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DATE: June 18, 2002

****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 2002-242, Laws of Florida

**HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIAL OVERSIGHT
FINAL ANALYSIS**

BILL #: HB 1669, 1ST ENG. (IDENTICAL PROVISIONS PASSED IN CS/SB 1066, 1ST ENG.)

RELATING TO: Uniform Commercial Code

SPONSOR(S): Committee on Judicial Oversight and Representative Crow

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT YEAS 8 NAYS 0
 - (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 11 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

Article 9 of the Uniform Commercial Code governs the process of establishing and foreclosing liens against personal property. Article 9 is found at ch. 679, F.S., entitled "Uniform Commercial Code: Secured Transactions".

In the 2001 legislative session, the Revised Article 9 of the Uniform Commercial Code, as prepared by the National Conference of Commissioners on Uniform State Laws, with Florida modifications, passed and was subsequently enacted into law. This act corrects errors in that enactment and clarifies the relationship between fixtures filings and Florida real property law.

This act does not appear to have a fiscal impact on state or local government.

On March 20, 2002, CS/SB 1066, 1st Eng., was substituted for HB 1669, 1st Eng., which was laid on the table. CS/SB 1066, 1st Eng., became law on May 13, 2002, as Chapter 2002-242, Laws of Florida (the "act"). The effective date of the act is may 13, 2002. This analysis, with certain exceptions, is of Chapter 2002-242, Laws of Florida. The exceptions are those sections that address the House bill, which are clearly identified.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Background on Article 9 of the Uniform Commercial Code (by the National Conference of Commissioners on Uniform Laws):

The Uniform Commercial Code has eleven substantive articles. Article 9, Secured Transactions, may be the most important of the eleven. Article 9 provides the rules governing any transaction (other than a finance lease) that couples a debt with a creditor's interest in a debtor's personal property. If the debtor defaults, the creditor may repossess and sell the property (generally called collateral) to satisfy the debt. The creditor's interest is called a "security interest." Article 9 also covers certain kinds of sales that look like a grant of a security interest.

The operation of Article 9 appears deceptively simple. There are two key concepts: "attachment" and "perfection." These terms describe the two key events in the creation of a "security interest." Attachment generally occurs when the security interest is effective between the creditor and the debtor, and that usually happens when their agreement provides that it take place. Perfection occurs when the creditor establishes his or her "priority" in relation to other creditors of the debtor in the same collateral. The creditor with "priority" may use the collateral to satisfy the debtor's obligation when the debtor defaults before other creditors subsequent in priority may do so. Perfection occurs usually when a "financing statement" is filed in the appropriate public record. Generally, the first to file has the first priority, and so on.

Article 9 relies on the public record because it provides the means for creditors to determine if there is any security interest that precedes theirs--a notice function. A subsequent secured creditor cannot complain that his or her grant of credit was made in ignorance of the prior security interests easily found in the public record, and cannot complain of the priority of the prior interests as a result. Every secured creditor has a priority over any unsecured creditor.

The somewhat simple description in the prior paragraphs should not mislead anyone. Article 9 is not simple. There are substantial exceptions to the above-stated perfection rule, for example. Filing is not the only method for perfection. Much depends upon the kind of property that is collateral. Possession of collateral by the secured party is an alternative method of perfection for many kinds of collateral. For some kinds of property, control (a defined term) either perfects the interest or provides a better priority than filing does. There are kinds of transactions for which attachment is perfection. Priority is, also, not always a matter of perfecting a security interest first in time.

C. EFFECT OF PROPOSED CHANGES:

See "Section-by-Section Analysis".

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 679.1021(1)(nn), F.S., to correct a cross-reference error.

Section 2. Amends s. 679.1081, F.S., regarding descriptions of collateral.

Present Situation: Section 679.1081, F.S., specifies how collateral must be described in a financing statement. If the collateral securing the loan is not properly described, the creditor may lose priority in that collateral.

Effect of Proposed Changes: This act amends subsection (5) to correct a general cross-reference error referring to the entire "Uniform Commercial Code" (thus making reference to chapters 670-679, F.S.). The correct general cross-reference, referring only to ch. 679, F.S., is substituted.

This act also adds paragraph (c) to subsection (5). This new paragraph is a non-uniform provision that specifies that a general lien against accounts owned by a debtor will not be a lien against the proceeds from the sale of the debtor's homestead real property, unless the debtor specifically pledges that asset. Florida case law provides that the proceeds from the sale of homestead real property enjoys the same constitutional homestead protection as the homestead real property that the proceeds were derived from. It is arguable that the revised Article 9 provisions may perhaps have the unintended consequence of altering this law. This change reinforces current law protecting Florida homestead property. A corresponding provision is added at new s. 679.2031(10), F.S.

Section 3. Amends s. 679.2031, F.S., regarding attachment and enforceability of a security interest, to add a new subsection (10).

Present Situation: Section 679.2031, F.S., provides the formal requirements for attachment of a security interest to property. If not properly attached, there is no security interest in a particular property.

Effect of Proposed Change: This act adds new subsection (10) to s. 679.2031, F.S. This new paragraph is a non-uniform provision that specifies the requirements for attachment of a lien against the proceeds from the sale of the debtor's homestead real property. The debtor must specifically pledge the proceeds from the sale. The financing statement must contain the legal description of the property, must be executed by both spouses where the property is owned by a married person, and must state that it is a pledge of homestead property. A corresponding provision is added at new s. 679.1081(5)(c), F.S.

Section 4. Amends s. 679.210, F.S., regarding requests for accounting.

Present Situation: Article 9 of the Uniform Commercial Code is applicable to both consumer transactions and commercial transactions. Much of the code is the same for either type of debtor, but some provisions are changed to account for the differences between consumers and businesses. Section 679.210(6), F.S., provides, in part, that a "debtor in a consumer transaction is entitled to a single response to a request regarding a list of collateral, for a transaction other than a consumer transaction, . . ." A debtor in a consumer transaction cannot, by definition, engage in a transaction other than a consumer transaction. The exception here is nonsensical.

Effect of Proposed Change: This act removes the exception “for a transaction other than a consumer transaction”.

Section 5. Amends s. 679.3011, F.S., regarding the law governing perfection and priority of security interests.

Present Situation: Section 679.3011, F.S., provides the general rules regarding which state’s law is controlling over a particular secured transaction. Subsection (3) provides that, in general, while negotiable documents, goods, instruments, money, or tangible chattel paper are located within a jurisdiction, the local law of that jurisdiction governs perfection of a security interest in the goods by filing a fixture filing; perfection of a security interest in timber to be cut; and the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

Section 679.1021(nn), F.S., defines "fixture filing" to mean “the filing of a financing statement covering goods that are or are to become fixtures and satisfying ss. 679.502(1) and (2), F.S. The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.” Section 679.1021(oo), F.S., defines "fixtures" to mean “goods that have become so related to particular real property that an interest in them arises under real property law.” A fixture filing is accomplished by notice at the county level in the Official Records, other secured transaction filings are at the state level. Filing a secured transaction record in the wrong place, and correspondingly failing to file in the correct place, will result in a loss of the creditor’s protections under Article 9 of the Uniform Commercial Code.

There are, in general, three categories of goods: (1) those that retain their chattel character entirely and are not part of the real property; (2) ordinary building materials that have become an integral part of the real property and cannot retain their chattel character for purposes of finance; and (3) an intermediate class that has become real property for certain purposes, but as to which chattel financing may be preserved. It is this third category to which the term “fixtures” and the concept of “fixture filings” address. Because the question whether goods have become fixtures often is a difficult one under applicable real property law, a secured party may make a fixture filing as a precaution.

Effect of Proposed Changes: This act adds a new subsection (5) to s. 679.3011, F.S., which provides an exception to the general rule of subsection (3). This new subsection provides that Florida law governs the perfection of a security interest in goods that are or are to become fixtures in this state by the filing of a fixture filing. This new subsection (3) also specifies the effect of perfection or nonperfection, and the priority of a security interest in goods that are or are to become fixtures in this state.

Section 6. Amends s. 679.3171, F.S., regarding interests that take priority over or take free of a security interest or an agricultural lien.

Present Situation: Section 679.3171, F.S., provides exceptions to the general rules of priority of security interests. In general, the priority order for security interests that are properly perfected is “first in time, first in right.” Section 695.01, F.S., provides that no conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, is good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice; unless the conveyance, transfer, or mortgage is recorded in the Official Records of the county or counties in which the real property lies.

Effect of Proposed Changes: This act adds new subsection (6) to s. 679.3171, F.S. This new subsection provides that an encumbrancer or owner, other than the debtor or a lien creditor, who acquires an interest in the related real property takes free of a security interest in goods which are or become fixtures in this state that is perfected only with a financing statement not filed as a fixture filing, even if the encumbrancer or owner knows of its existence. For purposes of s. 695.01, F.S., the filing of a financing statement covering goods which are or become fixtures in this state that is not filed as a fixture filing does not constitute constructive notice of such security interest to any person, other than a lien creditor, who acquires an interest in the related real property.

This act adds new subsection (7) to s. 679.3171, F.S. This new subsection provides that the holder of a mortgage or other lien against real property arising under the laws of this state, other than one under ch. 679, F.S., has priority with respect to the rents, issues, profits, and proceeds of the real property, including proceeds from the sale thereof, over a security interest in an account consisting of a right to payment of a monetary obligation for the sale of the real property.

Section 7. Amends s. 679.334, F.S., regarding the priority of a security interest in fixtures and crops.

Present Situation: Section 679.334(4), F.S., provides that a security interest in goods which are or become fixtures takes priority as to the goods over the claims of all persons acquiring an interest in the real property subsequent to the perfection of such security interest or the affixing of the goods to the real property, whichever occurs later.

Section 679.3171(1)(b), F.S., provides that a security interest or agricultural lien is subordinate to the rights of a person who becomes a lien creditor before the earlier of: the time the security interest or agricultural lien is perfected; the time that a security interest attaches to the property by meeting one of the conditions specified in s. 679.2031(2)(c), F.S.,¹ and a financing statement covering the collateral is filed.

Effect of Proposed Changes: This act amends s. 679.334(4), F.S. to clarify that only a security interest filed as a fixtures filing (filed in the Official Records Book of the county or counties in which the real property lies) is sufficient to establish the priority of the security interest in the goods which are or become fixtures. Additionally, this act provides that a security interest in goods which are or become fixtures perfected only by a financing statement that is not filed as a fixture filing is subject to the rights of an encumbrancer or owner of the related real

¹ Section 679.2031(2), F.S., provides a general rule, subject to exceptions, that a security interest is enforceable against the debtor and third parties with respect to the collateral only if several conditions are met. Section 679.2031(2)(c), F.S., requires that one of the following conditions be met:

1. The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
2. The collateral is not a certificated security and is in the possession of the secured party under s. 679.3131, F.S., pursuant to the debtor's security agreement;
3. The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under s. 678.3011, F.S., pursuant to the debtor's security agreement; or
4. The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under s. 679.1041, F.S., s. 679.1051, F.S., s. 679.1061, F.S., or s. 679.1071, F.S., pursuant to the debtor's security agreement.

property under s. 679.3171(6), F.S., and to the rights of a lien creditor under s. 679.3171(1)(b), F.S., but takes priority as to the goods over the rights of a lien creditor who does not meet the requirements of s. 679.3171(1)(b), F.S.

Sections 679.3171(6) and (7), F.S., created by this act, provide the priority that an encumbrancer or owner, other than the debtor or a lien creditor, has in real property related to the security interest.

Section 8. Amends s. 679.5011, F.S., regarding the filing office.

Present Situation: Section 679.1021(kk), F.S., defines "filing office" to mean an office designated in s. 679.5011, F.S., as the place to file a financing statement. Section 679.5011(1)(a), F.S., provides that fixture filings are filed with the clerk of the circuit court. Section 679.5011(1)(b), F.S., provides that "in all other cases" the filing office is the Florida Secured Transaction Registry. Fixtures are items of personal property that transition into real property. This transition can create uncertainty as to the correct filing office to utilize at a given point in time.

Effect of Proposed Changes: This act amends s. 679.5011(1), F.S., to specify that the filing office for collateral that is or is to become fixtures is the office of the clerk of the circuit court; and to specify that the filing office for all other security is the Florida Transaction Registry. Additionally, this act provides that a creditor may file a financing statement with the Florida Secured Transaction Registry where the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

This act also corrects two technical errors in s. 679.5011, F.S. In paragraph (1)(b), the act removes the word "and", which word can confuse the meaning of the sentence. Also, this act corrects a cross-reference error in subsection (2).

Section 9. Amends s. 679.510, F.S., regarding the effectiveness of a filed record.

Present Situation: Section 679.510(3), F.S., provides that, if a person may file a termination statement only under s. 679.509(3)(b), F.S., the filed termination statement is effective only if the debtor authorizes the filing and the termination statement indicates that the debtor authorized it to be filed. Section 679.509(3)(b), F.S., provides that a person may file an amendment to a financing statement other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if the amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required.

Effect of Proposed Changes: This act deletes s. 679.510(3), F.S.

Section 10. Amends s. 679.513, F.S., regarding termination statements.

Present Situation: Section 679.513(4), F.S., includes an exception for matters covered by s. 679.510, F.S.

Effect of Proposed Changes: This act removes the references to s. 679.510, F.S., to conform to other changes made by this act.

Section 11. Amends s. 679.516, F.S., regarding what constitutes filing and the effectiveness of filing.

Present Situation: Section 679.516(1), F.S., may perhaps be read to require the filing office to accept a filing without the payment of the required fee. There are several references in subsection (2) which provide that, in identifying an individual debtor, the debtor's first name or first initial may be used to identify the individual. Paragraph (2)(c), a non-uniform provision, was added into a list of 8 other paragraphs in the original enactment of the revised UCC Article 9, but corresponding cross-references in other parts of ch. 679, F.S., were not changed to conform.

Effect of Proposed Changes: This act amends s. 679.516(1), F.S., to make a grammatical change that specifies that payment of the required filing fee is a prerequisite to acceptance of a filing. This act amends subsection (2) to remove the ability to identify a debtor that is an individual using only the first initial of the individual's first name, thereby requiring that the full first name of an individual be used to identify a debtor that is an individual. Paragraph (2)(c) is redesignated as (2)(i), and the other subparagraphs redesignated correspondingly, in order to correct the cross-references to subsection (2). Also, other grammatical changes are made to s. 679.516, F.S.

Section 12. Amends s. 679.519, F.S., regarding UCC filings.

Present Situation: Section 679.519(1), F.S., regarding the filing of UCC records in a filing office, provides that any such filing must be "in accordance with such other laws applicable to the recording of instruments by a filing office described in s. 679.5011(1)(a)". The reference to s. 679.5011(1)(a), F.S., is unnecessary.

Effect of Proposed Changes: This act amends s. 679.519(1), F.S., to remove the unnecessary reference.

Section 13. Amends s. 679.527, F.S., regarding the Florida Secured Transaction Registry.

Present Situation: The Florida Secured Transaction Registry is the place for filing of financing statements at the state level. The process for filing financing statements with the state was privatized effective October 1, 2001. The vendor is Image API, Inc. All filings, photocopy and certification requests, forms, and database availability for searches, is the responsibility of Image API, Inc.² Section 679.527, F.S., provides the minimum terms and conditions of the privatization contract. Section 679.527(2), F.S., provides that the contract may not be assignable or otherwise transferable without the express written consent of the Department of State. Section 679.527(4), F.S., provides that the Department of State maintains ownership of all of the financing statements and other records related to financing statements filed with the Florida Secured Transaction Registry, and that the department may immediately reclaim and take possession and control of such records upon the occurrence of any number of conditions, one of which is if the private contractor "consents to an insolvency proceeding".

Section 679.4061, F.S., provides general restrictions upon the discharge of an account debtor; notification of assignment of contracts; identification and proof of assignment; and restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes. Section 679.4081, F.S., provides general restrictions on the assignment of promissory notes, health-care-insurance receivables, and certain general intangibles. In part, these two statutes place some restrictions on the right of parties to contracts to prohibit assignment or transfer of contract rights.

Effect of Proposed Changes: This act provides that ss. 679.4061 and .4081, F.S., are not applicable as to provision in s. 627.527(2), F.S. (which prohibits assignment or transfer of the

² http://ccfcorp.dos.state.fl.us/corpweb/inquiry/ucc_info.html

contract between the Department of State and the vendor selected to operate the Florida Secured Transaction Registry). Additionally, this act changes one of the conditions upon which the Department of State may immediately reclaim and take possession and control of the financing statements and other records from if the private contractor “consents to an insolvency proceeding” to if the private contractor “is adjudicated a debtor in an insolvency proceeding.”

Section 14. Amends s. 679.625, F.S., regarding remedies for failure to comply with ch. 679, F.S.

Present Situation: Section 679.625(2), F.S., provides that, subject to certain limitations, a person is liable for damages in the amount of any loss caused by a failure to comply with ch. 679, F.S., including damages suffered by the debtor resulting from the debtor's inability to obtain, or increased costs of, alternative financing, but not including consequential, special, or penal damages, unless the conduct giving rise to the failure constitutes an independent claim under Florida law other than ch. 679, F.S., and then only to the extent otherwise recoverable under that other law. Section 679.625(5)(f), F.S., provides that, in lieu of damages recoverable under subsection (2), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover \$500 from a secured party who fails to comply with the requirement at s. 679.616(2)(b), F.S., that the secured party, within 14 of a demand from the consumer and where applicable, state in writing that the secured party will not seek a deficiency as a result of a repossession of collateral.

Effect of Proposed Changes: This act amends s. 679.625(5)(f), F.S., to remove the distinction between consumer transactions and other transactions.

Section 15. Amends s. 679.5041, F.S., regarding indication of collateral.

Present Situation: Section 679.5041(2), F.S., is a non-uniform provision which provides that, if a security agreement grants a security interest in all of the debtor's personal property and such property is reasonably identified in the security agreement, the financing statement sufficiently indicates the collateral that it covers.

Effect of Proposed Changes: This act amends s. 679.5041(2), F.S., to remove the non-uniform text regarding the requirements for a security interest in all of a debtor's property. Accordingly, the security agreement will not be required to specify the property that is all of the debtor's property.

Section 16. Provides an effective date of “upon becoming law.” This act was signed by the Governor on May 13, 2002.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This act does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

HB 1669

On February 14, 2002, the Council on Smarter Government adopted a "remove everything after the enacting clause amendment", which amendment conformed the bill to SB 1066. The amendment:

- Specifies that a general lien against accounts owned by a debtor will not be a lien against the proceeds from the sale of the debtor's homestead real property, unless the debtor specifically pledges that asset. Florida case law provides that the proceeds from the sale of homestead real property enjoys the same constitutional homestead protection as the homestead real property that the proceeds were derived from. It is arguable that the revised Article 9 provisions may perhaps have the unintended consequence of altering this law. This change reinforces current law protecting Florida homestead property, adding new ss. 679.1081(5)(c) and 679.2031(10), F.S.
- Specifies that a holder of a real property mortgage on real property has priority in the proceeds of that real property, by adding s. 679.3171(7), F.S.
- Removes the word "and" in s. 679.5011(1)(b), F.S., which word can confuse the meaning of the sentence.
- Removes the last portion of s. 679.625(5)(f), F.S.

The bill was then reported favorably, as amended.

On March 14, 2002, the House adopted on second reading the traveling amendment, with two amendments to the amendment. Those amendments:

- (552289) This amendment to the amendment adds a section to the bill to change s. 679.5041, F.S. This change removes non-uniform text regarding the requirements for a security interest in all of a debtor's property.
- (940619) This amendment to the amendment amends s. 679.516, F.S., to specify that the filing fee must be paid before a filing statement may be filed; remove the ability to refer to the just the first initial of a debtor; and move paragraph (c) in subsection (2) in order to correct errors in cross-references to other paragraphs in subsection (2).

SB 1066

On March 13, 2002, the Senate adopted 2 amendments:

- (600782) This amendment amends s. 679.516, F.S., to specify that the filing fee must be paid before a filing statement may be filed; remove the ability to refer to the just the first initial of a debtor; and move paragraph (c) in subsection (2) in order to correct errors in cross-references to other paragraphs in subsection (2).
- (894736) This amendment adds a section to the bill to change s. 679.5041, F.S. This change removes non-uniform text regarding the requirements for a security interest in all of a debtor's property.

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VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

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Staff Director:

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FINAL ANALYSIS PREPARED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

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