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The *Delaware Law Review* (ISSN 1097-1874) is devoted to the publication of scholarly articles on legal subjects and issues, with a particular focus on Delaware law. With this issue, the Delaware State Bar Association is changing the focus of the law review format to provide an overview of recent developments in case law and legislature that impacts Delaware practitioners. This shift in the focus of the publication is in keeping with the ever-evolving role of the Delaware State Bar Association to remain relevant to the bar as a practical resource.

The Delaware State Bar Association expresses it gratitude and appreciation to Danielle Gibbs for 4 years of exemplary service as Editor-in-Chief of the *Delaware Law Review*. Alisa E. Moen is the incoming Editor-in Chief. She is a partner at Blank Rome LLP and currently serves as the firm's Corporate Litigation Vice Practice Group Leader.*

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DELAWARE LAW REVIEW

Editorial Board

THE "2010" AMENDMENTS TO DELAWARE UCC ARTICLE 9

Norman M. Powell*

The current version of Article 9 ("Current Article 9") of the Uniform Commercial Code ("UCC"), as promulgated in 1998 by the Uniform Law Commission ("ULC") and The American Law Institute ("ALI"), has been enacted in all fifty states, the District of Columbia, and the U.S. Virgin Islands, and generally took effect on July 1, 2001. From 2008 to 2010, a committee (the "Review Committee") convened by the ULC and the ALI considered certain issues, ultimately recommending amendments to the official text of, and official comments to, Current Article 9 (the "2010 Amendments"), intended to take effect on July 1, 2013. While most are unremarkable and simply clarify existing text, some are noteworthy. Some address issues seemingly anticipated by nonuniform text in Current Article 9 as enacted in Delaware ("Delaware Current Article 9"). This article provides a summary and brief discussion of the 2010 Amendments as well as nonuniformities in their text as recently enacted in Delaware (the "Delaware 2010 Amendments"). To the extent feasible, related provisions are discussed together regardless of their juxtaposition (or lack thereof) in the UCC. Unless otherwise noted, all citations in this article are to Current Article 9. Where the Delaware 2010 Amendments differ from the 2010 Amendments, such differences are discussed below.

I. SUMMARY

The 2010 Amendments were approved by the ULC at its 2010 annual meeting, and are being adopted by the various states in anticipation of a proposed uniform effective date of July 1, 2013. They include provisions that clarify, rather than change, what was intended by Current Article 9, as well as substantive changes reflecting emerged and emerging thought. Perhaps the most significant change is the offering of two alternative approaches to the vagaries of determining individual debtors' names. Alternative A, the so-called "only if" approach, would require that such names be rendered as they appear on a driver's license or other specified document. Alternative B, the so-called "safe harbor" approach, would merely create a safe harbor for financing statements naming debtors thus. Delaware took a nonuniform approach to individual debtors' names in 2001, and continues essentially that same approach under the Delaware 2010 Amendments, but with the addition of Alternative B's safe harbor. Other debtor name changes are relevant where collateral is held by the personal representative of a decedent, and where collateral is held in a trust. The classification of certain entities as "registered organizations" is clarified, as is the record to be consulted to determine a registered organization's name. The current "four month rule" that continues perfection following a change in a debtor's location is changed to provide not merely that a secured party's perfected security interest continues for four months following a change in its debtor's location (or, similarly, for four months following a new debtor becoming bound under an existing security agreement), but that such secured party is generally perfected in collateral acquired by its debtor within four months thereafter. The much-misunderstood "correction statement," which has no legal effect and can be filed only by a debtor, is renamed an "information statement," continues to have no legal effect, but can be filed by either a debtor or a secured party. The

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proposed changes eliminate the requirement that financing statements indicate a debtor's type of organization, jurisdiction of organization, and organizational identification number, based on the judgment that the burden of providing such information outweighs the resulting benefits. For precisely that reason, Delaware did not require inclusion of organizational identification numbers under Delaware Current Article 9. These and the other revisions are discussed in more detail below.

II. PROPOSED CHANGES TO PART 1: GENERAL PROVISIONS

The 2010 Amendments begin with revisions to certain definitions, most reflecting further refined thinking or facilitating greater clarity and certainty.

A. Section 9-102(a)(7) – "Authenticate"

Section 9-102(a)(7) is revised such that the definition of "authenticate" more closely resembles the definitions of "sign" in revised UCC Article 1 (general provisions) and Article 7 (documents of title). Recall that Current Article 9, intended to be medium-neutral, largely did away with anachronistic terms that suggested any requirement for paper documents and manual signatures affixed by humans wielding pens. This amendment brings to Article 9 the further-refined thinking of the years since the text of Current Article 9 was finalized in 1998.

B. Section 9-102(a)((10) – "Certificate Of Title"

Section 9-102(a)(10)'s definition of "certificate of title" is revised to comport with the emerging practice in many jurisdictions of maintaining nonpaper electronic records evidencing both ownership and security interests. Conforming changes appear in section 9-311 (Perfection of Security Interests in Property Subject to Certain Statutes, Regulations, and Treaties). The 2010 Amendments include a new sentence in Official Comment 5b to section 9-102, noting that when electronic chattel paper is converted to tangible form ("papered-out," in industry parlance), tangible chattel paper results. In a similar vein, Official Comment 3 to section 9-330 is modified to more clearly state that a secured party may achieve priority with respect to "hybrid" chattel paper (that is, chattel paper that is partly tangible and partly electronic) under Section 9-330(a) or (b), and to clarify how a secured party can retain its priority when tangible chattel paper is converted to electronic chattel paper and vice versa.

C. Official Comment 5D To Section 9-102 – Assignment Of Lessor Rights As Chattel Paper

Rejecting the holding in *In re Commercial Money Center, Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006), the 2010 Amendments provide in their changes to Official Comment 5d to section 9-102 that if a lessor's rights under a lease constitute chattel paper, an assignment of the lessor's right to payment under the lease, even if the assignment excludes any other rights, would be an assignment of chattel paper.

D. Section 9-102(A)(68) – "Public Organic Record"

Section 9-102(a)(68) is new, and brings specificity to the question of just what public record should be consulted to determine a registered organization's name. The new term "public organic record" generally means the document filed

with or issued by the relevant state or the United States to form or organize a registered organization. Revisions to the accompanying Official Comment 11 explicitly indicate that a certificate of good standing is not a public organic record and, thus, is not an appropriate referent for determining a registered organization's name. In a modest nonuniformity, the Delaware 2010 Amendments recognize that relevant filings relating to Delaware registered organizations can include not only initially filed records, amendments thereto, and restatements thereof, but also related corrective filings. Similarly, the definition of "registered organization" in (what is renumbered as) section 9-102(a)(71) is amended to clarify that the term includes organizations (i) formed or organized, (ii) by (a) the filing or issuance of a public organic record, or (b) by legislative enactment, even if such organizations are created without the need for a public organic record. These latter two provisions work in concert with revisions to section 9-503 (discussed below).

E. Section 9-105 – Control Of Electronic Chattel Paper

Section 9-105 is revised to provide a general test, and a safe harbor, for achieving perfection by control of electronic chattel paper. The language derives from the Uniform Electronic Transactions Act, and defers to emerging systems that reliably establish the secured party as the assignee of the chattel paper, contemplating continued innovation in this field.

III. PROPOSED CHANGES TO PART 3: PERFECTION AND PRIORITY

The revisions to Part 3 clarify certain matters related to transmitting utilities, location of debtors, and priority issues. They also affect changes resulting from a change in governing law, as for example when a debtor's location changes from one jurisdiction to another.

A. Section 9-301 – Law Governing Perfection And Priority

The 2010 Amendments include revision and augmentation of Official Comment 5b to section 9-301 to clarify certain matters relevant to fixture filings and nonfixture filings against collateral of transmitting utilities. A security interest in most types of collateral, including fixtures, of a transmitting utility can be perfected by a central filing in the jurisdiction where the transmitting utility is located. But a fixture filing is effective to perfect a security interest only in fixtures located in the jurisdiction in which such fixture filing is made, with the consequence that multiple such filings may be required.

B. Section 9-307 – Location Of Debtor

Section 9-307 of Current Article 9 provides the rules for determining a debtor's location, and thus the place in which one must generally file a financing statement naming that debtor for such financing statement to be effective.[1] Its subsection (f) addresses the location of registered organizations organized under federal law. Subparagraph (f)(2) currently provides that when an organization's location is designated in accordance with federal law, such location constitutes the organization's location for filing purposes. Alas, this succinct and seemingly clear provision has given rise to considerable consternation. In the parlance of many federal laws (e.g., the National Bank Act), what's designated is actually denominated

1. The general rule is subject to exceptions, e.g., for fixture filings and for security interests in timber to be cut and as-extracted collateral. *See* U.C.C. § 9-301, cmt. 5.

a "main office" or "home office," not a location. In its initial enactment of Current Article 9, Delaware added to section 9-307(f) nonuniform language to the effect that designating a main office or home office constitutes designation of a location. Revised versions of the Official Comments to Current Article 9 offered the same assurance,[2] but of course lack the force of law. The 2010 Amendments remove any doubt that such designations are, in fact, designations of a location for filing purposes. Inasmuch as the language to such effect in the 2010 Amendments differs from the nonuniform language in Delaware Current Article 9, for avoidance of any uncertainty Delaware both carries forward its original nonuniformity and adopts the new uniform text.

C. Section 9-316 – Effect Of Change In Governing Law

The 2010 Amendments significantly alter the effect of a change in governing law. Under Current Article 9 section 316, perfection of security interests that have attached prior to a change in the debtor's location continues for four months after such change. The 2010 Amendments add a new subsection 316(h) pursuant to which a secured party would also enjoy perfection of security interests that attach within four months after a change in the debtor's location, provided the secured party has already taken steps pursuant to which it would have been perfected absent the change in location. To illustrate, assume D is located in Florida and SP has properly perfected its security interest in D's inventory and accounts receivable by filing a financing statement in Florida. Thereafter, D's location changes to Delaware. Under Current Article 9, SP remains perfected, for four months following the change in location, in any inventory and accounts receivable in which it was perfected *before* the change. Under the 2010 Amendment, this remains so, but SP is *also* perfected in any (newly acquired) inventory and (newly arising) accounts receivable to which its security interest first attaches during the four months *after* the change in location. Such perfection continues until the end of this four-month period.

Similarly, a new subsection 316(i) provides for perfection of security interests that attach within four months after a new debtor becomes bound by an existing security agreement. Returning to our example, let's suppose that upon its "relocation" to Delaware "old D" is succeeded by "new D" as the debtor bound by the existing security agreement in favor of SP. Let us further suppose that, within the four months following such "relocation," "new D" enters into a financing transaction in which it grants SP2 a security interest in all of its inventory and accounts receivable, and that SP2 promptly perfects its security interest by filing in Delaware a financing statement naming "new D" as debtor. As between SP and SP2, both of which have perfected security interests in inventory acquired and accounts receivable arising within the four months immediately following "new D's" becoming bound, who has greater priority? Current Article 9 section 326 generally provides that, with respect to collateral in which the original debtor never held an interest, the security interest perfected by filing against the original debtor is subordinate to the security interest perfected by filing against the new debtor. The 2010 Amendments include revisions to Section 326 that preserve and extend this result to the circumstances contemplated by new subsection 316(i). Thus, in our example, SP is subordinate to SP2 with respect to collateral in which "old D" never held an interest. A modest revision to Official Comment 2 to Section 9-326 clarifies the interplay between that section and section 9-508 regarding subordination of certain security interests created by a new debtor.

D. Section 9-317 – Interests That Take Priority Over Or Take Free Of Security Interest Or Agricultural Lien

In what is viewed as a clarification, the language of section 9-317 is expanded to explicitly cover buyers of all types of collateral not susceptible to possession. Thus, a licensee of a general intangible, and a buyer (other than a secured party)

2. *See Id.* § 9.307 cmt. 5.

of any collateral other than tangible chattel paper, tangible documents, goods, instruments, or certificated securities takes free of a security interest if such licensee or buyer gives value without knowledge of, and before perfection of, such interest.

E. Section 9-322 – Priorities Among Conflicting Security Interests In And Agricultural Liens On Same Collateral

In another clarification, Official Comment 4 to section 9-322 has been augmented to include an explicit statement to the effect that a financing statement filed without authorization, but later authorized or ratified, thereupon becomes effective, but nevertheless enjoys priority from its time of filing. Official Comment 8 to the same section has been augmented to complete the explanation of certain priority rules applicable to proceeds: specifically, where two security interests in the same original collateral are entitled to priority in proceeds under section 9-322(c)(2), the security interest having priority in the original collateral has priority in the proceeds.

IV. PROPOSED CHANGES TO PART 4: RIGHTS OF THIRD PARTIES

Current Article 9 section 406 includes a broad override of certain contractual restrictions on assignability of property including accounts, chattel paper, payment intangibles, and promissory notes, but does not apply to a sale of a payment intangible or promissory note. Current Article 9 section 408 includes a more narrow such override of certain contractual restrictions on assignability of property including promissory notes, health-care insurance receivables, and general intangibles, but applies only to security interests in payment intangibles or promissory notes arising out of a sale. Thus, if a right to payment is evidenced by a promissory note, or is a payment intangible, Current Article 9 sections 406 and 408 facilitate assignments for security but not assignments by sale. Uncertainty has arisen as to whether foreclosure should be regarded as a "sale" or an assignment "for security." The 2010 Amendments clarify that the anti-assignment provisions of both sections apply to sales pursuant to Article 9 Section 9-610 and acceptances of collateral under Article 9 section 9-620.

V. PROPOSED CHANGES TO PART 5: FILING.

Amendments to Part 5 relate to determination of debtor names, persons entitled to file amendments, what to do when a debtor entity is "converted" into another debtor entity (and thus may be the same debtor, albeit perhaps with a different name or location, or may be a new debtor), certain filings against utility companies, bases on which filing offices can rightfully reject filings, filings asserting that specified existing filings are inaccurate or unauthorized, and revisions to the safe harbor written forms accepted by all filing offices that accept written filings.

A. Section 9-503 (Name Of Debtor And Secured Party)

Perhaps the most significant of the 2010 Amendments, these changes are relevant to filings against registered organizations, filings where collateral is being administered by the personal representative of a decedent, filings where collateral is held in a trust that is not a registered organization, and, most significant of all, filings against individual debtors. With different variations in each context, it has proven challenging to determine exactly what a given debtor's name is, and likewise challenging to make other determinations antecedent to filling out financing statements and tendering them

for filing. In addition to the changes discussed below, consistent changes appear in Official Comment 2 to section 9-506 (Effect of Errors or Omissions).

B. Registered Organizations

It has proven unclear just which public record is relevant to determining the name of a registered organization. Many quickly came to the view that good standing certificates were not the appropriate source of such information, but uncertainty remained as to which filed, or issued, formation document should be consulted.[3] As revised by the 2010 Amendments, Section 9-503 refers to the "public organic record," the newly defined term appearing at new subsection 9-102(a)(68),[4] which includes a record filed with the relevant state or the United States, and a charter issued by such state or the United States. Helpfully, it explicitly notes that a certificate of good standing or an index of domestic entities is irrelevant.[5] In a modest nonuniformity, the Delaware 2010 Amendments refer to the "public organic record inclusive of the record most recently filed," rather than the uniform 2010 Amendments' formulation "public organic record most recently filed." The term "public organic record" is collective, and thus includes initially filed records and amendments thereto and restatements thereof, as well as (in Delaware—*see* discussion of 9-102(a)(68) *supra*) related corrective filings. Moving beyond the challenge of determining a registered organization's name, the 2010 Amendments revisit the threshold question of what organizations are registered organizations. "Registered organization" includes an organization created without a public record but that is "formed" only when a public filing has been made. For example, a Delaware statutory trust is "created" by its governing instrument,[6] but is "formed at the time of the filing of the initial certificate of trust in the office of the Secretary of State…."[7] Many have had little doubt that Delaware statutory trusts are "registered organizations," but may nonetheless take further comfort from the explicit assurance afforded by the 2010 Amendments. Similarly, the 2010 Amendments clarify that a Massachusetts business trust is a registered organization.[8]

C. Decedents And Their Estates; Trusts And Trustees.

The 2010 Amendments respond to some extent to difficulties experienced by those endeavoring to determine, in contexts involving decedents and their estates, and trusts and trustees acting with respect to property held in trust, the exact identity of the "debtor," which is to say the person possessed of the requisite rights in the collateral to meet the statutory

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3. In a better world, of course, a registered entity's name would be rendered identically always and everywhere. The concern arises because many states maintain separate databases from which different documents and informational reports are generated. For a variety of reasons, including human error in data entry, programming or execution error in the transfer of data from one database to another, differing field length limitations, and differing protocols for the rendering of nonstandard characters, it should be contemplated that the rendering of a registered organization's name may not be identical always and everywhere.

4. *See* discussion *supra*.

5. *Id.*

6. *See* Del. Code Ann. tit. 12, § 3801(a)(1).

7. Del. Code Ann. tit. 12, § 3810(a)(2).

8. §§ *See, generally,* 2010 Amendments §§102(a)(68) and (71), and Official Comment 11 thereto.

definition of "debtor" in section 9-102(a)(28). In the former context, the 2010 Amendments eliminate the requirement that a filing indicate whether, in fact, the debtor is "a decedent's estate,"[9] and instead simply require indication that the collateral is "being administered by the personal representative of the decedent." In the latter context, the 2010 Amendments eliminate the requirement that a filing indicate whether, in fact, the debtor is "a trust" or, alternatively, is "a trustee acting with respect to property held in trust," and instead simply require indication that "the collateral is held in a trust." In both contexts, special transition rules provide, in effect, that financing statements filed prior to the effective date of the 2010 Amendments and meeting the current requirements (that is, the requirements of Current Article 9) in this regard will not cease to be effective by reason of their failure to provide the simpler (yet arguably different) indication required by the 2010 Amendments. The reader is cautioned, however, that although the challenge of determining the precise identity of the "debtor" need no longer be met as a precondition to properly filling out a financing statement, it remains vitally important inasmuch as the financing statement, to be effective, must generally be filed in the jurisdiction in which the debtor is located within the meaning of section 9-307.[10] The 2010 Amendments clarify that these special rules applicable to property held in a trust don't apply where collateral is held by a trust that is itself a registered organization – in such cases, the ordinary rules for filing against registered organization debtors should be followed.

D. Individual Debtor Names

The issue that presented the greatest challenge to the Review Committee was that of individual debtor names. Under Current Article 9, when the debtor is an individual, a financing statement is sufficient only if it provides the "name of the debtor." While Current Article 9 provides guidance for determining and rendering a debtor's name "sufficiently," such guidance is less than helpful in the case of individual debtors, for whom use of their "individual" names is required.[11] The simplicity of the requirement belies the challenge of its application. American law provides individuals nearly unlimited freedom to change their names, often with little or no formality or documentation. Consider, for example, the name changes that commonly accompany marriage and divorce, and the insidious spread of informality by which many a Thomas is known far and wide as Tom and many an Elizabeth as Liz (or, if personal preference so dictates, Beth), to say nothing of Stefani Joanne Angelina Germanotta (or is her name now "Lady Gaga"? And if so, is that a first name and surname, or something else?). The simplicity of requiring the "name of the debtor," while appealing, presupposes that one can determine a debtor's name with greater certainty and ease than experience suggests one actually can. The Review Committee found no panacea, and instead offered in the 2010 Amendments two alternative approaches.

Alternative A – the "only if" approach – requires use of the name that appears on the debtor's driver's license or other specified document (e.g., an identification card issued by his or her state of residence) or, if the debtor has no such document, the debtor's surname and first personal name. Alternative B – the "safe harbor" approach – retains the current "name of the debtor" approach, but also provides a "safe harbor" for using either of the names designated by statute (viz., the surname and first personal name, or the name appearing on the debtor's driver's license or state-issued identification card). These alternatives strike different balances in the allocation of risks and protections among filers and searchers. The "only if" approach appears very simple – if only the name on the relevant identification document will suffice, searchers

9. Often, the "debtor" will be the personal representative of the decedent, not the estate itself. See 2010 Amendments, section 9-503, Official Comment 2c.

10. *See supra* note 1 and accompanying text.

11. U.C.C. § 9-503(a)(4)(A).

need only conduct searches in such name. But this approach is not without its limitations and shortcomings. The Delaware Division of Motor Vehicles utilizes only uppercase letters, truncates surnames at forty characters, lists first and middle names (without distinction between them) in a second field truncated at forty characters, omits all commas, renders "junior" and "senior" as "JR" and "SR," renders roman numerals as arabic (Thurston Howell, III, had he lived in Delaware, would have been issued a driver's license identifying him as THURSTON HOWELL 3RD), and uses only the twenty-six letters of the English alphabet and arabic numerals modified as shown in the preceding parenthetical. Hyphens are used only in the surname field; no "foreign" letters or characters whatsoever are used. Of course, these conventions could change at any time. If the relevant identification document expires, it is no longer a proper source for determining the debtor's name. One moves progressively down the waterfall of possible source documents or other indicia of individual names, any of which could provide something different as the debtor's name. That is to say, a financing statement once perfectly featuring the debtor's name could cease to be effective upon expiration of a driver's license, or issuance of a replacement license rendering the debtor's name differently.

Delaware was the first state to act on the challenge presented by individual debtors' names. Prior to the enactment of Delaware Current Article 9, it was recognized that determining an individual debtor's name could prove problematic. This issue arises as follows. Current Article 9 provides, in its subsection 9-503(a)(4)(A), that (as noted above) a financing statement "sufficiently" provides an individual debtor's name if it provides such debtor's individual name. Section 9-506 provides that a financing statement containing minor errors and omissions is effective unless the errors or omissions make it "seriously misleading." Any financing statement that fails sufficiently to provide the debtor's name is, of necessity, "seriously misleading."[12] Note that financing statements are generally indexed and searched by debtor's name. Subsection 9-506(c) provides a safe harbor, providing in effect that if a search under the debtor's correct name would disclose a filing that fails to provide the debtor's name in accordance with subsection 9-503(a), such filing would not be "seriously misleading" for that reason, and thus could be effective despite the rendering of the name. A corollary of this rule, of course, is that such a financing statement, if not so found, is "seriously misleading" and ineffective. In its enactment of Current Article 9, Delaware exempted filings naming individual debtors from Section 9-506's search logic test by inclusion of nonuniform text (i.e., "[e]xcept in the case of individual debtors…").[13] This approach has worked well for Delaware, and is continued through the Delaware 2010 Amendments, though with the addition of Alternative B. Thus, the Delaware 2010 Amendments offer safe harbors for filings providing either the surname and first personal name of an individual debtor, or such individual debtor's name as it appears on an unexpired driver's license or state-issued identification card.

E. Individual Debtor Names – Special Rule For Mortgages

The Review Committee recognized the very real possibility that people may continue to hold real estate in names that differ (at least to some extent) from their names as they appear on their driver's licenses. New subsection 502(c)(3)(B) recognizes that strict requirement of a debtor's "driver's license" name may not make sense in the context of real estate documents, and provides that use of the debtor's "individual name" or "surname and first personal name" suffices in the case of a mortgage effective as a financing statement. As explained in a legislative note to the 2010 Amendments, section 9-502 should only be amended in states that adopt Alternative A – the "only if" approach – for naming individual

12. U.C.C. § 9-506(b).

13. Del. Code Ann. tit. 6, § 9-506(b).

debtors under section 9-503, and is unnecessary in states that adopt Alternative B – the "safe harbor" approach. No such amendment has been made in Delaware.

F. Section 9-507 – Effect Of Certain Events On Effectiveness Of Financing Statement

Current Article 9 recognizes that debtors sometimes change their names, and that such changes can render existing financing statements seriously misleading and, thus, ineffective, unless appropriate amendments are filed. The Review Committee recognized that Current Article 9 subsection 507(c) focuses on behavior –"If a debtor so changes its name" – and in efforts to coordinate with the proposed revisions to section 9-503 regarding individuals' names, shifts the focus to consequences – "the name that a filed financing statement provides for a debtor becomes insufficient … under Section 9-503(a)." That is, it recognizes that under the 2010 Amendments a debtor's name may change not only by reason of action on the part of the debtor, but also by reason of, for example, expiration (or reissuance) of a driver's license.

G. Section 9-509 – Persons Entitled To File A Record

An amendment to Official Comment 6 to section 9-509 is intended to clarify that authorization to file a record under section 9-509(d) (that is, an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement) need not appear in an authenticated record. This stands in contrast with the requirement that any authorization required under section 9-509(a) (that is, in connection with an initial financing statement, an amendment that adds collateral covered by a financing statement, or an amendment that adds a debtor to a financing statement) must appear in an authenticated record.

H. Section 9-512 – Amendment Of Financing Statement (New Debtor Or New Name)

Many have puzzled over section 9-512 (Amendment of Financing Statement), and its requirements where a debtor undergoes a "conversion" to a different form of business entity under applicable state law. Many states permit "conversion" of one organization into another, but state laws differ (and some are simply unclear) as to whether the organization resulting from the conversion is the same legal person as the organization prior to conversion, or is a new legal person. That is, it is sometimes unclear whether the debtor is the same organization, albeit with a different name (and perhaps a different type of organization and jurisdiction of organization), or is a different organization entirely. Current Article 9 defers to the law governing conversion for a determination as to whether the resulting organization is the same legal person as the original debtor, and the 2010 Amendments make no change in that approach. New Official Comment 5 is intended to clarify and emphasize this deference. It explicitly provides that when such organizations are one and the same, an amendment reflecting the name (and any other) change should be filed, whereas when such organizations are separate and distinct, an amendment adding the resulting entity as a new debtor should be filed. Helpfully, the Official Comment offers that in the face of uncertainty, one would do well to follow both courses of action. Owing to the ubiquity of Delaware entities, in the interest of greater salience and clarity the Delaware 2010 Amendments include nonuniform text to such effect at section 9-512(f).

I. Section 9-515 - Evergreen Filings Against Transmitting Utilities

Recognizing a systems limitation present in many filing offices, section 515(f) is revised to require that in order to take advantage of the special rule that a financing statement naming a transmitting utility as debtor is effective until

terminated, the initial financing statement (as contrasted with an amendment thereto) must indicate such status. The similar rule, found in section 515(b), providing for thirty year effectiveness of financing statements relating to public-finance or manufactured-home transactions, has always required the designation in the initial financing statement. Many filing offices simply can't revisit their initial coding of a financing statement to change its lapse date.

J. Section 9-516 – What Constitutes Filing; Effectiveness Of Filing

This section deals with the question of what constitutes filing, whether of an initial financing statement or any amendment (including assignments, terminations, and continuations). It also provides an exclusive list of grounds upon which a filing office may rightfully reject a record, and the correlative concept that a wrongfully rejected filing is generally effective except as to a purchaser that gives value in reasonable reliance upon the absence of the wrongfully rejected record. This section is amended to reflect certain nomenclatural changes (see *infra* for discussion of section 9-518 and the change from "correction statements" to "information statements"; see above for discussion of section 9-503 and certain changes regarding the rendering of debtors' names).

In an effort to assist searchers in eliminating from concern filings that appear to relate to the debtors with which they are concerned but which, in fact, relate to other, identically or similarly named debtors, Current Article 9 provides that a financing statement can be rejected if it fails to state the debtor's type of organization, jurisdiction of organization, and organizational identification number (or an indication that it has none).[14] Of course, such information has little relevance except as applied to registered organizations, as to which filings are generally to be made in their jurisdiction of formation. And jurisdictions generally preclude the duplicative use of registered organization names and confusingly or deceptively similar names. The consequence is that the burden of providing such information was adjudged greater than any resulting benefit. The 2010 Amendments eliminate any requirement for these three data. Interestingly, Delaware Current Article 9 never required inclusion of organizational identification numbers – Delaware declined to adopt subsection 9-516(b)(5)(C)(iii). Thus, Delaware is no longer nonuniform in this regard.

Delaware Current Article 9 contains certain nonuniform provisions intended to coordinate with other provisions of Delaware law. These include text in section 9-516(c) relating to records filed in the office of the recorder of deeds in the several counties. Title 9, Chapter 96 of the Delaware Code requires that certain information appear on documents filed in such offices (e.g., real estate tax parcel number and identity of document preparer). While the 2010 Amendments do not bear directly on these nonuniform provisions, their text has been revisited in the Delaware 2010 Amendments to make certain nonsubstantive, conforming changes.

Finally, Delaware Current Article 9 contains certain nonuniform provisions intended to bring greater clarity and certainty to filings involving trusts and trustees as debtors. These provisions, which speak in terms of the debtor being a trust or trustee, have been amended to conform to the general nomenclature of the 2010 Amendments, and now speak in terms of the collateral being held in a trust. See *supra* for discussion of Decedents and Their Estates; Trusts and Trustees.

K Section 9-518 – Claim Concerning Inaccurate Or Wrongfully Filed Record

In a pernicious example of regrettable word choice, Current Article 9 gave rise to the so-called "correction statement." Conceptually, it was intended to be something akin to the statement an aggrieved debtor could send to the omnipotent consumer credit rating agencies, under the Fair Credit Reporting Act, to place "on record" a statement of

14. U.C.C. § 9-516(b)(5)(C).

disagreement with respect to an entry believed to be erroneous or unauthorized. The Article 9 correction statement is a mechanism by which a debtor can add to the public record an objection to a statement that he or she believes to be inaccurate or unauthorized. As a matter of law, it can be filed only by a debtor, and has no legal effect whatsoever.[15] Despite the clarity with which these limitations are stated, not a few secured parties have purported to file correction statements, sometimes seeking to "undo" terminations filed in error[16] or to add a collateral description where one is otherwise missing. In any event, the 2010 Amendments would rename these filings "information statements," and would permit both secured parties and debtors to file them. They would continue to have no legal effect, but nonetheless may prove helpful in certain contexts. For example, consider the secured party whose financing statement has not been terminated, but appears to have been terminated owing to the presence in the record of an erroneous termination statement filed by a rogue actor without authority.

L. Section 9-521 – Uniform Form Of Written Financing Statement And Amendment

While an increasing proportion of financing statements are filed online, some filers continue to tender written financing statements. Filing offices that accept written records may accept them on any number of different forms (including both current and out-of-date forms promulgated by IACA (the International Association of Commercial Administrators, a professional association for government administrators of business entity and secured transaction record systems)). Section 9-521 mandates, however, that a filing office that accepts written records must accept them on specified "safe harbor" forms. The 2010 Amendments include revisions to such forms, reflecting the substantive changes effected by the 2010 Amendments. The Delaware 2010 Amendments include such revised forms, as well as conforming revisions to certain alternative forms suitable for filing with the Delaware Secretary of State.

V. PROPOSED CHANGES TO PART 6: DEFAULT

The rules applicable following the occurrence of a default are being revised in three respects: nonjudicial enforcement of mortgages, public notice of electronic disposition of collateral, and prohibition of a secured party's buying collateral in its private disposition.

A. Section 9-607 – Collection And Enforcement By Secured Party

As it appears in Current Article 9, subsection 9-607(b)(2)(A) relates to nonjudicial enforcement of mortgages. It permits the secured party to record a copy of the relevant security agreement and a sworn affidavit with the mortgage

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15. *See* U.C.C. § 9-518.

16. A prominent example can be seen in Bank of America's filing of a correction statement in an attempt to fix its potentially $58 million filing mistake. Bank of America, acting for itself and as an agent of Citibank, terminated perfection of both institutions' security interests in certain assets of the now defunct law firm Heller Ehrman by accidently checking the "termination" box instead of the "continuation" box on the amendment it filed. The issue was litigated in connection with the bankruptcy of Heller Ehrman LLP (*See, In re:* Heller Ehrman LLP, Case No.: 08-32514 (Bankr. N.D. Cal. Mar. 27, 2009), *Order Granting Official Committee of Unsecured Creditors' Motion for Order Authorizing the Creditors' Committee to Pursue Certain Estate Causes of Action*. The author is unaware of the final resolution of this issue, which was before the U.S. Bankruptcy Court for the Northern District of California, San Francisco Division).

records. This sworn statement must state that a default has occurred, but the subsection is less than explicit in requiring indication that such default must have occurred with respect to the obligation secured by the mortgage, as contrasted with some other obligation. For example, suppose Homeowner obtains a mortgage loan from Bailey Savings and Loan, which in turn sells the mortgage loan to Bear Stearns, which bundles it with others and sells interests in the pool through a securitization. If the securitization vehicle defaults, for example by failing to make a scheduled payment under the securities it issued, the holder of such securities would not be able to foreclose on Homeowner's mortgage. This result, intended by Current Article 9, is more clearly mandated by the 2010 Amendments.

B. Section 9-613 – Contents And Form Of Notification Before Disposition Of Collateral: General

There has been much consternation in recent years regarding notification of a public disposition of collateral that will be conducted electronically. New text in Official Comment 2 to section 9-613 (Contents and Form of Notification Before Disposition of Collateral: General) would confirm the applicability of such section to those dispositions, and clarify what information is required for compliance. Among other things, the 2010 Amendments clarify that a Uniform Resource Locator (URL) or other Internet address currently suffices as an electronic "location."

C. Section 9-624 – Waiver

Official Comment 2 to section 9-624 (Waiver) notes that such section is a limited exception to the general rule of section 9-602 prohibiting waiver by debtors and obligors. It explicitly notes that the rule prohibiting a secured party from buying at its own private disposition, the equivalent of a "strict foreclosure," cannot be waived. The 2010 Amendments add language to similar effect to both Official Comment 3 to section 9-602 and Official Comment 7 to section 9-610. A new Official Comment 10 is added to section 9-611 (Notification Before Disposition of Collateral), reminding readers that enforcement of an Article 9 security interest may implicate other law.

VI. PROPOSED CHANGE TO PART 7: TRANSITION (TO CURRENT ARTICLE 9).

The 2010 Amendments include the addition of text to Official Comment 2 to section 9-706 (When Initial Financing Statement Suffices to Continue Effectiveness of Financing Statement), emphasizing that the "minor error" rule in section 9-506(a) applies to any initial financing statement filed as an "in lieu" continuation statement pursuant to section 9-706.

VII. PROPOSED (NEW) PART 8: TRANSITION (TO THE 2010 AMENDMENTS)

When current Article 9 was released for consideration and enactment, there was great interest in having a uniform effective date in all enacting jurisdictions. In furtherance of that goal, its text provided for a uniform effective date of July 1, 2001, roughly three years after its release. Similarly, the 2010 amendments contemplate a July 1, 2013 effective date.[17] Generally, there's a five-year transition period before "old" filings made in conformity with Current Article 9 must be amended or otherwise revised to conform to the 2010 Amendments. The most significant transition issue, and the one

17. 2010 Amendments § 9-801.

likely to require the greatest number of amendment to previously filed financing statements, involves sufficiency of debtors' names under section 9-503, particularly those relating to individual debtors. Less common, but no less important, is the fact that certain debtors perhaps not currently but soon-to-be considered "registered organizations" may experience a change in location (i.e., from their place of business or chief executive office to their jurisdiction of formation). Recognizing the risk, burden, and potential for errors posed by the transition from former Article 9 (i.e., Article 9 as in effect prior to July 1, 2001) to Current Article 9, Delaware Current Article 9 includes a nonuniform (and no longer relevant) subsection § 9-703(c) providing special transition rules for financing statements filed under former Article 9 with respect to trusts and trustees as debtors. This nonuniform provision, and the accompanying nonuniform text in subsection 9-705(f), effectively provides that certain Delaware filings made under former Article 9 and identifying the debtor in the manner customary under former Article 9 (e.g., ABC Trust Company, not in its individual capacity, but solely as Owner Trustee) could be continued under Delaware Current Article 9 without the necessity of complying with the debtor naming convention mandated by Delaware Current Article 9. This special rule is carried forward by the Delaware 2010 Amendments. As before, it applies only to continuations, and not to amendments. When such a Delaware filing made under Current Article 9 is first amended in any respect, it also must concurrently be amended to comply with then-current requirements for identifying the debtor.

VIII. ACCOMPANYING REVISION TO UCC ARTICLE 8 (INVESTMENT SECURITIES)

The 2010 Amendments add a new paragraph to Official Comment 13 to UCC Article 8 (Investment Securities) Section 8-102 (Definitions). The paragraph addresses the registerability requirement in the definition of "registered form" and its parallel in the definition of "security," clarifying that such requirement is satisfied only if books are maintained for the purpose of register of transfer, including termination of rights under section 8-207(a) (or if, in the case of a certificated security, the security so states). Explicitly rejecting the holding of *Highland Capital Management LP v. Schneider*, 8 N.Y.3d 406 (N.Y. 2007), the comment notes it is not sufficient that the issuer record ownership or transfers for other purposes, nor is it sufficient that the issuer, though not in fact maintaining books for such purpose, theoretically could do so (for such is always the case).

IX. INVITATION TO REPEAL UCC ARTICLE 11

Finally, noting that UCC Article 11 affects transactions that were entered into before the effective date of the 1972 amendments to Article 9, the 2010 Amendments invite states to consider whether they may wish to repeal Article 11. The Delaware 2010 Amendments do not affect UCC Article 11.