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New York State Enacts Revisions to Uniform Commercial Code Relevant to Commercial Secured Lenders

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On December 17, 2014, New York Assembly Bill 9933, which amends the Uniform Commercial Code in effect in the state of New York (the “**NYUCC**”), was signed into law by Governor Andrew Cuomo, and took effect immediately. This new law (the “**UCC Revisions Law**”) includes several changes to Article 9 of the NYUCC (“**Article 9**”)², that governs the creation and perfection of security interests in personal property under New York law. In light of these amendments to Article 9, secured lenders in secured transactions governed by New York law should take note of these new provisions and determine if changes need to be made with respect to any documentation or filing of any security documents.

The revisions to the Uniform Commercial Code were first recommended by the American Legal Institute and the National Conference of Commissioners on Uniform State Laws in 2010, and 48 other U.S. states have adopted all or most of the recommended changes to Article 9 of the Uniform Commercial Code. The UCC Revisions Law, however, does not implement all of such recommended revisions and therefore, following the passage of the UCC Revisions Law, some, but not all provisions of the NYUCC are consistent with changes that have already been in effect in the Uniform Commercial Code in most U.S. jurisdictions. For this reason, secured lenders should remain cognizant that despite the enactment of the UCC Revisions Law, key differences still exist between the NYUCC and the Uniform Commercial Code in effect in most other U.S. jurisdictions. It is important for secured lenders to understand how these variations could affect the creation and perfection of security interests when the applicable law for creation and perfection is not the NYUCC.

For purposes of this article, several of the more general changes to Article 9 affecting commercial secured loan transactions have been summarized in more detail below, though this is not meant to be an all-encompassing list of the changes. While many of the changes are intended to be clarifying, and will likely not affect the current practice of secured lenders in New York, the UCC Revisions Law does contain revisions to Article 9 not included below, and secured lenders should always discuss with counsel whether the changes will affect creation or perfection of any security interests under New York law.

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² The UCC Revisions Law also enacts amendments to Articles 1 and 7 of the NYUCC. Changes to Articles 1 and 7 will not be addressed in this article, though Lenders should take note of such changes, particularly if the changes to the provisions regarding documents of title in Article 7 would be relevant to their transactions.

Among the most relevant changes to Article 9 for secured lenders in New York State are the following:

Changes and Clarifications to Form and Content of UCC-1 Financing Statements

(a) Name of Debtor

To be able to effectively search the record to determine if a debtor has filed a financing statement, it is important to ensure that the debtor's correct legal name is uniformly determined. Under the prior version of Article 9, the correct name of a registered entity was "the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized." The problems that subsequently arose resulted from lack of clarity over what specifically was intended by the term "public record" and what document would be controlling, since some entities file several documents publicly.

The UCC Revisions Law clarifies both the definition of "registered organization" and the manner in which the name to be listed on a UCC-1 Financing Statement (a "**UCC-1**") is to be determined. This concept of "registered organization" would likely cover most business entities, including any corporation, partnership or limited liability company. Under Section 9-102 of Article 9, as revised, a "registered organization" is defined, in pertinent part, as an organization formed or organized in a single state or the United States by virtue of the filing of a "public organic record" (defined in Section 9-102, in pertinent part, as "...the record initially filed with or issued by a state or the United States to form or organize an organization..."). This amends the existing Section 9-102, which defined a "registered organization" as an organization in which a state or the United States was required to maintain a public record of such entity's organization. Section 9-503 of revised Article 9 further states that the name of a registered organization to be included on a UCC-1 listing such registered organization as debtor shall be the name listed on its public organic record. This revision clarifies that such public documents as good standing certificates (which in any event are not filed by the related entity) are not intended to be construed as public organic records.

The UCC Revisions Law also includes clarifications as to the name of the debtor to be listed on a UCC-1 in the event that the debtor is an individual, trust, or a decedent's estate. If a secured party has filed, or is planning to file a UCC-1 against any of these entities, they should take note of the changes to Section 9-503 of Article 9 of the NYUCC in this regard.

(b) No Changes to Form of UCC-1

It should be noted, however, that the UCC Revisions Law did not include the proposed 2010 amendment to Section 9-516 of Article 9, which eliminates the inclusion of the organizational type, jurisdiction of incorporation and state issued identification number of the debtor from the form of UCC-1 to be filed in New York State. Therefore, although almost all other states have adopted this revision and are currently accepting the new form UCC-1 that omits this information, New York remains one of the few states that will not accept the revised form. Secured parties should ensure that when making UCC-1 filings in New York State they are using the appropriate form of UCC-1, and not the new UCC-1 that is currently in use in many other states.

Changes to Deposit Account Control Agreements

An important aspect in many secured lending arrangements is cash collateral, which in most instances is held in a deposit account. The UCC Revisions Law has added two additional methods by which a secured party can perfect by control over a deposit account. Pursuant to the new Section 9-104(a)(4) of the NYUCC, the secured

party has control over a deposit account if the account itself is in the name of the secured party or if the name indicates that the secured party has a security interest in it. Pursuant to the new Section 9-104(a)(5) of the NYUCC, the secured party has control over a deposit account if another person has control of the deposit account on behalf of the secured party or, having previously acquired control of the deposit account, acknowledges his control on behalf of the secured party. This latter provision allows for the secured party to gain control via a contractual relationship with another party gaining or previously having control over the deposit account.

In addition, under Article 9, both previously, and as revised, pursuant to Section 9-104, a secured party's security interest in a deposit account is perfected, among other possible means of perfection, if the depository bank (the "**Depository Bank**"), the debtor and the secured party have entered into an agreement whereby the Depository Bank has agreed to comply with instructions from the secured party regarding the disposition of funds in the account without further consent by the debtor (a "**Deposit Account Control Agreement**"). The UCC Revisions Law adds provisions to Section 9-104 of the NYUCC stating that the secured party shall be deemed to have control over a deposit account, even if the Depository Bank's obligation to comply with instructions from the secured party under the Deposit Account Control Agreement is subject to conditions mandated by the Depository Bank, so long as such conditions do not include the requirement of further consents from the debtor. This change reflects current trends in which Depository Banks are increasingly mandating conditions for compliance with the secured party's instructions, to, among other things, ensure that the Depository Bank's fees and expenses are paid from the balance in the account prior to disbursement. However, it should be noted that this revision was not included in the proposed 2010 Amendments, and was modeled from the Uniform Commercial Code in effect in the state of Delaware. Therefore, this provision is not in effect in every U.S. jurisdiction, and might not apply to Deposit Account Control Agreements where the Depository Bank's jurisdiction is not New York. Further, the UCC Revisions Law only applies this change to Deposit Account Control Agreements, and not to control agreements in respect of commodities accounts.

Clarification and Expansion of the Four-Month Grace Period to After-Acquired Property in the Event of a Change in Governing Law

Pursuant to the terms of the NYUCC, in order to perfect a security interest in assets of a debtor that can be perfected by the filing of a UCC-1 ("**Article 9 Collateral**"), a secured party must file a UCC-1 in the debtor's location (such location to be determined in accordance with applicable NYUCC provisions). Under the NYUCC (both before and after the passage of the UCC Revisions Law), if a debtor were to subsequently change its location, then assuming that a secured party had previously filed a valid UCC-1 in the debtor's original location, the secured party's security interest evidenced by such UCC-1 would remain valid for a period of four months from the date of such subsequent change of location. In order for the secured party to maintain the effectiveness of its security interest, it would be required to file a new UCC-1 in the debtor's new location prior to the expiration of such four-month grace period. However, under the old NYUCC provisions, such four-month grace period only applied to Article 9 Collateral that the debtor owned or otherwise had rights in **at the time of the change in location**, and not to any security interest held in after-acquired property. The result of this provision was that the secured party's security interest in any Article 9 Collateral acquired by the debtor after it changed its location was unperfected until the secured party filed a new UCC-1 in the debtor's new location. The changes to Section 9-316 of Article 9 include a revision to expand the security interests covered by this four-month grace period to include Article 9 Collateral acquired by a debtor after its change of location, thereby providing additional protection to secured parties that hold a security interest in after-acquired property.



Additional changes to the NYUCC expand a similar four-month grace period in the event that a new debtor located in a different jurisdiction becomes bound by an existing security agreement. This might occur in a situation where a debtor merges into another entity. If the surviving entity, located in another state from the original debtor, becomes a debtor under the original entity's security agreement, the secured party's security interest against the original debtor would be perfected against the merged entity for a period of four months, and would include assets acquired by the merged entity during such four-month period. Notwithstanding this additional protection, however, as with the addition of any new debtor, whether in a new jurisdiction or otherwise, secured parties should still investigate whether any existing UCC-1s were filed against the new debtor prior to such new debtor becoming bound by the original security agreement, as any existing UCC-1s would still take priority.

While the UCC Revisions Law represents an important step in New York's modernization of the NYUCC, certain laws governing secured transactions in New York State are not consistent in all respects with the Uniform Commercial Code in effect in most other U.S. jurisdictions. Secured lenders operating under New York law should remain cognizant of the recent changes in the laws most commonly effecting their transactions, and should be aware of how these laws deviate across jurisdictions.

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