Leases Law.<sup>49</sup>

### **Relation of chapter to treaties and other laws**

The bill subjects the UCC – Documents of Title to any treaty or statute of the United States or Ohio regulatory statute to the extent the treaty, statute, or regulatory statute is applicable. Additionally, the bill includes, similar to the language added to the UCC – General Provisions, that the UCC – Documents of Title modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act," 15 U.S.C. section 7001, *et seq.*, but does not modify, limit, or supersede section 101(c) of that act or authorize electronic delivery of any of the notices described in section 103(b) of that act. Also, to the extent there is a conflict between the Uniform Electronic

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<sup>47</sup> R.C. 1307.504(B).

<sup>48</sup> R.C. 1307.504(C) and (D).

<sup>49</sup> R.C. 1307.507 and 1307.509.

Transactions Act (R.C. Chapter 1306.) and the UCC – Documents of Title, the UCC – Documents of Title governs.<sup>50</sup>

### **Updated terminology**

The bill modernizes a few of the terms currently used in the UCC – Documents of Title Law. A "connecting carrier" is a "performing carrier" under the bill, and references to goods "in bloc or in parcels" is changed to "in bulk or in packages" under the bill.<sup>51</sup>

The bill changes the general reference to "any law or rule of law" to "any statute, regulation, or rule of law" and the reference to "any other law or regulation" to "any other statute, rule, or regulation."<sup>52</sup>

### **Applicability of changes to UCC – Documents of Title; savings clause**

The UCC – Documents of Title applies to a document of title that is issued or a bailment that arises on or after the bill's effective date. The UCC – Documents of Title does not apply to a document of title that is issued or a bailment that arises before the bill's effective date even if the document of title or bailment would be subject to that law if the document of title had been issued or bailment had arisen after the bill's effective date. The UCC – Documents of Title does not apply to a right of action that has accrued before the bill's effective date. A document of title issued or a bailment that arises before the bill's effective date and the rights, obligations, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by the bill as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.<sup>53</sup>

### **Definitions**

The bill adds or substantively modifies the definitions of the following terms:

--Carrier: the bill defines "carrier" as a person that issues a bill of lading (R.C. 1307.102(A)(2)).

--Delivery order: current law defines "delivery order" as a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary

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<sup>50</sup> R.C. 1307.103(A), (C), and (D).

<sup>51</sup> R.C. 1307.210, 1307.302, and 1307.308.

<sup>52</sup> R.C. 1307.309(A) and 1307.401(1).

<sup>53</sup> R.C. 1307.703 and 1307.704.

course of business issues warehouse receipts or bills of lading. The bill replaces "written order" with *record*, thus incorporating electronic documents into the term. (R.C. 1307.102(A)(5).)

--Document: the bill eliminates the definition of "document," which is currently defined as having the same meaning as "document of title" (defined under UCC – General Provisions). The bill makes conforming changes throughout the chapter to have "document" refer to "document of title," thus, it does not appear that a substantive change results from this repeal. (R.C. 1307.01(A)(5), repealed by the bill.)

--Goods: under current law, "goods" means all things that are treated as removable for the purposes of a contract of storage or transportation. The bill changes "removable" to "movable." (R.C. 1307.102(A)(7).)

--Record: the bill defines "record" as information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. This is the same definition of "record" added by the bill to UCC – General Provisions. (R.C. 1307.102(A)(10).)

--Sign: under the bill, "sign" means, with present intent to authenticate or adopt a record, to execute or adopt a tangible symbol or to attach to or logically associate with the record an electronic sound, symbol, or process. This definition differs from the definition of "signed" added by the bill to the UCC – General Provisions. (R.C. 1307.102(A)(11).)

--Shipper: the bill defines "shipper" as a person that enters into a contract of transportation with a carrier (R.C. 1307.102(A)(12)).

--Warehouseman: the bill renames this term to "warehouse" and retains the definition, which is a person engaged in the business of storing of goods for hire (R.C. 1307.102(A)(13), with conforming changes throughout the bill).

The bill also eliminates the cross-reference of the definition of "duly negotiate" found in the chapter; however, the bill does not completely eliminate the concept of the term (R.C. 1307.01(B)(1), repealed by the bill, and R.C. 1307.501). The bill also removes the cross-reference to the definition of "overseas," as changes to the chapter eliminate the use of the term. Additionally, the bill adds the definition of "lessee in ordinary course of business," which is defined as a person who in good faith and without knowledge that the lease to the person is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind. "Lessee in ordinary course of business" does not include a pawnbroker. (R.C. 1307.102(B), by reference to R.C. 1310.01.)

## Changes to the UCC as adopted by Ohio resulting from the regulation of electronic documents of title

### The Sales Law--R.C. Chapter 1302.

The bill defines "control" for purposes of the Sales Law to mean "control" as set forth in the provision of the UCC – Documents of Title that establishes control of an electronic document (see "**Electronic documents of title**" above). The bill modifies the definition of "financing agency" by referring to documents of title that accompany *or are associated* with the seller's draft.<sup>54</sup>

Current law specifies the timing that payment is due for specified sales. Under current law, unless otherwise agreed, if delivery is authorized and made by way of documents of title otherwise than when the seller is authorized to send the goods under continuing law, then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received. The bill limits the current law circumstance to *tangible* documents of title and adds the provision that payment is due regardless of where the goods are to be received at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or if none, the seller's residence.<sup>55</sup>

Current law specifies when title passes for the sale of goods. Under current law, unless otherwise explicitly agreed where delivery is to be made without moving the goods if the seller is to deliver a document of title, title passes at the time when and the place where the seller delivers the documents. The bill limits that requirement to *tangible* documents of title, and requires, unless otherwise explicitly agreed where delivery is to be made without moving the goods that if the seller is to deliver an electronic document of title, title passes when the seller delivers the document.<sup>56</sup>

Under current law, where goods are in the possession of a bailee and are to be delivered without being moved, tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods, but tender to the buyer of a non-negotiable document of title or of a *written direction* to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document

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<sup>54</sup> R.C. 1302.01(C), by reference to R.C. 1307.106 and R.C. 1302.01(A)(6).

<sup>55</sup> R.C. 1302.23(C).

<sup>56</sup> R.C. 1302.42(C)(1).

of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender. The bill changes the reference to a *written direction* to a *record directing*, thus incorporating electronic documents into the existing scheme, and also states that the bailee's receipt of the notification of the buyer's rights fixes those rights subject to the UCC – Secured Transactions Law. Additionally, where the contract requires the seller to deliver documents, continuing law requires the seller to tender all such documents in correct form, except as provided in continuing law, and tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection. The bill expands this provision to also apply to drafts *associated with* the documents, to incorporate electronic documents.<sup>57</sup>

Where the seller has identified goods to the contract by or before shipment under continuing law, a non-negotiable bill of lading to the seller's own self or the seller's nominee reserves possession of the goods as security but except in a case of conditional delivery as provided continuing law, a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading. The bill expands this provision to apply to situations in which the seller retains *control* of the bill of lading, to incorporate electronic documents.<sup>58</sup>

Under current law the right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular *on its face*. Additionally, payment against documents made without reservation of rights precludes recovery of the payment for defects apparent *on the face* of the documents. The bill eliminates the reference to *on its face* with respect to the document appearing regular or the defect being apparent in the document to incorporate electronic documents.<sup>59</sup>

Where the goods are held by a bailee to be delivered without being moved, current law passes the risk of loss to the buyer when any of the following occur:

- (1) On the buyer's receipt of a negotiable document of title covering the goods;
- (2) On acknowledgment by the bailee of the buyer's right to possession of the goods;

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<sup>57</sup> R.C. 1302.47(D) and (E).

<sup>58</sup> R.C. 1302.49(A)(2).

<sup>59</sup> R.C. 1302.50(B) and 1302.63(B).

(3) After the buyer's receipt of a non-negotiable document of title or other written direction to deliver, as provided in continuing law.

The bill, for purposes of (1) and (3) above, requires the bailee to receive *possession or control* of the nonnegotiable document of title, thus accommodating electronic documents of title. For purposes of (3) above, the bill requires the directions to be *in a record* rather than a written direction.<sup>60</sup>

To stop delivery under continuing law the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods. If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of *possession or control*, as added by the bill, of the document.<sup>61</sup>

#### **Bank Deposits and Collections Law--R.C. Chapter 1304.**

The bill defines "control" for purposes of the Bank Deposits and Collections Law to mean "control" as set forth in the provision of the UCC – Documents of Title that establishes control of an electronic document (see "**Electronic documents of title**" above). Under continuing law, receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or *possession or control*, as added by the bill to accommodate electronic documents, of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to the UCC – Secured Transactions, except as provided in continuing law.<sup>62</sup>

#### **Investment Securities Law--R.C. Chapter 1308.**

Under the bill, a document of title is not a financial asset unless it is property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under the Investment Securities Law.<sup>63</sup>

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<sup>60</sup> R.C. 1302.53(B).

<sup>61</sup> R.C. 1302.79(C).

<sup>62</sup> R.C. 1304.01(C)(4), by reference to R.C. 1307.106, and R.C. 1304.20(C).

<sup>63</sup> R.C. 1308.02(G).

## UCC – Secured Transactions--R.C. Chapter 1309.

The bill defines "control" for purposes of the UCC – Secured Transactions to mean "control" as set forth in the provision of the UCC – Documents of Title that establishes control of an electronic document (see "**Electronic documents of title**" above). Additionally, the bill defines "issuer," with respect to a document of title, as a bailee that issues a document of title or, in the case of an unaccepted delivery order, the person that orders the possessor of goods to deliver. The term includes a person for which an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer's instructions.<sup>64</sup>

Under continuing law, unless an exception applies, a security interest is enforceable against the debtor and third parties with respect to the collateral only if specified requirements are satisfied. One of those requirements is that the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, *or electronic documents*, as added by the bill, and the secured party has control under the applicable law pursuant to the debtor's security agreement. The bill allows a secured party that has control of an electronic document of title as described under "**Electronic documents of title**," above, as collateral to take the same actions that a secured party that has control of deposit paper, electronic chattel paper, investment property, or letter-of-credit right may take regarding the secured property.<sup>65</sup>

A secured party that has control of electronic documents as described under "**Electronic documents of title**," above, as collateral has the same rights and duties regarding possession and care of the collateral as other secured parties.<sup>66</sup>

The bill requires, within ten days after receiving an authenticated demand by the debtor, a secured party having control of an electronic document to do all of the following:

- Give control of the electronic document to the debtor or its designated custodian;

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<sup>64</sup> R.C. 1309.102(B)(8), by reference to R.C. 1307.106 and R.C. 1309.102(B)(15), by reference to R.C. 1307.102(A)(8).

<sup>65</sup> R.C. 1309.203(B)(3)(d) and 1309.207(C).

<sup>66</sup> R.C. 1309.601(B).

- If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor;
- Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party.<sup>67</sup>

Continuing law lists the rules that determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral. While negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs: (1) perfection of a security interest in the goods by filing a fixture filing, (2) perfection of a security interest in timber to be cut, and (3) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral. The bill limits this rule to *tangible negotiable documents* only.<sup>68</sup>

A security interest in certificated securities, negotiable documents, or instruments under continuing law is perfected without filing or the taking of possession or control, as added by the bill, for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement. Similar to other electronic collateral under current law, the bill permits a security interest in *electronic documents* to be perfected by control of the collateral as described under "**Electronic documents of title**" above. Such a security interest is perfected by control under "**Electronic documents of title**" above when the secured party obtains control and remains perfected by control only while the secured party retains control. A security interest that is perfected in either this manner described above does not need the filing of a financial statement.<sup>69</sup>

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<sup>67</sup> R.C. 1309.208(B)(6).

<sup>68</sup> R.C. 1309.301(C).

<sup>69</sup> R.C. 1309.310(A)(5) and (8), 1309.312(E), and 1309.314(A) and (B).

Under current law, unless an exception applies, a secured party may perfect a security interest in negotiable documents by taking possession of the collateral. The bill limits this provision to *tangible* negotiable documents.<sup>70</sup>

Except as otherwise provided in continuing law, a buyer, other than a secured party, of *tangible* documents (instead of documents under current law) takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected. A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper or documents, receives delivery of the collateral. The bill limits this provision to *tangible* chattel paper or *tangible* documents. The bill states that a licensee of a general intangible or a buyer, other than a secured party, of electronic documents takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.<sup>71</sup>

### **Leases Law--R.C. Chapter 1310.**

Under current law, "buying," for the purpose of defining "buyer in ordinary course" under the Leases Law includes receiving goods or documents of title under a preexisting contract for sale. Under the bill, a person *acquires* goods or documents of title, rather than receives them, to incorporate electronic documents of title. Similarly, "leasing" for purposes of defining "lessee in ordinary course of business" includes *acquiring*, rather than receiving under current law, goods or documents of title under a preexisting lease contract.<sup>72</sup> Additionally, under continuing law, a lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent *in*, rather than on the face of as under current law, the documents.<sup>73</sup>

### **Technical changes**

The bill makes numerous technical changes throughout the Revised Code, largely to reflect the revised numbering system used in R.C. Chapters 1301. and 1307. and to reflect the change in the term "warehouseman" to "warehouse."

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<sup>70</sup> R.C. 1309.313(A).

<sup>71</sup> R.C. 1309.317(B) and (D) and 1309.338(B).

<sup>72</sup> R.C. 1310.01(A)(1) and (15).

<sup>73</sup> R.C. 1310.60(B).

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## HISTORY

ACTION

DATE

Introduced

01-11-11

H0490-RH-128.docx/jc



## TABLE I

### Location in the bill of current Revised Code provisions that contain Articles 1 and 7 of the UCC

R.C. 1301.16, 1301.18, and 1301.21 are not considered part of the UCC, and the bill relocates those sections to other chapters of the Revised Code.

Current law section number	Bill section number
1301.01	1301.201
1301.01(Y) to (AA)	1301.202
1301.01(EE)	1301.206
1301.01(KK)(2) to (4)	1301.203
1301.01(RR)	1301.204
1301.02(A) and (B)	1301.103(A)
1301.02(C)	1301.302
1301.03	1301.103(B)
1301.04	1301.104
1301.05	1301.301
1301.06	1301.305
1301.07	1301.306
1301.08	1301.307
1301.09	1301.304
1301.10(A)	1301.302(B)
1301.10(B)	1301.205
1301.11	1301.303
1301.12	Repealed by the bill
1301.13	1301.308
1301.14	1301.309
1301.15	1301.311
1301.16	1333.72
1301.18	1333.73
1301.21	1319.02
1307.01	1307.102
1307.02	1307.103
1307.03	1307.103(A)

<b>Current law section number</b>	<b>Bill section number</b>
1307.04	1307.104
1307.05	Repealed by the bill
1307.06	1307.201
1307.07	1301.202
1307.08	1307.203
1307.09	1307.204
1307.10	1307.205
1307.11	1307.206
1307.12	1307.207
1307.13	1307.208
1307.14	1307.209
1307.15	1307.210
1307.16	1307.301
1307.17	1307.302
1307.18	1307.303
1307.19	1307.304
1307.20	1307.305
1307.21	1307.306
1307.22	1307.307
1307.23	1307.308
1307.24	1307.309
1307.25	1307.401
1307.26	1307.402
1307.27	1307.403
1307.27(D)	1307.102(A)(9)
1307.28	1307.404
1307.29	1307.501
1307.30	1307.502
1307.31	1307.503
1307.32	1307.504
1307.33	1307.505
1307.34	1307.506
1307.35	1307.507

Current law section number	Bill section number
1307.36	1307.508
1307.37	1307.509
1307.38	1307.601
1307.39	1307.602
1307.40	1307.603

**TABLE II**

**Location of the bill's provisions concerning Articles 1 and 7 of the UCC as contained in existing law**

Section under bill	Section under current law
1301.101	New substantive section
1301.102	New substantive section
1301.103(A)	1301.02
1301.103(B)	1301.03
1301.104	1301.04
1301.105	New section
1301.106	New section
1301.107	New substantive section
1301.108	New substantive section
1301.201	1301.01
1301.202	1301.01(Y) to (AA)
1301.203	1301.01(KK)(2) to (4)
1301.204	1301.01(RR)
1301.205	1301.10(B)
1301.206	1301.01(EE)
1301.301	1301.05
1301.302	1301.02(C)
1301.302(B)	1301.10(A)
1301.303	1301.11
1301.304	1301.09
1301.305	1301.06
1301.306	1301.07

<b>Section under bill</b>	<b>Section under current law</b>
1301.307	1301.08
1301.308	1301.13
1301.309	1301.14
1301.310	New substantive section
1301.311	1301.15
1307.101	New substantive section
1307.102	1307.01
1307.102(A)(9)	1307.27(D)
1307.103	1307.02
1307.103(A)	1307.03
1307.104	1307.04
1307.105	New substantive section
1307.106	New substantive section
1307.201	1307.06
1307.202	1307.07
1307.203	1307.08
1307.204	1307.09
1307.205	1307.10
1307.206	1307.11
1307.207	1307.12
1307.208	1307.13
1307.209	1307.14
1307.210	1307.15
1307.301	1307.16
1307.302	1307.17
1307.303	1307.18
1307.304	1307.19
1307.305	1307.20
1307.306	1307.21
1307.307	1307.22
1307.308	1307.23
1307.309	1307.24
1307.401	1307.25

<b>Section under bill</b>	<b>Section under current law</b>
1307.402	1307.26
1307.403	1307.27
1307.404	1307.28
1307.501	1307.29
1307.502	1307.30
1307.503	1307.31
1307.504	1307.32
1307.505	1307.33
1307.506	1307.34
1307.507	1307.35
1307.508	1307.36
1307.509	1307.37
1307.601	1307.38
1307.602	1307.39
1307.603	1307.40
1307.703	New substantive section
1307.704	New substantive section