Congress Takes Exception to the Farm Products Exception of the UCC

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CONGRESS TAKES EXCEPTION TO THE FARM PRODUCTS EXCEPTION OF THE UCC: CENTRALIZED AND PRESALE NOTIFICATION SYSTEMS*

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I. INTRODUCTION

A. General

The first part of this article dealt with the history of the farm products exception of the Uniform Commercial Code (the Code) and many of the broad based retroactivity and preemption issues implicated by passage of section 1324 of the Food Security Act of 1985. Numerous articles and the rapid response of state legislatures to its passage demonstrate the significant impact of section 1324’s “clear title” provisions on farmers, farm lenders, farm product buyers, commission merchants, and selling agents. Section 1324 affects farm lend-
ing and sale transactions involving millions of farmers, thousands of private banks, and various federal agricultural lending agencies.\footnote{7}

Section 1324's goals are to remove the potential double payment burden on buyers of farm products created by the Code's farm products exception,\footnote{8} and to establish uniformity and reduce overall transactional costs.\footnote{9} Whether the section will achieve these goals, however, remains a very real question. As demonstrated in the first part of


This legislation will have a direct impact on the myriad of agricultural transactions which take place among the Nation's 2.3 million farmers. It will also affect thousands of daily transactions between these farmers and representatives of industries such as seed production, meat packing and processing, grain processing, and poultry processing.

Recent surveys indicate that there are approximately 7,800 commercial banks with 10 or more agricultural loans in their portfolios. These banks provide approximately 37 percent of all short term operating credit to agricultural producers. The Farmers Home Administration, an agency of the U.S. Department of Agriculture, provides approximately 15 percent of all short term operating credit to farm operations, and the Commodity Credit Corporation, also an entity of the U.S. Department of Agriculture, extends approximately 10 percent of this credit. The Farm Credit System, through the Federal Intermediate Credit Banks and Production Credit Associations, provides approximately 19 percent of the short term operating credit, while individuals and others provide the remainder of this credit to farmers, or approximately 18 percent of the total.

There are millions of transactions involving the purchase of agricultural products annually. Enactment of this legislation will relieve the purchasers of these agricultural products from the uncertainties in current law.

Agricultural lending practices may also be affected, to the extent that lenders become more cautious in offering credit to farmers who have little or no collateral other than agricultural products, for their loans.

\textit{Id.}

The legislative history is replete with similar discussions concerning various estimates of how this legislation would affect the farming industry.

\footnote{8}{U.C.C. § 9-307(1).}

\footnote{9}{Subsection 1324(a) discusses the potential double payment burden placed on farm product buyers by the Code's farm products exception. Subsection 1324(b) expressly states that "[t]he purpose of [section 1324] is to remove such burden on and obstruction to interstate commerce in farm products." Food Security Act of 1985, supra note 3, at § 1324(b); see Ker- shen and Hardin, supra note 1, at 38-40. It also has been suggested that federal legislation like section 1324 promotes goals of uniformity and certainty resulting in decreased transactional costs, which will benefit farmers. See Meyer, The 9-307(1) Farm Products Puzzle: Its Parts and Its Future, 60 N.D.L. Rev. 401 (1984); Uchtmann, Bauer, and Dudek, The UCC Farm Products Exception—A Time to Change, 69 Minn. L. Rev. 1315, 1348 (1985). As stated by Senator Cochran just before the final Senate version of section 1324 was sent to the Joint Conference Committee, "This amendment seeks to establish a greater degree of uniformity, make it less onerous and burdensome for buyers and sellers, and protect the interests at the same time of lenders." 131 Cong. Rec. S16,297-98 (daily ed. Nov. 22, 1985).}
this article, section 1324 presents complex retroactivity and preemption questions, which may lead to significant litigation in federal courts. Even assuming that these interpretive issues are settled in a relatively short time, section 1324’s own notification exceptions to its pro-buyer rule raise additional complications. Thus, the ultimate efficiency and fairness of section 1324 hinge on how well the “presale notification” and “centralized notification” systems work in actual practice. If they provide easy-to-follow rules and guidelines and all parties to agricultural transactions can use them economically, Congress may have achieved its goals. If not, Congress ought to revise section 1324.

To analyze section 1324’s notification systems, this article is divided into five parts. The first reviews section 1324’s legislative history and provides a brief overview of the two notification systems. The second considers certain system commonalities and interactions. The third reviews centralized notification in detail, and the fourth discusses presale notification. Finally, the conclusion offers the authors’ views and recommendations on section 1324.

Although this article discusses many of the anomalies, questions, and issues raised by section 1324’s notification systems, it is impossible to cover them all. Yet, to properly understand the implementation of the two systems, they should be considered together rather than separately. Consequently, this article discusses a broad range of issues under section 1324’s notification systems to give lawyers, legislators, and judges a “comprehensive” view of the legislation.

B. Legislative History of Presale and Centralized Notification

Subsection 1324(d) reverses the farm products exception of Code section 9-307(1). Subsection 1324(d) provides that “a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though such security interest is perfected; and the buyer knows of the existence of such interest.” Subsection

10. See Kershen and Hardin, supra note 1.
12. Id. § 1324(e)(2)-(3), (g)(2)(C)-(D).
13. See infra notes 18-102 and accompanying text.
14. See infra notes 103-222 and accompanying text.
15. See infra notes 223-474 and accompanying text.
16. See infra notes 475-542 and accompanying text.
17. Imagine trying to deal with all of the permutations presented by the Code’s financing statement system. Exemplifying this problem, one commentator recommended over twenty-two corrections and technical amendments to cure perceived structural defects with section 1324’s two notification systems immediately after its passage. See Clark Memorandum, supra note 4, at 37-52.
1324(g)(1) states a similar rule for commission merchants and selling agents who, in the ordinary course of their business, sell farm products for others.\(^9\) In balancing conflicting interests, however, Congress diluted this new farm products rule. Congress created section 1324's presale notification and centralized notification systems to give secured parties a way to protect their security interests. Starting in 1983, proponents of federal legislation preempting the Code's farm products exception had a long and difficult road to travel, facing strong pro-lender opposition. Over two years, numerous legislative hearings were held. Section 1324's final form was the result of a series of compromises, including a last minute one forced by the Senate Banking Committee's intervention.

Originally introduced in June 1983,\(^{20}\) the first versions of section 1324 would have repealed the Code's farm products exception. Farm products lenders would have had no unique way to protect their security interests in sales transactions. Buyers in the ordinary course would seemingly be protected completely without regard to their knowledge of lender claims.

At House hearings held on November 16, 1983, testimony was solicited on four matters: (1) "the nature, scope, and extent of problems arising from the UCC agricultural exemption"; (2) "the experience of the various States in modifying or repealing the UCC agricultural exemption"; (3) "the purpose of the UCC agricultural exemption and its relevance to modern agriculture"; and (4) "opinions regarding the needs for Federal preemptive legislation in this area."\(^{21}\) Numerous representatives of farm lenders, farm product buyers, and farmers testified. Buyers and farmers extolled the fairness of abolishing the Code's farm products exception.\(^{22}\) Lenders predicted

\(^9\) Id. § 1324(g)(1).


[A] buyer in the ordinary course of business who buys farm products from a person engaged in farming operations shall own such goods free of any security interest in such goods created by his seller even though the security interest is perfected in accordance with applicable State law and even though the buyer knows of its existence. . . .

Id. H.R. 3297 provided a similar rule for "the purpose of protecting good faith purchasers of livestock." Id.


\(^{22}\) For example, Professor Ralph J. Rohner testified on behalf of the American Meat Institute that:

[W]e believe that, given the operation of the farm products exception, its disparate treatment in the States, preemptive Federal law is probably the only feasible way to correct a State rule that is unfair and capricious in its operation, that is subject to increasingly varying nuances in the different States, and that is . . . exacerbated
dire consequences if the bill was enacted. They also argued that federal preemption was inappropriate in an area traditionally reserved for livestock buyers by the [24 hour payment requirement of the] Federal Packers and Stockyards Act.

*Id.* at 7. E. James Strasma, Vice President and Controller of the Interstate Producers Livestock Association stated that:

I firmly believe that the lender has an automatic cosigner. . . . Now the lender has received compensation for taking risks on loans. They get it in the form of interest. A common argument that is presented is that the availability of credit will suffer and higher interest rates will prevail. My only reply to that is that retailers and other people who sell products in the ordinary course of business are not out of business and they still obtain credit.

I have yet to go into a lender’s facility and see a sign advertising where farm product loans are cheaper than other loans.

*Id.* at 58. Dennis D. Casey, Associate Manager of Government and Industry Affairs for the Livestock Marketing Association claimed that:

The threat of double payment has existed for some time, but the increase in losses in the past 3 to 4 years has been the cause of the attention directed at the subject. The number of claims and/or demands and the dollar amounts of those claims has had a dramatic increase as a result of lenders becoming more familiar with that avenue of collection, coupled with a farm economy that has created financial hardship for many producers. There is every reason to believe that the situation will grow worse in the coming year as the farmer continues to struggle and as lending practices are relaxed in attempts to aid those farmers.

Perhaps the Farmers Home Administration’s own figures best point out the growth in number and dollar value of claims in recent years. Those figures show that in fiscal year 1978, 105 livestock claims having a value of approximately $500,000 were referred to USDA’s Office of General Counsel. Four years later, in fiscal year 1982, the comparative numbers were 292 and $4 million. Also, in fiscal year 1982, FmHA referred to the Office of General Counsel 199 claims involving grain with a dollar amount of over $4 million.

Since Livestock Marketing Association is a trade group which provides commercial services, one of which is insurance, the association has a close relationship with Livestock Marketing Insurance Agency. That agency provides insurance coverage to marketing businesses and others, and specializes in livestock insurance. Coverage for the risk involved in buying or selling mortgaged livestock is carried by many in the industry. In calendar year 1981, that agency was made aware of claims totaling $1,038,000. In 1982, the agency was informed by insurance customers of 99 claims having a value of $1,440,000. From January 1 through November 9 of this year, the numbers are 95 and $1,466,000. Of note is the fact that of the total of 252 claims, totaling nearly $4 million, FmHA was implicated in about 71.5 percent of the claims, the dollar value of those claims being about 55.5 percent.

*Id.* at 66.

23. Delmar K. Banner, President of the Farm Credit Counsel, testified that:

We believe that striking of the exception will reduce the availability of credit and will likely raise the cost to cover the increased risk of conversion. We fear the effect would fall not only upon young and beginning farmers, but also upon many larger, established producers whose equity base is now eroded by the depressed farm economy of recent years.

*Id.* at 23.
to the states. 24 Perhaps sensing a congressional predisposition to take action, 25 however, lender lobbyists focused on the need to find a "middle ground" to "assure potential buyers of the notice they need to protect themselves in their interests in purchased farm commodities." 26 This concession was based on a recognition that Code farm product filing systems "in local county offices [do] not provide a feasible notice system [for farm product buyers] given changes in the marketing system of agricultural commodities." 27 Notwithstanding strong House support for section 1324's initial versions, the bill was not passed in 1983. Ironically, the pro-lender suggestions that fair notice would protect buyers came back to haunt lenders during the next congressional attack on the farm products exception.

The Code always has had a form of presale notification allowing a secured lender in an inventory loan transaction to protect its security interest against a buyer in the ordinary course. 28 In considering section 1324, both Congress and lenders acted as if they were unaware of this method, even though California lenders used a version of it after the 1976 repeal of California's farm products exception. 29 Under the Code system, a secured party can give a buyer actual notice of any special payment obligations imposed on the debtor in the security agreement prior to the sale. If the buyer subsequently ignores these special payment obligations, the buyer knows that he is buying from a debtor who is violating the security interest and the buyer, therefore, is not a "buyer in ordinary course of business" under Code section 1-201(9). Without this status, the buyer cannot claim Code section 9-307(1)'s protection. Thus, the buyer will take the goods subject to the security interest. 30 Obviously, in many transactions the use of

24. Professor Keith G. Myers stated that: "My view is that traditionally commercial transactions have been dealt with at the State level, either by statute or by case law. The other thing is that traditionally Congress has not gotten involved in commercial transactions." Id. at 27.

25. The witness list gives one clue: 18 pro-buyer witnesses were heard and three pro-lender witnesses testified. Id. at III-IV.

26. Id. at 23 (testimony of Delmar K. Banner).

27. Id. at 25 (testimony of Ross B. Anderson, Vice President, Credit, St. Louis Bank for Cooperatives). Code filing requirements for farm products are enacted under the various alternatives of Code section 9-401. As stated by Delmar K. Banner, President of the Farm Credit Counsel:

[T]he problem under present law is not with the farm products exception. The problem is one of notice. Certainly buyers are entitled to notice of outstanding liens sufficient to permit them to protect their interests in commodities they purchase. It is, therefore, toward that end that legislative efforts should be directed.

Id. at 133.


29. See Clark Memorandum, supra note 4, at 41-42.

30. Under Code section 1-201(9) a buyer cannot be a "buyer in ordinary course" if he takes with knowledge that the sale to him is in violation of a security interest of a third party.
this tool is limited because of difficulties in identifying buyers in advance of sales. The 1983 versions of section 1324 would have preempted the farm products exception, but would not have deprived farm product lenders of this Code presale notification system.\textsuperscript{31} Effectively, the 1983 versions put the farm products buyer in the same position as a Code inventory buyer.

As revived in March 1985, the initial House and Senate versions of section 1324\textsuperscript{32} introduced lender presale notification of buyers. Both bills provided that a farm products buyer would take subject to a security interest if (1) within one year before the sale, the buyer received from the seller or secured party written notice of the security interest, (2) the notice specified payment obligations, and (3) the buyer failed to perform those obligations.\textsuperscript{33} The notice was to include "the name and address of the secured party and seller, and a reasonable description of the property, including the jurisdiction where the property is located."\textsuperscript{34} The House created the same presale notification exception for commission merchants and selling agents.\textsuperscript{35} No similar exception, however, was included in the first 1985 Senate bill.\textsuperscript{36} Nothing in the legislative history suggests a connection between the 1985 House/Senate presale notification system and the Code system. Nevertheless, they are similar in providing an uncomplicated form of actual notice.\textsuperscript{37} The March 1985 versions of section 1324 more closely resembled presale notice systems that some states adopted as nonuniform amendments to the Code’s farm products exception.\textsuperscript{38}

The rule of Code section 9-307(1) only applies to buyers in ordinary course of business. See U.C.C. § 9-307 comment 2.

\textsuperscript{31} This assumes that receipt of such Code notice would have deprived a person of the status of "buyer in ordinary course" under the 1983 version of section 1324. See id. § 1-201(9).


\textsuperscript{33} H.R. 2100, supra note 32, § 1314(d); S. 744, supra note 32, § 1324(c).

\textsuperscript{34} H.R. 2100, supra note 32, § 1314(d); S. 744, supra note 32, § 1324(c).

\textsuperscript{35} H.R. 2100, supra note 32, § 1314(e).

\textsuperscript{36} S. 744, supra note 32, § 1324(d).

\textsuperscript{37} First, the information included in the notice resembled the requirements of Code section 9-402(1) for an inventory transaction: the names and addresses of the debtor and secured party and "a statement indicating the types, or describing the items, of collateral." U.C.C. § 9-402(1). Note that Code section 9-402(1) provides that a Code financing statement "is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral." Id. Second, the secured party was required to give the buyer a statement of payment obligations. Finally, the buyer took subject to the security interest unless it performed those payment obligations.

\textsuperscript{38} See Kershen and Hardin, supra note 1, at notes 134-36.
Both 1985 initial versions of section 1324 allowed secured parties to obtain the identity of potential buyers. These versions stated that the security agreement could require the farmer-debtor "to furnish the secured party a list of the persons to whom the seller will sell the [farm] products." Under certain circumstances, failure to sell to a buyer on that list subjected the farmer-debtor to a criminal fine of not more than $5,000.

Clearly, the presale notification system provided "a mechanism under which lenders may CHOOSE to protect their security interests through Presale Notice to potential buyers." Farmers and farm product buyers accepted this first compromise because it was based on actual notice received by them. Lenders believe it was better than the "all-or-nothing approach" of the 1983 versions. Lenders, however, were still very unsatisfied with this initial presale notice system. In March 1985 testimony before the House Subcommittee reviewing section 1324's proposed form, the President of the Farm Credit Council criticized the 1985 presale notice system as unworkable. Other lender representatives continued to oppose section 1324 because it

39. See H.R. 2100, supra note 32, § 1314(f); S. 744, supra note 32, § 1314(e).
40. See H.R. 2100, supra note 32, § 1314(g). For more discussion of this issue, see infra notes 180-89.
42. Id. at 37. Delmar K. Banner, President of the Farm Credit Council, testified that:

Specifically, the council is committed to support alternatives that will provide for a sharing of responsibilities among lenders, buyers, and producers for seeing that the lien is paid. We have worked, in recent weeks, with representatives of the farm and commodity organizations in an effort to fashion such an alternative. I had hoped that we could join with them in support of a better alternative today. We cannot, however, support the provisions of H.R. 1591 as it has been introduced. It is certainly a step in the right direction having abandoned the kind of all-or-nothing approach that was in previous legislation.

We believe this bill, as introduced, results not in a sharing of responsibility, but in a shifting of responsibility totally to the lender. It does nothing, moreover, we would suggest to deter the diversion of collateral proceeds. We believe that to succeed in deterring diversion of collateral proceeds the law has to cause the producer to become involved to reckon with the rights of others in his produce and in their sale proceeds.

Id.
43. The president commented that:

The problem with this approach is that a lender has no way of determining with any degree of certainty to whom his borrower will sell unless the borrower has contracted in advance to sell his crops or livestock to a particular buyer.

The seemingly simple task of asking a producer at the time he borrows his operating money to list prospective purchasers of the crops or livestock yet to be produced or raised necessarily assumes the producer knows at the time he takes out an operating
would preempt the good faith and very substantial efforts of a number of states, and would replace those states' procedures with an arrangement which in many cases would be less effective than the existing UCC provisions or the procedures which the state has provided.

The specific state procedures referred to in this testimony were central notice filing systems such as those adopted in Montana, Kansas, Iowa, Nebraska, and North Dakota. Despite continuing opposition from pro-lender groups, the initial 1985 version of section 1324 passed the House of Representatives on October 8, 1985. The Senate Committee on Agriculture, Nutrition, and Forestry recommended this version's passage on October 3, 1985. However, lender lobbyists obtained one more chance to derail, or at least reroute, section 1324. They convinced the Senate Banking Committee to assert concurrent committee jurisdiction over section 1324. The committee agreed to consider the section's effect "on agricultural credit and on agricultural lenders" at a hearing held on October 9, 1985.

Just before the October 9 Senate Banking Committee hearing, Senator Mark Andrews of North Dakota authored a last minute report that was approved by the Senate Agriculture Committee. The report allowed a "state designed pre-notification system" to meet the presale notice requirements of section 1324. This proposal specifically protected the centralized notification system adopted by North Dakota loan to whom he will ultimately sell. Moreover, it assumes that a producer who is intent upon diverting collateral proceeds and thereby defrauding his lender will feel honor-bound to sell only to the buyers he has previously listed with his lender.

Id. at 152-54; see also id. at 167 (testimony of Timothy Taylor on behalf of the American Bankers Association).

44. Id. at 178 (testimony of Bob Gerhart, Chairman of the Agriculture-Rural Committee of the Independent Bankers Association of America). The specific state procedures referred to in this testimony were central notice filing systems such as those adopted in Montana, Kansas, Iowa, Nebraska, and North Dakota. Id. at 178; see also Kershen and Hardin, supra note 1, at notes 129-56.

45. See Senate Report, supra note 7 (making no mention of a central filing system).

46. See Amending the Agricultural and Food Act of 1981: Hearing on S. 744 Before the Comm. on Banking, Housing, and Urban Affairs, 99th Cong., 1st Sess. 1 (1985) [hereinafter Senate Hearings]. The farm product lobbyists most probably were concerned with the tone of Chairman Jack Garn's opening comments, which boded ill for the 1985 House bill remaining unchanged:

Certainly, it is unfair for buyers of farm products to be required to pay for them twice. On the other had, the National Grange has sent me a letter, which will be included in the record, that states that illegal conversion, which triggers this double liability for purchasers, is relatively infrequent. In addition, I do not know what effect, if any, passage of S. 744 would have on agricultural lenders, who seem to be the key to the survival of the American farm community. Would the passage of S. 744 result in the wholesale classification of crop loans by the regulators, on the ground that they are no longer secured loans? Would S. 744 have any effect on credit availability for marginal farm operators? These seem to me to be the immediate, practical issues that should be addressed in this hearing.
in 1985. The proposal allowed "central notice systems to qualify as pre-notification" under the following circumstances:

If a state has enacted legislation which provides for written notice to be made under a central notification system which serves as "constructive notice" to buyers of agricultural commodities, it is also the intent of this legislation that notice given through such system constitutes written pre-notification under this Act.47

Constructive notice, however, ran counter to the actual notice provisions then supported by farm product buyers and farmers. Thus, they opposed the amendment.

Comments made by Senator Jake Garn, Chairman of the Senate Banking Committee during the October 9, 1985, hearing made it clear that he did not believe that section 1324 should remain as it then stood. Instead, he insisted that the two sides reach a compromise.48

However, there is another issue that is of great importance to me as well. That is that S. 744 would preempt the laws of at least 48 States. Now, 35 States still operate under the official text version of the UCC on this point, and 15 States have looked at this double liability problem, and have amended their laws. But the laws of these States, where the expertise in the area of commercial law really lays and knowledge of local agricultural practices exists, would be preempted.

Id. at 2.

47. Id. at 16 (statement of Sen. Andrews).

48. Id.

49. The following is an exchange between Senator Garn and the President of the Pennsylvania Livestock Auction Association, Inc., a farm products buyers:

MR. DEGAETANO. Senator, we think S. 744 is the compromise by both parties and what you're saying about the States changing laws is exactly right except if we didn't have the Uniform Commercial Code then it would be all fair on both sides all the way around.

THE CHAIRMAN. Well, you're missing my point. It obviously is not a compromise or you wouldn't have such differences of opinion in testimony.

MR. DEGAETANO. I'd feel the same way if I were lending money out as they were. That's all I'm asking you to look at.

THE CHAIRMAN. And all I'm asking you to look at is the fact that it isn't a compromise and to have some recognition that you need financial institutes to loan you money and if you can ignore an increase from $213 million in the Farm Credit System in delinquencies from $6 billion and the problems of farmers and agricultural banks for your own self-interest, be my guest.

Id. at 110-11. Senator Garn and JoAnn Smith, President of the National Cattlemen's Association had the following exchange:

THE CHAIRMAN. Mrs. Smith, have the cattlemen attempted to compromise on this issue?

MRS. SMITH. Mr. Chairman, let me state that we recognize the need for a compromise in a solution. But we also recognize the need to represent our industry. But we know that in States such as Illinois and California where these laws have been in effect and have a track record that the credit in those States is not the issue at hand, so we know it's working. But we can assure you that the National Cattlemen's Association stands ready to work with other commodity groups and this
Garn believed that appropriate compromise would (1) balance the burdens of preserving a lender’s security interest, and (2) serve federalism by maximizing state flexibility in handling farm commerce transactions. Although further compromise at this point appeared to be pro-lender, the legislative history shows that the changes were made to achieve these two goals, not to favor lenders.

Committee and the Agriculture Committee to make a solution that is workable.

THE CHAIRMAN. OK. Everybody stands ready. Who’s been holding meetings? Who’s going to initiate it? Who’s going to make the calls? Let’s put this on the record, too. When I initially talked about jurisdiction, I have never had more threatening calls in my political career than came from the National Cattlemen’s Association about wanting my home phone number—they were just going to beat me to death with calls and lobbying, and so on. Well, that doesn’t work with Jake Garn. That made me all the more determined to hold hearings. But there has been a game going on for some months. There’s been an unwillingness to talk about this issue and try and compromise it. And I don’t like that—totally apart from the substance of the issue—once again, I agree with you. I don’t like double jeopardy. But from a group that has normally been a very good friend of mine, certainly the Utah Cattlemen’s Association understands me and where I’m coming from. There was a very desperate campaign going on by some of the farm groups to even prevent us from holding this hearing.

When there’s an attempt to even keep a committee from holding a hearing, there is something terribly, terribly wrong with that.

\textit{Id.} at 131-32.

In his concluding remarks, Senator Garn reemphasized his “compromise” position to lenders, farmers, and farm product buyers:

There hasn’t been a lot of incentives for the bankers to go along because they would prefer no change at all. They’re satisfied with what is there. So I would like the pressure to be equal on both sides of this argument... I really believe you will benefit if you are willing to give a little bit on each side to come up with a compromise rather than putting Congress in the position of taking these absolute positions. . . .

\textit{Id.} at 151.

50. \textit{Id.} at 130 (Senator Garn: “Basically what we’re hearing is we’re hearing two sides, and you’re in this problem together. At least that’s my opinion. And it’s got to be worked out together. . . .’’); \textit{id.} at 132 (Senator Garn: “If you fight for your own position you’re both going to lose either way because you can’t separate agricultural credit from the performance of agriculture.’’).

51. \textit{See id.} at 2. Note also the following exchange between Senators Garn and Andrews in response to Senator Andrews’ proposed amendment:

THE CHAIRMAN. You will never have trouble from this Senator on giving States maximum flexibility.

SENATOR ANDREWS. I thought [North Dakota was] on the right track.

THE CHAIRMAN. I guarantee you that. Every time in the 11 years I’ve served on this committee we have had any State override... there has always been a so-called Garn amendment that allows States... to override and tell the Congress... to go to hell, to put it very bluntly.

\textit{Id.} at 10-11.
Following the Senate Banking Committee hearings, Senator Cochran co-authored a revised version of section 1324 giving form to Senator Andrews' centralized notification concept.\textsuperscript{52} By providing a well-defined centralized system, Senator Cochran's version protected buyers, commission merchants, and selling agents from overly imaginative state centralized notification systems. With certain significant differences,\textsuperscript{53} the Conference Committee subsequently adopted this Senate amendment. Section 1324's centralized notification system was conceived, drafted, and passed in less than two months. Not unexpectedly, the legislation that emerged from this hurried process differed significantly from the initial 1985 House and Senate versions in the following ways:

_first_: In addition to the presale notification system, the Conference Committee adopted a centralized notification system. In many respects, this system followed the North Dakota system reviewed by Senator Andrews in the October 9 hearings.\textsuperscript{54} To implement the new system, the Committee added crucial new definitional and operative provisions.

_second_: The important terms "buyer in the ordinary course of business"\textsuperscript{55} and "farm product"\textsuperscript{56} were changed.

\textsuperscript{52} 131 CONG. REC., _supra_ note 9, at S16,296-301. Referring to Senator Andrews' suggestion that presale notification be expanded to include "central filing systems," Senator Cochran criticized it because:

[T]here is no attempt to specify the basic prerequisites of a central filing system.

If a State called its system 'central registration,' that would apparently suffice, whether or not the buyer would in fact receive actual notice. . . .

The answer I propose is to refine [Senator Andrews' proposal] by clearly defining a central filing/central notice system.

_Id._ at S16,299.

\textsuperscript{53} Major examples include the following:

(1) The effective financing statement was to include "a legal description of the real estate concerned;" (2) no three month limitation existed for amendments of effective financing statement; (3) the concept of crop year was not present for either notification system; (4) presale notice was to include a description of the property, "including the jurisdiction in which the property is located" (no reference to "location" was contained in the EFS definition); (5) the terms "farm products" and "buyer" differ; (6) there was no requirement that a presale notice be "organized according to farm products" or contain social security numbers or taxpayer identifications; (7) presale notification had no amendment or lapse provisions; and (8) there was no requirement to include payment obligations.

_Id._ at S16,296-97.

\textsuperscript{54} See H.R. CONF. REP. No. 447, 99th Cong., 1st Sess. 485-86, _reprinted in_ 3 U.S. CODE CONG. & ADMIN. NEWS 1660, 2411-12 (stating that "[t]he Senate amendment is essentially the same as the House provision (referring to presale notification), except that it exempts buyers of farm products produced in States having central systems for the recording of financial statements from the general provisions explained in paragraph (a) [of section 1324].").

\textsuperscript{55} The words "who is in the business of selling farm products" was added to the original definition.

\textsuperscript{56} Compare the original definition, "a crop or livestock used or produced in farming operations, or a product of a crop or livestock in its unmanufactured state (such as ginned
Third: Numerous additions were then made to the presale notification system's notice form. Many aspects of the newly designed and defined centralized notification system were imported into presale notification without explanation.57

Fourth: The Committee added a preamble that expressly stated the reasons for the legislation.58

Because these modifications resulted from senatorial staff discussions59 or were made in the privacy of conference, little or no written explanation exists for many of them. What started out as a relatively simple concept evolved into lengthy and detailed rules and definitions. The absolute rule of the Code's farm products exception was replaced by complex mechanisms that divided the burdens of giving and receiving notice of a security interest among the parties to agricultural financing and sale transactions.60 Unlike the Code's evolution, however, the final form of section 1324 responded to a perceived problem. The section's complex notification systems did not result from a lengthy and detailed study of the practicality of the systems. As this article will demonstrate, section 1324 consequently suffers from several imperfections.61

C. An Overview

Although this article deals with the specific mechanisms of section 1324's notification systems in great detail, it first reviews each system's basic scheme. Before beginning, however, the authors note the limited scope of section 1324 and the even more limited functions of its two notification systems.62 Section 1324 deals only with priority disputes

57. Compare Food Security Act of 1985, supra note 3, § 1324(e)(1), (g)(2)(A) with supra text accompanying note 33.
58. See H.R. CONF. REP. No. 447, supra note 54, at 190-91.
59. See 131 CONG. REC., supra note 9, at S16,300.
60. Senator Garn probably was pleased with this result. In the October 9th Senate Banking Committee hearings he observed that: "The best compromises I've ever seen is when nobody likes them but they will grudgingly accept. That means everybody has given a little bit and didn't get their own way, but it's better for the overall situation." Senate Hearings, supra note 46, at 133.
61. In commenting on Senator Cochran's centralized notification, which closely paralleled section 1324's final form, Senator Kassebaum of Kansas observed:
   My concern, Mr. President, is not that this proposal is unreasonable in concept.
   My fear is that it is unworkable in practice.
131 CONG. REC., supra note 9, at S16,301.
62. For a more detailed discussion, see Kershen and Hardin, supra note 1, at notes 6-30, 175-82.
between (1) buyers of farm products in the ordinary course of business, or commission merchants or selling agents of farm products selling in the ordinary course of business, and (2) holders of Article Nine security interests in farm products. Section 1324 does not replace or supersede Code rules for taking or perfecting security interests or the priority between security interests. It does not apply to any collateral other than "farm products," as defined in subsection 1324(c)(5).61 Although somewhat similar in structure, the purpose of the section 1324 notification systems is unrelated to the purpose of the Code's financing statement notice system. Conceptually, if not practically, they operate on simultaneous but separate tracks. Presale and centralized notification matter only in section 1324 priority disputes between buyers, commission merchants, or selling agents on the one hand and farm products secured parties on the other.

1. Presale Notification System (PNS)

As previously discussed, section 1324's presale notification system in some ways resembles the Code's actual notice system to protect secured parties and similar state presale notification systems adopted before passage of section 1324.64 Incorporated in subsections 1324(1)(A) and (B), presale notification provides that a buyer, commission merchant, or selling agent will take subject to a security interest in section 1324 farm products if all of the following criteria are satisfied:

1. The buyer, commission merchant, or selling agent actually receives written notice (the "PNS notice") of the security interest within one year before the sale in question.65
2. The PNS notice is an original or reproduced copy of the original.66
3. The PNS notice is "organized according to farm products."67
4. The PNS notice contains the following information:
   a. the names and addresses of the secured party and debtor;68

63. Section 1324 defines "farm product" as:
   An agricultural commodity such as wheat, corn, soybeans, or a species of livestock such as cattle, hogs, sheep, horses, or poultry used or produced in farming operations, or a product of such crop or livestock in its unmanufactured state (such as ginned cotton, wool-clip, maple syrup, milk, and eggs), that is in the possession of a person engaged in farming operations.
Food Security Act of 1985, supra note 3, at § 1324(c)(5).
64. See supra text accompanying notes 20-38.
66. Id. § 1324(e)(1)(A)(i), (g)(2)(A)(i).
67. Id. § 1324(e)(1)(A), (g)(2)(A). For a discussion of this requirement, see infra notes 482-84, 494 and accompanying text.
b. the debtor's social security number, or in the case of a debtor doing business other than as an individual, the debtor's IRS taxpayer identification number;69

c. a description of the farm products covered by the PNS notice, including:70

(i) the amount of such farm products, where applicable;
(ii) crop year(s) covered;
(iii) county or parish;
(iv) a "reasonable description of the property;"71 and
(v) a statement of any payment obligations imposed on the buyer, commission merchant, or selling agent "as conditions for waiver or release of the security interest."72

5. The lender amends the PNS notice to reflect material changes within three months of such change.73

6. The PNS notice lapses on "either the expiration period of the statement or the transmission of a notice signed by the secured party that the statement has lapsed, whichever occurs first."74

7. The buyer, commission merchant, or selling agent who receives the PNS notice fails to perform any stated payment obligations.75

Secured parties can meet all these conditions only if they first locate all potential buyers, commission merchants, and selling agents. As pointed out in the legislative hearings,76 this means reliance on information that only the debtor/seller can supply. Subsection 1324(h)(1), therefore, permits secured parties to require in security agreements that the debtor/seller provide "a list of the buyers, commission merchants, and selling agents to or through whom the person engaged in farming operations may sell such farm product."77 Having provided an informational lever, Congress also created a hammer to encourage compliance. Subsection 1324(h)(3) imposes a fine equal to the greater of 5,000 dollars or fifteen percent of sale proceeds78 unless the debtor/seller (1) gives written notice identifying the buyer, commission merchant, or selling agent at least seven days before sale,79

70. Id. § 1324(e)(1)(A)(IV), (g)(2)(A)(ii)(IV).
71. See infra notes 499-512 and accompanying text.
73. Id. § 1324(e)(1)(A)(iii), (g)(2)(A)(iii).
74. Id. § 1324(e)(1)(A)(iv), (g)(2)(A)(iv).
75. Id. § 1324(e)(1)(B), (g)(2)(B).
76. See supra note 43 and accompanying text.
78. The actual statutory language is 15% "of the value or benefit received [by the seller] for such farm product described in the security agreement." Id. § 1324(h)(3); see infra text accompanying notes 180-89.
or (2) accounts to the secured party for the sale's proceeds no later than ten days after the sale. Although this tool originated with presale notification, it can be read to apply to any farm products lending transaction whether covered by centralized or presale notification.

Although the concept of PNS is simple, section 1324 imposes numerous criteria that are quite complicated, interposing many hurdles for secured parties to leap to protect their security interests. Moreover, Congress left numerous unanswered questions and made apparent drafting inconsistencies that cast a shadow over PNS's usefulness. These issues will be considered later in this article.

2. Centralized Notification System (CNS)

The operative provisions of section 1324's centralized notification system are contained in subsections 1324(e)(2) and (3) for buyers and subsections 1324(g)(2)(C) and (D) for commission merchants and selling agents. Unlike PNS, centralized notification requires state action and is only available in states that create a "central filing system" meeting section 1324's stringent requirements. The certification, operation, and maintenance of a CNS will be reviewed in detail in the third section of this article. Again it should be emphasized that a CNS does not replace the Code's filing system. Notwithstanding certain similarities, CNS serves different purposes and raises independent issues. Technically, a state's Code notice system and a central filing system can be integrated. This temptation, however, should be avoided. Different definitions for identical terms, complex collateral description rules, and different amendment and cancellation provisions encourage confusion and mistakes. One commentator has even suggested that an integrated system might result in "total chaos." Notwithstanding this warning, several states have integrated the two systems.

80. Id. § 1324(h)(2)(B).
81. See supra text accompanying notes 32-40.
82. See infra text accompanying notes 174-79.
83. A central filing system is defined as "a system for filing effective financing statements or notice of such financing statements on a statewide basis and which has been certified by the Secretary of the United States Department of Agriculture." Food Security Act of 1985, supra note 3, at § 1324(c)(2).
84. See infra pt. III.
85. In fact, the USDA regulations warn that an EFS need not be the same as a Code financing statement. See 9 C.F.R. § 205.202(a) (1987).
86. Meyer Comments, supra note 4, at 160 ("If the many specific definitions and requirements of Section 1324 are made applicable to all filings covered by the UCC, there may well be total chaos."); see also Sanford, supra note 4, at 25 ("Merging of the two systems will only encourage mistakes.").
87. The Idaho, Maine, Mississippi, and Montana applications for certification of their CNS's indicate that the Code filing system and the section 1324 CNS are intertwined through the use of the same forms to satisfy both systems. See Application of the State of Idaho for
In CNS states, secured parties can protect their security interests only by filing an effective financing statement (EFS). An EFS must not be confused with a Code financing statement. An EFS contains substantially more and different information about the debtor and the farm products covered than does a Code financing statement. Defined in subsection 1324(c)(4), an EFS, with certain important exceptions, generally follows section 1324's form of PNS notice. Thus, an EFS is a statement signed by both the debtor and secured party and filed with the CNS operator. An EFS contains the following information: (1) the names and addresses of the debtor and secured party; (2) the social security number, or if applicable, the IRS taxpayer identification number of the debtor; and (3) a description of the farm products subject to the security interest, including the amount of such products (where applicable), and a reasonable description of the property, including the county or parish in which the products are produced.

The Conference Committee Report summarizes how CNS works as follows:

In States having a central filing system, the buyer purchases the farm product subject to a lender's security interest if (1) the buyer did not register with the Secretary of State as a potential buyer of the class of farm products involved and the lender has filed an EFS covering the product being sold, or (2) the buyer (i) received written notice from the Secretary of State that specifies both the seller and the specific farm product that is subject to an EFS and (ii) did not obtain waiver or release of the security interest from the secured party.

Thus, the secured party's first step is to file an EFS, or notice of the EFS, with the central filing system. Section 1324's regulations permit "notice" of the EFS only if the original EFS is filed somewhere else in that state's public records. There is no legislative history.


89. See supra text accompanying notes 64-75.
91. H.R. CONF. REP. No. 447, supra note 54, at 486.
92. 9 C.F.R. § 205.204(a) (1988). Section 1324 does not require such notice to be signed. Id.
regarding the reason for the notice option. Presumably, it permits an EFS filing at a county or local office, with the local office providing notice of the EFS to CNS operators.\footnote{In Nebraska, the EFS will be filed with the county clerk of the county where the debtor resides or, if the debtor is a nonresident, then with the county clerk of the county where the farm product is used or produced within the state. The county clerk then transmits notice of the EFS to the Secretary of State for inclusion in the CNS master list. 1986 Neb. Laws LB1 § 12. EFS’s are filed with the Secretary of State of a state with a certified central filing system. Since subsection 1324(c)(11) defines “Secretary of State” to include any “designee of the State,” this article uses the more general terminology of “system operator” or “CNS operator” to describe the state office charged with operating and maintaining central filing systems. See 9 C.F.R. § 205.1(e), .201 (1988).}

On its face, CNS seems to favor secured parties. To receive actual notice from the system, buyers, commission merchants, and selling agents must register with the CNS. Moreover, the burden of giving actual notice of the filed security interests is shifted to the system operator. The system operator must regularly distribute a “master list” compiled from information contained on all EFS’s filed.\footnote{Food Security Act of 1985, supra note 3, at § 1324(c)(2)(E).} The master list must be organized by farm products for each farm product category.\footnote{Id. § 1324(c)(2)(C)(i).} Each farm product category must be subdivided to give the following listings: (1) alphabetical by last name of each debtor, (2) numerical by social security numbers or taxpayer identification numbers, (3) geographical by county or parish, and (4) by crop year.\footnote{Id. § 1324(c)(2)(C)(ii).} System registrants may request that they receive only the portions of the master list limited to the farm products in which they are interested.\footnote{Id. § 1324(c)(2)(E).}

In the alternative, buyers, commission merchants, and selling agents may choose not to register. If the secured party files an EFS covering the farm products being sold, nonregistrants will have received constructive notice of the security interest and therefore will take subject to it.\footnote{Id. § 1324(c)(2)(A)-(B), (g)(2)(C)(i)-(ii).} Subsection 1324(c)(2)(F) offers nonregistrants a form of potential protection. It requires that a CNS be capable of furnishing oral notice of any EFS within twenty-four hours of a nonregistrant’s request, with written confirmation to follow.\footnote{Id. § 1324(c)(2)(F).} This feature allows nonregistrants the opportunity to protect themselves by obtaining a waiver or release from the secured party whose name is revealed through the oral inquiry and written confirmation.

Pursuant to its obligation to certify central filing systems and under the authority granted by subsection 1324(i), the Secretary of the United
States Department of Agriculture (the USDA), through the Packers and Stockyards Administration, has promulgated rules and regulations (the USDA regulations). As of February 29, 1988, the USDA has certified CNS’s in sixteen states. Other states are preparing and submitting applications for approval. Thus, for the near future both PNS and CNS will coexist throughout the nation.

II. RELATIONSHIP BETWEEN CENTRALIZED AND PRESALE NOTIFICATION SYSTEMS

A. Functional Relationship of PNS and CNS

Legislative history demonstrates that Congress created section 1324’s two notification systems to balance the burdens of preserving a lender’s security interest and to provide maximum flexibility to states. PNS and CNS, however, differ significantly in how they distribute the burdens (and corresponding risks) of protecting secured parties. The right to choose between these two alternatives provides flexibility.

CNS has three separate components: (1) EFS’s that secured parties compile and file; (2) state-created central filing systems that receive the EFS’s, process them, and give notice to third parties in the form of CNS master lists; and (3) receipt (or nonreceipt) of this information by system registrants or persons making inquiry requests. EFS’s are analogous to Code financing statements. Master lists distributed to registrants, however, have no Code counterpart. PNS eliminates the governmental middleman by requiring secured parties to act as their own “system operators.” Secured parties are solely responsible for getting section 1324’s very specific and detailed information to buyers, sellers, commission merchants, and selling agents. As a result, PNS notices combine the compilation and notice functions performed by EFS’s and CNS master lists. PNS notices, therefore, are comparable to Code presale notices to inventory buyers or to state non-

100. Clear Title—Protection for Purchasers of Farm Products, 9 C.F.R. pt. 205 (1988). Interim Final Regulations originally had been prescribed on March 29, 1986, with a 90 day period for comments concerning modification of the regulations. 51 Fed. Reg. 10,795 (1986). On June 23, 1986, the Secretary gave notice of proposed amendments to the March 1986 Interim Final Regulation. These amendments set forth fairly extensive changes to the March 1986 Interim Final Regulations in response to numerous comments. These modifications were open to public comment for one month. 51 Fed. Reg. 22,814 (1986). The Final Regulations were promulgated on August 18, 1986, to be effective September 17, 1986. Additional changes were made in the regulations when set forth as final regulations in August but the changes made were much less extensive than those made in June. 51 Fed. Reg. 29,449 (1986).

101. See infra note 231.

102. For example, West Virginia reportedly was preparing an application for submission to the USDA. Texas has a legislative committee studying whether a CNS should be adopted.

103. See supra text accompanying notes 50-51.
uniform section 9-307(1) presale notice systems existing before section 1324's enactment. In analyzing many of the issues that the two systems raise, it is useful to keep this functional relationship in mind.

B. Concurrent or Mutually Exclusive Alternatives?

One question raised is whether PNS is an available alternative in states that have a CNS. If a state does not create a CNS, subsections 1324(d), (g)(1) and (j) explicitly state that presale notification is the governing law for farm product transactions within that state. If a state chooses a CNS by creating a certified central filing system, it is much less clear whether presale notification also remains an available additional notification method. At least four states, which have obtained USDA certification for their CNS's, have indicated that presale notification and centralized notification are concurrent alternatives within their states. Analysis of section 1324 suggests that states might desire both notification methods as concurrent alternatives for at least two reasons.

First, a state's CNS exists from the time that the USDA certifies that the system satisfies section 1324's requirements. The USDA, however, has expressly declined to "operate a continuing program to regulate, inspect or supervise [certified central filing systems] or to revoke certification after it is granted." USDA certification only means that the USDA believes a state's designed system satisfies section 1324's requirements. Certification does not mean that the system can, or will, be operated in compliance with section 1324. Thus, states might want to retain PNS so that secured parties can "hedge their bets" in case the states fail to properly construct, operate, and maintain CNS's.

Second, section 1324 and the USDA regulations provide that registered buyers, commission merchants, and selling agents take sub-

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104. Senator Garn, Chairman of the Senate Committee that held hearings on section 1324 "guaranteed" that the bill would contain a provision which allowed the states a period of time to override the federal preemption in section 1324 and tell the Congress to "go to hell." Senator Hearings, supra note 46, at 11. No such "opt-out" provision was included in section 1324 as passed.


107. Note that funding and technical sophistication problems that might occur because of no USDA supervision are problems of implementation by the states. These are not problems of design that make systems subject to court challenge for not being in compliance with section 1324. For a discussion of system design problems, see infra text accompanying notes 223-31, 393-458.
ject to security interests only when they have received actual notice of the security interests. There will almost always be a time gap between the time EFS's are filed with the CNS and when registered buyers, commission merchants, and selling agents receive the resulting actual notice from the system.\textsuperscript{108} If sales are made during this gap, secured parties will not have section 1324's protection unless they are also permitted to give PNS notices.\textsuperscript{109}

Two notification methods were included in section 1324 to allow states flexibility in deciding how section 1324 will affect their agricultural credit systems.\textsuperscript{110} Arguably, section 1324 permits states to make PNS and CNS concurrent alternatives because of the two reasons set forth above. The authors conclude that this argument should be rejected and that the two systems are mutually exclusive alternatives.\textsuperscript{111} This conclusion will not be popular with lenders because it leaves them exposed to these two risks, but the legislative history, statutory language, and policy considerations support this result.

Neither the language of section 1324 nor the USDA regulations expressly resolve this exclusivity issue. However, the statute uses the disjunctive word "or" between subsections 1324(e)(1) and (2). Also, USDA Regulation 205.208 states that system registrants are accountable only for security interests shown on master lists that the registrants receive. These factors imply that the two systems are mutually exclusive.\textsuperscript{112}

Section 1324's legislative history, moreover, has two

\textsuperscript{108} The time length between filing and the actual notice depends upon the frequency with which a centralized notification system distributes actual notice to the buyers, commission merchants, and selling agents. In the certified systems, this time length varies. For example, Arkansas will distribute a complete master list on a quarterly basis with no intervening supplements. Application of the State of Arkansas for Certification with Responses from USDA and Amendments by the State of Arkansas (1986) [hereinafter Arkansas Application] (copy on file with the \textit{Kansas Law Review}). North Dakota will distribute a complete master list each month with a weekly supplement. Application of the State of North Dakota for Certification with Responses from USDA and Amendments by the State of North Dakota (1986) [hereinafter North Dakota Application] (copy on file with the \textit{Kansas Law Review}).

Lenders also may respond to this "unprotected" gap time by delaying the execution of loan documents until immediately preceding the deadline dates prescribed by the centralized notification system for entering effective financing statements into the system in time for the next distribution. If a significant number of lenders followed this practice, questions then are raised about the ability of the personnel operating the centralized notification system to handle so many last minute filings. The systems' ability to handle the filings as they arrive is a question of funding and technical capability.

\textsuperscript{109} See 9 C.F.R. § 205.208(c) (1988).

\textsuperscript{110} See supra text accompanying notes 47-61.


\textsuperscript{112} For a detailed argument that the statutory language and 9 C.F.R. § 205.208 mean the two systems are mutually exclusive, see Op. N.D. Att'y Gen. (Feb. 17, 1987).
references that support this conclusion. The House Conference Report comparing the House and Senate versions of section 1324 states:

The Senate amendment is essentially the same as the House provision, except that it exempts buyers of farm products produced in States having central systems for the recording of financial statements from the general provisions explained in paragraph (a).\(^\text{113}\)

Paragraph (a) is an explanation of the House presale notice system.\(^\text{114}\)

When Senator Zorinsky spoke about section 1324 in Senate debate, he noted:

Similarly, in those States that choose to set up a central filing system rather than providing for prenotification, the purchaser buying farm products takes them subject to a lender's security interest if first, the purchaser agent did not register with the Secretary of State . . . as a potential purchaser and the lender has filed an effective financing statement; . . .\(^\text{115}\)

Thus, legislative history supports the statutory language's and the regulations' implication that the two systems are mutually exclusive.

Equally important, policy reasons justify treating the two systems as mutually exclusive. CNS emerged as an alternative only after Senator Garn strongly urged farmers, farm products lenders, buyers, commission merchants, and selling agents to arrive at legislation that would share the burdens involved.\(^\text{116}\)

During debate on the Senate's first version of CNS, senators stressed that the proposed amendments equitably distributed the legislation's burdens on all segments involved in the financing and marketing of agricultural products.\(^\text{117}\)

The concurrent alternatives approach places an unnecessary and extra burden on buyers, commission merchants, and selling agents. This result is contrary to Congress's desired sharing of burdens. If the systems can operate simultaneously in a state, buyers, commission merchants, and selling agents will be required to pay for, sort, and maintain master lists received from the CNS operator. In addition, they also will be required to design and keep their own filing systems of PNS notices.

Section 1324 places the burden on them to read and process the actual notice received from the state CNS. Section 1324's purposes, however, are not served by requiring buyers simultaneously to read and keep track of PNS actual notices. In fact, witnesses at the

\(^{113}\) H.R. CONF. REP. No. 447, supra note 54, at 485-86 (emphasis added); see also Conference Report language quoted in the text accompanying note 91.

\(^{114}\) H.R. CONF. REP. No. 447, supra note 54, at 485.

\(^{115}\) 131 CONG. REC., supra note 6, at S17,888 (statement of Sen. Zorinsky) (emphasis added).

\(^{116}\) Senate Hearings, supra note 46, at 108-11, 130-33, 150-51 (interchanges between Sen. Garn and witnesses at the hearings); see supra text accompanying notes 45-61.

\(^{117}\) See 131 CONG. REC., supra note 9, at S16,299 (remarks of Sen. Cochran); id. at S16,300 (remarks of Sen. Garn).
legislative hearings were very concerned about the administrative burdens that section 1324’s actual notice requirement would create for buyers, selling agents, and commission merchants. Although PNS and CNS provide secured party protection, the systems are not for the sole benefit of secured parties. The systems are also to provide reliable and usable information to buyers, commission merchants, and selling agents.

Finally, a state’s improper maintenance of a certified CNS and the unprotected time period between filing and distribution of actual notice are risks inherent in the adoption of a CNS. Legislative history and the USDA regulations indicate that secured parties are to bear these inherent risks. If secured parties can give PNS notices in a CNS state, they would be allowed to transfer these inherent risks that section 1324 places on them to buyers, commission merchants, and selling agents. Thus, section 1324 should be interpreted to present two alternative notification methods between which states must choose. Once a state chooses one notification method, that method is exclusive and precludes use of the other.

The conclusion that PNS and CNS are mutually exclusive means that secured lenders cannot choose the notification system they find most convenient. The two alternatives were adopted solely to allow states a choice between two systems allocating the notification burdens differently. Once a state selects a system and allocates the burdens, secured lenders must use the state-selected notification system and abide by the resulting allocation of burdens and benefits.

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118. E.g., Senate Hearings, supra note 46, at 41 (statement of Marlin Jackson, Arkansas State Banking Commissioner) (presale notification creates a paper avalanche); id. at 72 (statement of Gene Swackhamer, President of the Baltimore Farm Credit Banks and the Baltimore District Farm Credit Council) (presale notification creates great administrative burdens on buyers); id. at 99-100 (statement of Jim DeGaetano, President of the Pennsylvania Livestock Auction Assoc., Inc.) (buyers willing to handle presale notification provided they get actual notice); id. at 104 (statement of Dale Seyler, President of Colorado Commodity Traders, Inc.) (buyers willing to keep records if they receive actual notice); id. at 120 (statement of John White, Jr., President of the American Farm Bureau Federation) (concern that paperwork burden be kept to a minimum); id. at 142 (statement of William B. Brandt, Nebraska Bankers Association) (presale notification requires each buyer to have a mini-central filing system); cf. 131 Cong. Rec., supra note 9, at S16,300 (remarks of Sen. Cochran); id. at S16,301 (remarks of Sen. Harkin).


120. In Oklahoma’s application for certification, the USDA took the position that the two notification methods were statutory options that Congress granted to secured parties. See Application of the State of Oklahoma for Certification with Responses from USDA and Amendments by the State of Oklahoma (1987) [hereinafter Oklahoma Application] (copy on file with the Kansas Law Review). This position contradicts the USDA’s position publicly stated in 9 C.F.R. § 205.208 (1988). See supra notes 112-15 and accompanying text. As the text of the article indicates, the authors believe the USDA’s position in the Oklahoma application is incorrect.
The conclusion that the two systems are mutually exclusive has one consequence that should be examined. If a state changes from PNS to CNS, CNS is the governing system from the moment that the USDA certifies the state's central filing system. Thus, previously sent PNS notices are no longer effective as section 1324 actual notice. Once a CNS exists in a particular state, secured parties are protected only if they properly file EFS's with system operators.

Two related situations should be distinguished from this conclusion. First, section 1324 does not require a state to include all categories of farm products produced in that state within the coverage of that state's CNS. The central filing system will apply exclusively to those farm products for which it was certified. PNS will apply exclusively to those farm products for which no certification was sought. Thus, although a state may have both notification methods, the methods are mutually exclusive within a farm product category.

Second, because of interstate movement of farm products, secured parties desiring section 1324 protection may become confused over which state's law governs the farm products subject to their security interest. To protect themselves, secured parties might file an EFS with states having CNS's and simultaneously send PNS notices under the laws of other states. Section 1324 does not prohibit using both methods in this situation. In the interstate movement of farm products, the state laws are mutually exclusive. As will be discussed, only one method of notification will be correct once the state whose laws govern is correctly identified.

C. Use of the USDA Regulations As Guidelines for Interpreting Pre-sale Notification System Issues

Because no governmental action is required to implement PNS, section 1324 does not grant the USDA jurisdiction to prescribe regulations for presale notification. Thus, federal courts interpreting PNS

\[\text{121. See infra notes 240-44 and accompanying text.}\]
\[\text{122. Food Security Act of 1985, supra note 3, at § 1324(d), (g)(1), (j); 9 C.F.R. § 205.206(c) (1988).}\]
\[\text{123. See infra notes 245-56, 508, 512 and accompanying text.}\]
\[\text{124. See infra notes 513-28 and accompanying text.}\]
\[\text{125. Secured parties giving more than one form of notification are willing to waste this effort rather than choose one method alone. They feel they cannot accurately predict which notification method will ultimately govern. Factual uncertainties of collateral location lead to similar multiple filings under Code section 9-103.}\]
\[\text{126. See Food Security Act of 1985, supra note 3, at § 1324(j) (limiting the USDA's authority to prescribe regulations "to aid States in the implementation and management of a central filing system."). Based on this lack of authority, the USDA's March 1986 Interim Final Regulations state that section 1324 "does not give the [USDA] any authority or responsibility relating to such matters as direct notification by secured parties." 51 Fed. Reg. 10,795 (1986) (to be codified at 9 C.F.R. pt. 205) (proposed Mar. 31, 1986).}\]
issues must look to section 1324's express language and legislative history for answers. In making this examination, courts using administrative law principles must decide what weight, if any, to give the USDA regulations for CNS, particularly those labeled "Interpretive Opinions." If these interpretive opinions are found to be administrative rules with legislative effect, a court may decide that because the rules apply only to CNS they provide no guidance for answering PNS questions. If they are administrative rules without legislative effect, a court may treat them as secondary authority. Therefore, a court could defer to the interpretive opinions when confronted with a similar PNS issue. At either treatment, however, is an administrative law question, which is not the focus of this article.

Despite section 1324's limited grant of regulatory authority to the USDA, federal courts should give strong weight to the USDA regulations when faced with PNS issues similar to those that the regulations address. To a great extent, the USDA regulations are based on interpretations of legislative history. Although separate and mutually exclusive systems, CNS and PNS share common purposes, terms, definitions, and structures. The systems' commonalities arise from the functional equivalence of the two notification systems. Thus, in trying to implement PNS, secured parties face many of the same issues raised and addressed by the USDA regulations. Given the major overlap of the two systems, federal courts should strive to achieve section 1324's goals of maximizing uniformity and minimizing uncertainty. To achieve these goals, courts should apply the USDA regulations to answer corresponding questions raised by PNS, to the extent the interpretation is consistent with section 1324's express

128. At least one commentator assumes that the USDA regulations will provide secondary authority for presale notification system issues. See Uchtmann, supra note 4, at 2.
129. For example: (1) like CNS master lists, PNS notices must be organized "according to farm products" and describe the crop year. Compare Food Security Act of 1985, supra note 3, at § 1324(c)(2)(C)(i), (C)(ii)(IV) (master list) with id. at § 1324(e)(1)(A), (ii)(IV) and (g)(2)(A), (A)(ii)(IV) (PNS); (2) like EPS's, PNS notices must be originals or reproduced copies and contain (a) the names and addresses of the secured party and debtor, (b) the debtor's social security or taxpayer identification number, and (c) the amount (where applicable) of farm products covered by the notice. Compare id. § 1324(e)(1)(A), (ii) and (g)(2)(A)(i), (ii) (PNS); (3) both must be amended in writing within three months to reflect "material changes." Compare id. § 1324(c)(4)(E) (EPS) with id. § 1324(e)(1)(A)(iii), (g)(2)(A)(iii) (PNS).
130. See supra pt. II(A).
131. For instance, can farm products be described generically? 9 C.F.R. §§ 205.106, .206 (1988); see infra text accompanying notes 237-39, 538-39. Are miscellaneous categories allowed when describing farm products? Id. § 205.206. What is the effect of not including an "amount" or "crop year" in the description? Id. § 205.207(b).
language. This application of the regulations will reduce section 1324’s overall administrative burden and help reduce transactional costs for all parties. If courts do use the USDA regulations to answer PNS issues, the USDA’s authority will, in effect, be expanded to PNS.

D. Certain Differences Between PNS Notices and EFS’s

Without discussion, the Conference Committee transferred many EFS terms from CNS into section 1324 PNS notices. As a result, the form of a PNS notice parallels section 1324’s definition of an EFS. Unexplained anomalies between the two, however, create certain problems. These problems may or may not have been intentional, but will result in confusion. A brief review of the more important anomalies follows.

1. Minor Errors—Applicability to PNS Notice and CNS Master Lists; Overlap with Mandatory Amendments

Using the language of Code section 9-402(8), subsection 1324(c)(4)(I) validates an EFS that substantially complies with section 1324 “even though it contains minor errors that are not seriously misleading.” 132 No similar “minor errors” exception is expressly included in PNS. This omission encourages buyers, commission merchants, or selling agents who receive PNS notices with minor errors to argue that the notices are ineffective because they are not in exact compliance with section 1324. This argument should be rejected for three reasons.

First, nothing in section 1324’s legislative history suggests that the omission was intentional. If anything, legislative history strongly indicates that, when possible, the two systems should be treated to achieve uniformity and minimize uncertainty. The USDA takes this approach in handling the similar omission of “crop year” as part of a farm products description under the definition of an EFS, even though it is a CNS master list category and one of the PNS notice description requirements. 133

Second, like CNS, the purpose of PNS notice is to protect secured parties when buyers, commission merchants, and selling agents have actual notice that the farm products with which they are dealing are subject to a security interest. PNS notices containing only minor and not seriously misleading errors serve this purpose without unduly burdening recipients.

Finally, federal courts are courts of equity. Courts do not need

an express exception to do equity, when an exception can be implied from section 1324's purposes and legislative history. Code section 9-402(8) was added only "to discourage the fanatical and impossibly refined reading" of the Code's statutory requirements. Federal courts should be able to avoid "far out" interpretations of section 1324 without an express minor errors provision in PNS.

a. Minor errors exception for CNS master lists

Should courts imply a minor errors exception for CNS master lists? Minor errors are permitted in EFS's. Buyers, commission merchants, and selling agents, therefore, cannot argue that the same errors render the actual notice ineffective when they are repetitively transmitted by the CNS through master lists. But what if the system operator creates minor errors that were not part of the EFS? Principles of consistency and equity suggest that even if an EFS did not contain an error, master lists, which otherwise substantially comply with section 1324's requirements, are effective, even though they contain minor errors. USDA regulations require EFS amendments to be made only if changes occur that will render a master list "no longer informative." If the CNS error is a minor error, the error does not seriously mislead the reader of the master list. Thus, the list is still informative and the error should not destroy actual notice.

USDA Regulation 205.208(g) could be interpreted to argue against this conclusion. The Regulation states that "buyers, commission merchants, and selling agents are not intended to be liable for errors or other inaccuracies generated by the system." The language "errors or other inaccuracies" suggests that minor system errors are the problem of secured parties. Secured parties can guard against these errors only by (1) constantly reviewing the master lists to insure the system operator's accuracy (an unlikely solution given the burden), or (2) bringing legal actions against system operators to recover any resulting losses. This is a harsh interpretation that adds unnecessary burdens to CNS and should be rejected. The better interpretation of Regulation 205.208(g) is to read it as allocating to secured parties

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134. Arguably section 1324's exclusion of a minor errors exception preempted the courts' right to apply such equitable principles. Moreover, section 1324 does not have the equivalent of Code section 1-103, which incorporates those principles. The interpretive principle of minimum disruption posited by the authors in their first article, however, argues against this odd result.
137. Id. § 205.208(g).
138. See infra text accompanying notes 459-74.
the burden of all “seriously misleading” errors, which make the notice “no longer informative,” that arise within a CNS.

b. Relation between “minor errors” exception and mandatory amendments

Another question now arises: how does a minor errors exception interact with section 1324’s amendment requirements? By using language identical to Code section 9-402(8), Congress invites courts to define on a case-by-case basis what types of mistakes or omissions are minor errors.139 Courts should resist referring to Code cases in determining what constitutes minor errors. The main purpose of Code filings is to provide sufficient public information to alert interested parties that the goods may be subject to prior security interests.140 In fact, the Code contemplates further investigation by third parties.141 This purpose is the litmus test by which courts measure the Code’s minor error language. Thus under the Code, a seriously misleading defect is one that prevents a person searching the financing statement filing index from learning what property is subject to what security interest.142

By contrast, section 1324 changes the Code’s burden of inquiry for buyers, commission merchants, and selling agents. Also, the section imposes stricter data standards on secured parties. The amount and detail of information and the mechanism for supplying it demonstrate that secured parties must do more than just put the recipient on notice.

Under section 1324, secured parties must provide the information required for PNS and CNS actual notice to buyers, commission merchants, and selling agents. Consistent with this difference from the Code, section 1324 mandates amendments to reflect material changes. Code section 9-402(4) states only that a Code financing statement “may be amended.” Section 1324’s minor errors exception is consis-

139. See, e.g., 9 C.F.R. § 205.211 (1988) (making Code decisions about the farm products exception “applicable to an extent in interpreting” section 1324).
141. See Biggins v. Southwest Bank, 490 F.2d 1304, 1308 (9th Cir. 1973); Silver v. Gulf City Body & Trailer Works, 432 F.2d 992, 993-94 (5th Cir. 1970).
142. See in re McCauley’s Reprographics, Inc., 638 F.2d 117, 118-19 (9th Cir. 1981); In re Glasco, Inc., 642 F.2d 793, 795-96 (5th Cir. 1981).
tent with its amendment requirement.143 If an error is material enough to require an EFS amendment, it is not minor. If the error is minor, no amendment is necessary. This is particularly true considering the USDA's interpretation of what is "material" under section 1324.

According to the USDA, a material change is one that renders "the master list entry no longer informative as to what is subject to the security interest in question."144 This "no longer informative" test reflects the secured party's section 1324 detailed description obligations. The Code's minimal informational requirements for financing statements are consistent with an inquiry burden on third parties. Section 1324, however, effectively eliminates a great deal of this inquiry burden. First, the section forces secured parties to supply accurate data covering significantly more categories of information. Second, it provides that buyers, commission merchants, and selling agents are only responsible for data received, without regard to their actual knowledge about the security interest at the time of the transaction.145 The test under section 1324 is not what the notice reader knows or can find out. Instead, it is whether the reader received accurate and complete section 1324 information prior to the sale.

Based on this understanding, section 1324 minor errors cases may well arrive at results that differ from analogous Code cases. For example, although a Code financing statement must contain the debtor's address,146 courts have held that omission of that address is a minor error.147 As discussed, one justification for the Code result is that if the creditor's address is available, a third party using a Code financing statement can query the creditor for further information."148 Under section 1324, the result should be different. Without a debtor's address, the EFS or PNS notice does not contain all the information to which a buyer is statutorily entitled. Moreover, a section 1324 recipient is under no obligation to inquire to find the missing address.

143. Sanford, supra note 4, at 16 ("Presumably, a 'material change' would be something more than a 'minor error that is not seriously misleading.'").

144. 9 C.F.R. § 205.209(a) (1988); see infra text accompanying notes 200-02.

145. See Food Security Act of 1985, supra note 3, at § 1324(e)(3)(A), (g)(2)(D)(i) (stating that persons are only subject to a security interest if they receive subsection 1324(c)(2)(C) and (D) written notices); id. § 1324(a), (g)(1) (providing that buyers, commission merchants, and selling agents will take free even though they "know of the existence of such notice"); see also 9 C.F.R. § 205.208(c) (1988).

146. U.C.C. § 9-402(1).

147. See Lines v. Bank of California, 467 F.2d 1274 (9th Cir. 1972) (failure to list individual debtor's home address as required by California's Code held to be a minor error); In re Fowler, 407 F. Supp. 799, 805-06 (W.D. Okla. 1975) (omission of debtor's address does not prevent perfection).

Indeed, section 1324 goes even farther. An EFS or PNS notice that does not contain the required section 1324 information would also be ineffective even if the recipient had actual knowledge of the address.

Other examples abound. Code cases have held that misspellings of the debtor's name and use of a trade name when the debtor is actually known by the trade name are minor errors. Again, the USDA's "no longer informative" standard suggests that a contrary result might, and at times should, be reached under section 1324. The misspelling of the debtor's name or the use of a trade name may prevent buyers, commission merchants, or selling agents from connecting the actual notice to the farm product seller at the time of sale. Therefore, these errors are "seriously misleading" and the actual notice "no longer informative." Section 1324 requires a different result here than does the Code.

Under this analysis, the family of minor errors permitted by section 1324 is smaller than that allowed by the Code, but still exists. For example, digits on a zip code included with a debtor's or creditor's address may be transposed. Otherwise, the address is correct. Neither section 1324 nor the USDA regulations define "address" to include zip code. Because the remainder of the address is usable, the address entry is still informative even though the zip code is inaccurate. Thus, the transposed digits should be treated as a minor error.

Courts faced with a narrow interpretation of section 1324's minor errors exception may be tempted to expand the exception. Courts may wish to invoke a "no harm—no foul" exception. For example, because the buyer knew or should have known of the error, it is a minor error. This temptation is particularly understandable because under section 1324, the recipient's actual knowledge of missing or incorrect information is irrelevant to the outcome of a case. Equity could be used to import a broader minor errors exception into PNS notices and CNS master lists. Section 1324's structure and purpose, however, restrict that exception's scope and require rejection of this temptation to do equity. Section 1324 buyers, commission merchants, and selling agents are statutorily entitled to information that is not seriously misleading in the notice itself. They are not required to seek or recall this information from other sources.

2. Signature Requirements

Unlike EFS's, section 1324 does not expressly require that PNS

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notices be signed by either party. In fact, during the entire legislative process no signature requirement was imposed on PNS notices. This nonsignature feature is consistent with presection 1324 law. Under the Code, a debtor must sign the parent financing statement. Third party notice of that security interest, which the secured party sends to the inventory buyer, need not be signed. Similar state systems did not require that notice given to third parties be signed. PNS notices serve the same function under section 1324. On the other hand, EFS’s are more like Code financing statements because they are filed in public offices. Thus, it is also consistent with presection 1324 law that the debtor sign such public filings.

Notwithstanding this nonsignature feature of PNS notices, subsections 1324(e)(1)(A)(iii) and (g)(2)(A)(iii) state that an amendment to such notices must be “similarly signed.” Does this language imply an obligation to sign the original notice? Because of this uncertainty, at least one commentator has suggested that “[a] conservative approach would dictate that both the secured party and the debtor sign at least an original master notice.” For the secured party who does not follow this sound advice, however, legislative construction argues that such signatures are unnecessary.

The initial 1983 and 1985 versions of section 1324 PNS did not contain an amendment provision. Instead, an amendment provision was introduced into PNS as part of the final compromise version of section 1324. It exactly duplicates the amendment language of subsection 1324(c)(4)(E) for EFS’s, which do have signature requirements. Thus, it is probable that the “similarly signed” reference was a drafting error. Although somewhat strained, a strict reading of the PNS amendment signature requirement can support the conclusion that original PNS notices need not be signed. The language requires only that amendments be signed “similarly” to the original PNS notice. Since original PNS notices are not signed, this requirement is a nullity.

3. Crop Year

PNS notices must include information on the crop year of the farm products subject to the noticed security interests. Although section 1324 does not expressly require EFS’s to identify crop year data, CNS operators must include crop year information in their master lists.

To cure this anomaly, the USDA regulations state that EFS’s must

152. Sanford, supra note 4, at 20.
153. See supra text accompanying notes 33-34, 52-61.
155. Id. § 1324(c)(2)(C)(ii)(IV).
include information on crop year "unless every crop of the farm product in question, for the duration of the EFS, is to be subject to the particular security interest." If no crop year information is contained in an EFS, the USDA regulations, by default, presume the EFS is "applicable to the crop or product in question for every year for which . . . [the EFS is] effective." As with minor errors and signature requirements, quite possibly Conference Committee error explains the missing requirement for crop year information for EFS's. Whatever the source of the discrepancy between the information required on CNS master lists and that mandated for EFS's, the USDA regulation is correct in requiring the EFS to provide crop year information in some fashion. Otherwise, CNS system operators have no means of providing crop year information to registrants. The conclusion that EFS’s must provide crop year information does not resolve some remaining issues. Those issues are associated with (1) defining what "crop year" means for particular farm products, and (2) the overlap between EFS or PNS notice descriptions and security agreement descriptions. They are discussed elsewhere in this article.

4. Payment Obligations

Unlike PNS notices, EFS’s need not refer to any payment obligations that secured parties impose as a condition to the release of their security interests. In fact, such a requirement was never included

157. Id. § 205.107(b). EFS's are effective for 5 years from the date of filing. Food Security Act of 1985, supra note 3, at § 1324(e)(4)(F).
158. This is particularly true since the entire concept of crop year was absent from all versions of section 1324 before the Conference Committee report. Compare 131 CONG. REC., supra note 9, at S16,296-97 (Sen. Cochran's version of section 1324) with H.R. CONF. REP. No. 447, supra note 54, at 488-91 (final version of section 1324). As for where the concept of "crop year" originated, cf. United States v. Riceland Foods, Inc., 504 F. Supp. 1258 (E.D. Ark. 1981).
159. See infra notes 209-22, 310-25.
160. Subsection 1324(e)(1)(A)(v) contains the phrase "the buyer has received . . . written notice of the security interest . . . [of] any payment obligations imposed on the buyer by the secured party as conditions for waiver or release of the security interest." Food Security Act of 1985, supra note 3, at § 1324(e)(1)(A); see also id. § 1324(g)(2)(A)(v) (same language for selling agents). Two commentators note that the language is inartful because it omits the words "contains" or "describes," which complete the thought. See Sanford, supra note 4, at 20; Comment, 55 UMKC L. Rev. 454, supra note 4, at 468, n.107. By implication, payment obligations are practically mandatory inclusions with a presale notification notice. If the obligations are not included, then buyers, commission merchants, and selling agents cannot fail to perform the nonexistent payment obligations and would always take free of the noticed secured interest.
in any legislative versions of section 1324 addressing EFS's. Although such a provision’s usefulness cannot be doubted, it is not mandated by section 1324's purpose or structure and would have been difficult to implement.

The primary goal of CNS is to divide the burdens of keeping track of security interests between secured parties and buyers, commission merchants, and selling agents. Under CNS, secured parties bear the risk of losing the benefit of their security interests until registrants receive notice. Once system registrants receive actual notice, CNS shifts the burden to recipients to determine what action is needed to obtain waiver or release of the security interests. This scenario is even truer of nonregistrants who assume the risk of a properly filed EFS.

Structurally, EFS’s perform the function of Code financing statements. PNS notices, however, parallel the notices permitted by the Code’s presale notice system and the similar presection 1324 nonuniform state presale notice systems. Because payment information is not required in financing statements, it is consistent not to require EFS’s to contain that information. By contrast, PNS notices function like Code presale notices to inventory buyers. Inventory buyers are informed of payment obligations under security agreements. If inventory buyers buy without complying with the payment obligations, they cannot qualify as Code buyers in ordinary course. They know the sale is “in violation of the . . . security interest of a third party.”

PNS notices, therefore, must similarly set forth payment obligations to deprive section 1324 buyers, commission merchants, or selling agents of section 1324’s protections.

The inclusion of payment obligation information in an EFS would also present excessive administrative burdens for system operators. Current CNS mechanics make it technically difficult to get payment obligation information to buyers, commission merchants, or selling agents. CNS operators would have to include that information on master lists to be effective. Master lists, however, are ill suited to include data that may vary significantly between different lenders and farmers and from transaction to transaction. Such tailored information (which is equivalent to individual notice on each debtor) would place an additional burden on states. Section 1324’s drafters may have considered this burden unacceptable.

161. U.C.C. § 1-201(9).
162. North Dakota’s centralized notification system, touted by North Dakota Senator Andrews during the Senate Hearings, served as the closest model for the CNS alternative adopted in section 1324. It did not require that payment obligation information be provided on the form filed with the Secretary of State from which the North Dakota master lists were compiled. N.D. CENT. CODE § 41-09-28(9) (Supp. 1987). North Dakota did not require this information because its law imposed a standardized payment obligation of joint payee checks. Hence, the
information on a publicly accessible document raises very real privacy questions. These questions are better left unasked, given the existing complications already raised by section 1324's notification systems.

E. Receipt

To effectively protect secured parties, section 1324 PNS notices and CNS master lists must be "received" by buyers, commission merchants, and selling agents. Both PNS and CNS provide that "[w]hat constitutes receipt . . . shall be determined by the law of the State in which the buyer resides."163 This reference to state law is an anomaly that is difficult to reconcile with section 1324's goal of uniformity.

A definition of receipt first appeared in the November 22, 1985, Senate version of section 1324 sent to the Conference Committee. This version stated that "[t]he State shall determine under what circumstances receipt . . . shall be presumed."164 This language invited states to "presume" receipt (i.e., constructive receipt), as opposed to requiring actual, in-hand receipt. In conference, the definition was modified without discussion. Emphasis was shifted from constructive receipt to state law definitions of receipt. This change raises significant preemption issues for either PNS or CNS states that have taken advantage of this provision. Allowing states to define what constitutes receipt may be consistent with the congressional policy of allowing states maximum flexibility in adopting CNS's and PNS's.165 However, it adds uncertainty to the systems and destroys the uniformity allegedly created by section 1324 for at least three reasons.

First, as will be discussed later, EFS's are filed in the states where the subject farm products are produced.166 Yet, the receipt of these notices is determined by the law of the state in which the buyers, commission merchants, and selling agents reside. These may be different states. For example, a farmer-debtor who produces cotton in Mississippi may transport it to Arkansas for sale. Mississippi's CNS provides that receipt of master lists will be deemed to occur within three days following the date of mailing.167 Arkansas has no similar

163. Food Security Act of 1985, supra note 3, at § 1324(f), (g)(3).
164. 131 CONG. REC., supra note 9, at S16,297.
165. See supra notes 50-51.
166. See infra notes 245-56 and accompanying text.
167. Mississippi Application, supra note 87, at Mississippi Central Filing System Regulation 1.00(L) (definition of receipt).
definition. In the example, suppose the Arkansas buyer diligently and properly registers with the Arkansas and Mississippi CNS’s. For whatever reason, before the sale he does not physically receive the Mississippi master list. Because the buyer is in Arkansas and because Arkansas has no deemed receipt rule, the buyer takes free of the secured party’s security interest. Had the buyer been in Mississippi, the Mississippi rule suggests that the buyer takes subject to the security interest.

Second, several states have elected to define “receipt” in a way that does not require physical, in-hand possession. Instead, these states, by rule or statute, provide that receipt is deemed to occur within a certain time following mailing. This twist raises preemption issues that future litigation will no doubt settle. Subsections 1324(e) and (g) and legislative history indicate that buyers, commission merchants, and selling agents must receive actual notice. They must be able to “look” at their notice and “read” the information contained in the notice. Deemed or constructive receipt does not permit this. Additionally, “presumed” delivery is the very concept that the Conference Committee apparently rejected when it changed the original Senate receipt provision. Since constructive receipt conflicts with section 1324’s mandate of physical receipt, states that have defined receipt to include constructive receipt have invalid receipt provisions.

Section 1324 allows states to define “receipt” if the definition provides for actual delivery to buyers, commission merchants, or selling agents. States may set evidentiary requirements for receipt (e.g., requiring that mail be sent certified, registered, or return receipt re-

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168. See Idaho Code § 28-9-407(5) (Supp. 1987) (the date of receipt shall be the third calendar day following the date of mailing); Iowa Code § 554.9307 (Supp. 1987) (deemed received if sent by registered mail with proper postage and proper addresses); 1986 Neb. Laws LB 1 § 19 #1 (a buyer is presumed to have received notice ten days after mailing); Mississippi Application, supra note 87; Application of the State of Louisiana for Certification with Responses from USDA and Amendments by the State of Louisiana (1986) [hereinafter Louisiana Application] (copy on file with the Kansas Law Review) at La. Reg. tit. 7, pt. 37, ch. 181 (deemed received on the seventh day following mailing); Application of the State of Utah for Certification with Responses from USDA and Amendments by the State of Utah (1986) [hereinafter Utah Application] (copy on file with the Kansas Law Review) at Utah Regulation R165-1-15 (deemed received if system operator sends notice by first class mail and the system operator does not receive notice from the buyer that the buyer has not received the mailing before the fifth business day after the mailing was scheduled to be mailed).

169. If that definition fails, other state laws must be consulted to determine the meaning of receipt. Although not directly on point, see U.C.C. § 1-201(25)(b) (“A person has ‘notice’ of a fact when ... he has received a notice ... of it.”); id. § 1-201(26)(b) (“A person ‘receives’ a notice ... when ... it is duly delivered.”); id. § 1-201(27) (when notice is effective). The Code definitions are consistent with a definition of receipt based on actual delivery. This constructive receipt problem is similar to the constructive notice problem raised by direct computer access options discussed later in this article. See infra text accompanying notes 406-14.
quested). Also, states may decide that refusal to accept delivery constitutes receipt. Evidentiary requirements and the determination that actual delivery refused is receipt are permissible under section 1324. In each instance, these state imposed definitions show that buyers, commission merchants, or selling agents have the opportunity and ability to look at the notice and read the information on the notice, if they choose to make the effort to do so. States, however, may not undermine section 1324's primary purpose of providing buyers, commission merchants, and selling agents with actual notice through a "presumed receipt" definition.170

Finally, congressional drafters used identical receipt language for buyers, commission merchants, and selling agents, referring to the "law of the state in which the buyer resides."171 Commission merchants and selling agents often sell to a number of buyers who may be residents of different states. This "buyer" language is probably a mistake resulting from hurried drafting. However, it literally subjects commission merchants and selling agents dealing with buyers in different states to the different "receipt" laws of those various states. Attempting to avoid this odd result, the USDA regulations define the word "buyer," as used in subsections (f) and (g)(3), to mean "intended recipient of notice."172 This interpretation is most likely correct. Yet, as one commentator has suggested, courts faced with the plain language of subsection (g)(3) "may have trouble believing this."173

F. Buyer Disclosure Requirements in Security Agreements

Subsection 1324(h)(1) authorizes secured parties to require farmer-debtors "to furnish to the secured party a list of buyers, commission merchants, and selling agents to or through whom [such person] may sell [the] farm product."174 If the security agreement contains such

170. See Meyer Comments, supra note 4, at 155; Sanford, supra note 4, at 22. In addition, the authors do not think it is permissible in CNS states for states to impose an obligation on registrants to notify the system operator that the registrant has not received its regular distribution of the master list. A registrant may fail to receive the master list due to problems with mail delivery. This failure is an inherent risk of CNS that resides on the secured party, not on the registrant. See 9 C.F.R. § 205.208(g) (1988); see also 131 Cong. Rec., supra note 9, at S16,300 (Sen. Cochran explained the allocation of burdens under CNS and remarked: "Buyers would not be permitted to be passive, but they would not be required to be hyperactive either.").

171. The Food Security Act of 1985, supra note 3, at § 1324(f) (for buyers), (g)(3) (for commission merchants and selling agents) (emphasis added).


173. Sanford, supra note 4, at 22.

a provision, debtors may not sell to or through persons not so identified without incurring a fine.\textsuperscript{175} To avoid being fined, debtors must either (1) notify secured parties in writing of the identity of the actual buyer, commission merchant, or selling agent at least seven days before sale, or (2) account to the secured parties for sale proceeds not later than ten days after sale.\textsuperscript{176} Following its introduction in the initial 1985 versions of section 1324, this buyer disclosure provision remained essentially unchanged during the legislative process except for the addition of a provision allowing a penalty of fifteen percent of the sales price.\textsuperscript{177} However, it leaves numerous issues unresolved.

1. Does the Provision Apply to Both CNS and PNS States?

As a separate subsection, this security agreement buyers list provision appears to apply to both CNS and PNS systems. The provision is not expressly limited to one system or the other. However, legislative history and section 1324's structure suggest that subsection 1324(h)(1) may apply only to PNS. If this argument is correct, the penalty of subsection 1324(h)(3) may apply only in PNS states and may be unavailable in CNS states.

Potential buyer lists originated with the March 1985 versions of section 1324, which introduced presale notification.\textsuperscript{178} Structurally, buyer lists are highly desirable for PNS to work in a cost-efficient manner. From a secured lender's perspective, without a buyers list, secured parties cannot identify a limited buyers group to whom PNS notices must be sent. Because of its importance, Congress created a penalty to encourage debtors to provide accurate identity information and to sell to the identified parties. This function is not applicable, however, to CNS.

Secured party protection under CNS does not depend on knowing in advance the identity of the buyer, commission merchant, or selling agent. Instead, secured parties can protect themselves only by filing a proper EFS with the CNS system. Actual knowledge acquired by buyers, commission merchants, and selling agents outside of CNS is irrelevant.

Given this conclusion, the question becomes what function, if any, subsection 1324(h) can play in a CNS system. Farmers who sell a

\textsuperscript{175} Id. at § 1324(h)(3). The fine could equal the greater of $5,000 or 15% of the sales price. Id.
\textsuperscript{176} Id. § 1324(h)(2).
\textsuperscript{177} See H.R. CONF. REP. No. 447, supra note 54, at 486 (stating that the House and Senate versions differed only in the addition of the 15% provision).
\textsuperscript{178} See supra notes 39-40.
farm product covered by a CNS will contend that the list has no function in CNS. Farmers will argue that there can be no “off-list” sales under CNS. Secured lenders are fully protected against all buyers, commission merchants, or selling agents (who are either registrants or nonregistrants in the CNS) provided the secured parties have filed proper EFS’s. Secured parties, however, may argue that subsection 1324(h) permits protection outside the scope of CNS. Secured parties can work directly with pre-identified buyers, commission merchants, and selling agents through a buyers list required in a security agreement. Secured parties may claim that this additional protection approach is important given the inherent system risks that CNS places on them.

Courts faced with these competing arguments receive no direct guidance from legislative history, other than the fact that subsection 1324(h) originated with PNS. Yet, the authors conclude that the farmers’ arguments are correct. The secured parties’ argument that subsection 1324(h) has meaning in CNS rests on secured parties trying to protect themselves by working outside the scope of the state-selected CNS. If the secured parties’ argument were accepted, secured parties, in effect, would be allowed to undermine the state selection of CNS, which is mutually exclusive from PNS. In fact, secured parties are arguing for a limited PNS. Moreover, the secured parties’ desire to transfer inherent CNS risks to farmers should not be permitted. When a state selects one of the two section 1324 alternatives, the state also is accepting the allocation of risks that accompany the chosen system. A risk of PNS is not knowing who to notify. Thus, secured parties need a buyers list to protect against that risk. CNS has no risk of selling to an unidentified buyer and purposefully places other inherent system risks on secured parties. Secured parties cannot transfer an inherent system risk to farmers in contradiction of section 1324’s allocation of risks. For these reasons, the authors conclude that subsection 1324(h) is not applicable to CNS. It is limited to PNS.

2. Criminal or Civil Penalty?

The most important issue raised by subsection 1324(h) concerns Congress’s use of the term “fined” in subsection 1324(h)(3). This term generally denotes a criminal penalty and suggests that farmer noncompliance constitutes a federal crime. Subsection 1324(h)(3), however, may create only a civil penalty. The distinction between a criminal and civil penalty is important for several reasons.

179. See supra notes 104-25 and accompanying text.
If subsection 1324(h)(3) is a criminal provision, the United States District Attorney would be the appropriate enforcement agency because section 1324 is federal legislation. Busy U.S. Attorneys may be unwilling to pursue a criminal penalty against a farmer on behalf of a private secured party. The U.S. Attorney might perceive this action as primarily a collection matter. Unlike state prosecutors, private secured creditors have no political leverage to induce vigorous federal enforcement. By contrast, the Farmers Home Administration (FmHA) and the Commodity Credit Corporation (CCC), as entities of the federal government, may be able to interest the U.S. Attorney in enforcing subsection 1324(h). The U.S. Attorney’s willingness to take criminal action on behalf of governmental agencies, such as FmHA and CCC, may depend on who collects the fine. If subsection 1324(h) penalties are, in fact, criminal fines, the U.S. Attorney has an economic incentive to pursue criminal charges because the federal government will receive the fines collected.180

In contrast, if subsection 1324(h) creates civil penalties, then the provision’s enforcement most likely would be in the hands of the secured party. The secured party would be the beneficiary of the penalty. The possibility of obtaining a civil fine providing incentive for secured parties to use subsection 1324(h) is problematic. Many farmers who will be subject to the provision’s penalty likely sold “off list” in response to severe economic stress. These farmers, therefore, may not have the assets to satisfy the imposition of a civil penalty.

Whether a penalty, such as subsection 1324’s fine, is civil or criminal “is a matter of statutory construction” based on a two-stage inquiry.181 First, a court must determine whether Congress expressly or impliedly preferred one label. Second, even if a court finds that Congress intended to establish a civil penalty, it must decide “whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.”182

The precursor of subsection 1324(h) originated in the House and initially included only a fine of not more than 5,000 dollars. At this stage, Congress intended the penalty to be a criminal penalty.183 The

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180. FmHA has made a policy judgment not to comply with the notification requirements of section 1324. FmHA has decided to protect its security interests solely by obtaining priority under Article Nine of the Code and by emphasizing “borrower accountability for security.” FmHA AN No. 1703 (1940) (Dec. 22, 1987). The phrase “borrower accountability for security” apparently includes seeking criminal penalties against farmers who sell FmHA mortgaged property. Whether subsection 1324(h)’s criminal penalties against a farmer who sells “off-list” are available when the lender has not complied with section 1324’s notification requirements is a question the authors leave unaddressed in this article.


182. Id. at 248-49.

183. H.R. REP. No. 271, 99th Cong., 1st Sess., pt. 1, at 110 (1985); see Senate Hearings,
additional penalty of fifteen percent of the farm product’s value (which
could be interpreted as a civil penalty) was added through Senate
amendment. This additional penalty surfaced after the Senate Bank-
ing Committee Hearings. In those hearings, several witnesses called
for more severe penalties, but the witnesses disagreed about the
penalties’ characterization. Thus, it is unclear whether Congress
meant to impose a criminal or a civil penalty.

The Supreme Court in *Kennedy v. Mendoza-Martinez* analyzed
seven factors in considering whether an otherwise civil penalty is so
punitive that it invokes the same constitutional protections as a criminal
penalty. Section 1324 imposes an affirmative restraint on farmers,
the payment of money. Fines are historically considered criminal
punishments. Also, subsection 1324(h)’s fines are imposed on farmers
who knowingly sell “off-list.” Moreover, section 1324’s purpose ap-
parently is to deter farmers from selling “off-list” and to seek
retributive fines if the farmer does sell “off-list.” Finally, subsection
1324(h) patterns common state criminal statutes that make it a crime
for persons to sell mortgaged property. In light of the origins of subsec-
tion 1324(h) and the factors considered under Mendoza-Martinez,
the authors conclude that section 1324 creates a criminal, rather than
a civil, penalty.

The preceding conclusion has one other notable consequence.
Assume that a secured party begins collection proceedings against
a farmer. The secured party asks a farmer under oath, at a deposi-
tion for example, to whom the farmer sold the farm product. The
farmer can invoke the fifth amendment to avoid answering this ques-

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185. Senate Hearings, supra note 7, at 41 (call for “severe” civil and criminal penalties);
id. at 75 (criminal penalties urged); id. at 189 (characterization of the $5,000 fine as a civil
penalty and request for the “addition of criminal penalties”).
187. Id. The seven factors are as follows:
   Whether the sanction involves an affirmative disability or restraint, whether it has
   historically been regarded as a punishment, whether it comes into play only on a
   finding of *scienter*, whether its operation will promote the traditional aims of
   punishment—retribution and deterrence, whether the behavior to which it applies
   is already a crime, whether an alternative purpose to which it may rationally be
   connected is assignable for it, and whether it appears excessive in relation to the
   alternative purpose assigned . . . .”
Id. at 168-69 (footnotes omitted).
188. Accord Meyer Article, supra note 4, at 9; Clark Memorandum, supra note 4, at 44.
    Contra Comment, 55 UMKC L. REV. 454, supra note 4, at 470 (concluding it is a civil penalty
    by using the seven Mendoza-Martinez factors).
tion because his answer might incriminate him under subsection 1324(h). Although the farmer's refusal to answer does not derail the collection case, the assertion of his fifth amendment privilege can certainly make a secured party's task more difficult. Whether subsection 1324(h) significantly adds to a farmer's fifth amendment protection is doubtful because most states have statutes making it a crime to sell mortgaged property and the farmer could have asserted his fifth amendment privilege in refusing to answer whether he had even sold the property.\footnote{189}

\section*{G. Amendments to EFS's and PNS Notices}

Both EFS's and PNS notices "must be amended in writing, within 3 months, similarly signed and filed [or transmitted], to reflect material changes."\footnote{190} The first version of this amendment language was limited to CNS's and did not specify any time limit.\footnote{191} The Conference Committee imported the concept into PNS and added the three month requirement without any discussion. This provision creates an additional risk for secured parties by placing on them the burden to initiate amendments. Failure to properly amend EFS's or PNS notices means that the original EFS's or PNS notices become ineffective because they do not meet section 1324's requirements. Unlike Code section 9-402(4), which provides that Code financing statements "may" be amended, section 1324's language is unequivocable and mandatory.\footnote{192} Secured parties attempting to satisfy this obligation face a number of difficult issues. Because the same language is used, the problems and conclusions should be the same for both CNS and PNS.

\subsection*{1. "Within 3 Months" of What?}

The first problem presented is when the three month period begins. Does it run from the date of the material change or from the date of the secured party's discovery of the material change?\footnote{193} The USDA regulations strongly indicate that the clock starts on the date of

\begin{itemize}
\item \footnote{189} Senate Hearings, \textit{supra} note 46, at 164-65 (assertion that no criminal penalties are needed in the federal legislation because state criminal penalties are adequate).
\item \footnote{190} Food Security Act of 1985, \textit{supra} note 3, at § 1324(c)(4)(E), (e)(1)(A)(iii), g(2)(A)(iii).
\item \footnote{191} 131 \textit{Cong. Rec.}, \textit{supra} note 9, at S16,297 (an EFS "must be amended in writing similarly signed and filed, to reflect material changes.").
\item \footnote{193} \textit{See} Sanford, \textit{supra} note 4, at 15.
\end{itemize}
change. At first blush, this result seems unfair to secured parties who might not know or have reason to know that a material change has occurred. Admitting that section 1324 "is silent as to the consequences" of not amending EFS’s or master lists "through no fault of the secured party," the USDA justifies its interpretation by reference to section 1324's legislative history. As a compromise, section 1324 artificially forces secured parties, buyers, commission merchants, and selling agents to share the burden of protecting the secured party’s security interests. Thus, the USDA concludes that secured parties are at risk for certain problems that are beyond their control, such as errors or inaccuracies generated by a CNS. Another risk to which the USDA makes specific reference is the secured parties' nonprotection during the time between the filing of an EFS and the CNS registrants' actual receipt of the master list. Similar risks apply to PNS notices. If the three month period starts when a material change occurs rather than on its discovery, the allocation of burden is consistent with section 1324's purposes. Consequently, secured parties must take affirmative steps to ensure that they can and will learn of such changes within the three month period.

2. What is a Material Change?

With respect to CNS’s, the USDA regulations define a material change as one that "would render the master list entry no longer informative as to what is subject to the security interest in question." For the same reasons that a minor errors rule should be read into PNS’s, this same materiality standard should be applied to PNS notices. To do otherwise exacerbates uniformity problems that already exist between CNS and PNS.

Recognizing this definition's inadequacies, however, the USDA regulations comment that materiality "will vary from case to case." As discussed in connection with the minor errors exception, this "no

194. 9 C.F.R. § 205.209(a) (1988) ("[T]he requirement to amend arises when the information already made available no longer serves the purpose and other information is needed in order to do so.").
195. Id. § 205.209(b).
196. 131 CONG. REC., supra note 9, at S16,298 (remarks of Sen. Cochran).
198. Id. § 205.208(f); see infra text accompanying notes 393-414.
199. For example, a secured party is at risk until the buyer, commission merchant, or selling agent receives the notice. Any sales occurring between sending and receipt of the notice are not protected by presale notification.
201. See supra text accompanying notes 132-50.
longer informative” standard applies both to amendments and minor errors. Almost any change that affects the accuracy of required data will be material. For example, if a state’s CNS lists “waxed beans” as a farm product category and the EFS contains this description as the collateral, it is a material change if the farmer-debtor elects to plant butter beans (another CNS farm product category) instead of waxed beans? Correspondingly, such a change is not a material change if a state’s CNS category is the more generic “beans.” In the “waxed” to “butter” beans example, the buyer no longer has accurate information allowing the buyer to know what the collateral is. In the latter example, the buyer knows that “beans” are the collateral regardless of the variety planted. Other less drastic factual changes may not make an EFS uninformative. Thus, a material change may not result if a debtor with a rural address subsequently decides to start receiving mail at a town post office box, provided the rural address is still accurate.

3. Relation Back to Original Filing

The three month grace period introduces an additional complication. What is the result if a secured party properly amends an EFS or PNS notice within the three month period, but after a sale occurs? Does the amendment relate back to the filing date? The Code does not provide guidance because fatally defective Code financing statements cannot be resurrected by amendment. Thus, Code amendments generally establish priority only as of their filing date. But section 1324’s definitions of an EFS and PNS notice state that if the amendment is timely made, the original filing or notice is good because all section 1324 requirements have been met. Nothing in section 1324’s legislative history suggests otherwise. However, this conclusion has some strange results that Congress may not have adequately foreseen.

For example, what if the debtor changes from one crop to another covered by the same security agreement without the knowledge of

203. Other amendment questions exist. What if the amendment turns out to cover a change that is not material? Presumably, the amendment should be treated as a nullity since it was not in fact required by section 1324. But does it act to extend an expiration date? What if the amendment attempts to add collateral? Such an amendment to a Code financing statement would be effective to perfect an interest in the new collateral only from the date of filing the amendment. See U.C.C. § 9-402(4). Thus, such an amendment should be treated as an original financing statement. See Op. Ala. Att’y Gen. (Mar. 8, 1968), at 5 U.C.C. Rep. Serv. (Callaghan) 295. A similar result should apply under section 1324 with no relation back.

204. See 9 R. ANDERSON, supra note 148, § 9-402:66, at 505-06.

205. The discussion at this point in the text is limited to single state transactions and does not address multi-state transactions. See infra text accompanying notes 513-28.
the secured party and then sells, all within a three month period. Even if the buyer has a master list or PNS notice giving that debtor's name, the farm product involved in the transaction is different from that described. Further, suppose that within the same three months but after the sale, the secured party properly amends the original EFS or PNS notice. Based on the amendment the secured party will argue that it wins under section 1324. The buyer will ask “What did I do wrong? The secured party should have acted sooner.” Although this response may be true, section 1324 appears to allocate this risk to buyers, commission merchants, and selling agents because it gives secured parties a statutory right to amend an EFS or a PNS notice within three months from the time a material change occurs. With respect to a change in growing crops, however, it is unlikely the entire transaction can take place within three months of the change. Thus, the secured party would have the obligation to police adequately the collateral to learn of the material change and make the mandatory amendment. But the same result applies to amendments affecting livestock collateral, a debtor's name, address, taxpayer identification or social security number, or property description. All of these can materially change within three months and put buyers, commission merchants, and selling agents at risk.

H. Section 1324's Impact on "After Acquired Property" Clauses

Pursuant to Code section 9-204(1), secured parties commonly use "after acquired property" clauses to take and perfect floating security interests in all goods then owned or thereafter acquired by a debtor. Section 1324 does not legally affect a secured party's right to continue this practice for farm products; but it creates practical problems for secured parties. In particular, section 1324's specificity requirements make it difficult to effectively cover after acquired property on an EFS or PNS notice.206

Code financing statements permit general collateral descriptions that have no impact on the operation and effectiveness of after acquired property clauses.207 Generic descriptions, such as "all farm products owned by the debtor, wherever located," are needed to create floating liens. Thus, no matter what is grown, when or where, the floating lien is protected. The Code permits such broad descriptions because of its inquiry filing system, which presumes that third parties will check with secured parties or debtors for additional information.

207. U.C.C. § 9-204 comment 5.
Section 1324, however, is much more demanding. It obliges secured parties to identify in advance specific farm products, amount ("where applicable"), crop year, and a description of the property where produced. Under a Code floating lien, a debtor's change in planned crop, its amount, or where it is produced does not affect the secured party's floating lien. Under section 1324, a debtor who plants farm products different than the category identified, or in a different place than that listed in the secured party's EFS or PNS notice, has created a material change that potentially invalidates the secured party's section 1324 protection. This situation deprives the secured party of the advantage of its floating lien. Immediately after section 1324's passage, commentators expressed concern that section 1324's requirement to identify amount and crop year would destroy the effectiveness of a floating lien against section 1324 buyers, commission merchants, or selling agents.208 The authors conclude, however, that section 1324 does not prevent secured parties from acquiring floating liens. Section 1324 does, however, impose duties on secured parties to constantly police the collateral. Its specificity requirements place a higher risk on secured parties. Secured parties will lose their section 1324 protection for material changes made by farmer-debtors unless these changes are reflected in timely amendments to EFS's and PNS notices.

I. Conflicting Collateral Descriptions Between Security Agreements and EFS's or PNS Notices

Under Code section 9-203(1)(a), a security agreement must contain "a description of the collateral." A Code financing statement, however, need only have a collateral description "indicating the types, or describing the items, of collateral."209 Thus, Code financing statement collateral descriptions need not be identical to the ones in the underlying security agreements. For example, a Code financing statement might cover "all farm products now or hereafter produced," while the security agreement might be limited to all wheat produced in 1987 from a specific portion of the debtor's farm property. This dichotomy is permitted because financing statements are only intended to give inquiry notice to third parties. Security agreement descriptions, however, operate as a statute of frauds between the parties and, therefore, must be sufficient to reasonably identify the subject collateral.210

208. See Clark Memorandum, supra note 4, at 50.
209. U.C.C. § 9-402(1).
In a similar vein, Code section 9-110 allows "any description... whether or not it is specific if it reasonably identifies what is described."\textsuperscript{211} This rule reverses pre-Code chattel mortgage cases, which adopted a so-called "serial number test" requiring exact and detailed collateral descriptions.\textsuperscript{212}

Section 1324 does not permit the Code’s broader or more general collateral descriptions to suffice anymore in farm products financing. Section 1324 imposes greater specificity requirements upon collateral descriptions in four distinct ways. First, unlike the Code, which requires a real estate property description only for growing crops, section 1324 mandates a reasonable real estate description for all farm products, including livestock and harvested crops.\textsuperscript{213} Second, unlike the Code, which allows a secured party to claim “all” (in terms of amount) of any type farm products collateral in the financing statement, section 1324 requires that the actual notices from secured parties set forth “the amount of such products where applicable.”\textsuperscript{214} Third, unlike the Code, which permits a secured party to claim “all” (in terms of the years) farm products in the financing statement, section 1324 requires that the actual notices from secured parties set forth the “crop year” of the farm product being claimed as collateral.\textsuperscript{215} Finally, unlike the Code, which allows generic descriptions of the farm products taken as collateral, section 1324 defines farm product to mean a specific agricultural commodity.\textsuperscript{216}

Through its specificity requirements, section 1324, to a great extent, reintroduces the serial number test of pre-Code law into CNS and PNS. Section 1324’s legislative history supports this conclusion. During the Senate hearings, a panel of buyers stressed that lenders should be required to provide actual notice containing precise information and that lenders should shoulder the burden of policing their collateral to ensure the continuing accuracy of information provided on the actual notice.\textsuperscript{217} During Senate debate, Senator Cochran expressed concerns that the Garn-Andrews proposal, which allowed states to create an alternative notice to presale notification, placed too much inquiry burden on buyers. As part of the section 1324 compromise, however, Senator Cochran did support an alternative that mandated

\textsuperscript{211} U.C.C. § 9-110.
\textsuperscript{212} Id.
\textsuperscript{215} Id. § 1324(c)(2)(C)(ii)(IV).
\textsuperscript{216} Id. § 1324(c)(5).
\textsuperscript{217} Senate Hearings, supra note 7, at 80-107 passim.
specificity. The statutory language clearly indicates that Congress met buyer demands for actual notice, specificity in collateral descriptions, and continual policing of the collateral by lenders.

This conclusion raises an interesting question under USDA regulations. For "crop year," "amount," and "county or parish," the USDA regulations permit default assumptions that can simplify filling out EFS's. First, if no crop year is specified, an EFS "must be regarded as applicable to the crop or product in question for every year for which . . . the EFS [is] effective." Second, if an EFS does not "show an amount, this constitutes a representation that all such product owned by the person in question is subject to the security interest in question." Finally, if no property description other than county or parish is given, it "constitutes a representation that all such product produced in each county or parish, owned by such person, is subject to the security interest." A secured party trying to avoid many of these difficult definitional problems may be tempted to take advantage of these default assumptions. Or, a secured party might try to protect itself from future changes by "over-describing" the collateral on the EFS. These temptations should be resisted. If the default assumptions are true, secured parties can utilize them because the EFS accurately informs registrants of the farm products serving as collateral. However, the security agreement may show that (1) not all of a specific farm product in terms of amount, or (2) not all farm product for all crop years, or (3) not all farm product to be produced on all lands owned by the debtor within a particular county or parish was given as collateral. In such cases, an EFS that overclaims the collateral is not informative. It does not specifically and accurately identify what farm product is collateral. An EFS that overclaims collateral is "no longer informative" under section 1324 and, therefore, is ineffective as the source of actual notice in a CNS state.

Although the default assumptions of USDA regulations do not directly apply to PNS, the conclusion follows that a PNS that

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218. 131 CONG. REC., supra note 9, at S16,299-300. Later in his remarks, Senator Cochran states that the collateral description to be required by section 1324 is "comparable to, if not identical with" the information required by the Code. Id. at S16,299. Whether Senator Cochran was correct or not when he spoke is irrelevant because the proposal to which he was speaking was changed in Conference Committee to require greater specificity in collateral descriptions. These greater specificity requirements were enacted into section 1324. Compare id. at S16,296-97 (the bill as being debated on the Senate floor) with H.R. CONF. REP. No. 447, supra note 54, at 487-92 (section 1324 as presented by the Conference Committee and as ultimately passed).


220. Id. § 205.207(b).

221. Id. § 205.207(c).

222. Id. §§ 205.107(b), .207, .209(a)-(b).
overclaims collateral is also impermissible and ineffective. The same legislative history and almost identical statutory language also applies to PNS. Thus, courts should conclude that the default assumptions of the USDA regulations are also valid for PNS if, and only if, the default assumptions are factually true.

What happens if the EFS or PNS notice underclaims collateral rather than overclaiming? Actual notice recipients do not have information that correctly shows that the farm product is collateral. Recipients are only responsible for what is claimed on the notice. They will not be responsible for the greater collateral actually granted between the parties because recipients have no actual notice of this greater collateral pledge. In other words, an underclaiming EFS or PNS notice is effective, but the secured party has shortchanged itself through the underdescription.

The common sense and practical advice that emerges is that, to a greater degree than under the Code, secured parties in farm products financing should use identical collateral descriptions meeting section 1324's informational requirements in both the security agreement and in the EFS or PNS notice. Collateral description discrepancies between the security agreement and section 1324's actual notice work only to the secured party's disadvantage.

III. CENTRALIZED NOTIFICATION SYSTEMS (CNS)

A. Certification and Coverage

1. Adoption of CNS

a. The USDA regulations

Subsection 1324(i) explicitly delegates to the USDA the authority to " prescribe regulations . . . to aid States in the implementation and management of a central filing system."223 In conformity with this authority, the USDA promulgated regulations consisting of eight sections entitled "Definitions" and "Regulations," and fourteen sections entitled "Interpretive Opinions." Although the USDA regulations do not give a reason for the two groups, the USDA apparently intends the initial eight sections of "Definitions" and "Regulations" to be legislative rules, which carry the force of statutory law. Presumably the remaining fourteen sections are interpretative rules, which construe or explain section 1324 and its legislative rules. As interpretative rules, these fourteen sections theoretically are not binding on reviewing courts,224 but are entitled to deference. However,

223. Food Security Act of 1985, supra note 3, at § 1324(i).
224. For a recent, readable article that explains the distinction between legislative rules and interpretative rules, see Saunders, supra note 127.
these interpretive rules are so intertwined with the definitions and regulations and resolve so many of section 1324's policy disputes that it is unclear what precise characterization courts will give to them. Consequently, courts must decide many major unresolved issues under section 1324 by principles of administrative law concerning judicial review of administrative regulations. This article does not address these administrative law issues, even though they may well be dispositive of many section 1324 issues.

In accord with subsection 1324(i), the USDA regulations only cover CNS's.\textsuperscript{225} Narrowly construing its role, the USDA has expressly disclaimed any authority or responsibility under section 1324 for any task other than certification of CNS's submitted to it by states. Even though subsection 1324(i) speaks of “implementation and management,” the USDA has stated that section 1324 does not authorize it to become involved in a continuing program of regulating, inspecting, or supervising CNS's once they have been certified. Nor will the USDA penalize states or revoke certification if their CNS's are alleged to be in noncompliance with section 1324.\textsuperscript{226}

The USDA's determination that section 1324 grants it authority only to certify CNS's, but nothing more, is correct. Subsection 1324(c)(2) defines a “central filing system” as one that has been “certified” by the USDA and states that such a system will be certified if it complies with the “requirements” of the law.\textsuperscript{227} Other than using the word “management” in subsection 1324(i), section 1324's statutory language is devoid of any reference to continuous monitoring of CNS's by the USDA, or enforcement powers granted to the USDA against states to ensure continued compliance after certification. Moreover, section 1324's centralized notification alternative was added to the original bill after Senate hearings at which the Committee Chairman and others expressed a strong desire that states not be completely shunted aside by the federal government in farm products financing.\textsuperscript{228} In light of the statutory language and this legislative history, the USDA correctly decided that its delegated authority to prescribe regulations is limited to certification matters.

Thus, the USDA properly declined to act on a comment to the 1986 Interim Final Regulations which requested that the USDA deny

\textsuperscript{225} For a discussion of what significance the USDA regulations should have for PNS, see supra pt. II(C).


\textsuperscript{227} Food Security Act of 1985, supra note 3, at § 1324(c)(2).

\textsuperscript{228} Senate Hearings, supra note 46, at 9-11 (statements of Sen. Mark Andrews and Sen. (Chairman) Jake Garn, as examples of the calls for state autonomy).
certification unless a state proved that adequate funding and computer resources existed to make its submitted CNS functionally viable.\textsuperscript{229} The USDA is only permitted to judge whether state-submitted CNS’s comply with statutory requirements. No authority exists to ensure adequate funding, operational sophistication, or effective implementation.\textsuperscript{230} As a corollary to this analysis, once the USDA certifies that a state system complies with section 1324, that state has an exclusive CNS from that date forward, regardless of problems which the state might encounter with the day-to-day operation of the certified system.\textsuperscript{231}

b. Challenge to CNS

Given the USDA’s limited involvement with CNS’s, buyers, commission merchants, or selling agents trying to avoid double liability under section 1324 may challenge the CNS’s validity. Indeed, certified CNS’s carry a significant inherent risk of being declared invalid. First, USDA certification does not mean that the USDA has in all matters correctly understood section 1324’s requirements. A court could rule, therefore, that despite certification, a system is not in compliance with section 1324 and should not have been certified originally.\textsuperscript{232} Second, certification does not mean that the system thereafter continues to be in compliance with section 1324. A court could rule that while initially certifiable, the system as operating at any particular time is no longer in compliance with section 1324 and, therefore, is no longer a certified system.\textsuperscript{233} Buyers, commission mer-

\textsuperscript{230} Thus, a state that has passed authorizing legislation for a CNS and has obtained certification of that CNS from the USDA has a valid, controlling CNS, even if the state legislature has not appropriated adequate funds to operate it. Cf. Op. Att’y Gen. Ark. No. 87-222 (June 29, 1987).
\textsuperscript{232} The USDA had to resolve difficult and important ambiguities in the statute during the process of adopting regulations. The USDA may or may not have resolved these ambiguities in accord with statutory intent. Moreover, the CNS’s that have been certified thus far are substantially different from one another. For example, in some instances the USDA allowed a state to create a system with a particular element that the USDA then refused to allow another state to include in its CNS. See infra note 239.
\textsuperscript{233} See 9 C.F.R. § 205.214(a) (1988).
chants, or selling agents sued under section 1324 for payment of farm products that they thought had been purchased or sold with clear title have every incentive to raise these arguments. By having the CNS declared invalid for noncompliance with section 1324, they will avoid the risk of double payment in their specific case.\textsuperscript{234}

Thus, centralized notification carries the risk that states will spend great amounts of money, time, and effort to create and operate a CNS only to learn from a federal court in a case involving litigation between private parties that the money, time, and effort have been for naught. With this risk, secured parties might be justifiably insecure about CNS's ability to protect their security interests.\textsuperscript{235} This is particularly true in light of the mutual exclusivity of the presale and centralized notification systems.\textsuperscript{236}

2. Coverage of CNS's

a. Generic vs. specific descriptions

Subsection 1324(c)(5) defines "farm product" differently than the definition given by Code section 9-109(3). Legislative history and subsection 1324(c)(5)'s language make clear that Congress intended the identification of farm products under section 1324 to be much more specific than the Code's permitted generic descriptions.\textsuperscript{237} Under the Code, secured parties using the terms "all crops" or "all livestock" satisfy the requirements for identifying farm products. These generic descriptions are not permissible under section 1324. Subsection 1324(c)(5) requires that farm products be identified specifically as to type of agricultural commodity (such as wheat or corn, but not the more general term "grains" nor the more specific terms "durum wheat" or "sweet corn"), or species of livestock (such as horses or mules, but not the broader term "equine" nor the more specific terms "quarterhorse" or "appaloosa"). The USDA has strictly adhered to this specificity requirement in identifying farm products for CNS's. Although giving a list of acceptable descriptions, the USDA regulations allow states to develop their own list of specific identifiers for farm products.\textsuperscript{238} No miscellaneous categories are allowed. In fact, the USDA rejected farm product identifiers submitted by several states

\textsuperscript{234} See id. § 205.214(b).

\textsuperscript{235} See id.

\textsuperscript{236} See supra text accompanying notes 104-125.

\textsuperscript{237} The original 1985 bill passed by the House defined "farm product" in the same terms as the Code. The Senate bill carried an amendment that was the definition used in subsection 1324(c)(5) and the Conference Committee adopted the Senate version. H.R. Conf. Rep. No. 447, supra note 54, at 486.

because it considered them too general and, therefore, not in compliance with the specificity requirements of subsection 1324(c)(5). 239

b. Adoption of a limited CNS: all farm products or selected list of farm products

Subsections 1324(d), (e) and (g) make it clear that states need not create CNS’s; states can elect to do nothing in response to section 1324. In that event, buyers, commission merchants, and selling agents will take free of security interests in farm products unless they receive proper section 1324 PNS notice. The USDA rightly interprets this option as impliedly giving statutory deference to a state’s decision to request CNS certification only for some farm products. States can, but are not required to, seek certification for a CNS covering all farm products; they also can request certification for a CNS that covers only a selected list of farm products. 240

The USDA regulations spell out the legal consequences of systems covering only selected farm products. For those selected farm products, the states have a certified CNS. For farm products not selected, the states have taken no action and secured parties can protect their security interests in these unlisted farm products only by giving section 1324 PNS notices. 241 If a state with a selected list of farm products later decides to expand the list, the state must seek USDA cer-

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239. For example, the USDA rejected the identifiers “other livestock” and “other crops,” which Montana submitted as “catch-all” categories after listing ten categories of specific crops and livestock species. The USDA said “other livestock” and “other crops” were miscellaneous categories not permitted by the statute or regulation. Moreover, the USDA rejected as too general the term “dairy products.” Montana Application, supra note 87. Similarly, the USDA rejected the terms “melons” and “milk products” as too general when submitted as farm product identifiers by the State of Oregon. Oregon amended its application to change “melons” to “watermelons” and “cantaloupes” and “milk products” to “milk” (which the authors suppose excludes cream and whey). Application of the State of Oregon for Certification with Responses from USDA and Amendments by the State of Oregon (1986) [hereinafter Oregon Application] (copy on file with the Kansas Law Review). In contrast, the USDA did not object to the identifier “Beans—All” submitted by Oregon even though Mississippi’s certified system uses five identifiers for “Beans” (“Butter,” “Dry,” “Lima,” “Snap,” and “Waxed”). Compare Oregon Application, supra with Mississippi Application, supra note 87.

240. Of the first ten states to gain certification, four states (Arkansas, Maine, Montana, and North Dakota) sought certification for all farm products, while six states (Idaho, Louisiana, Mississippi, Nebraska, Oregon, and Utah) sought certification for a selected list of farm products. Arkansas has since requested an amended certification to move from a system that covers all farm products to a system that excludes six categories of livestock species. 52 Fed. Reg. 6,040 (1987). Idaho, Nebraska, and Oregon applied for amended certification to expand the list of farm products covered by their CNS’s. See 51 Fed. Reg. 36,257 (1986); 52 Fed. Reg. 8,938 (1987); id. at 33,260. Utah has received amended certification to move from a system covering a specified list to a system covering all farm products. Id. at 8,491.

tification to add these additional farm products to CNS coverage. States opting for certification of a selected list of farm products have hybrid farm products systems under section 1324: part centralized notification and part presale notification.

The USDA requires states seeking certification for CNS's covering all farm products to create a list of specific farm product identifiers. These product identifiers will be used by secured parties in describing their collateral and by registered buyers, commission merchants, and selling agents in registering for notification from the system. At the same time, the USDA recognizes that no matter how inclusive a list is, particular farm products might not be on the list. Thus, additional farm product descriptions are permitted provided those descriptions refer to a specific type of farm product and are not catch-all "other" or "miscellaneous" categories.

Secured parties who desire to take as collateral a farm product that is not on a state's farm product identifier list should be required to contact a state's Secretary of State before filing an EFS to permit the Secretary of State to create an identifier. This action ensures that secured parties do not describe the same additional farm product by several different names and that the product identifier is adequately specific. When a Secretary of State creates a new farm product identifier, a state that has gained certification for all farm products need not seek an amended certification because all farm products have already been certified as included within the CNS. The "all farm products" state can simply add this additional farm product to the list of farm product identifiers.

c. "Produced in the 'state'"

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242. See id. § 205.101(b)(8).
243. See id. § 205.206. For example, the USDA's list of suggested farm product identifiers does not include "bull semen." If a system is certified for all farm products, "bull semen" is covered by the system, but secured parties must give a specific description of the collateral ("bull semen") to gain the protections of section 1324. Secured parties would not be protected under section 1324 if they attempted to cover "bull semen" in a collateral description stated as "other cattle products." Furthermore, when the state sends the centralized notification to registered buyers, commission merchants, and selling agents, the state must be able to inform them that "bull semen" is collateral for some loans. The state cannot send centralized notification to the registrants that lists "bull semen" under a miscellaneous category such as "other cattle products." See Montana Application, supra note 87.
244. Vermont has adopted this procedure for its CNS. See Central Filing System Rule D and Instruction No. 6 for Completion of Form FPN-1 in Application of the State of Vermont for Certification with Responses from USDA and Amendments by the State of Vermont (1986) [hereinafter Vermont Application] (copy on file with the Kansas Law Review). Other CNS states have not addressed as clearly the issue of naming additional farm products that are not on the state's list of farm product identifiers.
When the USDA drafted section 1324's regulations, it confronted the question of what state CNS's should include what farm products. Should a state only record information about farm products produced in that state? Or should states record information about farm products from all states? Obviously, the burden on CNS's is much greater if information from all states is recorded than if the information is restricted to farm products produced in the state creating a CNS.

In its March 1986 Interim Final Regulations, the USDA appeared to favor the "all states" approach, though several regulations on this issue seemed to conflict. The source of the confusion stemmed from language in subsection 1324(c)(4)(D)(iv), which requires that an EFS provide "a reasonable description of the property, including county or parish in which the property is located,"245 contrasted with the statutory language of subsections 1324(e)(2), (3) and (g)(2)(C)(D) which read "in the case of a farm product produced in a State that has established a central filing system."246 The USDA tried to solve the discrepancy between place of location and place of production by requiring that an EFS be filed in the state where the farm product was produced but that the description on the EFS include information on each "county or parish, in the same or any other State, where the same product at the same time [as execution of the EFS] is foreseen to be located in the future."247 Comments to the USDA pointed out that the March regulations would have required a state CNS, where a farm product is produced, to immediately contain information concerning the predicted future location of that farm product in other counties within the state where produced or in other states.248 As a consequence, each CNS would be a massive system containing information about both where the farm product was produced and where the farm product was predicted to be located in the future. Much of the predicted location information would likely be inaccurate.

In the June 1986 amendments to the regulations, the USDA rethought the contrast between the place of location and place of production as set forth in the two relevant statutory provisions. The USDA concluded that a CNS should only include information about the place where the farm product was produced.249 The USDA decided that the statutory intent to limit CNS's to farm products "produced" in the state was much clearer than the meaning of the term "located"
required for an EFS. Consequently, it determined that the term "located" should be interpreted to mean "produced" so that the information on an EFS is consistent with the information contained in the CNS. In August 1986, in its Final Regulations, the USDA reaffirmed its June decision and told one correspondent that it had no basis "for more clarification than already appears" in the June amendments. Thus, the USDA’s Final Regulations abandoned the "all states" approach, limiting information in a state's CNS to information concerning crops produced, and the place of production, in that particular state.

To understand clearly the consequences of choosing the "produced in the state" approach, it is helpful to contrast crops and livestock. If a farmer comes to a lender for crop financing, the lender can inquire where the farmer is growing or intends to grow the crop for which financing is sought. Once the lender knows where the crop is or will be grown, the lender then knows the state in which the crop is to be produced. If the state in which the crop is to be produced has a CNS, the lender must file with that system an EFS that identifies the county or counties within that state where the crop is or will be produced. This is true for the lender regardless of whether its office is located in that state or in another state. Once the crop matures and is harvested, it has been produced in that state and in those counties for that state. Thus that state’s CNS continues to cover the crop even if it is moved to another county within that state or to another state for immediate sale or storage. Moreover, a lender who intends to take already harvested crops as collateral must remember that the county or counties which were the place of production, not the county or counties where the harvested crops are stored (place of location), is the relevant place for determining which state’s CNS controls and which counties must be described in the EFS.

In comparison to crop financing, consider a situation in which a rancher seeks financing for livestock. In accordance with USDA

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251. Id. at 29,450.
252. The real estate description on an EFS is discussed further at infra notes 297-309 and accompanying text.
253. The term "produced" is not defined in section 1324, nor in the USDA regulations. The authors take the position that movement for immediate resale or storage in another county in a state does not involve additional "production" of the crop. The authors also contend that drying or cleaning a harvested crop is not "producing" the crop. Thus, counties in which sale, storage, drying, or cleaning occur are not counties in which the crop was produced. Assuredly, litigation about what is and is not "production" is bound to occur.
regulations, the lender must inquire where the livestock are being or will be produced. If the rancher says that the livestock will be produced in a county in a state with a CNS, the lender knows that state's CNS is the appropriate system in which to file the EFS relating to the livestock. But unlike crops, livestock are being produced wherever they are gaining slaughter weight or pasturing. For livestock financing the terms "produced" and "located," in contrast to crop financing, are more closely synonymous terms under section 1324. Thus, if the livestock are moved from one county within a CNS state to another county within the same CNS state for additional pasturing, the livestock continue to be covered by the CNS of that state, but the lender must amend the EFS to inform the system of a material change in the place of production of the livestock.

In summary, the USDA decision in the Final Regulations to equate location with production and to choose the place of production as determining whether and which CNS covers a particular farm product means that a lender financing crops will be required to file one and only one EFS. A lender financing livestock, however, will have to file only one EFS in a particular state, but may be required to amend that EFS if the livestock are moved to other counties in that state for further production activities. Within a single state, section 1324 crop financing will be fairly analogous to Code crop financing because under both one financing statement suffices. But section 1324 livestock financing within a single state requires greater lender obligations in policing the collateral than does the Code. The Code does not require amendments as livestock location changes, but instead allows a single financing statement to be effective for livestock.

The USDA has correctly limited the farm products included within a CNS to those produced within the state having the system. Adoption of the "produced in the state" approach greatly simplifies sec-

255. The authors believe that livestock moved to another county or another state for immediate resale, and not for the purposes of further growth or gain, are not being produced in the place where they are located for immediate resale. Thus, the place of production and the place of location are not totally synonymous terms for livestock.

256. In the March 1986 Interim Regulations, the USDA required that the EFS description be as of the time of the execution of the EFS and that as of that same time predict where the collateral foreseeably will be located in the future. See supra note 247 and accompanying text. In the Final Regulations, the USDA dropped the time perspective that the description must reflect. The authors conclude, however, that the EFS must provide a description of the place of production as of the time of execution but need not predict future places of production. See 9 C.F.R. § 205.103-.107 (1988). However, lenders have the obligation to police the collateral, and if the place of production changes intrastate, the lender must amend the EFS to reflect this material change. For a discussion of the obligation to amend and the definition of material changes, see supra notes 132-50 and accompanying text. For a discussion of multi-state transactions, see infra notes 513-28 and accompanying text.
tion 1324's implementation within a particular state. System operators will have fewer EFS's to handle, less information to distribute, and the information in the system will be more accurate. Lenders and registrants must simply remember that the correct information to obtain from farmer-borrowers and farmer-sellers is the place of production, not the location, of farm products serving as collateral for a loan.

3. Termination of CNS

If a state obtains certification for a CNS, the most obvious manner in which that certification will terminate is if the state legislature repeals the system's authorizing legislation. States are not obligated to utilize section 1324's CNS alternative and each state has a CNS only if it presents an application for CNS certification. As part of the application process, the USDA requires that the applying state submit all state legislation or other legal authority under which the system is created and operated. Therefore, repeal of a CNS's authorizing legislation means termination of the system. From the effective date of the repealing legislation lenders must give PNS notice to buyers, commission merchants, and selling agents to keep section 1324's protection.

Adoption of a CNS carries the inherent risk that a court may declare that the system is not in compliance with section 1324. If a court rules that a state's CNS is not in compliance with section 1324, that state will no longer have a CNS. Two consequences will follow from such a court ruling. First, from that date forward secured parties must give PNS notice if they desire to receive section 1324's protection. Second, and assuredly more important, secured parties will have no section 1324 protection from the CNS (now declared invalid) for the period prior to the ruling during which the state and secured parties thought that a valid CNS existed, but for which period the court has ruled that the system was invalid. Because of the disastrous consequences of judicially declaring a CNS invalid, the authors can only conclude that courts faced with such challenges will try mightily to construe section 1324 in a manner to avoid that result.

B. Effective Financing Statements (EFS)

258. See supra text accompanying notes 232-36.
259. In response to a query that raised this issue, the USDA wrote: “If a State does not comply with the Statute, it would be considered not to have such a system.” 51 Fed. Reg. 29,451 (1986).
260. In response to a query that raised this issue, the USDA reached the same conclusion that the authors state in the text. See id. at 29,449.
EFS's provide the essential information for CNS's to operate. An EFS that fails to give the system operator the information necessary to provide section 1324's actual notice to buyers, commission merchants, and selling agents has failed its essential function. Moreover, an EFS must provide this information in an orderly, uniform arrangement so that the system operator can put that information into the CNS quickly and accurately. Whether an EFS contains correct information is practically irrelevant if the system operator cannot efficiently and reliably use that information. Thus, both the requisites of actual notice and administrative needs are relevant when interpreting section 1324's statutory language.

Subsection 1324(c)(4) defines the term "effective financing statement" by setting forth requirements that must be satisfied before a document can qualify as a legally valid EFS. A secured party must correctly understand each of these criteria to comply with section 1324 and thereby retain the right, in appropriate circumstances, to pursue conversion liability against buyers, commission merchants, and selling agents.

1. Comparing EFS's and Code Financing Statements

In comparing subsection 1324(c)(4)’s comprehensive definition for an EFS to Code section 9-402’s formal requisites for a Code financing statement, it is immediately apparent that the two documents require far different information and formalities. Secured parties cannot satisfy section 1324 by simply refiling Code financing statements with CNS system operators. Moreover, the same comparison makes it equally clear that section 1324's requirements for EFS's are more detailed and more onerous than the formal requisites of a Code financing statement.261

Although the authors are firmly convinced that state Code filing systems and CNS’s should be kept completely separate and that EFS’s and Code financing statements should be considered and treated as entirely separate documents for separate systems, the authors concede that federal law does not mandate that the two systems be kept completely distinct. Provided subsection 1324(c)(4)’s provisions for EFS’s are satisfied, a state can, if it chooses, adopt EFS’s as state Code financing statements. But as this section will explain, this choice is likely to result in confusion for secured parties and have unexpected effects on the creation, perfection, and priority of security interests under the Code.262 Notwithstanding the problems the authors

262. See 51 Fed. Reg. 29,450 (1986) (There is a question whether "the EFS could be the same as one of the UCC documents. The Statute does not prohibit this, but it may not be feasible as a practical matter.")
foresee, several states have created CNS’s in which EFS’s simultaneously serve as Code farm products financing statements.\textsuperscript{263}

2. Names, Numbers, and Signatures

Subsection 1324(c)(4) mandates that EFS’s contain the name and address of both the secured party and the person indebted. It also requires that EFS’s contain social security numbers of individual debtors or taxpayer identification numbers of nonindividual debtors. Under subsection 1324(c)(2)(C)(iii), these names, addresses, and numbers are in turn included on CNS master lists.

Secured parties should be aware of several potential pitfalls as they prepare the name information on EFS’s. First, the USDA regulations make it clear that the essential information required on an EFS is the name(s) of the person(s) who is offering farm products as collateral for a loan. Usually, that person is the loan debtor. If a secured party collateralizes a debtor’s loan with farm products owned by another person, such as a guarantor, the name of that other person must be on the EFS or the farm products are not subject to section 1324. As the USDA regulations indicate, farm products buyers, commission merchants, or selling agents are not interested in who (the debtor or guarantor) is really liable to the secured party, but rather in identifying the farm products serving as loan collateral. In other words, are the farm products being offered for sale subject to a security interest? If the name of the person who owns the collateralized farm products is not on the EFS, buyers, commissioner merchants, and selling agents cannot answer this question, and they will take such a person’s farm products free of security interests.\textsuperscript{264}

Second, secured parties must make absolutely certain that they provide name information in a manner that allows system operators to alphabetize the names correctly on master lists. Subsection

\textsuperscript{263} Of the initial eleven states receiving certification for centralized notification systems, five have intertwined their centralized notification system with the Uniform Commercial Code. See Idaho Application, \textit{supra} note 87; Maine Application, \textit{supra} note 87; Mississippi Application, \textit{supra} note 87; Montana Application, \textit{supra} note 87; North Dakota Application, \textit{supra} note 108. The applications of the other six states, Arkansas, Louisiana, Nebraska, Oregon, Utah, and Vermont, indicate that these states have separated section 1324’s centralized notification system from security interests under the Uniform Commercial Code. For an additional and more favorable discussion about intertwining the two systems, see Sanford, \textit{supra} note 4, at 25-26, 38-39; \textit{cf.}, 9 C.F.R. \S 205.213(d) (1988).

\textsuperscript{264} 9 C.F.R. \S\S 205.103(b), .213(b) (1988); \textit{see also} 51 Fed. Reg. 22,815 (1986). The USDA made several states amend their certification applications, particularly the accompanying EFS forms, so that it was clear that the names to be included on the EFS must, if applicable, include persons other than the “true” debtor on the loan. \textit{E.g.}, Oklahoma Application, \textit{supra} note 120. The Code similarly defines debtor to include not only the person who is obliged to pay the debt but also the person who owns the collateral. \textit{See} U.C.C. \S 9-105(1)(d).
1324(c)(2)(C)(ii)(I) requires system operators to arrange master lists in alphabetical order. For individuals, the USDA regulations decree that secured parties must provide the correct spelling of individual surnames; for business entities that are not natural persons, secured parties must present an entity's name beginning with the first word or character that is not an article or a punctuation mark. If secured parties provide name information that does not allow system operators to alphabetize that name correctly on master lists, that EFS is ineffective and invalid because it is not informative to the recipients of the master list. If secured parties learn that an EFS contains name information that prevents correct alphabetization, they can file an EFS which corrects the error, but such correcting EFS will be effective and valid only from the date filed and will not relate back to the date of the filing of the initial, incorrect EFS.

Section 1324's EFS definition requires that the document be "an original or reproduced copy thereof" and that it be signed by both the secured party and the debtor. When taken together, these two EFS requirements imply that wherever the EFS is filed, it must be a paper document upon which the required signatures may be seen as originals or facsimiles. The authors conclude, therefore, that section 1324 prohibits direct computer access for filing an EFS with a CNS because such direct filing would not visibly show the required signatures. Moreover, section 1324 explicitly states that the EFS

265. 9 C.F.R. § 205.102(a)-(b) (1988); see also 51 Fed. Reg. 22,815 (1986); id. at 29,450.
266. Contrast the situation discussed in the text with the situation when an EFS is amended to reflect a change in name that occurred after the first EFS was filed. In this latter situation, the change in name would be a material change requiring amendment, but the amendment would relate back to the date of filing of the first EFS that was effective when originally filed. See infra pt. II(G).
267. Food Security Act of 1985, supra note 3, at § 1324(c)(4)(A)-(C). In contrast, a Code financing statement need only be signed by the debtor. See U.C.C. § 9-402(1).
268. See 9 C.F.R. § 205.202(b) (1988). Amendments to, and continuations of, EFS's also must be paper documents when filed in CNS because they too, like the original EFS, must be signed by both the secured party and the debtor. See Food Security Act of 1985, supra note 3, at § 1324(c)(4)(E); 9 C.F.R. § 205.209(c) (1988); infra text accompanying notes 277-81 (discussion of signature requirements for continuation statements).
269. The EFS must be filed as a paper document somewhere with the CNS. However, if the place of filing the paper document is not with the CNS operator, section 1324 authorizes notice of the filing to be given to the central system operator. Such notice of the paper document filing need not be signed and can be transmitted by telephone or electronic means to the central system operator. 9 C.F.R. §§ 205.203, .204(a) (1988). Nebraska has obtained certification for a CNS in which the place of filing of the EFS will be with local county clerks who in turn will provide computer notice of the EFS filing to the central system operator (the Nebraska Secretary of State). Application of the State of Nebraska for Certification with Responses from USDA and Amendments by the State of Nebraska (1986) [hereinafter Nebraska Application] (copy on file with the Kansas Law Review).
is to be filed "by the secured party." Thus, section 1324 allocates the obligation to file and the risk for failure to file to the secured party, and places no obligation on the debtor or system operator to make certain that the EFS is a correct and valid document.

3. Initiation, Lapse, Continuation, Amendment, and Assignment

a. Initiation

USDA Regulation 205.213(a) states that EFS’s can be filed even before secured parties have made a loan to the person offering farm products as collateral. The USDA reached this interpretation because neither EFS’s nor master lists must contain information about the debt amount. The USDA interpretation parallels Code section 9-402, which expressly allows the filing of Code financing statements before any security agreement is made or security interest attaches. The Code allows financing statements to be filed prior to any security agreement to allow a secured party to gain priority over other lenders. Under Code section 9-312(5), priority between lenders can be determined by the date of filing. Thus, under the Code, filing financing statements early is purposefully allowed so that lenders may feel more secure in making loans without constantly having to check filings to see if any intervening loan has been made.

Yet, EFS filings under section 1324 serve a different function than Code financing statements. An EFS provides actual notice to registrants so that they know a security interest exists in the farm products collateral in which they are about to deal and can comply with any payment obligations. The most common payment obligation will be the obligation to write joint-payee checks. Buyers, commission merchants, and selling agents are likely to simply assume that they should write a joint-payee check whenever they deal in a farm product owned by a farmer on the CNS list. If an EFS is filed

271. For a discussion whether the system operator has any liability for accepting an ineffective and invalid EFS, see infra pt. III(E); cf. 9 C.F.R. §§ 205.202(c), .204(b) (1988).
272. U.C.C. § 9-312 comment 5.
273. Buyers, commission merchants, and selling agents are likely to make this assumption for two reasons. First, as previously discussed in Part II(D)(4), EFS’s and master lists do not, and need not, contain payment obligation information. Thus, buyers, commission merchants, and selling agents must take the initiative to contact secured parties to learn precisely what are the payment obligations. As a behavioral matter, buyers, commission merchants, and selling agents are unlikely to make that inquiry. Second, by writing a joint payee check, the buyer, commission merchant, or selling agent almost assuredly is not running any risk of double payment liability even if the payment obligation is different than assumed. By making the check joint payee, the buyer, commission merchant, or selling agent is making certain that the secured party has to participate in cashing the check, which means the secured party will be paid. A paid secured party has suffered no damages even if the payment obligation was something different than a joint payee check.
prior to a loan being made, however, the EFS may cause the farm product producer to have this payment withheld, through a joint payee check, for the benefit of someone who is not entitled to the money. The authors are leery that such interference with a farm product producer's right to payment may be so significant an interference as to constitute a conversion by the secured party and subject the secured party to liability to the farm product producer. To avoid such an argument, secured parties might choose not to file EFS's until a binding loan commitment exists, even though the actual loan disbursement may occur later.274

b. Lapse

Subsection 1324(c)(4)(F) makes an EFS, like a financing statement under Code section 9-403, effective for a five year period from the date of filing. After the five years have passed, subsection 1324(c)(4)(G) states that the EFS lapses. The clear implication is that after lapse the EFS is no longer a valid, effective CNS document.275 However, subsection 1324(c)(4)(G), unlike Code section 9-404, has no procedure by which a farmer or rancher can demand a written termination statement to purge the CNS of EFS's that are no longer valid. A secured party can voluntarily file a notice that an EFS has lapsed, but it cannot be forced to do so. Because section 1324 so meticulously sets forth the requirements for an EFS and a CNS, it must be interpreted as preempting Code section 9-404. Thus, aside from the passage of time or the voluntary actions of a secured party, an EFS is a valid, effective CNS document for a five year period.276

c. Continuation

Within six months before the five year period has passed, subsection 1324(c)(4)(F) allows a secured party to file a continuation statement that extends the EFS for an additional five year period. Although this procedure is analogous to Code section 9-403(3), a significant difference exists between section 1324 continuation and Code con-

274. This potential conversion liability for filing an early EFS, in contrast to the need to file a Code financing statement early to gain priority over other lenders, illustrates a conflict that exists when states intertwine their section 1324 CNS and Code systems. No conflict would exist if the two systems are treated independently.

275. See also U.C.C. § 9-403(2), which explicitly states that upon lapse a financing statement becomes "unperfected as against a person who became a purchaser or lien creditor before lapse."

276. No USDA regulations address the lapsing of EFS's. In a response to a complaint submitted to the USDA, however, the USDA did state that there is "nothing to prevent [the system operator from] purging the system of lapsed EFS's." 51 Fed. Reg. 29,450 (1986).
continuation statements. The USDA has determined that a section 1324 continuation is a form of EFS amendment. As an amendment, subsection 1324(c)(4)(E) applies, which means that section 1324 continuation statements, like other section 1324 amendments, must be signed by both secured parties and debtors. 277

The authors believe that the USDA determination is correct because subsection 1324(c)(4) gives no indication that EFS continuation statements are to be treated differently than the initial EFS filings or EFS amendments, each of which require signatures of both the secured party and the debtor. In contrast, the Code expressly sets forth different signature requirements for the initial filing (debtor only), amendments (secured party and debtor), and continuation statements (secured party only). 278 Moreover, although not addressed specifically by section 1324, the authors conclude that when a secured party must file a new EFS in a different state because the place of production has changed from one CNS state to another, 279 the new EFS must also be signed by both the secured party and the debtor. 280 Thus, section 1324’s signature requirements of EFS’s are more burdensome than those for Code financing statements. Section 1324, unlike the Code, does not remove the requirement that a debtor’s signature be obtained when circumstances foretell that the debtor might be hostile or reluctant to cooperate. 281

d. Amendment and assignment

Although EFS amendments are treated in a previous section, 282 one form of amendment should be specifically mentioned here. Section 1324 nowhere mentions the possibility that a secured party might assign its security interest to someone else. 283 Yet, section 1324 should not be interpreted as prohibiting the common practice of assigning security

277. See 9 C.F.R. § 205.209(d) (1988); see also 51 Fed. Reg. 29,450 (1986). The reader should remember that the section 1324 term “debtor” also includes a person who is subjecting farm products to a security interest even though not the “true” debtor.

278. Compare U.C.C. § 9-402(1) with id. § 9-402(4) and id. § 9-403(3).

279. For a discussion of the need to file a new EFS in multi-state transactions, see infra pt. IV(B)(4)(a).

280. But see U.C.C. § 9-402(2).

281. But see id. § 9-402 comment 4. The differences between the signature requirements for an EFS under section 1324 and a financing statement under the Code become even more significant when the two systems are intertwined. Due to the signature requirements for an EFS, a secured party will have greater difficulty in protecting its interest against other lenders in an intertwined system than if the two systems were independent.

282. See supra pt. II(G).

283. In contrast, the Code specifically provides for assignment in section 9-405 and makes reference to assignment in sections 9-403(3), 9-401(1), and 9-406.
interests. An assignment of a security interest must be considered an amendment involving a material change, however, because buyers, commission merchants, and selling agents are statutorily entitled to know to whom payment obligations are owed. As a material change, the assignment must be completed in compliance with subsection 1324(c)(4)(E)’s requirements that the amendment be “in writing, within 3 months, similarly signed and filed.”

The question that arises is, what does “similarly signed” mean in the context of an assignment amendment? If similarly signed means by the same parties who signed the original EFS, both the debtor and the initial secured party should sign the assignment amendment and clearly indicate who is the assignee. Alternatively, “similarly signed” might mean signed by the debtor and the party who is in fact the secured party at the time the amended EFS is filed, i.e., the assignee. Finally, “similarly signed” might mean three signatures: the debtor’s, the initial secured party’s, and the assignee’s.

When the purpose of an assignment amendment is considered, courts should rule that only the signatures of debtors and initial secured parties are mandatory. An assignment amendment must do the following two things: (1) let the system operator know with confidence that an assignment has legally been made, and (2) provide accurate information about who the assignee (and the assignee’s address) is so that this information can be substituted for the original data placed in the CNS. By having the initial secured party sign the assignment amendment, the system operator knows that the EFS being entered into the system is honestly an amendment, rather than a new EFS involving the debtor and a second lender. Second, the system operator knows that the initial secured party consents to the substitution of information about the assignee on the next CNS master list. Once this assignment information is accurately communicated to CNS registrants, they have the information they need to protect their interests and should not be allowed to complain that the assignment amendment did not contain the signature of the assignee secured party. Even if a court is tempted to believe that subsection 1324(c)(4)(E) requires the assignee’s signature on an assignment amendment, when a registrant challenges its validity because the assignee’s signature is

284. If subsection 1324(c)(4)(E) were interpreted to require only the signature of the initial secured party, section 1324 would mimic Code section 9-406. Although the USDA has not explicitly addressed the issue discussed in the text, it has approved state forms in CNS applications that only require the signature of the initial secured party. E.g., Maine Application, supra note 87, at Maine Form UCC-3; see also Oklahoma Application, supra note 120, at Oklahoma Form S.A.&I EFS-2. Thus, the USDA has impliedly decided that only the signature of the initial secured party is required on an assignment amendment.
missing, the court should protect the validity of such an assignment
amendment through the minor error rule of subsection 1324(c)(4)(I).
Of course, if and when additional changes occur in the collateral rela-
tionship, the assignee is the secured party who has the obligation to
make and file amendments with the CNS or suffer the consequence
of the master list information being "no longer informative" to those
who receive CNS actual notice.

4. EFS Description Issues

Subsection 1324(c)(4)(D)(iv) sets forth three categories of infor-
mation that EFS's must contain to have a proper description of the
subject collateral: the farm product, the amount where applicable,
and a reasonable description of the real estate. Moreover, when subsec-
tion 1324(c)(2)(C)(ii) (which sets forth the information required on
master lists) is considered, it becomes clear that an EFS also must
contain crop year information about the farm products.285 Each of
these four required categories will now be discussed.

a. Farm product

Secured parties must describe the collateral as a specific farm pro-
duct using farm product identifiers that have been approved by cer-
tified CNS operators.286 Secured parties are not allowed to deviate
from using approved farm product identifiers. If they could, system
operators would have no uniformity in the names used for farm pro-
ducts and, therefore, would have no uniform, efficient way of organiz-
ing the master list according to farm product as is required by subsec-
tion 1324(c)(2)(C)(i). Thus, secured parties who file EFS's with a farm
product described in terms other than the approved farm product
identifiers have filed an invalid, ineffective EFS.287 Moreover, if
secured parties deviate from the approved farm product identifier
list, they may often use terms that are too broad (such as "grains"
or "vegetables") thereby violating subsection 1324(c)(5)'s requirement
that farm product descriptions be of specific agricultural com-
modities.288 Secured parties also must realize that each CNS state is allowed
to develop its own list of farm product identifiers to reflect its par-
ticular agricultural conditions.289 Thus, one commodity can have dif-

285. See supra notes at pt. II(D)(3) and accompanying text.
286. See supra pt. III(A)(2)(a)-(b) (discussion of farm products that are included within
the various state certified CNS's).
288. Generic descriptions are not permissible, and the use of generic terms makes the filing
an invalid, ineffective EFS. See id. § 205.106(a).
289. See id. § 205.206(a); see also 51 Fed. Reg. 22,817 (1986).
ferent farm product identifiers in different states. Secured parties must always consult the farm product identifier list of the state where the farm product is being, will be, or was produced at the time the EFS is executed to locate and use the correct farm product description.

b. Amount

Subsection 1324(c)(4)(D)(iv) states that EFS's must describe the "amounts of such [farm] products where applicable." By this language, Congress communicated two ideas. First, Congress recognized that in many, if not most, instances secured parties will take all (in terms of amount) of a farm product as collateral for a loan. Thus, Congress agreed that for the amount description the term "all" is a valid description. As a consequence, secured parties are not required to estimate the number of bushels, the number of sacks, or the number of offspring that the farm products collateral will produce during the term of the loan. Second, Congress decided that if secured parties take less than all (in terms of amount) of a farm product, buyers, commission merchants, or selling agents are entitled to this information. Unlike the Code, which does not require farm products financing statements to include any amount, Congress added an amount description requirement to section 1324 to satisfy demands for greater specificity made by buyers, commission merchants, and selling agents during the legislative process.

In response to subsections 1324(c)(2)(C) and (c)(4)(D), the USDA regulations state that not every EFS or master list must carry specific amount information. In effect, the USDA concluded that subsection 1324(c)(4)(D)(iv)'s language "where applicable" means that when "all" in terms of amount is taken as collateral, amount information is not applicable. In light of this interpretation, the USDA then adopted a default assumption that an EFS or a master list that does not state an amount "constitutes a representation" that all (in terms of amount) of a particular farm product produced by a debtor has

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290. *E.g.*, Mississippi has gained approval for farm product identifiers as follows: "Beans, Butter," "Beans, Dry," "Beans, Lima," "Beans, Snap," and "Beans, Waxed." Mississippi Application, supra note 87. In contrast, Oregon has gained approval for the farm product identifier "Beans." Oregon Application, supra note 239. The difference arises because the agricultural conditions of Mississippi show five distinct markets for the various types of beans, while agricultural conditions in Oregon do not make such distinctions in the bean market.


292. For a discussion of legislative history showing that Congress purposefully adopted greater specificity requirements for section 1324 notices, see supra notes 209-22 and accompanying text.

been taken as collateral for the loan.\textsuperscript{294} This interpretation is correct. Section 1324 allows such a default assumption because amount information is mandated only when less than all is taken as collateral.

But as important, the USDA regulations also properly decreed that if less than all (in terms of amount) of a farm product is taken as collateral, this lesser amount must be specifically and accurately set forth on the EFS and CNS master list.\textsuperscript{295} If a secured party takes less than all (in terms of amount) of a farm product as collateral, but then does not include this specific amount information on the filed EFS, not only is the default assumption false, but the EFS and the master list are "no longer informative" to CNS registrants who are statutorily entitled to amount information "where applicable."\textsuperscript{296}

c. Reasonable description of the property

As secured parties think about describing the property (the real estate and not the farm product itself), the first thing they must remember is that the property to be described is the place where the farm product is produced. As previously explained, despite subsection 1324(c)(4)(D)(iv) which uses the word "located," the USDA has correctly interpreted the word "located" to mean "produced."\textsuperscript{297} Thus, the place of production, not the location, of the farm product is the property that must be reasonably described.\textsuperscript{298}

Subsection 1324(c)(4)(D)(iv) states that EFS's must contain "a reasonable description of the property, including county or parish."\textsuperscript{299} The information required on master lists by subsection 1324(c)(2)(C)(ii)(III) and the information by which CNS registrants can choose to receive partial master lists under subsection 1324(c)(2)(D) is information relating to the county or parish producing the farm

\textsuperscript{294.} \textit{Id.} § 205.207(b); see also 51 Fed. Reg. 22,817 (1986).
\textsuperscript{295.} 9 C.F.R. §§ 205.103(a)(6), 207(d)-(f) (1988).
\textsuperscript{296.} The discussion in the text is an example of conflicting collateral descriptions between the security agreement and its coordinate EFS. \textit{See supra} pt. II(I) (full discussion of such conflict descriptions). Only two of the initial eleven states receiving certification for CNS have provided units of measurement that are to be used by secured parties when indicating that less than all (in terms of amount) of a farm product has been taken as collateral. \textit{See Idaho Application, supra} note 87; \textit{Vermont Application, supra} note 244. Both Idaho and Vermont set forth the following fifteen different units of measurement: acres, bushels, hundredweight, cases, flats, gallons, head, pounds, bins, sacks, tons, hives, lugs, boxes, stubs. The other states leave the description of unit of measurement to the secured parties.
\textsuperscript{297.} \textit{See supra} notes 245-56 and accompanying text.
\textsuperscript{298.} For a full discussion of the USDA determination that "located" means "produced," \textit{see supra} pt. III(A)(2)(c). For a full discussion of the same issue in the PNS alternative and its impact in multi-state transactions, \textit{see infra} pt. IV(B).
\textsuperscript{299.} Food Security Act of 1985, \textit{supra} note 3, at § 1324(c)(4)(D)(iv).
In interpreting these three subsections, the USDA determined that every EFS must contain information about the county(ies) or parish(ies) where the farm product being used as collateral is being, will be, or was produced at the time the EFS is executed, but that EFS’s are not required in each and every instance to give any property description more specific than the county or parish description. Consequently, the USDA again developed a default assumption that if the EFS only sets forth the county or parish of production, the EFS constitutes a representation that all subject farm products produced in that county or parish by that particular debtor are subject to a security interest. At the same time, the USDA regulations also make clear that if secured parties do not take all (in terms of place of production) farm products within a particular county or parish, they must give a more detailed description of the place of production on EFS’s. This more detailed information must be communicated on master lists to CNS registrants.

The USDA’s interpretation of section 1324’s property description requirements should be contrasted with Code property description requirements. Under the Code, a real estate property description is required for farm products collateral only when such collateral is crops to be grown or growing. Moreover, the description required for crops is a description of the “land concerned,” which necessitates a description that identifies the farmland (not just the county or parish) where the crop is growing or to be growing. But under the Code, no other description of farm products collateral (such as livestock) need contain a real estate description.

In contrast, section 1324 requires a real estate description for all farm products collateral, not just crops. This means that section 1324’s EFS description requirements for farm products other than crops impose greater informational burdens upon secured parties than comparable Code financing statements. At the same time, because the USDA regulations interpreted section 1324’s property description to be met, in many instances, by describing only the county or parish where the farm products are produced, section 1324’s property descrip-

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301. Id.
302. Id. § 205.207(c).
303. Id. §§ 205.103(a)(6), .207(d)-(f).
304. See U.C.C. §§ 9-203(1)(a), 9-402(1); see id. § 9-203 comment 2; id. § 9-402, comments 1, 5.
305. For a brief discussion of real estate descriptions for crop financing under the Code and citation to cases about real estate descriptions, see K. Meyer, D. Pedersen, N. Thorson, J. Davidson, Agricultural Law 292-93 (1985) [hereinafter Agricultural Law].
tion is less detailed than Code real estate descriptions for crop financing. Finally, however, if secured parties take less than all (in terms of place of production) of a farm product within a county or parish as collateral, section 1324 imposes a description comparable to Code crop financing statement requirements because in this latter instance both section 1324 (for all farm products) and the Code (for crops) mandate a reasonable description of the farmland where the relevant farm product collateral is being produced. In this latter instance, when secured parties take less than all (in terms of place of production) of a farm product within a county or parish as collateral, Code crop-financing cases construing what is a reasonable real estate description should be relevant precedent.306

The authors believe that the USDA regulations have correctly interpreted section 1324's requirement relating to a reasonable property description. If secured parties have taken a security interest in all farm products produced in a particular county or parish, EFS's which list that county have given a "reasonable description of the property" as required by section 1324.307 Secured parties must be aware, however, that if the farm products are being, will be, or were produced at the time the EFS is executed in more than one county or parish within a CNS state, they must list every county or parish that constitutes a place of production or run the risk that the EFS information will be "no longer informative" about the place of production to CNS registrants at the time of sale. CNS registrants are statutorily entitled to information at the time of sale that accurately states the place of production. Moreover, if EFS's accurately describe the place of production at the time of execution, but the farmer then changes the place of production, secured parties must amend the EFS's to reflect this material change in accordance with subsection 1324(c)(4)(E).308

Secured parties also must remember that the preceding analysis is true if, and only if, all (in terms of place of production) of a farm product within a county or parish is collateral for the loan. If only farm products from a particular place of production, such as a debtor's particular farm, serve as collateral for a loan, an EFS property description that only lists the county or parish is not a "reasonable description of the property." In instances where not all (in terms of place of production) a debtor's farm products are taken as collateral, an EFS that does not provide the more detailed description (of the farmland where the farm products serving as collateral are produced)

306. Cf. 9 C.F.R. § 205.211 (1988); see also infra note 309.
is making a false representation to CNS registrants and is not providing the information to which CNS registrants are statutorily entitled. With respect to these more detailed property descriptions, however, a legal description of the property is not required by section 1324. Section 1324's property description is part of the description of farm products and is not a description of real estate for the purposes of filing in public land records.\textsuperscript{309} Of course, if a secured party provides a description of particular farmland as the place of production of farm products serving as collateral, and then the debtor changes the place of production to another farm, the secured party once again has the obligation to amend the EFS to reflect this material change.

d. Crop year

Although subsection 1324(c)(4)(D) does not specifically require an EFS to state crop year, such information must be on master lists under subsection 1324(c)(2)(C)(ii)(IV). Moreover, the USDA regulations demand that a state CNS must be able to deliver information to its registrants ""for any crop year"" if the registrant requests information for a particular crop year.\textsuperscript{310} Consequently, secured parties must provide crop year information on EFS's so that system operators have the data about crop year necessary for CNS master lists. However, the USDA regulations lighten the informational burden imposed on secured parties by allowing them to claim all crop years of a particular farm product and creating a default assumption that an EFS that does not state any crop year is claiming all crop years.\textsuperscript{311} The implication from the USDA regulations is clear; if secured parties take less than all (in terms of crop year) of a farm product as collateral, they must indicate the limited crop year claim on the EFS,

\textsuperscript{309} When section 1324 was presented to the Senate in November 1985, it did require a ""legal description of the real estate concerned."" This requirement was deleted in Conference Committee and section 1324 was passed with language that only requires a ""reasonable description"" of the property. \textit{Compare} 131 Cong. Rec., supra note 9, at S16,297 \textit{with} Food Security Act of 1985, supra note 3, at § 1324(c)(4)(D)(iv). By using the terms ""reasonable description,"" section 1324 uses language similar to the Code's general description rule of section 9-110. This amendment and similarity in language make it clear that section 1324 does not require a ""legal description"" of real estate when a more detailed property description than county or parish is required. \textit{Accord} Op. Idaho Att'y Gen. No. 86-17 (1986); cf. U.C.C. § 9-402 comment 1. For a discussion of this issue in the property description need for a PNS notice, see infra pt. IV(B)(2).

\textsuperscript{310} 9 C.F.R. § 205.105(a) (1988).

\textsuperscript{311} \textit{Id.} § 205.107(b). For a discussion of crop year information in section 1324's PNS and CNS alternatives, see \textit{supra} pt. II(D)(3).
and system operators must note this limited crop year claim on master lists for communication to limited CNS registrants.\textsuperscript{312}

Although these rules about when crop year information is to be included on an EFS are relatively clear, the definition of crop year is not. As a concept, crop year is most clear when applied to an annual crop that is grown within a single calendar year, such as potatoes planted in March and harvested in July. In addition, ranchers often refer to a calf or lamb crop for the year in which the calves or lambs are born. Beyond these two examples, however, the concept is murkier. For example, what is the crop year for a fall planted crop that is not harvested until the following year? What is the crop year for perennial crops, such as alfalfa, that may be sold in the field in one year for the buyer to harvest the alfalfa bales in a later year? What is the crop year for livestock acquired for breeding but which can be sold at any time during their breeding years? These questions arise because section 1324 does not limit the crop year information requirement to the two obvious examples. Crop year information is a requirement applicable to all farm products that serve as collateral for a loan.\textsuperscript{313}

To assist in clarifying the concept of crop year, the USDA developed the following three crop year definitions: 1) for “a crop grown in the soil,” the year of harvest; 2) for “animals,” the year born or acquired; and 3) for “poultry and eggs,” the year of sale.\textsuperscript{314} The USDA definitions leave undefined the crop year for many other farm product. For example, what is the crop year of milk? Should a lender analogize milk to crops and list the year of production as the year of milk harvest? Or, should a lender analogize milk to eggs and list the year of sale as the crop year? Because the crop year concept was added by the congressional Conference Committee without discussion and because the USDA regulations do not provide complete definitions, secured parties literally have no clue about how to define crop year.

In an apparent attempt to remedy the limited coverage of its crop

\textsuperscript{312} See 9 C.F.R. § 205.103(a)(6) (1988); cf. id. § 205.207(d)-(f). If a lender attempts to avoid the difficulties of crop year definition by relying upon the default assumption when in fact not all crop years of a farm product are taken as collateral for the loan, the lender has overclaimed in the description, and the EFS is an invalid and ineffective document. See supra pt. II(I) (full discussion of the dangers of overclaiming collateral after the passage of section 1324).

\textsuperscript{313} In comments to its proposed regulations, the USDA received several complaints that crop year information about livestock or trees made no sense and requesting that crop year information be deleted. See 51 Fed. Reg. 22,817 (1986); id. at 29,450. To these responses the USDA could only reply, correctly, that crop year information is mandated by section 1324.

\textsuperscript{314} 9 C.F.R. § 205.107(a) (1988).
year definitions, USDA Regulation 205.101(b)(9) requires a state applying for certification to "[s]how how the system will interpret the term 'crop year'." In response to this certification requirement, nine of the initial eleven states receiving certification simply restated in their application the crop year definitions that the USDA had provided in Regulation 205.107(a). Idaho expanded the definition of crop year to include: 1) "for a plant or plant product," the year of harvest; 2) "for mammals," the year born or acquired; 3) "for bees and worms," the year alive in adult stage; 4) "for poultry and the products of mammals, poultry and bees (i.e. milk, eggs, honey)," the year of sale; and 5) "for fish and other aquaculture," the year of harvest. Vermont purposefully imitated Idaho with respect to bees and worms but otherwise kept the USDA’s definitions. Idaho’s definitions are the most comprehensive and apparently do cover almost all possible farm products, but they apply only to the Idaho CNS. Thus, the limited crop year definitions provided by the USDA are the only proffered definitions that have widescale applicability.

These definitions of crop year indicate that a CNS will soon contain information about farm products subject to security interests for years prior to the filing of the EFS and for years beyond the five year validity of EFS documents. For example, a secured party taking a security interest in a herd of cattle bought seven years ago must report the crop year as the year in which they were bought. But to a CNS registrant who consults the master list four years later, this crop year information, now eleven years in the past, though accurate, might well appear outdated and mislead the registrant into thinking (falsely) that the cattle being sold are not subject to a security interest. Concurrently, a secured party taking a security interest in Christmas trees that are expected to be harvested seven years in the future must report the crop year as the year of expected harvest. If

315. Id. § 205.101(b)(9).
316. The nine state applications that simply restate the USDA definitions of crop year are Arkansas, Louisiana, Maine, Mississippi, Montana, Nebraska, North Dakota, Oregon, and Utah. Further evidence of confusion surrounding crop year information is provided by the fact that Arkansas, Maine, North Dakota, and Oregon were informed by the USDA that clarifications relating to crop year had to be provided in the instructions accompanying the EFS forms before the USDA would grant certification. Without the clarifications, the USDA said that secured parties would have inadequate guidance as to what “crop year” means when completing the EFS forms. See Arkansas Application, supra note 108; Maine Application, supra note 87; North Dakota Application, supra note 108; Oregon Application, supra note 239.
318. See Vermont Application, supra note 244, at Central Filing System Rule A.1. In its application, Vermont labeled the section devoted to crop year as Making Sense of “Crop Year.” Id.
the Christmas trees are sold while in the field prior to the expected year of harvest, does the EFS adequately inform the buyer, commission merchant, or selling agent that those Christmas trees are serving as collateral for a loan?\textsuperscript{320} The definition of crop year, however, does not appear to allow the secured party in the Christmas tree example to claim as crop years any year but the expected year of harvest. In both examples, the crop year information does not seem to provide useful information to those who are reading the master list distributed by a CNS state.\textsuperscript{321} On the contrary, the crop year information appears as likely to mislead as to inform.

It is unclear from the legislative history what purpose "crop year" information serves. Buyers, commission merchants, and selling agents may say, for example, that they need to know if a debtor's wheat grown in 1986 is collateral for a loan when the same debtor's 1987 wheat is not collateral for the loan.\textsuperscript{322} Although that statement is understandable, it is unclear how buyers, commission merchants, and selling agents will be able in many instances to distinguish fungible 1986 wheat from 1987 wheat. If the farmer lies or is mistaken about which crop is being sold, the buyers, commission merchants, or selling agents bear the risk of the farmer's lie or mistake if the correct crop year information has been provided on a properly filed EFS.\textsuperscript{323} As a consequence, they will be forced to assume for their own protection that any fungible farm product being sold is the farm product from a crop year covered by the secured party's security interest.

In light of the difficulties of defining crop year for many farm products and the limited utility of the information, the authors conclude that secured parties are likely to turn "crop year" into an obsolete requirement by always taking as collateral the farm product from all years in which that farm product was in the past, is presently, or will be in the future produced. By taking all (in terms of crop

\textsuperscript{320} The authors are assuming that Christmas trees are personal property covered as farm products under section 1324 and are not part of the real estate. See Schneider, \textit{The Ownership of Growing Crops: The Continuing Struggle Between Property Law and the Uniform Commercial Code}, 8 J. AGRIC. TAX’N & L. 99 (1986).


\textsuperscript{322} See United States v. Riceland Foods, Inc., 504 F. Supp. 1258 (E.D. Ark. 1981). Section 1324’s requirement that crop year information be supplied is consistent with its preference that more detailed information should be provided on its actual notice alternatives than is provided on Code financing statements.

\textsuperscript{323} Secured parties bear the risk of a CNS not providing correct information to CNS registrants. 9 C.F.R. § 205.208(g) (1988). But once a secured party has fully complied with section 1324’s CNS requirements, the secured party is statutorily entitled to protection, and the risk of lies or mistakes at the time of sale shifts to buyers, commission merchants, or selling agents. Accord Richards, \textit{supra} note 4, at 413-14.
years) farm products as collateral, secured parties not only avoid difficult definitional questions and the risks of misdefinition, but they gain a default assumption and ensure that the EFS will be effective against that farm product throughout its five year life as a valid document. Moreover, the authors are convinced that turning “crop year” into an obsolete requirement is also the most sensible solution to the problems that this requirement creates for section 1324’s actual notice under either CNS or PNS. Of course, this is correct if, and only if, secured parties do in fact take all (in terms of crop years) of a farm product as collateral in the security agreement. “All” crop years can be taken only in the security agreement and then by default reported on the EFS to the system operator, but “all” crop years has no meaning on an EFS alone if not accurately reflecting an underlying security agreement.

e. One EFS for multiple products and multiple counties

Subsection 1324(c)(4)(D)(iv) states that the EFS must contain a “description of the farm products” plus a reasonable description of the county or parish where the farm product is located. Although this statutory language is not completely clear, Congress’s use of the plural “farm products” certainly implies that a single EFS can list more than one farm product of an individual debtor. For an EFS to be a valid, effective document, however, it must also contain a reasonable description of the property (meaning real estate) where those multiple farm products are produced. If those multiple farm products are produced in multiple counties or parishes, it follows that a single EFS can list not only more than one farm product, but also each and every county or parish where those farm products are produced. Thus, the conclusion follows that a single EFS on a particular debtor can list multiple farm products and multiple counties and still be a valid, effective section 1324 document.

When this precise issue was brought to the USDA’s attention, it responded with a regulation that decrees that a state has the discretion to allow EFS’s to reflect multiple farm products in multiple counties or parishes. The USDA did not mandate that states allow multiple farm products produced in multiple counties to be reported on

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325. For a case in which poor drafting in terms of crop years resulted in a court concluding that a secured party had not taken farm products as collateral for a loan, see In re Jackson, #79-575-c (Bankr. S.D. Iowa 1980), reported in AGRICULTURAL LAW, supra note 305, at 288.
327. 9 C.F.R. § 205.103(c) (1988).
a single EFS because of concern about the administrative burdens of indexing multiple farm products from multiple counties or parishes listed on a single EFS. In response to these USDA regulations, all eleven of the initial states receiving certification for CNS gained approval for forms that do allow multiple products and multiple counties or parishes on a single EFS. These states apparently decided that it would be a lesser administrative burden to index multiple pieces of information from a single EFS than to deal with the significantly greater number of EFS's that would result if each EFS could list only one farm product.

f. Secured party tactics to simplify EFS description requirements

Clearly, EFS description requirements can be quite detailed and, therefore, burdensome to secured parties who must satisfy them. But, secured parties who properly understand section 1324 and the USDA regulations have two tactics that they can use to greatly simplify their task.

Tactic One: Secured parties should utilize the default assumptions that section 1324 and the USDA regulations allow with respect to amount, property description, and crop year. In other words, secured parties in every instance possible should take a security interest in a particular farm product for all crop years, for all real estate within the county(ies) or parish(es) listed, and for all amounts. If the underlying security agreement reflects such broad taking of a debtor's farm product as collateral, secured parties avoid the need to provide on the EFS any amount, any crop year, or any property description geographically smaller than the county(ies) or parish(es) where that farm product was, is, or will be produced. As a practical matter, utilizing the default assumptions fully is the only sensible response for secured parties. As a behavioral matter, the authors are convinced that this will be the response of secured parties.

329. For a discussion of this same issue in PNS notice, see infra pt. IV(C)(1).
330. As an illustration of the discussion in the text, the following is a sample collateral description that secured parties will likely use extensively for farm products collateral under section 1324: "all (in terms of amount) wheat produced in all crop years, whether occurring before or after the date of this security agreement, wherever produced in the following five counties: Cleveland, McClain, Grady, Caddo, Canadian." With this collateral description in the security agreement, the secured party need only list wheat and the five counties on the filed EFS to meet the description requirements of section 1324. No information relating to amount, crop years, or specific farmland in the five counties needs to be set forth because the default assumptions apply which means "all" amount, "all" crop years, and "all" farms have been claimed simultaneously.
In addition to their desire to lessen EFS informational burdens, secured parties also have an incentive to take all amounts of all crop years from all farmlands where a debtor produces a farm product as collateral because of the allocation of burdens of proof by section 1324. Although buyers, commission merchants, and selling agents bear the risk of lies or mistakes at the time of sale,331 secured parties have the burden of proving that buyers, commission merchants, or selling agents in fact bought or sold farm products against which secured parties have the burden of proving the elements of conversion. If secured parties have taken less than all amounts, or less than all crop years for less than all farmlands of a particular debtor for a particular farm product, secured parties will rarely, or only with great difficulty, be able to trace the particular encumbered farm products (as distinguished from other identical, fungible farm products from other crop years, or other farms of the debtor, or in noncovered amounts) to the farm products transaction about which secured parties complain and for which they seek payment.332 Moreover, courts should interpret section 1324 to impose a strict tracing requirement upon secured parties for two reasons. First, the purpose of section 1324, as explicitly stated in subsections 1324(a) and (b), is to remove burdens upon interstate commerce caused by security interests that are enforced against buyers, commission merchants, and selling agents.333 Section 1324 is written, therefore, with a bias against easy enforcement against buyers, commission merchants, or selling agents. Second, section 1324 places the burden upon secured parties to provide the information that allows buyers, commission merchants, or selling agents to distinguish between farm products that are subject to a security interest from those that are not.334 Section 1324 purposefully satisfied the demands of buyers, commission merchants, and selling agents for greater specificity in section 1324’s actual notice. Thus, secured parties who do not avail themselves of the broad collateral claims allowed by section 1324’s default assumptions often will be unable to satisfy the strict tracing requirements, making a lawsuit against a buyer, commission merchant, or selling agent a futile exercise.335

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331. See supra note 323 and accompanying text.
332. Secured parties must remember that in trying to trace a farmer’s farm products collateral to a particular farm products transaction the farmer is unlikely to cooperate in providing information. Furthermore, attempts through the subpoena power to make the farmer provide information can be thwarted if the farmer asserts his fifth amendment privilege against self-incrimination with respect to the crime of selling mortgaged property.
335. The only instance in which a secured party should take less than “all” (in all its sec-
Tactic Two: Because every state whose CNS has been certified allows multiple farm products in multiple counties or parishes to be listed on a single EFS for a particular debtor and building on the default assumptions of tactic one, secured parties have an even easier description tactic. Secured parties cannot file an EFS that claims "all farm products" or "all crops" or "all livestock" because such collateral descriptions do not properly identify a specific farm product as required by subsection 1324(c)(5)'s definition of farm product. Furthermore, secured parties cannot use "everywhere produced within the state" for the property description because section 1324 and the USDA regulations require that the secured party list counties or parishes for which a collateral claim for a particular farm product produced therein is made. Secured parties can gain a default assumption for all farmland within particular counties or parishes, but secured parties must first list those counties or parishes on the EFS.

Nevertheless, section 1324 does not in any way prevent secured parties from taking a security interest against a particular named debtor in all farm products of whatever type wherever produced within a particular CNS state. For example, section 1324 does not say that secured parties can only take two types of farm products as collateral for a loan from any individual debtor. Nor does section 1324 state that secured parties can only take farm products from four or less counties or parishes as collateral for a loan from any individual debtor. Secured parties, therefore, can use security agreement collateral descriptions that read "all crops, all livestock, all products of crops or livestock wherever produced within this state." Once secured par-
ties have used such a broad, allowable collateral claim in the security agreement, they must translate this security agreement claim into acceptable EFS descriptions. They can do so by simply photocopying the farm product identifier list developed by that particular state and a list of every county in the state. The secured party then should staple the two photocopied lists to the EFS with the following notation: "Secured party takes a security interest in every specific farm product on the attached list for each and every county set forth on the attached list." With the attached lists and notation, the secured party has filed a multi-farm product, multi-county or parish EFS as allowed by certified CNS's. More importantly, by using this photocopy tactic with the accompanying notation, secured parties have properly translated the broad collateral description of the security agreement into terms acceptable for an EFS. In effect, tactic two provides an easy means by which secured parties can make a valid, effective section 1324 claim against all the farm products produced throughout any particular CNS state by a named debtor.

Secured parties have an excellent reason for wanting to use a security agreement backed by an EFS as described in the preceding paragraph. Secured parties bear the responsibility for policing the collateral and amending EFS's when the information on an EFS is no longer informative. Thus, secured parties must be concerned about the risk of lending money to an agricultural producer who then uses the money to produce a different farm product in a different county than those listed on the EFS. By using a multi-farm product, multi-county or parish EFS as described in the preceding paragraph, the secured party has greatly reduced the burden of policing the collateral and amending the EFS because the master list distributed to registrants should show the secured party as having a security interest against every farm product produced in every county of the state where the CNS was filed. The secured party should be adequately protected against the risks of a farmer changing crops or place of production intrastate.

System operators faced with secured parties utilizing tactic two are likely to complain about the additional work that is generated by

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338. Every state must develop a farm product identifier list even if the state gains certification for all farm products produced within that state. Each state must have a farm product identifier list because the master list must be organized by farm product and because buyers, commission merchants, and selling agents who register with the system must be allowed to register only for specific farm products if they desire to do so. See infra pt. III(A)(2)(b).


these multi-farm product, multi-county or parish EFS’s.\footnote{341} In accord with section 1324, states have two permissible options. First, states can decide to limit EFS’s to one or a specified number of farm products for one or a specified number of counties or parishes.\footnote{342} States who choose this option run the risk that secured parties will comply with the mandated limitations, but simply fill out additional EFS’s. At some point the additional paperwork of a larger number of EFS’s outweighs the administrative burden of cross-indexing multiple pieces of information.\footnote{343} Second, states can decide to set filing fees for EFS’s based on the amount of information a secured party requests be entered into CNS.\footnote{344} If a single EFS can cover multiple farm products in multiple counties, a flat fee (so long as it is small) encourages secured parties to make multi-farm product and multi-county or parish claims. If the filing fee for EFS’s were based on the amount of data requested to be entered into CNS, secured parties would face a direct relationship between cost and information. Depending on the fee charged for bits of information, secured parties might have

\footnote{341} With a proper software program, system operators should have no difficulty in handling multi-farm product, multi-county, or parish EFS’s. Once information about the name and address of both the secured party and the debtor and the debtor’s social security number or taxpayer identification number has been entered into the system, a single key stroke can globally place this unique EFS information under every farm product for every county for every crop year for all amounts of the farm product.

The major impact of these multi-farm product, multi-county or parish EFS’s is not on the difficulty of handling the information, but on the length and arrangement of the master list. The list will be much longer because the names, addresses, and social security number or taxpayer identification number of each agricultural loan will be repeated under every farm product. Moreover, this multi-farm product, multi-county or parish EFS, like the EFS in tactic one which uses section 1324’s permissible default assumptions, means that the most common geographical description will be “all counties/parishes” and the most common crop year description will be “all crop years.”

\footnote{342} 9 C.F.R. § 205.103(c) (1988); see \textit{supra} notes 326-29 and accompanying text.

\footnote{343} Montana initially allowed an unlimited number of farm products in an unlimited number of counties to be listed on a single EFS. When secured parties responded in the manner described in the text, Montana limited its EFS form to eight farm products per form. Secured parties are not, because under section 1324 they cannot be, prohibited from filing additional EFS’s each with another eight farm products claimed as collateral. Many secured parties have responded by sending more than one EFS to the Montana system operator for each agricultural loan being made to an individual debtor. As far as the Montana Secretary of State is concerned, the saving grace of what is now happening is that each EFS must be accompanied by a filing fee. Work has not been significantly reduced, but revenues for the system are up. Telephone interview with Ms. Linda Watson, Office of Secretary of State of Montana (Dec. 23, 1987).

\footnote{344} 9 C.F.R. § 205.205 (1988). For an additional discussion about fees, see \textit{supra} pt. III(D)(2).

\footnote{345} Of the initial eleven states gaining certification for CNS, all but two charge a flat fee for an EFS regardless of the amount of information that the secured party puts on the form. The two states with a different fee structure for EFS filings are Montana and Idaho. See Idaho Application, \textit{supra} note 87; Montana Application, \textit{supra} note 87.
an economic incentive to make abridged farm product and county or parish claims on EFS's even if the security agreement wisely continues to use the broad, allowable language of "all crops, all livestock, and all products of crops or livestock wherever produced within this state."346 Whether the savings from reducing the information on EFS's because of the increased filing fee are greater than the incentive to increase information on EFS's to avoid policing and amendment obligations and the economic loss that may occur is a business judgment that each secured party must make.

5. EFS Additional Information

USDA Regulation 205.103(a) sets forth the minimum information that an EFS must contain, but the regulation then adds in subsection (b) that states have discretion to require additional information. Regulation 205.103(b) deserves discussion because its language is subject to misinterpretation. The USDA did not adequately distinguish in subsection (b) between three different types of additional information that states might try to require in an EFS.

a. Preempted additional information

States might be tempted to require that EFS's provide a description of the real estate by section, township, and range. This temptation could be particularly strong in a state that has intertwined section 1324 and the Code because with this real estate description the filed document would satisfy both section 1324 and Code section 9-402.347 Section 1324, however, purposefully does not require any geographical description smaller than county or parish if all farm products produced in that county or parish are serving as collateral for a loan. Moreover, even when a geographical description smaller than a county or parish is required, section 1324 purposefully does not mandate a legal description adequate for real estate records.348

346. Idaho is the only state of the initial eleven to gain certification for CNS to base the EFS filing fee on the amount of information contained on the form. See Idaho Application supra note 87, at Idaho Admin. Rule 34.U.01.K(i). By making secured parties pay based on the amount of information they request to be entered into CNS, Idaho determines the fee for secured parties in a way analogous to the fee charged registrants for the master list or portions of the master list. Registrants are charged a fee dependent upon the amount of information and the mode of distribution requested by the registrant. See infra notes 422, 424.

347. The EFS forms filed with the applications of the states of Louisiana and North Dakota contain blanks that request information on the section, township, and range of the real estate where the farm product is produced. The USDA approved these forms without challenge. See Louisiana Application, supra note 168; North Dakota Application, supra note 108. North Dakota clearly intertwines section 1324 and the Code while Louisiana's Application indicates that the two systems are not intertwined.

348. See supra pt. III(B)(4)(c).
Thus, secured parties who file EFS's that do not provide the requested information on section, township, and range have filed proper EFS's if they list county or parish in which the farm products taken as collateral are produced. Although it is true that the requested additional real estate information does not destroy section 1324 EFS's, secured parties might prefer to ignore the request for additional real estate information due to a desire to simplify EFS descriptions and to avoid policing and amending obligations. Because secured parties who ignore the request for additional real estate information have satisfied section 1324's description requirements, they are statutorily entitled to CNS protection even though CNS states may demand additional real estate information. States making this demand are preempted from refusing to give section 1324 protection to such secured parties.349

The preceding discussion illustrates that the discretion of a state to demand additional information on an EFS is limited by the doctrine of preemption. A state cannot demand additional information on an EFS if that additional information reduces or undermines section 1324's statutory protections and the manner in which secured parties gain those protections. The USDA did not make this point clear in Regulation 205.103(b). Its actions in approving forms that make preempted requests indicates that it did not adequately recognize the point.

b. Required additional information

The USDA apparently did not mean for Regulation 205.103(b) to apply to additional information needed to distinguish some farm products of a particular debtor subject to a security interest from other farm products of the same debtor that are not subject to that security interest. Section 1324 requires that the information necessary to make the distinction between farm products serving and not serving as collateral be placed on an EFS so that registrants can have this specific and detailed information at the time of sale of the debtor's farm products.350 For example, a secured party taking only a debtor's purebred

349. Accord Op. Idaho Att'y Gen. No. 86-17 (1986). This conflict between the real estate information needed for section 1324 protection and for Code crop financing protection illustrates well how intertwining the systems has adverse consequences for secured parties. Secured parties who use the same form to comply with both section 1324 and Code section 9-402(1) have subjected themselves to risks under section 1324 that they probably would not take if the systems were not intertwined. At the same time, the secured party who chooses only to provide sufficient information to satisfy section 1324 cannot gain Code priority against other lenders because the county or parish description is not adequate to satisfy section 9-402(1)'s requirements for real estate description on a crop financing statement.

Red Angus cattle as collateral for a loan, but not the debtor’s other cattle, is required to state on the EFS that the specific farm product serving as collateral is “cattle” and then more specifically “Red Angus” cattle of that particular debtor. A secured party who takes a security interest only in a debtor’s purebred Red Angus but who then claims a security interest in all cattle on a CNS has overclaimed. Therefore, the EFS is not informative to registrants.

USDA Regulation 205.103(b) did not clearly indicate that it only applies to additional information other than information required by section 1324’ specificity requirements. System operators too must be aware of the distinction between additional information that is within their discretion to request and additional information that is mandatory. By exercising their discretion, system operators cannot reduce the informational burdens required of secured parties nor the information to which registrants are statutorily entitled.

c. Optional additional information

When the USDA wrote Regulation 205.103(b), stating that states have discretion to require additional EFS information, it probably was thinking of information that was purely optional. For example, section 1324 does not require that payment obligations be set forth on an EFS or be reported on the master list distributed to registrants. Thus, a state CNS complies with section 1324 even if it does not include payment obligation information. At the same time, however, secured parties will have payment obligations governing the sale of the farm products collateral by the debtor. Because payment obliga-

351. The initial eleven state applications for CNS certification do not provide clear evidence that every system operator realized that additional information, beyond the minimum EFS requirements specified by USDA Regulation 205.103(a), must at times be reported on an EFS and then recorded in CNS and distributed to CNS registrants. The Nebraska application does indicate that the system operator clearly understood this “required” additional information concept. Under the Nebraska CNS, the EFS form has a clearly marked space for additional information, and the facsimile of a master list filed with the application shows that this additional information will be reported to CNS registrants. For reasons of computer limitations, Nebraska limits the additional information to no more than thirty characters of data. Nebraska Application, supra note 269. Luckily the example discussed in the text (purebred Red Angus) is only sixteen characters in length.

352. For a discussion of section 1324’s different handling of payment obligations in PNS and CNS, see supra pt. II(D)(4).

353. If the secured party has not imposed any payment obligations, it cannot impose any double payment liability on a buyer, commission merchant, or selling agent because there were no payment obligations for which buyers, commission merchants, or selling agents were required to obtain a waiver or release in accord with subsections 1324(e)(3)(B) and (g)(2)(D)(ii). Although the term “payment obligations” is not defined in section 1324, the authors interpret the term to mean obligations relating to payment, such as a joint payee check, but to exclude obligations not relating to payment, such as the obligation for the debtor to obtain written consent prior to any sale of the farm products collateral.
tion information exists and is useful to CNS registrants, a state could decide to request that secured parties provide this existing information on EFS’s filed with CNS. 354

Secured parties cannot claim that such a request for additional information is reducing their section 1324 protections and, therefore, preempted; nor can CNS registrants claim that such additional information is mandatory additional information. When secured parties cannot attack the request nor CNS registrants demand the information, the information is properly classified as optional additional information that is within the state’s discretion to request if the state desires to do so under Regulation 205.103(b). USDA Regulation 205.103(b) should be interpreted to apply only to information that is properly classified as optional additional information. The authors do not here speculate as to what other information, aside from payment obligations, falls within this optional classification. 355 But the authors do believe that the standard they have enunciated for what is within a state’s discretionary power to request is the correct standard for judging state requests for additional information on EFS’s.

C. Buyer Registration and CNS Master Lists

Once a secured party files an EFS with the CNS of the state where the farm product is produced, buyers, commission merchants, and selling agents have several choices in conducting their business. First, they can take no action whatsoever and simply continue to buy or sell farm products without regard to whether the farm products are encumbered by security interests. Subsections 1324(e)(2) and (g)(2)(C) make it absolutely clear that this “no action” approach leaves buyers, commission merchants, and selling agents subject to the filed security interest and liable for “double payment” on the farm products. 356

354. Louisiana has decided to request that secured parties indicate on the EFS whether they require joint payee checks. Louisiana Application, supra note 168, at Louisiana Form CR-1. It is not clear from the Louisiana application, however, that this payment obligation information will be reported to CNS registrants on the master list. See id. at Louisiana Admin. Reg., tit. 7, ch. 181, § 18,101 (Encumbrance certificate definition); id. § 18,111 (Farm Product Encumbrance List [Master List]). If Louisiana does not report the payment obligation information to CNS registrants, the system must want the information to respond to oral or written queries concerning payment obligations. No other state of the initial eleven seeking CNS certification requests payment obligation information from secured parties. Utah indicates that if such payment obligation information is voluntarily reported, the information will be communicated to CNS registrants. See Utah Application, supra note 168.

355. As an example of the kind of additional information that a state might request, the authors note that Louisiana also requests secured parties to list the amount of the loan on the EFS. Louisiana Application, supra note 168, at Louisiana Form CR-1.

356. As also is stated in subsections 1324(e)(2)(B) and (g)(2)(C)(ii), a precondition to the buyer being held liable is that the lender has filed a proper EFS with the correct CNS. If
Second, they can register with the CNS to receive periodic master lists of the debtors who have used farm products as collateral for loans and their secured parties.\textsuperscript{357} If registered buyers, commission merchants, and selling agents receive actual notice of a security interest in farm products from the CNS, they take free of security interests in the subject farm products only if they perform the payment obligations that exist between the agricultural producer and the secured party with regard to those farm products.\textsuperscript{358}

As previously discussed, a state’s CNS only contains information on farm products produced within that state.\textsuperscript{359} Moreover, the state with a CNS where a farm product is produced is the only state whose CNS applies to transactions relating to that farm product.\textsuperscript{360} It follows that once EFS’s have been filed with the appropriate CNS’s, the secured party has done everything section 1324 requires to protect the security interest. Furthermore, the fact that the farm product is subsequently moved from the state where it was produced to another state for sale or other nonproduction purpose does not render an original EFS ineffective.\textsuperscript{361}

In light of section 1324’s structure, buyers, commission merchants, and selling agents must, in every farm product transaction, inquire and correctly learn where the farm product was produced. This is their burden under section 1324.\textsuperscript{362} If they are told truthfully that

\begin{itemize}
  \item the secured party has failed to file a proper EFS, the buyer, commission merchant, or selling agent takes free of the security interest even when the buyer, commission merchant and selling agent also have failed to register. The general rule of “clear title” in section 1324, as expressed in subsections 1324(d) and (g)(1) governs in a situation in which the lender has failed to perform the prerequisite act of filing. In other words, the need for buyers, commission merchants, or selling agents to register or be held liable for double payment on a particular farm product only arises if that farm product has been properly entered into a centralized notification system.
  \item Buyers, commission merchants, and selling agents may be able to argue that the sale was authorized under Code section 9-306(2) or the tort law doctrine of conversion and thereby gain protection from double payment. See Kershen and Hardin, \textit{supra} note 1, at notes 276-88 and accompanying text.
  \item Food Security Act of 1985, \textit{supra} note 3, at § 1324(c)(2)(D)-(E).
  \item Id. § 1324(e)(3), (g)(2)(D).
  \item For a full discussion of the “produced” within the state limitation of CNS’s, see \textit{supra} notes 245-56 and accompanying text.
  \item For a full discussion of the applicability of only one state’s law to a particular farm product transaction, see \textit{supra} notes 313-28 and accompanying text.
  \item Note that buyers, commission merchants, and selling agents are required only to inquire and correctly learn where the farm product was produced. They are not required to obtain any kind of seller certificate from the farmer or rancher. Proposals that buyers, commission merchants, and selling agents be required to obtain seller certificates were purposefully not included in section 1324. H.R. Rep. No. 271, 99th Cong., 1st Sess., pt. 1, at 110 (1985) (“[T]his Act would preempt state laws that set . . . requirements that the buyer . . . obtain no-lien certificates from the farm products sellers, . . .’’); see Senate Hearings, \textit{supra} note
\end{itemize}
the farm product was produced in a state where PNS is the notification method, they must consult actual PNS notices received directly from secured parties in that state to learn whether the farm product is encumbered. If they are told truthfully that the farm product was produced in a state with a CNS, they must consult that system through one of the two methods discussed below to learn whether the farm product is encumbered. More strikingly, if the selling farmer or rancher lies about or mistakenly reports where the farm product was produced, and if the secured party has correctly filed an EFS with the correct CNS, buyers, commission merchants, and selling agents bear the risk of this dishonesty or mistake and can be held liable for double payment. On the other hand, if the farmer or rancher misleads the secured party about where the farm products are being, will be, or were produced at the time the EFS is executed, the secured party will not be able to provide correct information on the EFS. Thus, buyers, commission merchants, and selling agents will take free of the double payment risk. As a rule, section 1324 places the risk of loss due to farmer or rancher fraud or mistake on the person against whom the fraud or mistake has been perpetrated. Given these general guidelines, this article now addresses several important consequences concerning registration.

1. Where to Register

To acquire the greatest amount of information and the greatest protection from “double payment” liability, buyers, commission merchants, and selling agents routinely dealing in farm products from more than one state should register in all states that have certified CNS’s. By registering with all CNS’s they will be accountable for security interests against farm products produced in those states only if those security interests are described in the lists distributed by the systems and if they receive those lists. If a security interest has been properly filed in the correct system, but for some reason is not included on the distributed list, system registrants take free of that security interest because they have not received actual notice of it.

46, at 68-79 (statement of Gene Swackhamer, President of the Farm Credit Banks of Baltimore and the Baltimore District Farm Credit Council, presenting a proposal for buyers to obtain a no-lien certificate from the farm product seller).

363. See Richards, supra note 4, at 413-14.

364. For a full discussion of when actual notice is received under section 1324, see supra pt. II(E).

365. 9 C.F.R. § 205.208(c) (1988). If the reason that the properly filed security interest was not distributed was system operator error, the legislative history, as cited in the regulations, makes clear that loss from this error falls on the secured party, rather than on registrants. Id. at § 205.208(g). Secured parties may have a claim against the state for reimbursement for
As a practical matter, however, most buyers, commission merchants, and selling agents are unlikely to register with all certified CNS's. Their more likely response will be to register with CNS's in those states from which they expect in the normal course of business to handle the greatest amount of farm products produced within those states. This decision is understandable in terms of avoiding extra expense and administrative burdens. But failure to register with CNS means that the nonregistering buyer, commission merchant, or selling agent will be held accountable for security interests in that system even though they do not know of the security interests and even though they never even considered querying that CNS.  

2. For What to Register—Partial Master Lists

Subsections 1324(c)(2)(D) and (E) state that CNS registrants may register to receive only a portion of the system operator's master list. The USDA regulations interpret this section 1324 permission to mean that a certified CNS must permit buyers, commission merchants, and selling agents to register for specified farm products from specified counties or parishes grown in specified crop years that are produced within the state having the certified system. Furthermore, once buyers, commission merchants, and selling agents have registered their specific interests, the CNS must be capable of providing the portion...
of the master list that corresponds to the specific interests for which the buyers, commission merchants, or selling agents register.\textsuperscript{368}

If registrants can ask to receive only a portion of the master list compiled by a CNS, the question becomes whether such persons have any accountability for information within the system that is not within the parameters specified by them. In other words, is a person who requests only a portion of a master list a registered or unregistered person within the system? The USDA issued an interpretive regulation that states in part: "Registrants will be deemed to be registered only \textit{as to those portions} of the master list for which they register, and will be deemed to have failed to register as to those portions for which they do not register."\textsuperscript{369}

The USDA's interpretation is significant for two reasons. First, buyers, commission merchants, and selling agents should register for all farm products in which they have an interest from all crop years for all counties or parishes within the state having a certified CNS. This is the only way they will receive actual notice for all farm products for which they are held accountable under section 1324.\textsuperscript{370} Whether prompted by a desire to avoid extra expenses and administrative burdens (or otherwise), a decision to register to receive only a portion of a CNS's master list subjects such buyers, commission merchants, and selling agents to the risk of double payment for all security interests in the CNS of which they are unaware due to the parameters of their limited registration. Second, buyers, commission merchants, and selling agents cannot be permitted to manipulate the system. Otherwise, they could register for farm products in which they have no interest and then claim that they are "registered" but without actual notice regarding farm products in which they actually deal. If they could "register" without really registering for relevant information, they would avoid any responsibility for complying with payment obligations imposed by secured parties.\textsuperscript{371}

\textsuperscript{368} \textit{Id.} § 205.105(a); see 51 Fed. Reg. 22,816 (1986).
\textsuperscript{369} 9 C.F.R. § 205.208(e) (1988) (emphasis in original). At first glance, USDA regulations 205.208(c) and 205.208(e) seem to be in conflict. Section 205.208(c), however, refers to situations in which the registrant has registered for a portion of the master list and a security interest on a farm product that is within that portion is for some reason not distributed to the registrant. \textit{See supra} text accompanying notes 364-66 (discussion of section 205.208(c)). Section 205.208(e) refers to situations in which the registrant has registered for a portion of the master list and a security interest on a farm product exists in the system but outside the portion requested by the registrant.
\textsuperscript{370} The regulations presume that a failure to expressly limit the counties or parishes for which information is desired means that the registrant is "deemed" to be a registrant for "all counties and parishes shown on the master list." 9 C.F.R. § 205.104(b) (1988).
\textsuperscript{371} \textit{Id.} § 205.208(e).
The USDA's position with respect to partial registrations correctly interprets section 1324. Section 1324's structure makes it clear that secured parties are obligated to provide accurate information to certified CNS’s by filing EFS’s on farm products produced within that state. Once secured parties fulfill their section 1324 obligations, section 1324 obligates buyers, commission merchants, and selling agents to register with the CNS to receive the system's actual notice. If they do not register for that information, they are deemed responsible for all information properly entered into the system whether they receive it or not. Just as cost and administrative convenience may lead a buyer, commission merchant, or selling agent not to register with a CNS of a distant state, these reasons may lead them not to request information on distant counties or parishes within the states where they do register. The consequences, however, will be the same; buyers, commission merchants, and selling agents will not be considered “registered” for those counties or parishes. A similar result occurs with respect to crop year.

3. The Query Method of CNS

As noted previously, buyers, commission merchants, and selling agents may choose not to register with every state having a certified CNS nor for every farm product, county or parish, or crop year for the systems with which they do register. Consequently, they may handle farm product transactions for which they have not received actual notice because of their partial registration. Subsection 1324(c)(2)(F) provides an inquiry method that allows these buyers, commission merchants, and selling agents to protect themselves from double payment liability as follows:

[Under a CNS] the Secretary of State furnishes to those who are not registered pursuant to (2)(D) of this section oral confirmation within 24 hours of any effective financing statement on request followed by written confirmation to any buyer of farm products buying from a debtor, or commission merchant or selling agent selling for a seller covered by such statement."

The USDA has implemented this mandate by requiring each state

372. When Senator Cochran presented section 1324 to the Senate for its consideration, he explained clearly the equitable sharing of burdens section 1324 creates between lenders (the burden to file effective financing statements containing correct information) and buyers, commission merchants, and selling agents (the burden to register for the needed information and to scrutinize the information carefully). Senator Cochran's explanation provides legislative intent to support the interpretation set forth by the USDA in Regulation 205.208(e). 131 Cong. Rec., supra note 9, at 299-300.

applying for certification to explain in its application "the method and form of furnishing of information orally with written confirmation as required by subsection (c)(2)(F)."

It is crucial to realize that the statutory language of subsection 1324(c)(2)(F) states the information being confirmed is to nonregistrants. Nonregistrants have not registered to receive actual notice about these particular farm products from the system. Therefore, they must query the system to obtain information about whether farm products are encumbered. If the system provides correct information, nonregistered buyers, commission merchants, and selling agents can use this information to protect themselves from double payment liability. But consider what happens if the system gives the inquirer incorrect information, i.e., that certain farm products are not encumbered when in fact they are encumbered and such encumbrance has been properly recorded in the CNS. In this instance of incorrect information, the nonregistrants will still be subject to liability for double payment because they are not registered and the secured party has filed an EFS covering the farm products. By failing to register, buyers, commission merchants, and selling agents assume the risk of erroneous information when seeking confirmation under subsection 1324(c)(2)(F). Section 1324 allows query, but a query

375. Subsection 1324(c)(2)(F) does not prohibit secured parties or registrants from querying the system to double check information contained within the system. Such queries, however, have no legal consequences because these people will receive protection based solely on whether they have complied with the obligations that section 1324 imposes on them. In other words, "double check" queries can be made of the system, but they are no substitute for the action section 1324 mandates for lenders (to properly file effective financing statements which set forth correct information) or registrants (to be attentive to the actual notice received and to honor the payment obligations between lender and debtor).

Moreover, secured parties may be tempted to use the inquiry method to learn whether the farm products of a particular farmer are encumbered. If the particular farmer is not on the master list, secured parties may decide that a new loan to the farmer would be the first loan and therefore have Code priority. But secured parties using the inquiry method to obtain information are forgetting that a secured party with a properly filed financing statement (which is what determines priority under the Code) may have made a business judgment not to take action to gain section 1324 protection. In other words, the priority lender may have simply decided to forgo any possible recovery against buyers, commission merchants, or selling agents and to rely solely on its priority against the farmer's assets as protection for the loan. See supra note 180.

377. Cf. 9 C.F.R. § 205.208(g) (1988) ("Legislative history of the Section shows that buyers, commission merchants, and selling agents are not intended to be liable for errors or other inaccuracies generated by the system."). In the case of an error on query by nonregistrants, however, the language of subsections 1324(e)(2)(B) and (g)(2)(C)(ii) make it clear that nonregistrants take subject to any security interest evidenced by a properly filed EFS. See infra pt. III(E) (whether a buyer, commission merchant, or selling agent has a claim against the Secretary of State for damages suffered because of the erroneous information); see also infra note 379.
is not equivalent to, nor a substitute for, registration. The basic obligation section 1324 mandates for buyers, commission merchants, and selling agents is the obligation to register.378

The fact that nonregistrants are the class for whom subsection 1324(c)(2)(F) can provide some measure of legal protection from double payment liability also is important in determining who bears the risk of inquiry difficulties other than the incorrect information type errors addressed in the preceding paragraph. For example, what if a nonregistrant tries to contact the CNS by telephone and the system lines are busy or the system staff attempts to convey the information to the querying party and the telephone of the querying party is busy. Or, what if the nonregistrant queries the system by mail and the request letter is lost or mislaid. In these instances, the risks of miscommunication reside with the nonregistrant because it can avoid such risks simply by registering with the proper CNS.379 In some ways, subsection 1324(c)(2)(F) is a nonfunctional subsection. Buyers, commission merchants, and selling agents are most likely to make queries having important legal consequences by telephone once they learn that a farm product they are about to handle is produced in a state, county or parish, or crop year for which they do not have actual notice information. Thus, they are probably in need of immediate information so that the farm product transaction can proceed. But section 1324 only requires that confirmation be provided within twenty-four hours of the request.380 If reliable information is not provided

378. See 9 C.F.R. § 205.208(1) (1988). Although the legislative history does not address why subsection 1324(c)(2)(F) was limited to those "not registered," the overall structure of section 1324 makes clear that Congress meant for CNS's to operate primarily by the distribution of lists in written or printed form. See Food Security Act of 1985, supra note 3, at § 1324(c)(2)(E). If buyers, commission merchants, and selling agents could gain the protection of section 1324 simply by making inquiry of the system CNS's operator (almost assuredly by telephone), CNS's would become "answering services," not list distribution systems.

379. See 9 C.F.R. § 205.208(b) (1988); see also Idaho Application, supra note 87, at Idaho Admin. Rule 34.U.01(j)(iii) (the Secretary of State will attempt to contact the querying party for 48 hours with a minimum of three tries each 24 hour period. If the querying party cannot be reached after these efforts, the Secretary of State is "deemed to have fulfilled his obligation to make a timely verbal report."). These inquiry errors, which are the responsibility of the nonregistrant, are to be distinguished from system errors, which are the responsibility of secured parties. The secured party is responsible for errors in failing to file an effective financing statement containing the required information and for system errors that occur when the system operator does not distribute accurate information to registrants. These secured party system errors are addressed by the USDA in section 205.208(g) of the USDA regulations.

380. Fortunately, most states that have gained certification for their CNS's have indicated that if the request for information is made by telephone, oral confirmation will be provided immediately by a telephone operator who will access the system through a computer at the operator's desk. E.g., Nebraska Application, supra note 269; North Dakota Application, supra note 108. But see Idaho Application, supra note 87. Idaho Administrative Rule 34.U.01(j),
immediately upon inquiry, the flow of farm products within the stream of commerce will be impeded, and, as a practical matter, the information may not be sought at all because of the statute's lack of timeliness.\footnote{381}

Subsection 1324(c)(2)(F) also requires that written confirmation follow oral confirmation. But because it does not prescribe a period of time within which the written confirmation must be sent, the USDA has concluded that the time and method for providing written confirmation is "discretionary" with the CNS.\footnote{382} In reality, no matter how quickly written confirmation is sent, it most probably will not be the data on which nonregistered buyers, commission merchants, and selling agents act. These nonregistrants likely will use the oral information conveyed within twenty-four hours of the request without taking additional time to complete the farm product transaction while awaiting written confirmation. Thus, subsection 1324(c)(2)(F)'s written confirmation probably serves little function in assisting the rapid, correct completion of a farm products transaction. Written confirmation, however, does serve an evidentiary function in proving what information was communicated orally if and when a dispute arises at a later time about the query and its answer.\footnote{383}

In addition to the problems already discussed, nonregistrants may find it difficult to query CNS systems for still another reason. System operators have discretion under subsection 1324(c)(2)(F) to set the hours of the day and the days of the week in which the system will accept queries.\footnote{384} Predictably, the CNS's certified to date are open for queries only on regular, nonholiday weekdays and during regular business hours. Thus, CNS's cannot even be queried on weekends.

\footnote{381. The flexibility of oral confirmation within 24 hours is important when the query is a written request. With respect to a written request, subsection 1324(c)(2)(F) means that the CNS must respond within 24 hours of receiving the request. Also, the CNS must respond orally so that the requesting person gets information quickly. Although taking this written request scenario into account, Congress inartfully drafted subsection 1324(c)(2)(F) to allow an untimely response to the much more likely scenario of inquiries coming through telephone communication. \textit{Cf.} 9 C.F.R. \textsection 205.208(h), (i) (1988). \textit{But see supra} notes 377, 379.}

\footnote{382. 9 C.F.R. \textsection\textsection 205.208(m) (1988). Three states that have certified CNS's have indicated in their applications that they will provide written confirmation within "one working day" after they give oral confirmation. Maine Application, \textit{supra} note 87; Montana Application, \textit{supra} note 269. Oregon will provide written confirmation within two working days of receiving the written request. Oregon Application, \textit{supra} note 239.}

\footnote{383. \textit{Cf.} 9 C.F.R. \textsection 205.208(1) (1988).}

\footnote{384. \textit{Id.} \textsection 205.208(j).}
early mornings, evenings, and nights—times during which many farm product transactions are completed.\textsuperscript{385} Moreover, because oral confirmation need only be given within twenty-four hours on regular business days, a query that arrives Friday afternoon need not be answered until before that same time the following Monday afternoon. As a functional matter, therefore, subsection 1324(C)(2)(F) most probably will not provide timely information in a significant number of farm products transactions. It is arguable, however, that Congress permitted this result because the basic obligation of buyers, commission merchants, and selling agents in states with certified CNS's is the obligation to register.

4. Farmer-to-Farmer Sales

Farmers often buy farm products from neighboring farmers, such as seed corn or breeding livestock. If these farm products are collateral for a loan, the buying farmer is exposed to liability for double payment under the Code's farm products exception if the selling farmer does not use the proceeds received from the sale to repay the loan.\textsuperscript{386} Thus, buying farmers also will want to gain section 1324's protection from double payment liability.\textsuperscript{387}

Buying farmers can gain this protection, if they are "a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations."\textsuperscript{388} This language paraphrases subsection 1324(c)(1)'s definition of the term "buyer in the ordinary course of business."\textsuperscript{389} In determining whether farmers are covered by section 1324, the most crucial element is that the buyer be buying in the ordinary course of the buyer's business from a farm seller who is selling in the ordinary course of the seller's farm business.\textsuperscript{390} Clearly

\textsuperscript{385.} The certified systems of five states make it absolutely clear that the Secretary of State offices for those states are open to queries only during regular hours on working days. Idaho Application, supra note 87; Maine Application, supra note 87; Montana Application, supra note 87; Nebraska Application, supra note 269; Oregon Application, supra note 239.

\textsuperscript{386.} See U.C.C. § 9-307(i).

\textsuperscript{387.} The need for protection for buying farmers in farmer-to-farmer transactions was clearly articulated by two witnesses at the Senate Hearings in October, 1985. See Senate Hearings, supra note 46, at 114-15 (statement of Jo Ann Smith); id. at 119 (statement of John White, Jr.)

\textsuperscript{388.} Food Security Act of 1985, supra note 3, at § 1324(d).

\textsuperscript{389.} The complete definition read as follows: "[t]he term 'buyer in the ordinary course of business' means a person who, in the ordinary course of business, buys farm products from a person engaged in farming operations who is in the business of selling farm products." Id. at § 1324(c)(1).

\textsuperscript{390.} The subsection 1324(c)(1) requirement that the buyer be buying in the ordinary course of the buyer's business should be compared to Code section 1-201(9) which defines the identical term. Under the Code definition, a buyer must be buying in the ordinary course of the seller's business, and no requirement exists that buyer be buying for any business of its own. See U.C.C. § 1-201(9).
farmers are in the business of selling farm products, but are farmers in the business of buying farm products?

Although farmers often buy farm products from other farmers and are more than casual or rare purchasers of farm products, they are not daily traders in farm products in the same way as grain elevators, packing sheds, or slaughter houses. Because of subsection 1324(c)(1)'s requirement that the buyer be buying in the ordinary course of the buyer's business, it is possible to interpret section 1324 as only protecting regular commercial farm product buyers and not buying farmers. The authors conclude, however, that Congress meant for section 1324 to cover buying farmers.

Congress specifically rewrote the definition of "buyer in the ordinary course" to preempt the Code's definition. Thus, the inclusion of buying farmers within section 1324's statutory definition of "buyer in the ordinary course of business" does not violate the interpretive principle of "minimal disruption" posited in the first part of this article. Farmers buying farm products from other farmers is more than a rare or casual occurrence. Therefore, buying farmers are more analogous to commercial farm product buyers than to an ordinary consumer. Moreover, farmers are generally buying farm products for their farm businesses, rather than for personal use or consumption. Thus, the policy reasons for providing protection to commercial buyers as buyers of farm products apply equally well to farmers. For these reasons, courts should interpret section 1324 to protect buying farmers.

As "buyers" protected by section 1324, buying farmers also are obligated to bear the burdens that section 1324 imposes upon buyers. More specifically, in a state with a CNS, buying farmers have the basic obligation to register. Failure to register entails all the consequences for them that have been described in this article. Yet, as a practical matter, most buying farmers are unlikely to register because their need for farm product lists distributed by the system is not sufficiently great to justify the expense and administrative burden of receiving the master lists. As a consequence, buying farmers knowledgeable about section 1324 likely will be heavy users of the query method of obtaining information from a CNS under subsection 1324(c)(2)(F). Many farmers, however, will be unaware of section 1324 and will buy farm products without querying the system, thus subjecting themselves to liability for double payment just as if the law had never been passed.

D. CNS Master Lists and Fees

391. See Kershen and Hardin, supra note 1, at 41-43 (full discussion of preemption as specifically related to the definition of the term "buyer in the ordinary course of business").

392. See supra note 387.
1. Distribution of Farm Product Master Lists

After lenders have filed EFS's with appropriate CNS's, and buyers, commission merchants, and selling agents have registered with the proper CNS's, subsection 1324(c)(2)(E) places on system operators the burden to distribute master lists of security interests in farm products to the registrants. But again, numerous issues associated with the farm products master lists merit discussion.

a. Regular distribution

In a CNS, secured parties want the security interest master lists distributed as often as possible because they gain section 1324's protections against registrants only upon receipt of actual notice by those registrants. From a secured party's perspective, the worst scenario is a system in which the secured party files a proper EFS, but the system does not communicate this filing to registrants for a substantial period of time after filing. By comparison, registrants prefer infrequent distributions because they have no accountability for security interests in the system until they receive a list of them from the system operator. Equally important, registrants are concerned that whenever a list is distributed it is all encompassing so that they need not keep track of and use multiple lists. The greater the number of lists that must be retained and consulted, the greater the risk that a particular master list will be lost or that confusion between lists will occur.

Congress specifically left the right to define section 1324's mandate of "distributes regularly" to states applying for certification. Although the USDA did not interfere with this discretion, its regulations do require state certification applications to declare the frequency of distribution, which must be an "interval specified in advance." Furthermore, the USDA regulations also warn secured parties and system operators of the consequence of infrequent distributions. Through regulations relating to frequency, the USDA apparently has tried to reflect the secured party's perspective of this issue. The USDA

393. See Food Security Act of 1985, supra note 3, at § 1324(c)(2)(E) ("[T]he Secretary of State distributes regularly as prescribed by the State.").
394. 9 C.F.R. §§ 205.101(b)(7), 208(f) (1988). In CNS's, the frequency of distribution of a master list ranges from quarterly distribution in Arkansas, Idaho, Louisiana, and Nebraska to monthly in Maine, Montana, North Dakota, Oregon, and Utah. See, e.g., Arkansas Application, supra note 108; Louisiana Application, supra note 168; Montana Application, supra note 87; Oregon Application, supra note 239.
395. 9 C.F.R. § 205.208(f) (1988) ("The frequency of such distribution must be a consideration in review for certification since distribution must be timely to serve its purpose. . . . [W]hatever interval a State chooses will inevitably make possible some transactions in which security interests are filed in the system but registrants are not subject to them.").
regulations impliedly prohibit registrants from determining how often they want to receive lists. If registrants could pick the frequency of distribution, their self-interested response would likely be: "Once every five years (and no more!)." Obviously accepting such a response would undermine centralized notification. 396

At the same time, the USDA also correctly interpreted section 1324's legislative history to mean that its notification burdens should be shared equitably. Thus, the USDA also protects registrants from excessive administrative burdens with respect to retaining and consulting multiple master lists. 397 Under the USDA regulations, a system operator can issue a master list followed by supplements to the list, but registrants must be able to find the information in "no more than three distributions." 398 For example, states are allowed to distribute a master list quarterly followed by a supplement in each of the next two months or by a cumulative supplement issued each month. 399 As another example, states can issue monthly master lists with weekly cumulative supplements. 400 In this manner, buyers, commission merchants, and selling agents can find the information they need in the master list and its one or two supplements. When the next master list is distributed, registrants can then discard the previous list and be protected by consulting only the newest master list and its forthcoming supplements.

b. Written or printed form

One subsection 1324(c)(2)(E) requirement for a certified CNS is that the system operator distribute master lists regularly "in written

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396. The USDA required the Secretary of State of North Dakota to clarify the frequency of distribution before certification was granted to the North Dakota CNS. In requesting clarification, the USDA stated: "In no event should the frequency be determined by the users." North Dakota Application, supra note 108.

By contrast, the USDA certified Mississippi's system, which indicates that master lists will be prepared weekly, biweekly, or monthly and which permits registrants to select which of the three alternative frequencies they desire. Mississippi Application, supra note 87. Registrants with an ounce of enlightened self interest will choose the monthly distribution.

397. In the language quoted in supra note 396 from the USDA response to North Dakota, the USDA said that frequency of distribution cannot be determined by users. Thus, the USDA also meant that secured parties, as users, cannot control the distribution frequency. Otherwise, secured parties would demand that the state distribute every newly filed EFS immediately or at the end of every working day. To allow lenders to demand this level of distributional frequency would send a "blizzard of paper" on system registrants.

398. 9 C.F.R. § 205.105(c) (1988).

399. E.g., Idaho will distribute a master list quarterly with a cumulative supplement on a biweekly basis. Idaho Application, supra note 87, at Idaho Admin. Rule 34.U.01(g)(v)-(x).

400. North Dakota has adopted this frequency of distribution. North Dakota Application, supra note 108.
or printed form” to registrants requesting the lists or portions of the lists.\textsuperscript{401} As the centralized notification alternative was originally presented to the Senate, subsection 1324(c)(2)(E) included a parenthetical clause after the words “written or printed” that read “(or, where available, by means of an automated information retrieval system.)”\textsuperscript{402} This parenthetical language did not survive the Conference Committee, apparently because of concern about imposing a burden on buyers, commission merchants, or selling agents to purchase computer, microfilm, or microfiche equipment to be able to read master lists distributed in such form.\textsuperscript{403}

When the USDA interpreted subsection 1324(c)(2)(E)’s “written or printed form” language in the March 1986 Interim Final Regulations, it issued regulations which made distribution in written or printed form mandatory, but allowed states to offer “machine-readable” distribution as an additional, and concurrent, method of distribution.\textsuperscript{404} In response to criticisms of this interpretation, the USDA Final Regulations provide a fuller discussion of the language “written or printed form.” The USDA has now concluded that Congress meant to require states to make distribution lists available in a paper form, which can be read without the need for purchasing any equipment. However, states can offer, solely at the option of individual registrants, distribution in machine-readable form. Such an offer does not force any registrant to purchase equipment unless it desires to do so for its own independent reasons. If a registrant exercises the option to accept distribution in machine-readable form, the USDA concluded that such distribution would meet subsection 1324(c)(2)(E)’s requirement of “written or printed form” distribution.\textsuperscript{405}

USDA Regulation 205.105(b)’s interpretation of “written or printed form” properly balances Congress’s concern that excessive equipment purchase burdens not be imposed on CNS registrants with concern that states be allowed flexibility in designing and implementing their own CNS’s. By allowing optional machine-readable distributions, the USDA regulations free states to regularly distribute lists of farm products to registrants through more efficient, less costly, and less administratively burdensome technologies than paper lists.\textsuperscript{406}

\begin{footnotesize}
\begin{enumerate}
\item 402. 131 CONG. REC., \textit{supra} note 9, at S16,296-97.
\item 404. \textit{Id.} at 10,797; 9 C.F.R. § 205.105(b) (1988).
\item 405. 9 C.F.R. § 205.105(b) (1988).
\item 406. Six states, Idaho, Montana, Nebraska, North Dakota, Oregon, and Utah, have decided to offer registrants a choice between lists printed on paper or lists on fiche. By comparison, three states, Arkansas, Maine, and Vermont, have decided to distribute lists only by means of printed paper copies. Mr. Everett Wohlers, Deputy Secretary of State, State of Idaho, indicated that the feed and oil grains (barley, rye, triticale, oats, sorghum, flaxseed, safflower,
Section 1324 makes registrants accountable for information contained within a CNS only if the registrant receives actual notice of the information. The registrant has actual knowledge of printed master lists upon receipt because at that moment the registrant need only read the list to learn the information. In microfiche technology, the lists are recorded on fiche that also are mailed to the registrants who need only use their machines to read the information. Similarly, computer technology, which places the lists on computer discs or tapes, provides a physical object to distribute to registrants who need only place the disc or tape in a personal computer to read the information. All these options satisfy section 1324's requirement that actual notice be given through lists that are received by registrants.

c. Direct computer access

Direct computer access to CNS's from remote terminals raises unique issues because such access does not produce a tangible object that is distributed for registrants to "receive." On the other hand, if registrants have direct computer access to CNS's, they would have the ability to know what was in the system the moment it was entered. No time gap between entry into the CNS and the system's distribution of the list exists in a direct computer access option. In a direct computer access option, section 1324's actual notice becomes constructive notice for any registrant who chooses this option.

Four states presented certification applications to the USDA that included options for registrants to directly access the CNS from a remote terminal. Unfortunately, only one state, Louisiana, explicitly evidenced awareness of the constructive notice issue. Louisiana at-

rape, and field corn) list alone is about 3,000 pages in printed copy for these farm products produced in Idaho. These 3,000 pages constitute only seven fiche. Potato and sugar beet lists are each around 500 pages in printed paper copy which is only two fiche. Mr. Wohlers stated that Idaho greatly underestimated the length of the lists. If registrants were to select the paper printed copy, Mr. Wohlers is uncertain that the system would be feasible as a practical matter because of time and cost constraints, even though feasible as a technical matter. Fortunately for Idaho, virtually all registrants have opted for microfiche distribution. Telephone interview with Everett Wohlers, Deputy Secretary of State, State of Idaho, (July 16, 1987). Idaho has 79 other farm products aside from the eleven already listed. If a registrant were to request all 90 farm products in printed paper copy, the list would be massive whatever its exact page length.

407. Utah is the only state with a CNS that allows computer discs or tapes as a distribution option. Utah Application, supra note 168.

408. See Louisiana Application, supra note 168; Mississippi Application, supra note 87; Nebraska Application, supra note 269; Oregon Application, supra note 239.

409. Apparently, the Secretary of State of Nebraska also understood or sensed the existence of these receipt of actual notice issues for direct computer access. The Secretary informed the USDA that despite statutory authorization from the Nebraska legislature for a
tempted to avoid the issue by referencing subsections 1324(f) and (g)(3), which state: "What constitutes receipt, as used in this section, shall be determined by the law of the State in which the buyer resides." Louisiana promptly defined receipt of actual notice in a direct computer access system as "the first regular business day following date of filing." The USDA refused to certify the system with this definition of receipt and Louisiana deleted the definition. As a result, what constitutes receipt of actual notice in a CNS with a direct computer access option is left unresolved in the USDA regulations and in the applications from the four states.

In a direct computer access option, the only sensible definition of receipt of actual notice is the one proposed by the state of Louisiana and rejected by the USDA. However, the USDA properly rejected Louisiana’s proposal because it appears to make section 1324 a constructive notice statute in direct opposition to section 1324’s purpose of creating actual notice systems. At the same time, receipt of actual notice cannot depend on determining when a registrant uses its remote terminal to access a CNS to inquire about a particular farm product. If it did, registrants would simply never use their computers to query the system. Consequently, registrants would be registered, but by their own actions never receive actual notice. As stated earlier, section 1324 should not be implemented in a way that might allow registrants to undermine the regular distribution aspect of CNS’s. Because direct computer access cannot satisfy section 1324’s requirements for a regular distribution that results in receipt of actual notice by registrants, subsection 1324(c)(2)(E) should be interpreted to prohibit direct computer access as an acceptable distribution option. This conclusion does not mean that direct computer access is not a sensible and proper solution for the notice problems faced by secured parties, buyers, commission merchants, and selling agents in farm product transactions; it only means that section 1324 as drafted does not permit this alternative.

direct computer access option, the Secretary had decided not to implement direct computer access “at this time.” Nebraska Application, supra note 269.

410. Food Security Act of 1985, supra note 3, at § 1324(f), (g)(3). For a fuller discussion of the “receipt” issues of section 1324, see Kershen and Hardin, supra note 1, at 75-77; supra pt. II(E).


412. Id. The USDA’s refusal to certify a form of “presumed” receipt in the Louisiana direct computer access option implies that the state definitions of receipt that presume receipt of mailed notices within a certain number of days of mailing should also be subject to challenge by the USDA, even though the USDA has not done so. For a discussion of “presumed” receipt issues, see supra pt. II(E).

413. See supra text accompanying notes 393-97 and accompanying text.

414. The authors’ conclusion that direct computer access options are impermissible under section 1324 means that Louisiana, Mississippi, and Oregon should not utilize this option in
2. Fees for Registration and Distribution

a. Who and what can be charged?

Section 1324 only mentions fees once; subsection 1324(c)(4)(H) states that an EFS cannot be filed unless accompanied by the filing fee set by the CNS operator. Section 1324's legislative history makes it clear that Congress, through its silence, meant to allow states discretion in financing the operation of CNS's.\(^4\)\(^1\)

In the March 1986 Interim Final Regulations and the June comments, the USDA took the position that states in their certification applications had to present information justifying the fees to be charged, particularly to system registrants. The USDA's reason for requiring fee justification was to ensure that the fees charged were "fair as to different industry segments."\(^4\)\(^6\) By the time the final USDA regulations were issued, however, the USDA decided that section 1324's legislative history did not give it any authority to regulate fees. Thus, the USDA dropped the requirement that applications justify fees and amended its regulations to say simply that "[t]he fee structure is discretionary with the State."\(^4\)\(^1\)\(^7\)

States with certified CNS's have imposed registration fees, distribution fees, and oral or written confirmation fees on buyers, commission merchants, and selling agents who want to obtain the information contained in the CNS's. In some states, the authorizing legislation creating the CNS sets the fees. In other states, system operators are given the authority to set fees; sometimes the authority to set fees is given with the admonition that the fees are to reflect the cost of providing the service to the user.\(^4\)\(^1\)\(^8\) Fees charged to CNS registrants raise two issues.
As discussed earlier,\(^{19}\) Congress did not intend that CNS registrants be required to buy special machines to read the lists distributed to them by the system. Yet, by charging registrant fees, states indirectly may force registrants to buy these special machines.\(^{420}\) This occurs because the cost of producing and distributing printed paper lists is much greater than the cost of producing and distributing microfiche, computer discs or tapes.\(^{421}\) Thus, if a state sets fees for registration and distribution in accordance with the costs of the distribution method selected by the registrant, registrants who choose distribution through printed paper copy will pay more than registrants who pick distribution through one of the acceptable machine-readable modes.\(^{422}\)

Moreover, section 1324 also requires that registrants be able to obtain partial master lists for a limited number of counties or parishes and for a limited number of crop years.\(^{423}\) Yet, it is less time consuming and less costly to produce a complete master list of a farm product (or all farm products) for all counties within the state for all crop years than it is to produce master lists that are customized to the individual desires of each registrant.\(^{424}\) Thus, the fee structure

\(^{19}\) See supra text accompanying notes 401-03.

\(^{420}\) In a June 30, 1986, letter from the USDA to the Montana Secretary of State, the USDA expressed concern about the impact of fees in causing registrants to buy special machines to read the distributed lists. The USDA was concerned because Montana had proposed to charge $600 per year for printed paper copy distribution and $150 per year for fiche distribution. In response to the USDA's concern, Montana amended its fee structure to abandon a flat, annual registration fee and substituted a $5 per month per farm product registration fee plus $.10 per page fee for over fifty printed pages or $.25 per fiche fee for over 25 fiches. Montana will bill registrants monthly at the same time the requested list is distributed. Montana Application, supra note 87. For unintended problems created by the interchange between the USDA and the State of Montana, see infra text accompanying notes 426-33 (discussion on fees and due process).

\(^{421}\) Cf. supra note 406.

\(^{422}\) The fee structure of Idaho most graphically illustrates the differential between printed paper copy and microfiche. If a registrant selects microfiche for all farm products produced in all counties, for all crop years, the cost per year is $1,876. If a registrant selects printed paper copy for the same information, the cost per year is $8,590. Idaho Application, supra note 87, at Idaho Admin. Rule 34.U.01(k)(iii). The authors realize that few, if any, registrants will request information on all farm products. But the differential in cost exists even if the registrant only desires information about several farm products. For example, in Idaho if the registrant wants information only on wheat and buckwheat from all counties for all crop years, the microfiche cost is $90 per year while the printed paper copy is $1,040 per year. Id.

\(^{423}\) See supra notes 367-72 and accompanying text.

\(^{424}\) The fee structure of Idaho again graphically demonstrates the cost differential. In Idaho, registrants can request, as section 1324 requires, a list of a farm product produced in fewer than all Idaho counties and for fewer than all crop years. For these customized lists, however, the only distribution method available is printed paper copy. Idaho Application, supra note 87, at Idaho Admin. Rule 34.U.01(g)(v). If a registrant asked the Idaho system for a customized list of all farm products, but for fewer than all crop years, the cost for these lists would be $23,100 per year. At the same time, the registrant who decides to ask for the
adopted by a CNS state also may affect a registrant's decision to ask for complete versus partial lists.

Section 1324, therefore, appears to contain within its structure an inherent conflict between the discretion granted to states to set fees and the right of registrants to request master lists and customized lists to be distributed on human-readable printed paper. By enacting subsection 1324(c)(2)(E), Congress did not decree printed paper distribution to be the only acceptable distribution method. Correspondingly, although subsection 1324(c)(2)(E) permits registrants to request portions of master lists, Congress did not mandate that partial lists were the only acceptable form of information which registrants could request. Congress did require that CNS’s offer printed paper distributions of partial lists as an option to registrants. Provided systems can meet this requirement, they are not prohibited from using other modes of information distribution. Simultaneously, Congress purposefully allowed states to set fees for the distribution modes that they elect to adopt and for the amount of information that registrants request at a level permitting states to finance their systems. Even though the fee structures affect registrants' choices about which distribution mode and how much information to request from systems, the fees themselves do not destroy the options that section 1324 creates. Thus, the conflict between fee setting and registrant choices is not a true legal conflict. The provisions of subsection 1324(c)(2)(E) and state discretion to set fees can be harmonized. Since no true legal contradiction exists, considerations of administrative convenience are permissible and have led several states to utilize microfiche distributions of complete master lists as the most common distribution modes. CNS fee structures that indirectly pressure registrants to opt for a machine-readable distribution of the entire master list of EFS's contained within the system are permissible. If these systems are challenged because of fee structures, the authors believe they should be found in compliance with section 1324's statutory requirements.

b. Failure to pay for services and due process

If a secured party fails to send the filing fee with an EFS, subsection 1324(4)(H) permits the filing to be rejected. Secured parties must
pay for use of CNS's before receiving section 1324 protection for their security interests. Although CNS operators are equally interested in receiving fees from buyers, commission merchants, and selling agents, section 1324 is silent about whether system registrants can be refused services until fees are paid. In resolving whether system operators can refuse service until fees are paid, the type of fee being charged must be distinguished from the manner in which the fee is determined.

With respect to the type of fee being charged, it is relevant to consider the difference between (1) fees for system registration to receive all or portions of the master list, and (2) fees for oral or written confirmation to persons using the query method of obtaining system information. If a person is a "system registrant" and does not receive the requested lists, that person has no liability for the security interests which should have been but were not distributed to the registrant. Consequently, if a state allows persons to register, but then refuses to provide lists to those persons because certain fees have not been paid, the registered, but unpaying, buyer, commission merchant, or selling agent can make a strong argument that they are not accountable for double payment on security interests of which they did not receive actual notice because certain fees were not paid. Deprivation of statutory entitlements by state action raises serious due process issues of proper notice, hearings, and appeal. Thus, the authors believe that persons who achieve the status of registrants within a CNS cannot be refused information from the system based on their failure to pay fees owed the state, without creating great legal uncertainty for the protection of security interests filed in the system and raising difficult due process issues between the registrants and the state itself.


427. In its certification application, Arkansas proposed to register people, but to refuse to distribute lists to them if certain fees were not paid. The USDA responded that such refusal to distribute lists allowed these registrants to be protected from double liability under section 1324 because they had not received the lists to which they were entitled. See Arkansas Application, supra note 108. Although the USDA did not pursue the issue further, the clear implication of its position is that if a person is allowed to register and pay fees later, the state must provide the lists to the person despite the failure to pay the fees. Thus, the state's permissible action is to sue the nonpaying registrant for a debt owed the state. By gaining the status of a registrant, the person has acquired entitlements under section 1324 that must be provided; if not provided, the registrant cannot be made to suffer the burden of double liability.

428. The authors intend to make readers aware of the potential due process issues raised by the refusal to provide services to registrants but not to provide discussion of the concept of due process as it relates to statutory entitlements. Yet, due process and statutory entitlements have become prominent in agriculture in recent years, most especially in FmHA litigation. See, e.g., Coleman v. Block, 580 F. Supp. 194, 202-08 (D.N.D. 1985); Curry v. Block, 541 F. Supp. 506, 522-24 (S.D. Ga. 1982).
At this point, it is important to discuss the manner in which the fee is determined. If the fee for both registration and distribution of lists is a preset, annual fee, payable at the time of registration or renewal, the status of system registrant cannot be gained or maintained until the fee has been paid. In contrast, if the fee for registration is paid at the time of registration but distribution fees are billed when the lists are distributed, or if registration is a permanent registration with distribution fees billed to permanent registrants, the person has achieved the status of registrant with statutory entitlements.

If a registrant then fails to pay distribution fees, the legal uncertainty concerning accountability for unreceived lists and due process issues comes into existence.

Registration and distribution fees should be contrasted with fees for oral or written confirmation through the query method of obtaining information from CNS's. Nonregistrants who query the CNS are accountable for all information in the system regardless of whether the information is properly distributed to registrants requesting that information. Although subsection 1324(c)(2)(F) requires CNS states to furnish oral and written confirmation to those who query the system, it is satisfied when states create the query method itself. Section 1324 does not give nonregistrants any statutory entitlement to use a system without paying fees prescribed by the state. Section 1324 commits determination of fees for services to the states’ discretion. Thus, if a nonregistrant fails to pay at the time the query is made, states can properly refuse to answer the nonregistrant’s query without creating any due process issues relating to statutory entitlements and without

429. In their certification applications, most states indicate that the fees will be preset, annual fees payable at the time of registration. See, e.g., Louisiana Application, supra note 168; Utah Application, supra note 168. In effect, these states are treating buyers, commission merchants, and selling agents who desire to register in the same manner as they treat secured parties who want to file an effective financing statement. The request for service must be accompanied by the fee set for the service. Indeed, when the State of Arkansas and the USDA had the interchange referred to in supra note 427, the USDA told Arkansas: “Registration for a specified term, which would expire unless renewed with payment of fee, is recommended.” Arkansas Application, supra note 108.

430. See supra note 427.

431. Two states, Idaho and Montana, appear to allow a person to achieve the status of registrant followed by billing of that person for distributed lists. See Idaho Application, supra note 87, at Idaho Admin. Rule 34.U.01(k)(iii)(d); Montana Application, supra note 87. Montana is in this position because the USDA initially rejected the flat, annual fee approach. Montana then amended its application to allow registration followed by billing. See supra note 420. When the USDA later decided that it had no authority to regulate fees (because fees are within the discretion granted to states) and began to approve applications with flat, annual fees, Montana did not reinstate its original approach.

432. See supra note 366.
creating legal uncertainty concerning security interests filed with the system.  

3. Arrangement of Lists Distributed to Registrants

Subsection 1324(c)(2)(C) requires that CNS operators compile filed EFS’s into a master list “organized according to farm product” and “arranged within each such product” by (1) an alphabetical listing according to name, (2) a numerical listing according to social security number or taxpayer identification number, (3) county or parish, and (4) crop year.  

Subsections 1324(c)(2)(D) and (E) then require that the system operator register buyers, commission merchants, and selling agents according to their interests in the list and distribute the list or portions as requested by the registrants.

In the March 1986 Interim Final Regulations, the USDA adopted a format for the distributed lists or portions to registrants. The USDA mandated that the list be in two sections with each section arranged by crop year, with a subheading for each farm product and a sub-subheading for each county or parish. Within each county or parish, the first section would then be arranged alphabetically by name and the second section would be arranged numerically by social security number or taxpayer identification number. By June 1987, the USDA

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433. In its application, Vermont originally proposed to deny information to nonregistrants who had accounts receivable more than 60 days past due for information provided through the query mode. The USDA objected to this absolute refusal to provide information to a nonregistrant because of its concern that the statute could be interpreted to mandate providing the information despite amounts already owed for using the service. If subsection 1324(c)(2)(F) were interpreted to make it mandatory that states provide information to nonregistrants regardless of paying the designated fee, the USDA was concerned that the Vermont system might be vulnerable to a claim that it did not comply with section 1324's requirements. The USDA did go on to state however that “[i]f the provision in Regulation J-4 were changed to provide for refusal of telephone service for non-payment, so that the non-paying person would be able to obtain service only by making two trips to the office of the system operator, one to submit a query in writing, and a second to obtain the response to it, the purpose of the regulation would be served as a practical matter without that vulnerability.” Vermont Application, supra note 244 (emphasis in original). Vermont promptly amended Regulation J-4 to adopt the USDA suggestion. See id. The authors believe that the USDA was too strict in interpreting subsection 1324(c)(2)(F) to require not only that a state have a query method but that queries be answered regardless of whether the querying person has paid or is willing to pay the prescribed fee.


435. Id. § 1324(c)(2)(D)-(E).

436. March 1986 Interim Final Regulations, 51 Fed. Reg. 10,797 (1986). As prescribed by the March 1986 Interim Final Regulation, the distributed list would look like the following:

Registrant: (Local Grain Elevator)

Section One: Alphabetical Listing

I. Crop Year (1985)

A. Farm Product (Wheat)
had received objections to the March format because it required each debtor to be listed at least twice (alphabetically and numerically) and even more often than that if a debtor pledged farm products produced in more than one crop year or more than one county as collateral. The comments indicated that states wanted a simplified listing that eliminated duplication. Taking these comments into consideration, the USDA provided a fuller interpretation of subsections 1324(c)(2)(C), (D) and (E). Its new interpretation focuses not on a mandatory format but on a system’s capability to provide information in accordance with the expressed interest of system registrants. Thus, the USDA determined that a CNS complies with section 1324 provided it (1) allows registrants to register an interest in specific farm products (or all) for specific counties or parishes (or all) for specific crop years (or all), and (2) is able to deliver a list that meets those customized requests. Moreover, the USDA decided that if a CNS can provide registrants the information they request, the information need not be provided in two sections which duplicate information. Consequently, USDA Regulation 205.105(a) was amended to abandon a mandatory format. A CNS would be certified if it could provide the information requested by registrants and was offered in either an alphabetical or numerical format or both as requested by the registrant.

The CNS’s certified by the USDA to date are capable of providing customized information to registrants. Because of the computer technology that states are using to handle CNS’s, it is not difficult to sort the information requested by a particular registrant alphabetically by name or numerically by social security number or taxpayer identification number. Thus, all certified CNS’s satisfy

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1. County/Parish (Cache County, Utah)
   Able, Andrew
   Adams, Thomas
   .
   Zynda, Daniel

Section Two: Numerical Listing
1. Crop Year (1985)
   A. Farm Product (Wheat)
   1. County/Parish (Cache County, Utah)
      123-45-6789 (Zynda, Daniel)
      234-56-7891 (Able, Andrew)
      .
      345-67-8912 (Adams, Thomas)

438. Id.
440. Only one state, among the initial eleven applying for certification, tried to avoid the statutory obligation to provide customized lists to registrants. Vermont desired to send to every
the USDA regulations relating to the customization of distributed lists.

The USDA regulations' focus on the ability of systems to provide customized lists is somewhat misplaced because many, if not most, registrants will not request customized lists. As previously indicated, registrants, for their own protection from double liability, likely will request information from the system on farm products in which the registrant deals for all counties and for all crop years. Moreover, if self protection is not sufficient incentive to do so, the fee structure created by many states provides a direct economic incentive to do so. Thus, the problem that will concern most registrants is not whether the system can provide a customized list, but whether they can easily and successfully use the great amount of information which they will receive. Organization is the key to easy and successful use of a great amount of information. Thus, the format of the information, which was the focus (now abandoned) of the USDA's March 1986 Interim Final Regulations, is probably more important to registrants.

Subsection 1324(c)(2)(C) provides statutory guidance on the format of distributed lists. Subsection 1324(c)(2)(C)(i) requires that the list be "organized according to farm product" and then, under subsection 1324(c)(2)(C)(ii), "arranged within each such product" in alphabetical order by name, numerical order by social security number or taxpayer identification number, by county or parish and by crop year. The statutory language of these two subsections mandates that the basic arrangement of any distributed list be by farm product. Congress's decree of such an arrangement makes sense. In

registrar the entire master list organized by farm product and within a farm product arranged alphabetically and/or numerically. The USDA informed Vermont that the statute requires the system to have the capability of providing customized lists. Thus, the USDA refused to certify the system until Vermont assured it that customized lists could and would be provided to registrants who so desired. See Vermont Application, supra note 244. Due to miscommunication between it and the State of Arkansas, the USDA initially thought that Arkansas wanted a system that could not and would not provide customized lists. The USDA informed Arkansas that "[s]tandardized lists or the entire database cannot be forced on registrants." Arkansas Application, supra note 108. The Arkansas Secretary of State assured that USDA that its system was capable of and would provide customized lists. Id.

441. See supra text accompanying notes 364-72.
442. See supra text accompanying notes 415-25.
443. As to how long and large the lists may likely be, see supra note 406.
445. Id. § 1324(c)(2)(C)(ii).
446. Because the authors read subsection 1324(c)(2)(C) to mandate that lists be organized first by farm products, the authors think that the USDA March 1986 Interim Final Regulation section 205.105(a) (where the basic arrangement began with the crop year) was incorrect. See supra note 436.
a transaction between a registered buyer, commission merchant, or selling agent and an agricultural producer, the one piece of information that is always known is the specific farm product involved. Thus, as a registrant tries to use the distributed lists, the first and most logical place to look is under the heading for the specific farm product that is being bought or sold. At transaction time, the registrant wants to know if the agricultural producer trying to sell the specific farm product has used that farm product as collateral. The registrant is uninterested in and would be burdened by any list that intermingled all farm products together when the registrant’s interest is in a specific farm product. Thus, for a CNS to meet the statutory requirements of section 1324, the system must provide lists organized by specific farm product.

If a system does not provide master lists

447 Two systems certified by the USDA appear to be organized other than by farm products. In the master lists distributed by Utah, the lists will be organized alphabetically by name or numerically by social security number or taxpayer identification number. As evidenced by a sample printout of the Utah master list, “Aaron, Bill” of Bennion, Utah who has used his lima beans and snap beans (two specific farm products) as collateral is followed on the list by “Aaron, Bill” of Fillmore, Utah who has used his goats and cattle (two specific farm products) as collateral, and is followed by “Aaron, Bill” of Bennion, Utah (the identical person previously listed as using his lima beans and snap beans as collateral) who has also used his asparagus and broccoli as collateral for a different lender. This approach intermingles different farm products in a manner that confuses the registrant. A Utah registrant dealing in asparagus could have located “Aaron, Bill” of Bennion, Utah in the first entry for lima beans and snap beans and concluded (incorrectly) that Bill Aaron did not have a security interest against his asparagus. The registrant would not have known to look further on the list for a second entry or even further for other possible entries all on the identical person. Thus, the registered asparagus dealer would have bought the crop only to learn at a later time that the list did provide information showing that Bill Aaron’s asparagus also had a lien against it.

The master lists distributed by Maine are organized by crop year (following the USDA’s March 1986 arrangement) and within a crop year by generic farm products (berries or vegetables, for example) rather than by specific farm product. Subsection 1324(c)(5), however, defines farm product as a specific farm product and does not allow for generic farm product descriptions. Within the generic farm products list, producers are arranged alphabetically or numerically and each entry is accompanied by the specific farm product used as collateral. Thus, as an example, a Maine registrant about to buy or sell cabbage from or for an agricultural producer has to page through numerous crop years setting forth an intermixture of vegetables (lima beans, potatoes, etc.) before being able to locate the agricultural producer’s name and then checking there to learn if that producer has used cabbage (the specific farm product) as collateral for a lien.

If a Utah or Maine registrant did not find the necessary information on the list, a secured party would argue that the registrant is still liable for double payment because actual notice of the security interest had been received and the payment obligations were not satisfied. The registrant’s response is to argue that although the information was on the list, the list was not arranged in accord with the requirements of section 1324. Thus, the system arguably is not in compliance with section 1324, and consequently, the registrant has not, contrary to the lender’s allegations, received actual notice from a centralized notification system.
arranged first by specific farm product, the system is open to challenge on the ground that it is not in compliance with section 1324's requirements.

Once the distributed master list is organized according to farm products, the question then becomes whether subsection 1324 (c)(2)(C)(ii) imposes additional mandatory format requirements. As indicated, subsection 1324(c)(2)(C)(ii) sets forth four different arrangements: (1) alphabetical order by name, (2) numerical order by social security number or taxpayer identification number, (3) county or parish, and (4) crop year. However, it does not provide any easy clues about whether the four arrangements are to be concurrent or in some rank order. Interpreting subsection 1324(c)(2)(C)(ii) to require concurrent arrangements of the four statutory categories means distributing master lists arranged in at least six different formats.

If the statute mandates the four possible arrangements to be concurrent when master lists are distributed, tremendously costly and burdensome duplication will occur. CNS operators and registrants will have to pay for and handle the duplicate information. The authors do not believe Congress intended this result.

As for whether subsection 1324(c)(2)(C)(ii) implies a rank order, it is important to note that two of the four arrangements, alphabetical by name and numerical by social security or taxpayer identification

448. The six possible ways in which lists on each farm product can be organized are the following: 1) alphabetically by name with each individual name accompanied by information on the county or parish in which the farm product is produced and the crop years of production for which the farm product serves as collateral; 2) numerically by social security number or taxpayer identification number with each individual number accompanied by information on the county or parish in which the farm product is produced and the crop years of production for which the farm product serves as collateral; 3) arranged by county or parish with a subheading for crop year and then arranged in two sections, one alphabetically and the other numerically; 4) arranged by crop year with a subheading for county or parish and then arranged in two sections, one alphabetically and the other numerically; 5) arranged by county or parish in two sections, one alphabetically and the other numerically, and for each individual name and number entry an indication of the crop years for which the farm product has been pledged as collateral; and 6) arranged by crop year in two sections, one alphabetically and the other numerically, and for each individual name and number entry an indication of the county or parish from which the farm product produced in that county or parish has been pledged as collateral.

449. At the Senate hearings, witnesses discussed their concerns about the "paperwork" burdens that would result from an actual notice system. See supra note 118. More directly on point, Senator Kassebaum commented on the CNS alternative of section 1324 as follows:

"My concern . . . is not that this proposal is unreasonable in concept. My fear is that it is unworkable in practice . . . . The reaction of the Kansas Secretary of State to this proposal has been strong. It will be costly, burdensome, and technologically difficult."

131 CONG. REC., supra note 9, at S16,301.
number, are individual identifiers. The other two are broader and include many agricultural producers within each county or parish or for each crop year. At the time of a transaction in specific farm product, the most likely question a registrant will ask is “Who owns the specific farm product?” The registrant will look for an alphabetized list of agricultural producers of that specific farm product to ascertain whether a lien exists against the farm product. Because the buyer, commission merchant, or selling agent must also always ask where the farm product was produced, and in what year it was produced, the distributed list also must indicate that information. If all this information is provided, the authors conclude that the precise organization of the master list is irrelevant.

Yet at times, when a registrant locates the alphabetized name of an agricultural producer of a specific farm product, the registrant may encounter two identical names. The registrant at that point needs to know whether the identical name refers to the same person (who has two loans and, therefore, two separate EFS’s filed) or two distinct persons, and, if two distinct persons, which one is the agricultural producer with whom the registrant is about to enter into a farm product transaction. At this juncture, the distinct individual identifier of social security number or taxpayers identification number becomes important. By asking the agricultural producer for his social security number or taxpayer identification number and then checking the number accompanying the identical names on the alphabetized list, the registrant can make the needed identification. In a similar vein, assume that a registrant deals with an agricultural producer whose “name” is on the list but who insists that the “name” is the name of another agricultural producer who also produces the same specific farm product in the same county or parish. The registrant can ask the producer to provide an individual numerical identifier, which can then be checked against the “name” on the list. If the number provided differs from the number on the list, the registrant probably can safely assume that the agricultural producer does not have encumbered farm products. Surely, these examples provide reasons underlying Con-

450. See supra notes 356-72 and accompanying text.
451. See supra notes 151-59, 310-25 and accompanying text.
452. In other words, the authors believe that formats 3, 4, 5, and 6 as presented in supra note 448 are each permissible formats for the distributed master list because all the required information is presented. Subsection 1324(c)(2)(C)(ii) does not legislate that any one of these formats be favored over another. Hence, states are allowed to use different formats that fit their computer hardware and software. See 9 C.F.R. § 205.101(a)(5)-6 (1988) (“[D]etails of computer hardware and software need not be furnished but the results it will produce must be explained.”). As for formats 1 and 2, see infra note 457.
453. Anyone who doubts this possibility has not looked at a phone book recently or done a Code financing statement check.
gress’s requirement of a number identifier. But note something unique about both these “two identical names” examples. In these examples, the numerical identifier was used to distinguish between the identical names, but the list did not need to be rearranged to a numerical format for the numerical information to be useful and usable information.

Other examples, however, illustrate the importance of a separate numerical list and highlight the inadequacies of an alphabetized list by itself to provide registrants with section 1324 protection. Two examples illustrate this point.

**Example One:** Assume that a registrant encounters a farm products producer who has the product delivered for sale by a custom trucker. When the registrant asks the name of the owner, the custom trucker responds with a name that phonetically is identical in several different spellings. Rather than check all possible spellings of the name (and take the risk of not knowing all alternative spellings), the registrant would prefer to use an individual numerical identifier to determine whether the farm products are encumbered. But if the list the registrant has received is only in alphabetized format, the numerical information is unusable because the registrant would still be forced to check all possible spellings of the name. The registrant needs a separate numerical format to locate the individual numerical identifier quickly and accurately to avoid the risk of “strange” name spellings.

**Example Two:** Envision a farm product transaction in which the registrant cannot find the name given by an agricultural producer on the alphabetized list, and the registrant is concerned that the person may be lying about his true identity. Thus, the registrant asks the agricultural producer for a social security number or taxpayer identification number. When the agricultural producer provides the requested number, the registrant must be able to check the number against a numerical list, because the suspicion is that the “name” information is falsified. If the registrant has only received an alphabetized list, the numerical information that the registrant wants to use as protection against a lie is unusable information. The registrant cannot take the time to go through the entire alphabetized list looking for the number provided by the producer. As a practical matter, any time a registrant does not personally know the agricultural producer with whom it is dealing, the registrant probably will want to use both the alphabetical list and the numerical list as a double check.

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454. Examples taken from the Oklahoma City Telephone Directory include: Combes, Combs, Coombes, Coombs, Coomes; Coons, Koons, Koonce, Kuntz; Fraser, Frasier, Frazer, Frazier; Knight, Night. Of course, the custom trucker does not know, or cannot be trusted to know, the correct spelling of the farmer’s name.
to reduce the chances of fraud.\textsuperscript{455} This "double check" protection is the best explanation for Congress's mandate in subsection 1324(c)(2)(C)(ii) that master lists be "arranged within each such product" by two categories of individual identifier information.

If Congress intended for registrants to have access to both alphabetical and numerical master lists for added protection, the USDA's March 1986 Interim Final Regulations, which required that lists be formatted in two sections, one alphabetical and one numerical, were correct.\textsuperscript{456} By abandoning the two section format, the USDA allowed states to offer registrants a choice of format, either alphabetical, numerical, or both. If the state offers an option of receiving the lists under both alphabetical and numerical arrangement, one can argue that the registrant who does not choose the "both" alternative knowingly accepts a risk which the statute allows registrants to take. The authors believe, however, that section 1324 does not permit states to distribute master lists in a single identifier (name or number) format. Section 1324 does not allow states to undermine registrants' "double-check" protection by offering alphabetical or numerical options of arrangement within farm products. Through subsection 1324(c)(2)(C)(ii), Congress intended that CNS's provide master lists to registrants in a two section format that is both alphabetical and numerical. States are allowed flexibility within that format so that duplication of information is avoided, but the format must be a two section format that includes both alphabetical and numerical lists.\textsuperscript{457} Therefore, a real question exists whether states that

\textsuperscript{455} One should remember that registrants are accountable for all information which is properly in and distributed by a CNS. Thus, if a registrant buys from someone who lies about his identity in an attempt to evade a security interest properly in CNS, the registrant bears the risk of that lie and is subject to the security interest. \textit{Accord} Richards, supra note 4, at 413-14. Although an agricultural producer totally committed to fraud can lie not only about name identity but also about number identity, the ability to "double check" through name and number at least forces the agricultural producer to be a more sophisticated liar. Registrants should be able to protect themselves against the unsophisticated liar even if no way exists to protect against the sophisticated liar.

If a secured party sued a registrant for failing to honor payment obligations on encumbered farm products properly entered into CNS in a situation in which the producer lied about his identity, the registrant's response is to argue that the master list was not arranged in accord with the requirements of section 1324. Although the information was in CNS, it was arranged only in alphabetical format. Because the system is not in compliance with section 1324, the registrant, contrary to what the lender alleges, has not received actual notice from a centralized notification system.

\textsuperscript{456} The March 1986 Interim Final Regulations were incorrect, however, in adopting the crop year as the basic organizing category. See supra text accompanying note 446.

\textsuperscript{457} In \textit{supra} note 448 the authors set forth the six formats that can be derived from subsection 1324(c)(2)(C)(ii). Formats 3, 4, 5, 6 are permissible formats because each has the two section approach. The authors conclude that formats 1 and 2 by themselves are not in compliance with section 1324 although the two formats when combined would satisfy section 1324. States are allowed to choose among these acceptable formats to adopt a single format.
have CNS's that do not distribute master lists in the two section format have systems that comply with section 1324. 458

E. Tort Liability of System Operators

Nowhere in section 1324's legislative history or its statutory language is there mention of possible legal liability accompanying state adoption of CNS. Yet, CNS states may have significant liability exposure in farm products financing. Although this topic is too broad to fully resolve in this article, the authors will raise the issue of when CNS states might face claims. 459

As a general rule, states have abrogated their sovereign immunity and allow tort claims against themselves when state employees take action in a ministerial capacity that causes harm to another. States have ordinarily retained their sovereign immunity when state employees take discretionary action. Thus, governmental tort liability generally hinges on the distinction between discretionary and ministerial actions. 460 With respect to ministerial duties, states are most often liable when their employees violate the standard of reasonable care, although states sometimes protect themselves from tort liability by waiving sovereign immunity only for acts done without good faith or in a reckless manner. 461

458. Only two states of the initial eleven certified, Idaho and Mississippi, have created CNS's that distribute master lists in the two section (alphabetical and numerical) format. In Idaho, the distributed master list is organized by farm product and then alphabetically. At the end of the alphabetical list, a cross-index keyed to the item number in the alphabetical list is presented in order of social security number or taxpayer identification number. See Idaho Application, supra note 87, at Idaho Admin. Rule 34.U.01(g)(iv). In Mississippi, distributed master lists are organized by farm product and then arranged both alphabetically and numerically. See Mississippi Application, supra note 87, at Miss. Admin. Rules 5.01(A)(1), (4). The other nine states with certified systems give registrants the option of receiving master lists alphabetically or numerically or both.

459. States have no potential liability under PNS because it is solely and completely the responsibility of secured parties. It does not involve states in any way.


461. Of the initial eleven CNS states, only two addressed in their applications the issue of state liability for CNS mistakes or errors. Louisiana by statute explicitly accepted liability as follows:

The failure of the commissioner to keep correct indices for security devices recorded with the central registry shall subject the department and its insurer to the payment of all damages suffered thereby any person.

La. Rev. Stat. Ann. § 3:3655(C) (West 1987); see also id. § 3:3655(D); Louisiana Application, supra note 168. In contrast, Nebraska's application specifically addressed the liability of its system operator only with respect to query requests under subsection 1324(c)(2)(F) and limited liability to cases of "willful misconduct or gross negligence." Nebraska Application, supra note 269, at app. A. 1986 Neb. Laws LB 1 § 16(5); see also 1987 Okla. Sess. Laws ch. 69 § 12 (legislation authorizing CNS and limiting liability of system operator to bad faith actions, but this standard apparently applies only when responding to subsection 1324(c)(2)(F)
ministerial actions when these terms are applied to the activities of CNS operators?

As previously discussed, CNS states run an inherent risk that a federal court will rule that the CNS is not in compliance with section 1324 and, therefore, legally not a CNS. Even assuming that a federal court rules that a particular CNS is not in compliance with section 1324, the state involved should not incur liability for damages suffered by agricultural lenders, buyers, commission merchants, or selling agents as a result. States designing and modifying CNS’s for the purpose of gaining USDA certification are assuredly acting in discretionary capacity. To hold otherwise means that states adopting CNS have become guarantors of the system and potentially accountable for the entire farm products debt existing in that state.

On the other hand, when a secured party files a correct EFS, the system operator has the statutory obligation, which entails no discretion, to enter that correct EFS information onto the master list. If the system operator fails to enter the correct information, or enters the EFS (correct as presented) into the CNS but with errors that make the EFS no longer informative, the system operator has potentially caused harm to the secured party because the CNS registrants are not accountable for a security interest unless they receive informative, actual notice of the security interest. An EFS that has not been properly entered into the CNS or that has been entered with materially misleading errors does not give actual notice. Consequently, secured parties may have tort claims against the state if they suffer economic loss because of entry errors of system operators.

Aside from the information contained in the applications for certification, the authors have not done any general research into the laws of the various CNS states to ascertain the potential tort liability of system operators.

462. For a fuller discussion of a CNS being declared not in compliance with section 1324, see supra pt. III(A)(1)(b). Courts should not allow litigants to attack a CNS as invalid in each and every case in which litigants try to gain or avoid CNS protections. Courts should limit noncompliance challenges to CNS’s to cases in which the challenging party can present facts that specifically relate to the claimed deficiency. If a case’s facts do not relate to a claimed deficiency in the CNS’s compliance, that case should be decided without regard to possible CNS deficiencies. If the courts do not adopt such a limitation, those involved in agricultural financing and marketing will be in a constant state of uncertainty. Cf. 9 C.F.R. § 205.214 (1988) (private parties may litigate section 1324 compliance). Moreover, without such a limitation, system operators will be perpetual witnesses testifying about CNS in the numerous federal cases that assuredly will arise concerning section 1324. See Sanford, supra note 4, at 12-13.

463. For a discussion of comparable governmental liability under the Code for failure to index a financing statement, see 9 R. Anderson, supra note 148, at § 9-403:20-22. Under the Code, a secured party is protected from the moment that the financing statement is presented for filing because constructive notice exists from that moment forward even if the financing statement is never indexed by the agency where the filings are kept. U.C.C. § 9-403(1); id. comment 1. Thus, under the Code, a state’s liability for failure to index is owed to those
A similar analysis and conclusion apply when secured parties suffer economic loss because system operators do not timely distribute master lists. Although subsection 1324(2)(E) permits states to select the frequency with which master lists will be distributed, system operators are required to make timely distributions. Once a CNS state’s authorizing statute or application for certification commits the system operator to a particular frequency of distribution, the system operator no longer has discretion on this matter.\textsuperscript{444} If system operators fail to distribute the master list as promised, they have failed in a ministerial duty. If a secured party loses protection as a result of this failure, it may have a tort claim against the state for any economic loss.\textsuperscript{445}

Subsection 1324(c)(2)(B) requires system operators to record the date and hour EFS’s are filed; section 1324 does not command system operators to check EFS’s to determine whether they contain the information section 1324 demands. Thus, system operators owe no federal statutorily mandated duty to secured parties to refuse a presented document that lacks section 1324’s formal requisites. Consequently, states should incur no liability to secured parties if system operators ministerially enter whatever document is presented, even if later a secured party suffers economic loss because the document

\begin{footnotesize}
\begin{enumerate}
\item who are misled when they consult the public record, rather than to secured parties. \textit{See}, \textit{e.g.}, \textit{Scot Lad Foods, Inc. v. Secretary of State}, 66 Ohio St. 2d 1, 418 N.E.2d 1368 (1981). In contrast, under section 1324 the state’s liability for failing to properly enter the EFS into CNS is owed to the secured party, not CNS registrants. To reduce EFS handling errors, system operators may desire to use countermeasures such as returning an acknowledged EFS to the secured party. Section 1324 does not, however, impose any specific countermeasures upon system operators. Hence, the decision to adopt, or not adopt, countermeasures to reduce errors is discretionary with each state. 9 C.F.R. §§ 205.202(c), .204(b) (1988). Utah, for example, does use the countermeasure of an acknowledgment copy. \textit{See} Utah Application, \textit{supra} note 168, at Utah Form C.F.S.-1.
\item Cf. 9 C.F.R. §§ 205.101(b)(7), .208(f) (1988) (CNS states must specify how frequently master lists will be distributed).
\item Although states were required to explain in their applications how the master list would be complied and distributed to registrants, they were not required to provide proof that the CNS would be adequately funded or that the computer hardware and software being selected would be sufficiently sophisticated to handle the resulting data. \textit{Id.} § 205.101(5)-(6). For a fuller discussion of the USDA’s authority in the certification process, see \textit{supra} pt. III(A)(1).
\item Thus, a state can have a CNS that, as designed, complies with section 1324, but which for funding or technical reasons cannot perform as designed. Such a state has a CNS, but secured parties, as a practical matter, have no protection because the system does not provide proper actual notice to CNS registrants. \textit{Cf.} Op. Ark. Att'y Gen. No. 87-222 (1987) (reliance upon “direct notice” as a sole means of protecting a security interest is not considered prudent under such circumstances). Whether system operators are liable to secured parties when the reason for untimely distribution relates to funding or technical sophistication problems is a question upon which the authors take no position. The authors’ position in the text relates to distribution failures that relate to negligent operation of an adequately funded and sufficiently sophisticated CNS.
\end{enumerate}
\end{footnotesize}
was successfully challenged as invalid and ineffective. 466 On the other hand, certain states have voluntarily created a state-owed obligation in favor of secured parties to check EFS's to make certain that they satisfy section 1324's requirements. 467 These states have expanded their potential tort liability to secured parties beyond that to which section 1324 otherwise exposes system operators. The authors believe that states should not voluntarily agree to audit presented documents because section 1324's EFS requirements are detailed and confusing. States agreeing to audit presented documents are undertaking a difficult task and greatly increasing their exposure to tort liability.

As discussed, subsection 1324(c)(2)(F) places a statutory obligation on system operators to create a query method for nonregistrants. 468 When nonregistrants request information, system operators have the obligation to respond orally within twenty-four hours and follow that response with written confirmation. These responses and confirmation mandates are meant to ensure that inquirers receive both usable and accurate information. Thus, section 1324 imposes a ministerial duty of promptness and accuracy on system operators under the query method. If they fail to so provide the information, they may be liable in tort to nonregistrants who suffer economic loss. 469 Note that subsection 1324(c)(2)(F) does not prescribe the manner in which or the hours during which the system operator can be queried. The USDA has

466. Similarly, under the Code, filing officers have no obligation to read a presented document to determine whether it contains the information needed to qualify as a valid, effective Code financing statement. 9 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 9-403:01 (1986).

467. Of the initial eleven states gaining CNS certification, two states explicitly accepted the obligation to inform secured parties whether a presented document satisfies section 1324's EFS requirements. See Maine Application, supra note 87; Montana Application, supra note 87. Both states evidently accepted this obligation because the same document serves as a Code financing statement and as a section 1324 EFS. In contrast, Mississippi's application for certification apparently twice declined responsibility for determining whether a presented document, which can serve both as a Code financing statement and a section 1324 EFS, satisfies section 1324's EFS requirements. See Mississippi Application, supra note 87, at Miss. Admin. Rules 2.00, .02(C). The applications of two other states leave unclear the state operator's obligation to audit presented documents. The Louisiana EFS form states prominently that "FORMS NOT COMPLETED IN ACCORDANCE WITH THESE INSTRUCTIONS WILL BE RETURNED." Louisiana Application, supra note 168, at La. Form CR-1. Oregon Administrative Rule D(3) says: "The EFS will be rejected if it does not contain the information listed in D(2) above." Oregon Application, supra note 239, at Or. Admin. Rule D(3).

468. For a fuller discussion of the query method, see supra pt. III(C)(3).

469. Under the Code, filing officers also have an obligation to respond to requests for information about financing statements that have been filed against any particular debtor. U.C.C. § 9-407(2). Mistakes in complying with Code section 9-407 can subject the filing officer to tort liability. See 9 R. ANDERSON, supra note 148, § 9-407:10; 9 W. HAWKLAND, supra note 466, § 9-407:01.
decided, therefore, that system operators have discretion to accept queries only in writing, or in writing and by telephone, and only during regular nonholiday business hours, or twenty-four hours per day, as fits the administrative needs of the system operator.\textsuperscript{470} Because the manner and hours of inquiry are discretionary with system operators, they can have no tort liability for these discretionary choices.\textsuperscript{471}

One additional point about system operator tort liability under subsection 1324(c)(2)(F) deserves special emphasis: the statutory obligation to answer queries, and, therefore, potential tort liability, is a duty only to nonregistrants. System operators, therefore, are clearly within their statutory rights if they simply refuse to respond to queries made by secured parties or CNS registrants. As a consequence, system operators have no tort liability for delayed or inaccurate information provided to secured parties or to CNS registrants who might try to use the query method as a shortcut to gaining information about security interests. Secured parties cannot use the query method as a way of avoiding their obligation to check Code filings to determine priority between secured parties.\textsuperscript{472} CNS registrants cannot use the query method as a way of avoiding their obligation to read the CNS master list distributed to them. Although system operators might provide information through queries initiated by secured parties or CNS registrants as a courtesy, secured parties and CNS registrants cannot transfer the risks allocated to them by section 1324 to system operators.\textsuperscript{473} An exception arises if, and only if, a CNS state voluntarily expands its responsibilities by mandating that its system operator provide query information to a larger class than nonregistrants.\textsuperscript{474}

IV. PRESALE NOTIFICATION SYSTEMS (PNS)

A. Beware of the "Blizzard"—Blanket or Batch PNS Notice Mailings

\textsuperscript{470} 9 C.F.R. § 205.208(h)-(m) (1988).

\textsuperscript{471} E.g., Oregon allows queries under subsection 1324(c)(2)(F) only if those queries are in writing and presented to the system operator during regular business hours. See Oregon Application, supra 239, at Or. Admin. Rule J(2).

\textsuperscript{472} See supra note 375.

\textsuperscript{473} Under Code section 9-407, filing officers are accountable in tort only to the person who requested the information as allowed by the section's language, but not to third parties who relied upon the information. 9 R. Anderson, supra note 148, § 9-407:10. Courts should consider secured parties and CNS registrants under subsection 1324(c)(2)(F) as analogous to these nonprotected third parties under Code section 9-407.

\textsuperscript{474} Nebraska has explicitly decided to expand the system operator's obligation to provide information to encompass anyone who queries the system. Nebraska made this decision clearly recognizing that subsection 1324(c)(2)(F) only extends statutory protection to nonregistrants. Nebraska Application, supra note 269.
Much has already been said about presale notification, with concentration on the form and content of PNS notices. Before continuing, it is important to focus on how secured parties will implement PNS notices. Security interests in farm products not produced in a CNS state at the time of sale can be protected only if buyers, commission merchants, and selling agents who actually deal with the subject farm products receive proper PNS notice from secured parties.\textsuperscript{475}

Conceptually, PNS is simple. In advance of sale, secured parties should obtain the identity of buyers, commission merchants, and selling agents with whom debtors may deal pursuant to subsection 1324(h) (or otherwise); then they must use that information to transmit PNS notices to the person so identified. For secured parties, however, PNS's biggest problem is the risk that debtors will actually sell to or through persons not identified in advance and who, therefore, do not receive PNS notice.\textsuperscript{476} Section 1324 makes it clear that if this happens, whether by mistake or fraud, such nonidentified buyers will take the farm products free and clear of security interests created by the seller.

Faced with this risk, secured parties may be tempted to find ways to minimize their reliance on information supplied by debtors. In particular, House and Senate witnesses suggested that secured parties would respond by sending a "blizzard" of PNS notices to all potential buyers, commission merchants, and selling agents with whom their debtors may deal.\textsuperscript{477} Generally, the list of recipients would be based on known farm product markets, without regard to the information supplied by debtors. One witness went even further, envisioning that such a blizzard would create "a mini-central filing system in the hands of each buyer of farm products."\textsuperscript{478} In fact, this phenomenon occurred in several states that adopted similar presale notice systems before section 1324's passage.\textsuperscript{479}

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\textsuperscript{475} See supra notes 525-28 and accompanying text.

\textsuperscript{476} See supra note 43 and accompanying text.

\textsuperscript{477} Senate Hearings, supra note 46, at 189 (testimony of Glenn F. Lemon, Chairman, First Bank and Trust of Booker, Texas); see also id. at 135 (testimony of William B. Brandt, Nebraska Bankers Association: "This provision alone will proliferate the dissemination of secured debtors names and would create a paper blizzard of names in the hands of every potential purchaser."); id. at 41 (testimony of Marlin D. Jackson, Arkansas Banking Commissioner that advance notice will result in prospective purchasers being drowned in a sea of paperwork); Second House Hearing, supra note 41 at 153 ("Faced with this prospect, responsible lenders would have no alternative but to inundate their respective trade areas with computer-generated lists of borrowers on whose crops or livestock they hold a lien.").

\textsuperscript{478} Senate Hearings, supra note 46, at 142 (testimony of William B. Brandt, Nebraska Bankers Association).

\textsuperscript{479} Second House Hearing, supra note 41, at 207 (testimony of G. Ray Wilson discussing Tennessee's system); Clark Memorandum, supra note 4, at 37 ("This problem has arisen in Iowa, which adopted a pre-notification system some time ago."); B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 8.4[3][h], at S8-27 (Supp.
ings of PNS notices to all potential buyers, commission merchants, and selling agents in a defined market area reduce the risk that a debtor will sell to a person who has not received PNS notice. It is unclear, however, whether section 1324 permits secured parties to make blanket or batch mailings of PNS notices.

1. Arguments Supporting Blanket PNS Notices

Section 1324 does not expressly limit secured parties to transmitting PNS notices to those persons identified by debtors. Nor does section 1324 specifically prohibit blanket PNS notices, a possibility amply reviewed and forecasted during the legislative process.\textsuperscript{480} Given the discussion of this technique during the House and Senate hearings, Congress's failure to expressly prohibit blanket mailings can be interpreted as a decision to permit it. Indeed, Congress may have decided that if lenders were limited to mailing presale notice to pre-identified buyers under subsection 1324(h), secured parties would bear too great and unfair a risk. Although Congress knew that presale notice places the risk of unnotified buyers on secured parties, it may have decided to allow secured parties to exercise their own business judgment in protecting against this risk.\textsuperscript{481} A second more technical argument based on section 1324's language also can be made.

Section 1324's mandate to organize PNS notices "according to farm products"\textsuperscript{482} is consistent with a form of blanket mailings that compiles a number of PNS notices into one form. Such a compilation may well look like a "mini" section 1324 CNS master list. Under this approach, secured parties would prepare a blanket list of all debtors with whom they deal, organized by farm products and containing all other required PNS notice information for each debtor. This list then would be sent to all potential buyers, commission merchants, and selling agents dealing in the types of farm products covered by the compilation in a well-defined market area. Computer technology

\textsuperscript{480} See supra notes 477-79.

\textsuperscript{481} The witnesses' testimony, cited in the preceding four footnotes, commented in a general fashion about the consequences of adopting presale notice in farm products financing. Most were "lender-oriented" witnesses who used the "blizzard" consequence as an argument against adopting presale notification. But one witness, a farm products buyer, focused specifically on the legislation's language and interpreted the legislation as allowing blanket or batch mailings if the lender wanted to expend the time and effort to make such broadscale mailings of presale notice. Senate Hearings, supra note 46, at 106 (testimony of Dale Seyler, President of Colorado Commodity Traders). The witness further stated that farm product buyers were willing to take on the record-keeping burdens of presale notice to reduce or eliminate the risk of double payment. Id. at 104.

\textsuperscript{482} Food Security Act of 1985, supra note 3, at § 1324(e)(1)(A), (g)(2)(A).
available to most commercial lenders permits and encourages this approach. Permitting such blanket lists gives meaning to this statutory language.

The Senate version of section 1324 sent to the Conference Committee in November 1985 did not require that PNS notices be “organized according to farm products,” even though other EFS informational categories were imposed on PNS notices at that time. Without explanation, the Conference Committee added this requirement for PNS notices. The addition of this language is consistent with an attempt to create uniformity between CNS and PNS. CNS master lists must be organized by farm products because they are designed to convey information about multiple debtors. Arguably, the Conference Committee’s inclusion of a farm products organizational requirement into PNS notices supports the conclusion that secured parties may similarly use and organize PNS. Of course, unlike CNS master lists, Congress made no reference to any specific order or format for presenting the data contained in blanket PNS notices. As a practical matter, some lenders in PNS states have in fact adopted blanket mailings based on these arguments.

Assuming blanket PNS notices are permitted, what form can they take? First, secured parties might just collect all of their PNS notices, make copies, and mail them as a PNS package to a predetermined address list on some periodic basis. This method, however, is cumbersome at best. Moreover, if there are a significant number of debtors included, it may be costly to organize, update, copy, and send. Computer PNS master data lists suggested by section 1324’s “organized” language are similar to CNS master lists and may offer a more attractive option to secured parties because they can be automated for annual mailings. Such a form also may assist secured parties in meeting section 1324’s one year limitation on the life of PNS notices and mandatory amendment requirement for material changes because computerization allows amendments and updates to be completed, automated, and mailed more easily.

Two other section 1324 requirements, however, cast doubt on whether a computerized master PNS list may be used. First, PNS notices must be original or reproduced copies, which means that

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483. 131 CONG. REC., supra note 9, at S16,297.
484. Telephone conversation with Ms. Ann Duffield, General Counsel of the Oklahoma Banker’s Association (Oct. 20, 1987). Ms. Duffield stated that the Oklahoma Banker’s Association had not recommended the blanket/batch approach. In fact, she believed most lenders were not following it, but that some lenders were sending blanket/batch notices. See also Clark Memorandum, supra note 4, at 37 (“This is not prohibited by the federal statute.”); Meyer Comments, supra note 4, at 154 (“It also appears that, if the lender wants to incur the costs, the lender is not prohibited from sending notices to all known buyers.”).
the format of a computer list is limited to a series of actual sequential PNS notices. This format detracts from other possible formats that might be more useable on computer because no summary form for each compilation or reordering (as under CNS master lists) can be made which meets this requirement. Second, the uncertainties that may lead secured parties to require debtors to sign PNS notices will create longistical problems that negate the advantages of computer processing. 486

2. Arguments Against Blanket PNS Notices

PNS was added to section 1324 as a way for farmers, farm product lenders, buyers, commission merchants, and selling agents to share the burdens involved in solving the "double payment" problem of the Code's farm products exception. 487 House and Senate debate stressed that PNS and CNS are to distribute equitably section 1324's burdens on all segments of the agricultural community and to achieve some level of uniformity across the nation. 488 Distribution of blanket PNS notices runs contrary to this sharing of responsibility. Instead, it places an extra weight on buyers, commission merchants, and selling agents. They will be forced to sort, maintain, and analyze different forms of PNS notices from different secured parties which may be mailed, updated, and replaced on whatever schedule secured parties choose. Adding to this burden, these PNS blanket notices in all probability will include many debtors with whom the recipient will never deal, thus increasing the total number of PNS notices which each recipient must handle.

For example, one Senate witness estimated 150 to 170 potential markets were located within a 75 to 100 mile radius in his home state. 489 Assuming that within that same radius fifty lenders are making farm products loans to an average of fifty farmers (a conservative estimate), 490 a blanket mailing by each of these lenders to all markets in the area will generate 7,500 to 8,500 different master PNS lists or packages of reproduced PNS notices. Since no organizational requirement for PNS notices exists, other than by farm products, the formats of the fifty lists received by each market may vary significantly. Like EFS's, PNS notices must specifically identify farm products as

486. See supra notes 151-53 and accompanying text.
487. See supra notes 32-51, 116 and accompanying text.
488. See, e.g., 131 CONG. REC., supra note 9, at S16,298-300.
489. Senate Hearings, supra note 46, at 135 (testimony of William B. Brandt, Nebraska Bankers Association).
490. The Senate hearings example was given by the witness for southeast Nebraska. A glance at the atlas for that area shows more than 100 communities.
to type of agricultural commodity.491 Unlike CNS's, however, there are no standard categories of commodities that all secured parties can use for guidance. Consequently, secured parties may use different words to describe the same farm products (e.g., "string beans" versus the more general "beans"). Each list or package may be amended or superceded by a new mailing by each lender on a different time schedule. Different lists may cover the same debtor, but different farm products. The permutations created by this system are awesome. Indeed, as predicted by House and Senate witnesses, blanket mailings can result in a paper avalanche that effectively creates a form of constructive notice. Buyers, commission merchants, and selling agents cannot reasonably, conveniently, or cost effectively sort, process, or use the data that will be in their possession. Lender mailings limited to markets identified by debtors will likely lead to significantly less paper in the hands of recipients, increasing the chance that recipients will deal with the listed debtors. Thus, the allowance of blanket mailings of PNS notices is counterproductive to section 1324's purposes of equitably sharing burdens and uniformity.

A second reason for prohibiting blanket PNS notices arises out of the same inherent problems. By congressional intent and design, secured parties under PNS bear the risk that debtors will sell to or through persons not previously identified. Congress heard and most probably understood the identification hurdles this risk creates for secured parties. Their response was to create CNS, which made blanket mailings unnecessary. The states (not secured parties) were then given the option of choosing between the two systems. This solution met both goals espoused by Senator Garn. CNS provides more flexibility to states and a method of burden sharing more acceptable to secured parties.492 For buyers, commission merchants, and selling agents, CNS avoids the problems posed by multiple, uncoordinated mailings like those arising from blanket mailings of PNS notices. CNS also deals with the unidentified buyer problem that secured parties handled in state presale notice systems by blanket mailings. Congress then delegated to the state the authority to choose between the two. Congress also expressly rejected any attempt to impose anything but actual notice on buyers, commission merchants, and selling agents except when they elect not to register with an applicable CNS. By creating CNS in response to the very problem which gives rise to blanket PNS notices, Congress preempted any implied right of secured parties to use blanket PNS notices. This conclusion is compatible with the earlier determination that PNS and CNS are co-equal but mutually exclusive systems.493

491. See supra notes 237-39 and accompanying text.
492. See supra notes 49-51 and accompanying text.
493. See supra notes 104-25 and accompanying text.
Next, although section 1324's statutory language does not expressly prohibit blanket PNS notices, neither does it expressly permit them. Section 1324's "organized according to farm products" language is equally consistent with a recognition by the Conference Committee that debtors often produce more than one class of farm products, each of which may be listed on the same PNS notice. Thus, the "organized according to farm products" language does not necessarily imply permission to use blanket or batch mailing. 494

Finally, blanket mailings of PNS notices raise privacy and authority questions that must trouble secured parties considering the approach. PNS notices and EFS's contain much more information than is found in Code financing statements, including debtor social security and taxpayer identification numbers. The question is whether it is an invasion of privacy or violation of any law for secured parties to publish this information without either express statutory authority or prior debtor consent. For example, a comment to the USDA's March 1986 Interim Regulations suggested that "it would violate the Social Security Act to require social security numbers on U.C.C. financing statements." 495 For CNS's the USDA had an easy answer to this observation: "Any such provision . . . would be superseded by . . . [section 1324] . . . since [section 1324] requires the EFS to show such number and requires the master list to be organized according to such numbers." 496 But this answer may not apply to blanket PNS notice mailings. Congress clearly foresaw and intended that all EFS information would become public by requiring that it be contained in public CNS master lists. No such express intent is present for PNS notices. This lack of statutory authority has led one commentator to recommend that "[i]f blanket notices are going to be sent, the lender should obtain a consent to send written notices to others besides those listed in the security agreement or a separate agreement before sending blanket notices." 497 This is sound advice and the authors commend it to the reader. Not only does it address privacy and disclosure issues, but it may create waiver, estoppel, or debtor authorization arguments, which might be interposed to stop debtors, buyers, commission merchants, or selling agents from arguing blanket PNS notices are ineffective.

3. Conclusion

Whether section 1324 prohibits blanket mailings of PNS notices

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494. See supra notes 482-84, infra notes 530-31 and accompanying text.
496. Id.
497. Meyer Comments, supra note 4, at 154.
is a close question.99 If buyers, commission merchants, and selling agents are actually bombarded by blanket mailings from a variety of secured parties, section 1324's legislative history and dual notification system structure suggest that such action is contrary to Congress's intent. Yet, the issue most probably will not be raised in the context of multiple secured parties. Instead, it will only be introduced in the same way defenses were created under the Code's farm products exception. After the fact, buyers, commission merchants, or selling agents will introduce the issue while attempting to avoid section 1324 liability under PNS. In such a situation, only one secured party is involved. If it did not use blanket mailings, how can the contrary arguments be used against it? Even if it did use blanket mailings, the resulting burdens previously discussed are based on all (or at least a large number of) secured parties acting in the same manner. If in fact they have, how can the buyer, commission merchant, or selling agent base its defense on the actions of third parties over which the involved secured party had no control? If for no other reason, this lack of nexus between the secured party litigant and the problem probably will force courts to conclude that because section 1324 does not expressly prohibit blanket mailings they are permissible as a matter of law, even if they may be contrary to legislative intent.

B. Property Descriptions and Multi-State Transactions

1. General

As section 1324 was introduced in 1985, PNS notices were to contain "a reasonable description of the property, including the jurisdiction where the property is located."499 The Senate's first detailed version of CNS required EFS's to contain "a description of the farm products... including... a legal description of the real estate concerned."500 The Senate amendment, however, left the PNS language untouched. Without explanation, the Conference Committee deleted the phrase "the jurisdiction where the property is located." The Committee substituted PNS's original "location" language into EFS's while deleting the Senate's "legal description" terminology from EFS's. At the same time, the Conference Committee introduced the first reference to county or parish identification in connection with EFS

498. See IOWA CODE § 554.9307 (Supp. 1986) (imposing a $200 per person fine for sending notices to persons not identified by the debtor); Meyer Comments, supra note 4, at 154 (arguing that section 1324 preempts such a penalty).
499. H.R. 2100, supra note 32, § 1314(d)(1)(A) (emphasis added); see also S. 744, supra note 32.
500. 131 CONG. REC., supra note 9, at S16,297 (emphasis added).
and PNS property descriptions. As a result of these modifications, subsections 1324(e)(1)(A)(ii)(IV) and (g)(2)(A)(ii)(IV) require PNS notices to contain "a description of the farm products . . . including . . . county or parish, and a reasonable description of the property."

501 At the same time, the Conference Committee required EFS's to contain "a reasonable description of the property, including county or parish in which the property is located." 502 As previously discussed, the USDA regulations interpret the "location" language for EFS's to mean "where . . . produced." 503 The changes leave a confusing trail for anyone trying to explain why section 1324's property description language varies between EFS's and PNS notices. The language changes raise two questions: Are the requirements identical for PNS notices and EFS's? Do PNS notices require descriptions of the property where farm products are "produced" or where they are "located?"

2. Property Description Requirements in PNS Notices

The USDA regulations permit secured parties to limit an EFS's property identification to only a county or parish if all farm products produced in the county or parish are subject to the security interest evidenced by the EFS. 504 Nothing more is required, unless additional information is needed to adequately describe the collateral. Additional information would be needed if not all the product that a farmer produced in that county or parish is subject to the security interest. 505 Section 1324's language variation between EFS and PNS notice property descriptions, however, casts doubt on whether the same rule applies to PNS notices. In EFS's, the county or parish language is one part of the property description. On the other hand, PNS notices must contain county or parish and a "reasonable description of the property" as two separate pieces of information. Arguably,

501. Food Security Act of 1985, supra note 3, at § 1324(e)(1)(A)(ii)(IV), (g)(2)(A)(ii)(IV). Note that subsection 1324(g)(2)(A)(ii)(IV) adds an "etc." after the words "reasonable description of the property." Presumably this is a drafting error that does nothing more than confirm that a secured party is not limited to section 1324's categories of amount, crop year, county or parish, and description of the property in describing the subject farm products.

502. Id. § 1324(c)(4)(D)(iv).

503. 9 C.F.R. § 205.207(c) (1988); see supra text accompanying notes 245-56. The USDA interpretation creates a presumptive "representation" by a secured party who only lists a county or parish as the property description. For a discussion of presumptive "representations," see supra pt. II(I), III(B)(4)(c).

504. 9 C.F.R. § 205.207(d), (e) (1988).

505. Id. § 205.207(d); see supra text accompanying notes 297-309. It may be appropriate to state location in an EFS if such information will "distinguish it from other such product owned by the same person but not subject to the particular security interest." 51 Fed. Reg. 22,816 (1986).
this difference means that all PNS notices must contain a property
description more specific than just county or parish. Legislative history,
however, suggests that such a distinction is artificial. Although CNS
and PNS differ in how they get information to buyers, commission
merchants, and selling agents, there is no reason to interpret EFS
and PNS property descriptions differently. According to the USDA,
only the county or parish data is necessary to protect buyers, com-
mission merchants, or selling agents if all farm products that debtor
produces in that county or parish are subject to the noticed security
interest. Such an interpretation is consistent with section 1324’s uni-
formity and cost efficiency goals and its purpose of supplying adequate
information to identify farm products subject to a security interest.
Thus, courts should not require PNS notices to identify both a county
or parish and a description of the property when all of a debtor’s
farm products are subject to the security interest evidenced by the
PNS notice.

By the same token, as with an EFS, more than a county or parish
identity is needed in cases where more information is required to permit
PNS notice readers to identify the farm products which are the ob-
ject of the notice. An example is the case posited by the USDA where
some of a debtor’s farm products in a county or parish are subject
to the noticed security interest and some are not. However, the
Conference Committee’s rejection of the Senate’s “legal description”
language supports the conclusion that exact legal descriptions are not
required in such a further description. Instead, Code cases under sec-
tions 9-402(1) and 9-110 may provide guidance on what is a suffi-
cient description.

3. State in Which Produced or Located?

As previously discussed, subsection 1324(c)(4)(D)(iv) provides that
an EFS must contain “[the] county or parish in which the property
is located.” The USDA regulations state that the minimum infor-

507. Under the Code the basic requirement for real estate is that it be reasonably iden-
tified. See U.C.C. § 9-110. Thus, it has been held that a simple street address satisfies this
goal. See E. REILEY, GUIDEBOOK TO SECURITY INTERESTS IN PERSONAL PROPERTY § 3.7, at
3-21 (1981). More is required if the filing must be made in real estate records. Comment 5
to Code section 9-402, however, suggests that a metes and bounds description is not always
necessary. For example, it may be acceptable to incorporate a prior filing by reference. Still,
the Code imposes another standard on crops under Code section 9-402. Comment 1 states
that the description of land for crops “is merely part of the description of the crops concerned.”
U.C.C. § 9-402 comment 1. Since neither EFS's nor PNS notices need be filed in real estate
records, Code section 9-110 should provide courts guidance in interpreting the sufficiency of
the real property description.
mation necessary includes "each county or parish . . . where the farm product is produced or to be produced." Section 1324 does not expressly state whether PNS notices should describe where the subject farm products are produced or where they are located. Draft language requiring "location" information in PNS notices was deleted by the Conference Committee without discussion.

The USDA's position on EFS property description is mandated by the "produced in a State" language of section 1324 with respect to CNS. Moreover, this position avoids the necessity of state CNS's recording information about farm products produced in other states. No similar statutory mandate or necessity exists for PNS notices, which are transmitted to wherever debtor designated buyers, commission merchants, or selling agents reside. Indeed, unlike EFS's, nothing in section 1324 is inconsistent with PNS notices describing farm products location. However, the need for uniformity and convenience of repeated use supports the argument that PNS notices, to the extent possible, should be consistent with their EFS cousins. Section 1324's two notification systems make it likely that secured parties will complete both EFS's and PNS notices in connection with the same lending transaction if the farm products will be produced in both PNS and CNS states. No purpose is served by making secured parties describe "where produced" for EFS's and "where located" for PNS notices. Similarly, using "where produced" for PNS notices allows buyers, commission merchants, and selling agents the oppor- tunity to more easily integrate PNS notices with CNS master lists. Additionally, if location is used, PNS notices must be amended whenever the subject farm products are relocated without regard to production. The use of the "where produced" interpretation limits this obligation, particularly with crops that generally are produced in only one place. Thus, the best and most efficient interpretation of PNS is that secured parties should describe where farm products are produced in completing PNS notices.

The question then becomes, what are the consequences if a secured party uses "location" for its description? Are such PNS notices ineffective? Secured parties can argue that notwithstanding uniformity and convenience considerations, "location" satisfies PNS's express property description requirements, which do not mention either location or where produced. The primary purpose of both EFS's and PNS notices, however, is to provide buyers, commission merchants,

509. 9 C.F.R. § 205.103(a)(3) (1988); see also supra notes 245-56 and accompanying text.
510. See supra notes 245-56 and accompanying text.
511. Id.
512. See infra notes 513-28 and accompanying text.
and selling agents sufficient data to determine whether the farm products in a specific sale transaction are subject to a security interest. Knowledge of the farm products' location is not as informative for this purpose as knowledge of where they are produced. This is particularly true of crops that are generally produced in only one site but which may be located in a variety of places between production and sale. Buyers, commission merchants, and selling agents who know where farm products are produced more likely can determine whether these farm products are subject to a security interest. Section 1324 places the burden of supplying such useful information on secured parties. Thus, if a secured party gives a property description that describes the place of location rather than the place of production, the secured party has failed to give a correct property description in the PNS notices. Whether this failure makes the PNS notice ineffective as "no longer informative," however, depends on whether the failure can be considered a minor error.

4. Multiple-State Transactions

What happens if secured parties take security interests in farm products produced in more than one state? Section 1324 does not contain any provision similar to Code section 9-103 that furnishes perfection rules in multiple state transactions. Without such a rule, the effect of multi-state transactions on section 1324 must be deduced from its operative language and legislative history.

To best understand multiple-state transactions under section 1324, it is necessary to consider three separate scenarios: (1) transactions involving only CNS states, (2) transactions involving only PNS states and (3) transactions involving both PNS and CNS states. One common rule governs the analysis of these three possibilities. Although farm products may be produced in more than one state throughout their lives, they are produced in only one state at any given time.

a. CNS/CNS states

CNS applies "in the case of a farm product produced in a state that has established a central filing system." This phrase governs multi-state transactions involving two or more CNS states. The USDA regulations expressly address the movement of farm products between two CNS states:

513. See supra notes 253-56 and accompanying text.
Section 1324 provides only for filing an EFS, covering a given product, in the system for the State in which it is produced. Upon such filing in such system, subsections (e)(2) and (g)(2)(C) make buyers, commission merchants and selling agents not registered with that system subject to the security interest in that product whether or not they know about it, even if they are outside that State. Subsections (e)(3) and (g)(2)(D) make persons registered with that system subject if they receive written notice of it even if they are outside that State. All of these provisions apply only where an EFS is filed in the system for the State in which the product is produced. They do not apply to a filing in another system.  

This regulation covers the simple case of farm products produced in a state with a CNS and then moved to another for nonproduction reasons, such as storage or nonproduction processing. Whether the second state has a PNS or CNS does not matter since section 1324 focuses only on the CNS of the state of production. Unlike Code perfection rules, mere location of the debtor or the farm product without production is not determinative.  

The relevant USDA regulation, however, apparently assumes that farm products can only be "produced" in one state. But as previously shown, livestock are in constant production and are produced wherever they are located for further gain or growth in the handling cycle. If livestock is continuously produced across state lines, the determination of which state's CNS system applies is best demonstrated by way of example.  

Consider a lender making a loan secured by cattle, which the farmer plans to acquire and raise in Arkansas. However, the cattle are to be sent to Nebraska for final feeding (part of the production cycle) and sale. Both states have CNS's. To protect itself, the lender files an EFS in Arkansas, but not Nebraska. Clearly, this filing will result in maximum section 1324 protection only if the cattle are sold in Arkansas before being moved to Nebraska. Operative CNS subsections 1324(e)(2) and (3) and (g)(2)(C) and (D) apply because the livestock are being produced at the time of sale in Arkansas. Time of sale is determinative.  

This example only becomes a multi-state transaction if the farmer moves the cattle to Nebraska for final feeding before sale. If the sale occurs in Nebraska, the Arkansas filing will not protect the lender. The lender has not filed with the CNS of the state in which the livestock

516. See U.C.C. § 9-103(1)(b).
517. See supra notes 253-56 and accompanying text.
518. The basic rule of subsections 1324(d) and (g)(1) is that, except as provided by CNS or PNS, buyers, commission merchants, and selling agents who "buy" section 1324 farm products take free of a security interest created by the seller.
are being produced at the time of sale (Nebraska). Without this filing, the operative CNS exceptions of subsections 1324(e)(2) and (3) and (g)(2)(C) and (D) do not apply.

What if the lender, knowing the farmer’s plans, diligently files an EFS in both Nebraska and Arkansas (or an original EFS in Arkansas and a notice in Nebraska) at the time of taking the security interest? The USDA regulations address this possibility: “A question arises whether, if an EFS is filed in one State, a notice of it can be filed in another State and shown on the master list for the second State. There is nothing in the Section to prevent this, but it would serve no purpose.” The USDA’s answer raises two points. First, like Code section 9-103, section 1324 permits filings covering the same security interest in more than one state. Thus, the lender in the example can file multiple EFS’s (or notices of EFS) in Arkansas and Nebraska at the beginning of the loan transaction. As the USDA observes, however, the second filing in Nebraska initially has no effect. So long as the cattle are being produced in Arkansas, the CNS of Arkansas (and Arkansas alone) governs. Yet, the USDA statement is too broad, for it implies that the Nebraska filing never has effect. This is not true once the debtor moves the cattle to Nebraska for production. If the Nebraska filing is proper at the time of sale, the lender will be covered.

The next question is whether a proper EFS is on file in Nebraska. Since the filing was made when the cattle were being produced in Arkansas, both the Nebraska and Arkansas EFS’s should describe the Arkansas production locations. This means that when the cattle are moved to Nebraska the lender must amend the Nebraska EFS (or notice) within three months, since a change in place of production is a material change. Nothing in section 1324, however, suggests that the amendment must be made before the sale. This result is consistent with the “relation back” perfection permitted by Code sections 9-103 and 1324. Obviously, if the amendment is not made within the three-month grace period, the second CNS filing is ineffective.

Another possible question is whether the lender can avoid this amendment requirement (and the corresponding risk of failing to make it) by properly describing in advance all the locations in both Nebraska and Arkansas where the cattle will be produced. Such EFS’s contain more information than section 1324 requires, since at any given time

521. See U.C.C. § 9-103(1)(d).
522. See supra pt. II(G).
they give a description that does not then apply (i.e., when the cattle are being produced in Arkansas, the Nebraska description is inapplicable and vice versa). Assuming the accuracy and sufficiency of all descriptions and that the underlying security agreement property description is broad enough\textsuperscript{523} to cover multiple production locations, nothing in section 1324 expressly prohibits this practice. As a practical matter, however, system operators may object to such filings because of section 1324's requirement that operators arrange master lists geographically. Naturally, system operators have no obligation or capacity to describe production locations outside their states' borders.

Based on this example certain generalizations can be made about how to analyse transactions involving production in two or more CNS states:

1. Even though livestock may be "produced" in more than one state, they are produced in only one state at any given time for purposes of section 1324's notification systems.
2. Under section 1324, only one state's law governs at any given time during the production cycle of farm products.
3. To receive section 1324's CNS protection, secured parties must have a proper EFS on file in the state in which the farm products are being produced \textit{at the time of sale}. "Location" at the time of sale is irrelevant under section 1324.
4. Multiple advance filings are permissible in CNS states where the farm products may be produced, but such filings are subject to section 1324's amendment requirements.

These generalizations will supply guidance in considering the other two interstate possibilities. Before proceeding, however, several caveats and exceptions are worth noting.

First, the authors take no position about whether farm products other than livestock can be produced in more than one state within the meaning of section 1324. Second, no attempt is made to define the term "produced." For example, livestock moved across state lines solely for the purpose of immediate sale should not be treated as being "produced" in the sale state. But will the answer differ if, as a factual matter, they are fed in the sale state for a short period of time before sale?\textsuperscript{524} Finally, problems associated with border farms, which overlap two states, will not be addressed.

b. PNS/PNS transactions

Since a majority of states at this time have PNS's, it is likely that

\textsuperscript{523} See supra pt. II(l).

\textsuperscript{524} See supra text accompanying notes 253-56.
many multi-state transactions will involve only PNS states. Although similar in some respects to the previous CNS/CNS consideration, PNS multi-state transactions are more straightforward to analyze.

Under PNS, the test is simply whether the actual buyer, commission merchant, or selling agent of the farm products received proper PNS notice "within 1 year before the sale of such farm product."\(^5\)\(^2\) The fact of multi-state production has no effect on this test, except that at the time of sale the PNS notice must contain a correct description of where the farm product is being or was produced.\(^5\)\(^2\) As with EFS's, however, the secured party must amend the notice to correctly reflect material changes in property description.\(^5\)\(^2\) States that do not adopt CNS have one common system—PNS. Thus, movement within that system should not affect the result. Like the CNS/CNS analysis, only the law of one state controls at any time, but unlike CNS, that law is essentially identical between PNS states. The only difference between section 1324 PNS notice in one state compared to another PNS state is the possibly different definitions of what constitutes receipt. That definition is governed by the law of the state where the recipient resides.

c. Interaction between PNS and CNS states

If farm products are produced in both PNS and CNS states, the interaction between the systems is a more difficult question. To illustrate the problem, consider the example of ewes bred in Idaho and then shipped to California for lambing and nursing, to Nevada for pasturing, and back to Idaho for feedlot finishing and sale of the lambs and rebreeding of the ewes.\(^5\)\(^2\) As of this article, Idaho has adopted CNS but California and Nevada are PNS states. Suppose a lender takes the ewes and lambs as collateral and files a proper EFS with Idaho, but takes no action to contact prospective buyers, commission merchants, or selling agents in the other states under PNS? Neither section 1324 nor the USDA regulations supply explicit guidance for this case. However, the answer follows from the preceding CNS/CNS and PNS/PNS analysis.

If the lambs are in Idaho and the EFS properly describes their production location in Idaho, the lender is protected by CNS. Once the lambs are moved from Idaho to California, the lender loses that pro-
The lambs are no longer being produced in Idaho and CNS sections 1324(e)(2) and (3) and (g)(2)(C) and (D) do not apply. Thus, if the lambs are actually sold while in California or Nevada, instead of Idaho, the Idaho EFS will not protect the lender. This result holds even if the ultimate buyer, commission merchant, or selling agent who deals with the lambs is an Idaho CNS registrant and has received a proper master list based on the lender’s EFS. This conclusion follows from a strict reading of section 1324. Buyers, commission merchants, and selling agents take free of a security interest unless the operative PNS exceptions (subsections 1324(e)(1)(A), (B) and (g)(2)(A), (B)) or CNS exceptions (subsections 1324(e)(2), (3) and (g)(2)(C), (D)) apply at the time of sale. As already noted, the CNS exceptions do not govern because the lambs are not actually being "produced in a state that has established a central filing system" at the time of sale (Idaho). PNS does not help because the lender did not give prior PNS notice. Further, subsections 1324(d) and (g)(1) show that the actual knowledge of the registrant buyer, commission merchant, or selling agent is not relevant, because it was not obtained as a result of the exceptions of subsections 1324(e) or (g)(2).

To avoid this seemingly harsh result, courts and secured parties may be tempted to invoke common law devices, such as estoppel and waiver or redefine "produced in a state" to include the initial production in Idaho. Both of these temptations should be avoided. The first reintroduces all the uncertainties and litigation that Congress expressly addressed by making actual prior knowledge of the security interest irrelevant. The second significantly complicates analysis of multi-state transactions by overruling the principal that only one notification system applies at any given time in the production cycle. If "produced" is interpreted to include prior production in Idaho as well as production in California and Nevada, buyers, commission merchants, and selling agents, are faced with an obligation (and corresponding risk) to determine every state in which production has ever occurred and search their CNS and PNS records for information that may be conflicting because of stale EFS filings or PNS notices. Nothing in section 1324's legislative history even hints that buyers, commission merchants, or selling agents should be subject to such risks, burdens, and uncertainties. Instead, they are obligated to determine only where the farm products are being produced at the time of sale. They are not charged with knowing the "life history" of farm products.

On the other hand, section 1324, especially the mandatory amendment requirement, places the burden on secured parties to keep track of their collateral. Either they will know in advance about planned movements, as in the example, or they must make arrangements to keep track of the collateral to make proper notices. Thus, the only
way the lender in this example can protect itself from a sale that occurs in California or Nevada when the sheep are being produced in one of those two PNS states is to give proper PNS notice when the lambs leave Idaho or when initially taking its security interest. As with the CNS/CNS and PNS/PNS analysis, secured parties attempting to simultaneously make EFS filings and give PNS notices must describe the property upon which production will take place. Although technically permissible, this may be quite difficult as a practical matter. It can easily lead to all filings and notices being improper because of an inaccurate property description that is "no longer informative."

There is one final caveat to this analysis. If the lambs return to Idaho as planned, Idaho's CNS once again governs. The initial EFS filing is proper provided it has not expired and still contains accurate information on the categories mandated by subsection 1324(c)(4).

C. Other Aspects of PNS Notices

Several additional issues concerning PNS notices must be addressed. These include covering a number of farm products with one PNS notice, the one-year effectiveness of PNS notices, whether default assumptions such as "all" crop years or "all" amounts may be used, and the right of PNS states to impose mandatory forms.

1. Are Separate PNS Notices Required for Each Farm Product?

Section 1324 does not expressly permit one PNS notice to cover more than one category of farm products. Yet, for convenience, most secured parties will prefer to use a single PNS notice for each debtor without regard to the number of farm products or counties or parishes. A similar issue exists for EFS's and was addressed by the USDA regulations, which provide that an EFS must contain the "farm product name." 9 However, the regulations allow each state CNS to determine "whether to permit one EFS to reflect multiple products, or products in multiple counties." 10 Thus, notwithstanding their adoption of the singular term "farm product," the USDA regulations appear to recognize the convenience to secured parties of one EFS covering all of a debtor's subject farm products.

Similarly, section 1324 should be interpreted to allow a single PNS notice to describe all farm products of a debtor subject to the security interest evidenced by that PNS notice. This interpretation encourages uniformity with EFS's and is based on identical statutory language. To enforce this conclusion, subsections 1324(c)(1)(a) and 1324(g)(2)(A)

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530. Id. § 205.103(c); see supra pt. III(B)(4)(e).
require that PNS notices be “organized according to farm products.” This language implies that more than one category of farm products may be described on the same physical notice. A single notice form also limits the amount of paper that buyers, commission merchants, and selling agents will receive, a result which is consistent with Congress’s goal of sharing burdens.

2. One Year Limitation and Lapse

Subsections 1324(e)(1)(A)(iv) and (g)(2)(A)(iv) state that PNS notices “will lapse on either the expiration period of the statement or the transmission of a notice signed by the secured party that the statement has lapsed, whichever occurs first.” With minor word differences to make it consistent with PNS notice, this language was transplanted from the definition of EFS’s into PNS without explanation by the Conference Committee. Although “expiration period” is not defined, it presumably refers to subsections 1324(e)(1)(A) and (g)(2)(A), which state that buyers, commission merchants, and selling agents take subject to a security interest unless they receive a PNS notice covering the farm products “within one year before the sale.” Unlike EFS expiration, which is a five-year period measured from the “date of filing” forward, PNS notice effectiveness is measured one year from the sale date backward. The following example demonstrates this provision.

On June 1, 1987, a lender in a PNS state takes a blanket Code security interest in all corn now or hereafter produced by a farmer. To protect itself under section 1324, the lender that same day transmits proper PNS notice to the local grain elevator, identified by the farmer as the potential purchaser, instructing it to issue a joint payee check. The farmer harvests the corn in September 1987 and stores it because of low grain prices. Finally, in July 1988, prices increase to a point where the farmer sells it to the elevator that received the lender’s PNS notice. Despite the PNS notice instructions, the elevator issues a single payee check and the farmer does not pay the lender. What result?

Since the elevator received the PNS notice more than one year before the sale, it takes free of the lender’s security interest, assuming it was a section 1324 buyer in the ordinary course. The elevator’s actual knowledge from the June 1987 PNS notice is not relevant under section 1324. To avoid this result, secured parties must create a

532. Id. § 1324(c)(4)(F).
533. Id. § 1324(e)(1)(A), (g)(2)(A).
"reminder list" to give new PNS notices annually. Unlike the Code or CNS, PNS makes no provision for continuation statements.

If this is not enough, consider if and how the example result changes if in August 1987, before harvest, the farmer enters into a forward sale contract for his September crop with the same elevator calling for delivery in August 1988. Is the date of sale the delivery date (i.e., the date title passes) or the contract date (i.e., the date a binding commitment is created)?

Code section 2-106(1) states that a "sale' consists in the passing of title from the seller to the buyer for a price." Although Code section 2-401 provides standards for passage of title, in part these are subject to an agreement between the parties. Thus, unlike a date of filing, the sale date may depend on the understandings of the parties to the sale and courts will be required to determine it on a case-by-case basis.

3. Generic Descriptions and Use of "All"

Section 1324's requirement of specific rather than generic descriptions also holds true for PNS notices. Generic descriptions such as "all crops" or "all livestock" are not permitted. Legislative history and subsection 1324(c)(5) require that farm products be identified specifically by type of agricultural commodity or species of livestock. The USDA has given a list of nonbinding but acceptable descriptions for central filing systems, and CNS states have the right to develop their own lists as part of the certification process. No similar guidance exists for PNS, although nothing prohibits secured parties from using the USDA and state CNS lists for guidance. Thus, secured parties must select their own characterization of farm products when completing PNS notices. Given this choice and to minimize the need to amend, secured parties should choose the broadest description possible without running afoul of subsection 1324(c)(5)'s limitations. For example, if the debtor says that he is planning to raise durum wheat, the secured party should use the term "wheat" rather than "durum wheat," but not the more general term "grain."

More difficult questions are posed by the requirement that lenders identify the amount (where applicable) and crop year. It appears per-
missible for PNS notices to say "all wheat whenever produced." By implication, this covers an amount (all) and crop years (all). Nothing in section 1324's language or its legislative history suggests that this type of description cannot be used, provided each specific farm product is listed. The "where applicable" limitation on the amount requirement further supports this conclusion. It also is consistent with the USDA regulations, which create the presumption that failure to specify amount or crop year means that "all of such products owned by the person in question" for every year for which an EFS is effective are covered by the EFS. If such a "default" presumption is permitted by section 1324 for EFS's, surely secured parties can use the same default description for PNS notices.

Finally, secured parties are faced with trying to define what the terms "amount" or "crop year" mean. Since the language, purpose and context of the two terms is identical when used in both PNS and CNS, the USDA regulations should be applicable to PNS notices on this issue.

4. Can PNS States Impose Mandatory PNS Notice Forms?

Given all that has been said about PNS notices, it is clear that buyers, commission merchants, and selling agents who receive them from numerous sources will face a significant problem in conveniently and cost-effectively sorting and using the data in their possession. Even if blanket PNS notices are not permitted, the amount of paper involved will still be significant. Moreover, since PNS does not require any specific ordering of information, the variety of self-made forms will exacerbate this processing problem. Can buyers assert that nonuniform PNS notices are a violation of section 1324? Although a court may sympathize with the assertion, it seems that such an argument, if made, should be rejected. PNS makes this result not only possible but certain. Congress placed this burden on buyers, commission merchants, and selling agents under section 1324 and testimony indicated that recipients were prepared to live with it as part of the compromise.

Perhaps a more interesting question is whether PNS states recognizing this problem can mandate a form of PNS notice. Section 1324 does not expressly address this possibility. At first glance this seems an attractive concept for all parties. Secured parties need not spend time and money inventing a form. Buyers, commission, merchants,
and selling agents will receive a more limited variety of PNS notices with savings from the resulting efficiencies. However, section 1324 should be interpreted to prohibit this state interference.

Secured parties, buyers, commission merchants, and selling agents involved in a multiple state transactions already must keep track of what states have what system and the various rules and regulations governing certified central filing systems in states adopting CNS. These are burdens inherent in section 1324. Secured parties satisfy section 1324's PNS conditions once they transmit notices containing the section 1324 PNS information to a buyer, commission merchant, or selling agent who actually receives that notice. Section 1324 requires nothing more to shift the burden. Thus, secured parties have a statutory entitlement to section 1324 protection if they properly transmit an actual PNS notice. If states were allowed to mandate PNS forms, buyers, commission merchants, and selling agents might try to assert defenses based on those state forms. This would undermine the secured party's section 1324 protection. Section 1324, as a federal law, does not allow such state defenses.

V. Conclusion

Section 1324 has three goals: (1) to remove the potential double payment burden on buyers of farm products created by the Code's farm products exception; (2) to establish uniformity in farm products lending transactions; and (3) to reduce overall costs. To achieve these goals, PNS and CNS must provide easy to follow rules and guidelines that all parties to farm products transactions can economically use. As this article demonstrates, CNS and PNS contain numerous anomalies, inconsistencies, and outright drafting mistakes that cast doubt on the ease of use and effectiveness of both systems. Immediately following its passage, section 1324 commentators raised many of these problems and questions. Attempts were made to have Congress postpone the effective date of section 1324 to allow technical and simplifying amendments. Given the contentious legislative history of section 1324, it is not surprising that, to date, Congress has refused to take such action. Thus, the agricultural community must learn to use and implement section 1324, and federal courts face the unenviable task of interpreting and resolving many of the issues this article discusses.

This article has attempted to answer some of the questions raised

543. See supra notes 8-9.
544. See supra note 17.
545. See Clark Memorandum, supra note 4, at 36.
by early section 1324 commentators, but it is impossible to anticipate them all. Even for the ones addressed, the answers given often are based on legislative history, the USDA regulations, and an analysis of section 1324's purposes and structure rather than explicit statutory language. Because of the nature of this approach and the closeness of some of the arguments, courts may well reach different conclusions for specific problems.

As a general conclusion, however, in attempting to solve actual or perceived problems with the Code's farm products exception, Congress leapt too quickly into uncharted waters. Although Congress frequently discussed the possibility of changing the Code's farm products exception between 1983 and 1985, section 1324 was a result of less than two months of work, much of it behind closed doors. The resulting notification systems are so complex that it is difficult to see how section 1324 will successfully navigate many of the same shoals that wrecked the Code's farm products exception. Litigation concerning section 1324's definitions and compliance with its requirements will abound. Problems of retroactivity and preemption limit its scope, and even suggest that buyers, commission merchants, and selling agents otherwise liable under section 1324 can still raise all the consent, waiver, and estoppel defenses interposed to avoid the Code's farm products exception. Thus, Code section 9-306(2) litigation also will continue unabated. Without relief from these uncertainties and their related litigation, eventually some change must come again to farm products financing.

With this prediction in mind, it would be helpful to summarize some of the more common possibilities under section 1324 before drawing further conclusions.

<table>
<thead>
<tr>
<th>Applicable System</th>
<th>Action by Buyer, Commission Merchant, or Selling Agent</th>
<th>Result for Buyer, Commission Merchant, or Selling Agent*</th>
</tr>
</thead>
<tbody>
<tr>
<td>CNS No EFS filed</td>
<td>Registered with Central Notification System (&quot;CNS&quot;)</td>
<td>Takes free</td>
</tr>
<tr>
<td>CNS No EFS filed</td>
<td>Not registered with CNS</td>
<td>Takes free</td>
</tr>
<tr>
<td>CNS EFS filed</td>
<td>Registered with CNS</td>
<td>Takes subject to</td>
</tr>
<tr>
<td>CNS EFS filed</td>
<td>Not registered with CNS</td>
<td>Takes subject to</td>
</tr>
</tbody>
</table>

546. See supra notes 45-61 and accompanying text.
547. See Kershen and Hardin, supra note 1, at pt. II(C)(3)(d).
| CNS | EFS filed | Registered with CNS but does not receive master list with proper information before sale | Takes free |
| CNS | Improper or nonconforming EFS filed | Registered or not registered with CNS | Takes free |
| CNS | EFS filed | Not registered with CNS and receives incorrect information upon querying the CNS operator | Takes subject to |
| CNS | EFS filed | Registered with CNS but refuses to pay fees charged for lists and therefore does not receive lists | Takes subject to if the list fee is a part of the fee to gain registered status, but takes free if the list owed as a debt to state after registered status acquired. |
| CNS | EFS filed, but court determines that CNS is not in compliance with section 1324 or USDA Regulations | Registered or not registered | Takes free |
| PNS | No PNS notice received by buyer | N/A | Takes free |
| PNS | Proper PNS notice received by buyer | N/A | Takes subject to |

*Naturally, a buyer, commission merchant, or selling agent who takes subject to a security interest can avoid a double liability by complying with controlling payment obligations or otherwise securing a release or waiver from the secured party.

This chart does not show all possible scenarios but demonstrates some of the more likely variations.

In analyzing farm products financing transactions under section 1324 for both secured parties and buyers, commission merchants, and selling agents, one key is that the debtor must give honest answers to questions and must honor the security interest. Under the Code’s farm products exception, an honest and diligent debtor protected all
other parties to the transaction, whether by paying the secured party or causing the buyer, commission merchant, or selling agent to issue a joint payee check. Thus, one test for deciding section 1324's success is whether it protects secured parties, buyers, commission merchants, and selling agents from dishonest or incompetent debtors.

Section 1324 clearly does not measure up to this test. Under PNS, the debtor can circumvent the system by selling off list. Noting this simple escape route, one congressional witness suggested that PNS "can actually facilitate diversions of collateral proceeds by that small percentage of producers whose fraudulent conduct is the underlying cause of the problem this bill seeks to remedy."548 Sadly, it is doubtful that subsection 1324(h)'s provisions will provide much deterrent to a debtor bent on fraud or one who is simply inept because the penalty, whether criminal or civil, is not likely to be a significant deterrent. Subsection 1324(h) does not provide much solace to secured parties who have lost their collateral, have no action against the buyer, commission merchant, or selling agent, and who may not even receive fine proceeds.549

Further, CNS does not truly protect secured parties, buyers, commission merchants, or selling agents from fraudulent conduct by farmers. As for secured parties, farmers may invalidate an EFS by initially giving inaccurate information about what farm product will be produced or where it will be produced or by making changes (without reporting the changes) in what will be produced or where it will be produced. These actions would make the previous EFS information "no longer informative." Although secured parties can try to police the collateral to catch these fraudulent efforts by farmers, debtors intent on evading a security interest are likely to be successful in many instances in keeping the accurate or changed information hidden from secured parties.

At the same time, if a secured party has a properly filed EFS in a correct CNS, secured parties are protected, but buyers, commission merchants, and selling agents take the risk of debtors who use false identities or false social security numbers, lie about where the farm product is produced, or use a third party to sell the farm product for them under the third party's name. In these instances, secured parties can hold buyers, commission merchants, or selling agents liable for double payment provided the secured party can prove that an applicable CNS-protected farm products collateral was bought or sold by that particular buyer, commission merchant, or selling agent. Although buyers, commission merchants, and selling agents can try

548. See Second House Hearing, supra note 41, at 153.
549. See supra pt. II(F).
to protect themselves by asking the right questions, they cannot easily recognize the lies of a debtor determined to perpetrate a fraud.

In other words, neither the PNS or CNS alternative of section 1324 has solved the problems created by debtors intent on fraud. Only a small percentage of farm product transactions result in a claim by a secured party against a buyer, commission merchant, or selling agent. Many of those claims, however, involve situations in which the farmer has been dishonest about the existence of a security interest against the farm product being sold. Thus, for a significant number of farm product transactions that have given rise to double payment claims, section 1324 basically does nothing either to prevent or to solve these defrauding-farmer problems.

In analyzing section 1324, only two real alternatives appear to solve all the issues that have been discussed and which still may be raised. Even if informational categories are clarified and simplified, permitting PNS and CNS to exist side-by-side still poses significant unresolved issues that adversely affect all parties to farm products transactions. Congress should either return to its initial simple concept of reversing the Code's farm products exception without regard to actual notice of a security interest, as is the case in inventory financing transactions, or eliminate the PNS alternative and simplify and consolidate the CNS alternative as a federal system rather than a state system.

A. Elimination of Both PNS and CNS

Obviously, all the problems that this article has addressed will become moot if Congress eliminates both PNS and CNS and the Code farm products exception. Although farm products lenders vehemently opposed this approach in 1983 and 1985, the resulting CNS and PNS systems should leave no one happy. For secured parties, the systems are difficult to comply with, require a significant amount of paperwork to implement, increase transaction costs, and do not create uniformity. It is difficult to believe that section 1324 makes life easier and facilitates agricultural lending or sales transactions for any party to agricultural transactions. Instead, it merely creates an avalanche of paper for all parties concerned.

Given this result, it is appropriate to again focus without emotion on some underlying facts that emerged from the House and Senate hearings. When pressed, those testifying in favor of change found it difficult to quantify the financial impact of the Code's farm products exception on lenders, buyers, commission merchants, and selling agents. Similarly, lenders found it impossible to assess what would happen if the Code's farm products exception were eliminated. For example, although its farm products financing system varies in some
important respects from that of the rest of the nation, California’s elimination of the Code’s farm products exception had no appreciable effect on farm products lending. Perhaps more evidence of this questionable impact is that when faced with the new risks imposed on lenders by section 1324 in PNS states, federal banking regulators only required evidence that lenders were “attempting” to comply with PNS. Actual compliance was not the test. This approach makes one wonder whether these same regulators might not be satisfied with the loss of this questionable protection.

Although in theory this approach is the simplest way to eliminate the problems posed by section 1324’s notification systems, the contentious legislative history of section 1324 indicates that it may be impossible to go backwards. If so, lenders, farm products buyers, commission merchants, and selling agents should seriously consider uniting behind a federal central notification alternative to PNS and CNS. This alternative should offer simplified informational requirements that will create a system with some chance of achieving section 1324’s purported goals.

B. Federal Central Filing

In a federal central filing system, Congress would preempt only the place of filing under Code section 9-401 so that there would be a single, national place for filing farm products financing statements. Congress would authorize the USDA to create a central repository for farm products financing statements, but would explicitly leave all statutory requirements and questions of statutory interpretation to state Code law. Concurrently, Congress would leave all jurisdiction over farm products litigation to state courts.550

By creating a central repository and nothing more, Congress would simply be adopting at a national level the central filing alternative that the Code has always proffered to the states. As a central filing system, this alternative would provide constructive notice to everyone in accordance with the Code’s approach and in sharp contrast to section 1324’s actual notice approach. Thus, once Congress created this national central filing alternative, secured parties would have to look in only one place to determine other secured parties’ priority or interest in farm products proposed as collateral for a loan. Moreover, buyers, commission merchants, and selling agents would have to con-

suit only one place to learn whether farm products offered for sale were collateral for a loan.

For national central filing to be efficient and effective, the system must be accessible by modern computer telecommunications. It must be a full text system that allows secured parties, buyers, commission merchants, or selling agents to search by any word or number set forth on any individual financing statement. The system should be accessible for obtaining information, but not for entering data, on a twenty-four hour a day basis.\textsuperscript{551} For simplicity, Congress should not preempt the informational requirements for farm products financing statements set by the Code except for one additional requirement. To ensure that every single debtor can be identified by a truly unique identifier, Congress should mandate that every financing statement filed with the national central repository contain the debtor's social security or taxpayer identification number.

By adopting a national central filing system, Congress would be agreeing that the farm products exception is important and should be preserved. But Congress would be creating an efficient, simple system of constructive notice that provides maximum information to all parties involved in the financing and marketing of agricultural products, while imposing a minimum of statutory requirements, informational complexity, and paperwork. The authors realize that they have not addressed many questions about the details of a national central filing system. But the object here is to raise national central filing as an alternative, not to discuss details of such a system.\textsuperscript{552} If farm products financing and marketing are national concerns, national central filing is a sensible federal response to those concerns. Section 1324, unfortunately, is not.

\textsuperscript{551} The type of system the authors propose is similar to the full text databases, searchable almost 24 hours a day, that are available for legal research. For the person who desires to use these systems, they are easy to learn, easy to use, and relatively inexpensive.

\textsuperscript{552} Professor Richards also ended her article by concluding that a national central filing system is a preferred solution to section 1324. Richards, \textit{supra} note 4, at 417-18.