

UCC ARTICLE 9 UPDATE

First Run Broadcast: August 6, 2013

1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. **(60 minutes)**

The 2010 Amendments to UCC Article 9 governing secured transactions, the most common form of commercial activity, took effect in early July 2013. The amendments work a fairly substantial change on existing secured transaction practice, changing filing procedures, increasing the protection of after-acquired liens, and covering changes to debtor names. These and other changes will have a direct and substantial impact on financing statements that are in progress and on due diligence on a going-forward basis. This program will provide you with a detailed review of changes to existing secured transaction practice under the 2010 Amendments, practical guidance on secured transactions in progress and during the transition period, and tips on due diligence going forward.

- Detailed review of UCC Article 9/Secured Transactions changes taking effect July 2013
- Ensuring financing statements are compliant with new Article 9
- After-acquired property liens after a mergers or change of location
- New filing procedures, issues related to debtor names, and trusts' filing status
- How due diligence should change after recent changes to Article 9
- Practical guidance on how to handle transactions in the transition period

Speakers:

Steven O. Weise is a partner in the Los Angeles office Proskauer Rose, LLP, where his practice encompasses all areas of commercial law. He has extensive experience in financings, particularly those secured by personal property. He also handles matters involving real property anti-deficiency laws, workouts, guarantees, sales of goods, letters of credit, commercial paper and checks, and investment securities. Mr. Weise formerly served as chair of the ABA Business Law Section. He has also served as a member of the Permanent Editorial Board of the UCC and as an Advisor to the UCC Code Article 9 Drafting Committee. Mr. Weise received his B.A. from Yale University and his J.D. from the University of California, Berkeley, Boalt Hall School of Law.

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UCC Article 9 Update

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Overview of Changes

- Most changes are clarifications
 - Statutory text changes made only when necessary
 - Changes limited to the Comments whenever possible
- Greatest effect is on the filing process
 - Sufficiency of debtor names
 - Forms
- Other changes:
 - Transition rules
 - Effect of post-closing changes
 - Enforcement




Miscellaneous revisions to definitions

- § 9-102(a)(7) - “authenticate.” More closely resembles the definitions of “sign” in revised UCC Article 1 (general provisions) and Article 7 (documents of title).
- § 9-102(a)(10) - “certificate of title.” Revised to comport with the emerging practice in many jurisdictions of maintaining non-paper electronic records.



Definitions relevant to filing

- Definition of new term: “public organic record”
 - Record initially filed with a state or U.S. to form an entity.
 - Record issued by a state or the U.S. to form an entity.
 - Legislation that creates an organization.
 - Record of a business trust required to be filed by state law.
 - Records filed to amend or restate the name for any of the above records.
 - See § 9-102(a)(68).
- Clarified definition of “registered organization”
 - An entity formed or organized by the filing or issuance of a public organic record or the enactment of legislation.
 - See § 9-102(a)(71).



Scope of registered organizations (slightly expanded)

- Corporations, LLCs & LPs:
 - Entities that fell within the definition of “registered organization” prior to the effective date will remain registered organizations.
- Business Trusts
 - Intended primarily to clarify that Massachusetts-style business trusts and Delaware statutory trusts fall within the definition if “registered organization.”
- Entities Created by Legislation
 - Entities formed by either state or federal statute.



Registered organization name sufficiency

- Revised § 9-503(a)(1):
 - If the debtor is a registered organization, the financing statement is sufficient only if it provides the name stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction that purports to state, amend or restate the registered organization's name.



Name from public organic records

ARTICLE I

The exact name of the corporation is:

AVRORA EXPRESS INC.

Name from public organic records

- Entities Created by Legislation
 - Refer to the statute.

12 U.S.C. § 1452. Federal Home Loan Mortgage Corporation

(a) Creation; Board of Directors; policies; principal office; membership; term; vacancies.

(1) There is hereby created the Federal Home Loan Mortgage Corporation...



Name from public organic record

- Business Trust
 - Record filed with the state in compliance with state law.

**ARTICLE TWO
NAME, BUSINESS ADDRESS AND TRUSTEES**

- A. Trustees may be collectively designated as Trinity Business Trust, in which name they make and execute contracts and all kinds of instruments, conduct business, acquire and convey real or personal property, and sue and be sued.



Individual debtor names

- Background
 - Current UCC § 9-503(a)(4) provides no guidance for what constitutes a sufficient individual name for a financing statement
- Drafting Concerns
 - Effect on searching
 - Source documents



Individual name Alt A

- Alternative A sufficiency
 - Financing statement is sufficient only if it provides the name indicated on the [driver's license].
- Driver's license requirements
 - Driver's license must be:
 - unexpired and
 - issued by "this state."
- No qualifying driver's license?
 - Individual name of the debtor, or
 - Surname & first personal name



Individual name Alt B

- Alternative B Sufficiency
 - Financing statement is sufficient only if it provides:
 - The individual name of the debtor, or
 - The surname and first personal name of the debtor, or
 - The name indicated on the [driver's license]
- Driver's license requirements
 - Same rules as Alternative A



Driver's license road map



Driver's license issue: how to extract?





Driver's license extraction issues: debtor name variations

OR	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SL
	JOHNSON	MARY	ELLEN KAYE	
1c. MAILING ADDRESS		CITY	STATE POSTAL CODE	CC
OR	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SL
	JOHNSON	MARY ELLEN	KAYE	
1c. MAILING ADDRESS		CITY	STATE POSTAL CODE	CC
OR	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SL
	KAYE JOHNSON	MARY	ELLEN	
1c. MAILING ADDRESS		CITY	STATE POSTAL CODE	CC
OR	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SL
	KAYE JOHNSON	MARY ELLEN		
1c. MAILING ADDRESS		CITY	STATE POSTAL CODE	CC



Driver's license issue: nickname





Nickname name variations

1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME

OR	1b. INDIVIDUAL'S SURNAME STEWART	FIRST PERSONAL NAME MIKE	ADDITIONAL NAME(S)/INITIAL(S) R	SUFFIX
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1c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
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1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME

OR	1b. INDIVIDUAL'S SURNAME STEWART	FIRST PERSONAL NAME MICHAEL	ADDITIONAL NAME(S)/INITIAL(S) R	SUFFIX
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1c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
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Driver's license issues: errors

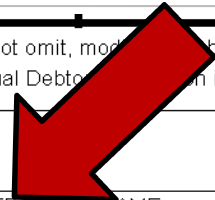




Name variations

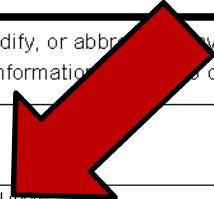
1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME						
OR	1b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
	SMITH		MQRY	ANN		
1c. MAILING ADDRESS			CITY	STATE	POSTAL CODE	COUNTRY



1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME						
OR	1b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
	SMITH		MARY	ANN		
1c. MAILING ADDRESS			CITY	STATE	POSTAL CODE	COUNTRY



Driver's License Issue: Special Characters





Special Characters: Name Variations

OR		1b. INDIVIDUAL'S SURNAME			Individual Debtor's C1Ad)
1. DEBTOR'S NAME: Provide only <u>one</u> Debtor name (1a or 1b) (name will not fit in line 1b, leave all of item 1 blank, check here)		PEÑA			
1a. ORGANIZATION'S NAME		OR			
1b. INDIVIDUAL'S SURNAME		c. MAILING ADDRESS			SUFFIX
PEÑA		MARIA	A		
1c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY

1. DEBTOR'S NAME: Provide only <u>one</u> Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here <input type="checkbox"/> and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)				
1a. ORGANIZATION'S NAME				
OR				
1b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
PENA		MARIA	A	
1c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
				COUNTRY



Filing - decedents

- Eliminate the requirement that a filing indicate whether the debtor is “a decedent’s estate”
- Instead require indication that the collateral is “being administered by the personal representative of the decedent.”



Proposed changes to Part 5: Filing - trusts

- Eliminate requirement that a filing indicate whether the debtor is “a trust” or, alternatively, is “a trustee acting with respect to property held in trust”
- Instead require indication that “the collateral is held in a trust”
- 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.



New financing statement forms

- Revisions to forms implement changes in statute (§ 9-516)
- Eliminate requirements for:
 - Debtor's type of organization
 - Debtor's jurisdiction of organization
 - Debtor's organizations ID number
 - Debtor's SSN



Approved Forms

2. **TERMINATION:** Effectiveness of the Financing Statement identified above is terminated as of the date of this statement

3. **ASSIGNMENT** (full or partial): Provide name of Assignee in item 7a or 7b, and address of Assignee in item 7c. For partial assignment, complete items 7 and 9 and also indicate affected collateral

4. **CONTINUATION:** Effectiveness of the Financing Statement identified above with this statement is continued for the additional period provided by applicable law

5. **PARTY INFORMATION CHANGE:**

Check one of these two boxes:

This Change affects Debtor or Secured Party of record

AND Check one of these

CHANGE name in item 6a or 6b; a



Filing - transmitting utility

- § 9-301, Comment 5b:
 - 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 the central fixture filing is made, so multiple such filings may be required
- § 9-515 - Evergreen Filings Against Transmitting Utilities.
 - Initial financing statement (as contrasted with an amendment) must indicate such status



Where to file - federal entities

- Under many federal laws (e.g., the National Bank Act), what's designated is actually denominated a “main office” or “home office,” not a location.
- The 2010 Amendments remove any doubt that such designations are, in fact, designations of a location for filing purposes.
- § 9-307(f)(2)

Ratification of financing statement not authorized at time of filing

- § 9-322 - Official Comment 4
- Financing statement filed without authorization, but later authorized or ratified, becomes effective at time of ratification, but has priority from its time of filing



Correction Statement - § 9-518

- Background
 - Correction Statement doesn't "correct" anything!
- Effect of Amendments to § 9-518
 - Changes name of record to "Information Statement".
 - Authorizes the secured party to file the record
 - Official Comment clarifies that a secured party is under no obligation to file an information statement



Control of electronic chattel paper

- Revised to provide a general test, and a safe harbor, for achieving perfection by control.
- Derives from the Uniform Electronic Transactions Act.
- Defers to emerging systems contemplating continued innovation.



Hybrid chattel paper

- Official Comment 3 to § 9-330 is modified with respect to “hybrid” chattel paper to clarify how a secured party can retain its priority when tangible chattel paper is converted to electronic chattel paper and vice versa.

Stripping payments from chattel paper

- Official Comment 5d to § 9-102:
 - Rejects the holding in *In re Commercial Money Center, Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006).
 - If a lessor's rights under a lease constitute chattel paper, an assignment of the lessor's right to payment under the lease is an assignment of chattel paper, even if the assignment excludes any other rights.



Effect of change in governing law

- Current Article 9: perfection of security interests that have attached prior to a change in the debtor's location continues for four months after such change
- 2010 Amendments: add a new subsection 9-316(h) - a secured party is also perfected in security interests that attach within four months after a change in the debtor's location



Perfection against new debtor

- § 9-316(i)
- Perfection of security interests that attach within four months after a new debtor becomes bound by an existing security agreement



Conversion of debtor

- § 9-512 - Amendment of Financing Statement (new debtor or new name).
 - Many states permit “conversion” of one organization into another
 - State laws differ (and some are simply unclear) as to whether the resulting organization is the same legal person or is a new legal person.
 - Article 9 defers to the law governing conversion.
- § 9-512 (New) Comment 5:
 - When such organizations are one and the same, an amendment reflecting the name (and any other) change should be filed.
 - When such organizations are separate and distinct, an amendment adding the resulting entity as a new debtor should be filed.



Internet foreclosure

- Section 9-613 - Contents and Form of Notification Before Disposition of Collateral: General.
 - 2010 Amendments clarify that a Uniform Resource Locator (URL) or other Internet address currently suffices as an electronic “location.”



Waivers by debtor

- Comment 2 to § 9-624 (Waiver) notes such section is a limited exception to the general rule of Section 9-602 prohibiting waiver of UCC protections by debtors and obligors
- The rule prohibiting a secured party from buying at its own private disposition cannot be waived
- The 2010 Amendments add language to similar effect to both Official Comment 3 to § 9-602 and Comment 7 to § 9-610



Part 8 Transition Rules

- Key provisions
 - Uniform effective date of July 1, 2013
 - 5-year transition period ending June 30, 2018
- Note not all states will have revisions on July 1, 2013
- General rule for continued effectiveness:
 - Filed records remain effective until earlier time of lapse or end of transition. See new § 9-803



Transition Effect on Filed Records

- Debtor is currently a registered organization
 - No transition action is necessary.
- Debtor becomes a registered organization
 - If change in governing law:
 - File Financing Statement In Lieu of Continuation.
- Individual debtor names:
 - Alternative A states: File amendment to add name that complies with new § 9-503(a)(4), if necessary.
 - Timing - when file continuation statement
 - Alternative B states: No action required at time of continuation if name is sufficient under current law.
- Debtor is a decedent's estate, trust or trustee:
 - No action may be required.
 - Debtor type Indications for estate, trust or trustee under current law remain sufficient under new § 9-805(e).



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