

UCC LIEN PERFECTION AND LIEN PRIORITIES: AN OVERVIEW

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UCC LIEN PERFECTION AND LIEN PRIORITIES: AN OVERVIEW

	<u>Page</u>
A. INTRODUCTION	1
1. UCC Article 9	1
2. Scope of Paper	1
B. ATTACHMENT	1
1. Generally.....	1
2. Components of Attachment	1
C. PERFECTION	4
1. Generally.....	4
2. Methods of Perfection	4
D. PERFECTION BY FILING	4
1. Generally.....	4
2. Contents of Financing Statements.....	4
3. Debtor Doesn't Need To Sign.....	5
4. Collateral Description and Financing Statement.....	5
5. Name of the Debtor	5
6. Other Blanks on the Financing Statement Form.....	6
7. Where to File/Location of Debtor	7
E. PERFECTION BY POSSESSION	8
1. Generally.....	8
2. Types of Collateral that may or must be Perfected by Possession.....	8
3. Possession by Third Parties	9

F.	PERFECTION BY CONTROL.....	9
1.	Generally.....	9
2.	Deposit Accounts	9
3.	Investment Property	9
G.	UCC PRIORITY RULES: THE BASICS.....	11
1.	Priorities Generally.....	11
2.	Secured Creditor vs. Unsecured Creditors and Judgment Creditors.....	11
3.	Secured Creditor vs. Secured Creditor	11
4.	Purchase Money Security Interests	12
5.	Priority by Subordination Agreement	13
6.	Secured Party vs. Bank’s Right of Setoff.....	13
7.	Debtor’s Trustee in Bankruptcy	14
H.	SECURED CREDITOR VERSUS FEDERAL TAX LIEN.....	15
1.	Background.....	15
2.	General Scheme of the Federal Tax Lien Act.....	15
3.	Special Filing Problem: Debtor Names	16
4.	Future Advances and After-Acquired Property	17

LIST OF EXHIBITS

- A. Table Summarizing Methods of Perfection
- B. Samples of UCC Forms
- C. Addresses and Phone Numbers of Most Likely Locations for Revised Article 9 Filings

UCC LIEN PERFECTION AND LIEN PRIORITIES: AN OVERVIEW

A. INTRODUCTION

1. UCC Article 9. Article 9 of the Texas Uniform Commercial Code, or UCC, is the body of law which governs the creation, perfection and priority of security interests in personal property collateral and fixtures¹.

2. Scope of Paper. This paper covers only key perfection and priority issues **affecting commercial transactions only**. Article 9 consumer transactions are not addressed. This paper presents the subject matter in an overview format rather than an in-depth analysis, and consequently it is not a substitute for specific legal advice for any specific transaction.

B. ATTACHMENT

1. Generally. The first step in the perfection of a lien is to cause "attachment" of the collateral to occur, which will thereafter allow the creditor to "perfect" the security interest - the ultimate goal in properly securing the collateral. Thus, as a first step, attachment of the collateral must occur. If the security interest has attached to the collateral, it is enforceable against the debtor; if it has not attached, it is not enforceable at all.² Thereafter, if perfection is achieved, it will ensure that the lien of the secured party is enforceable against most third parties that acquire a lien in the collateral subsequent to the secured party.

2. Components of Attachment. An Article 9 security interest attaches when all of the following events have occurred:

- Value has been given
- Debtor has rights in the collateral
- A security agreement has been entered into which is/does:
 - Authenticated by the debtor
 - Describes the collateral
 - Describes the land if the collateral includes timber to be cut

(a) Value Given. Value in the context of Article 9 is broader than the contractual concept of "consideration." Value includes giving a security interest in total or partial satisfaction of a pre-existing debt. It also includes binding commitments to extend credit.³

¹ “[G]oods that have become so related to particular real property that an interest in them arises under real property law.” TEX. BUS. & COM. CODE ANN. § 9.102.

² *Id.* at § 9-203.

³ TEX. BUS. & COM. CODE ANN. § 1-204.

(b) Debtor has Rights in the Collateral. For purposes of Article 9, the debtor need not own the collateral. It is sufficient if the debtor has some limited rights to the collateral. Of course, the security interest would then attach only to the limited rights the debtor has or has the power to transfer.⁴ In addition, the debtor, for purposes of this section of Article 9, may not necessarily be the primary obligor on the underlying loan. It is the party with rights in the collateral granting the security interest.⁵ Thus, the primary obligor could be a corporation and the collateral securing the loan could belong to the president of the corporation or its sole shareholder. The president or sole shareholder in such a case would then be the "debtor" who would have rights in the collateral.

(c) Security Agreement. No particular form is required for a security agreement. It can be contained in the promissory note, the deed of trust, or a loan agreement. It must, however, contain language granting a security interest. While no "magic language" is required, a present grant of a security interest should be evident from the words. For instance, a UCC-1 financing statement has all of the information required to be in a security agreement. It is "authenticated" by the debtor, it describes the collateral, and it may describe the land. Indeed, by the very act of authenticating a financing statement, one could argue that it is implicit that the debtor intended to grant a security interest in the described collateral to the secured party. Nonetheless, this alone is not sufficient unless it contains granting language of some kind.⁶

It should be noted that a security agreement is not required for attachment if collateral is in the possession of the secured party "pursuant to the debtor's security agreement," or the collateral is deposit accounts, electronic chattel paper, investment property, or letter of credit rights over which the secured party has control.⁷

(d) Description of Collateral. The security agreement must contain a description of the collateral being secured. Under 9-108, 9-110, the security agreement's description of collateral need not be exact and detailed (i.e. serial numbers), but must reasonably identify the collateral that is subject to the security interest. On the other hand, a super-generic description such as "all assets" or "all personal property" is not sufficient for a security agreement. (That would, however, be a sufficient description for a *financing statement* under revised Article 9).⁸ It is sufficient if the security agreement lists the collateral by category, such as all equipment, inventory, and accounts.

⁴ *Id.* at § 9-203 comment 6.

⁵ *Id.* at § 9-102(28).

⁶ *See, e.g., In re Kilton Motors, Inc.*, 117 B.R. 87 (Bankr. D. Vt. 1990); *In re Arctic Air, Inc.*, 200 BR 533 (Bankr. D.R.I. 1996).

⁷ TEX. BUS. & COM. CODE ANN. § 9-203(b)(3).

⁸ *Id.* at § 9-504.

(e) Proceeds. In Article 9 parlance, proceeds means, among other things, any property acquired upon the sale, lease, exchange, or other disposition of collateral that is subject to a security interest, anything collected or distributed on account of the collateral, and insurance proceeds upon the loss or destruction of the collateral up to the value of the collateral.⁹ There is no need to put a statement in the security agreement providing for a security interest in the proceeds of collateral. The attachment of a security interest in collateral automatically gives a secured party rights to the identifiable proceeds.¹⁰

(f) After-Acquired Property. After-acquired property is property in which the debtor had no rights at the time of the loan transaction, but in which it subsequently acquires rights. In order for a security interest to attach to that type of collateral, there must be an affirmative statement in the security agreement creating or providing for a security interest in after-acquired property. It is sufficient to insert the phrase "now owned or hereafter acquired" in the security agreement's description of collateral.¹¹ Such a statement is *not* required in the financing statement for *perfection* of a security interest in after-acquired property.

(g) Future Advances. If appropriate, a security interest in collateral may also secure future obligations owed by the debtor to the secured party. Those future obligations or advances do not need to be made pursuant to a commitment made or even be seriously contemplated at the time the security agreement was entered into.¹² All that is required is a statement in the security agreement whereby the debtor grants the security interest to secure future advances. As should be evident, when representing debtors, it is important to focus on the language in the security agreement. It could be so broad that the agreement grants the security interest to secure any and every other obligation of any kind ever owed by the debtor to the secured party. This is a clause that bears close examination to ensure that it accords with the intent of the parties at the time the contract is entered into.

Review of the Requirements of a Security Agreement:

- Written (or electronic) record
- Signed or authenticated by the debtor
- Contains a sufficient description of the collateral
 - Less than a specific serial number approach
 - More than merely "all assets"
 - A description by category is sufficient (e.g., all equipment, accounts and general tangibles)
- Value has been given

⁹ *Id.* at § 9-102(a)(65).

¹⁰ *Id.* at § 9-203(f).

¹¹ *Id.* at § 9-204(a).

¹² TEX. BUS. & COM. CODE ANN. § 9-204(c).

- Debtor has rights in the collateral
- No need to include proceeds, which is automatically included
- After-acquired property clause included
- Future advances clause included, if appropriate

C. PERFECTION

1. Generally. As everyone knows, an unperfected security interest is subordinated to a lien creditor and a bankruptcy trustee. Stated in the reverse, a perfected security interest prevails over a judgment creditor and a bankruptcy trustee.

2. Methods of Perfection. There are four basic methods of perfecting an attached security interest. First and most common is a properly completed financing statement filed with the appropriate UCC filing office. Second, the collateral may be in the possession of the secured party. Third, the secured party may have control over the collateral. Fourth, in a few cases, the attachment of the security interest automatically perfects the security interest.

D. PERFECTION BY FILING

1. Generally. A security interest in many types of collateral may be perfected by filing a properly completed financing statement in the appropriate UCC filing offices. Except for security interests arising out certain sales of accounts or payment intangibles, the filing of a properly completed financing statement is the only method of perfecting a security interest in accounts, or commercial tort claim intangibles. This is because these types of collateral have no physical presence that enables perfection by possession. The filing of a financing statement is an alternative method of perfecting a security interest in goods, negotiable documents, instruments, chattel paper and investment property.

2. Contents of Financing Statements. Attached as Exhibit A is a table summarizing the methods of perfection for various types of personal property collateral. A financing statement under revised Article 9 must set forth (a) the debtor's name¹³; (b) the debtor's mailing address; (c) indicate whether the debtor is an individual or an organization; (d) if the debtor is an organization, the type of organization (i.e., corporation, partnership, limited liability company), the jurisdiction of organization and an organizational number; (e) the name of the secured party or the secured party's representative; (f) the mailing address of the secured party or its representative; and (g) a description of the collateral covered by the financing statement.¹⁴ The two principal ingredients that cause the greatest trouble are (i) the debtor's name and (2) the description of collateral. Uniform forms for financing statements, continuation statements, termination statements and the like are contained in Article 9 itself. Any document meeting these requirements may be filed as a financing statement. **However, the statutory approved**

¹³ TEX. BUS. & COM. CODE ANN. § 9.503(a).

¹⁴ *Id.* at §§ 9.502(a) and 9.516(b).

form UCC-1 Financing Statement is a safe harbor form that a filing office may not reject if it is properly completed.¹⁵ Samples of the new UCC forms are attached as Exhibit B.

3. Debtor Doesn't Need To Sign. A financing statement may be filed without the debtor's signature on the financing statement if the debtor authorizes the filing.¹⁶ By entering into a security agreement, a debtor automatically authorizes the filing of a financing statement covering the collateral described in the security agreement.¹⁷

4. Collateral Description and Financing Statement. A collateral description in a financing statement is sufficient if it "indicates the collateral covered by the financing statement."¹⁸ A financing statement indicates the collateral if it has a description of the collateral or if it indicates that it covers all assets or personal property of the debtor.¹⁹ "Supergeneric" collateral descriptions for financing statements are allowed under revised Article 9. Where the security agreement creates a lien in all of the assets of the debtor, the "supergeneric" collateral description would be as follows:

"All assets."

A slightly expanded "supergeneric" all asset description is as follows:

"All personal property of debtor, wherever located, and now owned or hereafter acquired, including accounts, chattel paper, deposit accounts, documents, equipment, general intangibles, instruments, inventory, investment property, letter-of-credit rights and commercial tort claims, and the proceeds and products of the foregoing."

5. Name of the Debtor. The debtor's correct name is **crucial** to the validity of the financing statement because records are indexed on that basis. The name of the debtor should appear on this form **exactly** as it appears on the security agreement, and if the debtor is a registered organization, exactly as the debtor's name appears in the public records of the organization.²⁰ If the debtor is an individual, the financing statement must indicate the debtor's last name.²¹ A trade name is **not a sufficient name** for a debtor.²²

¹⁵ *Id.* at § 9.521.

¹⁶ TEX. BUS. & COM. CODE ANN. § 9.509(a)(1).

¹⁷ *Id.* at § 9.509(b).

¹⁸ *Id.* at § 9.502(a)(3).

¹⁹ *Id.* at § 9.504.

²⁰ *Id.* at § 9.503(a)(1).

²¹ TEX. BUS. & COM. CODE ANN. § 9.516(b)(3).

For a trust, the rules are somewhat confusing and are not entirely consistent with Texas trust law property concepts. You must examine the trust documents and should consult counsel. Counsel may advise separate filings under the names of the individual trustee(s), and either the individual settlor(s), or the name of the trust itself, if it has one.²³ Under Texas law, a trustee will be your “debtor” under the loan documents, but counsel may advise you to also name either the trust or the settlor of the trust on the financing statement as the “debtor” or an additional “debtor.” The reason is to permit a searcher to locate filings more easily.

Any name used for debtor other than the correct name renders the financing statement insufficient and seriously misleading unless the name used is so similar to the debtor’s correct name that a search under the debtor’s correct name, using the filing office’s standard search logic, would disclose the filing with the incorrect name.²⁴ Thus, the message for the secured party is clear: **GET THE DEBTOR’S NAME RIGHT.**

(a) Tip: Registered Organization. Get the name of the registered organization from its certificate of formation, its certified articles of incorporation, its certified articles of organization, or its certificate of limited partnership, in each instance issued by the secretary of state of the jurisdiction of its formation.

(b) Tip: Individual. Require an individual to produce his passport, social security card, birth certificate, federal income tax return or photocopy of his driver's license.

(c) Tip: Organizations Not Registered. Obtain copies of the documents of formation (the partnership agreement, etc.).

(d) Tip: Trusts. Obtain a copy of the trust agreement and all amendments. Get correct names of the trust, the trustee(s) and the settlor(s) and list all three as debtors.

6. Other Blanks on the Financing Statement Form. The mailing address of the debtor must be included. The UCC-1 form has a space for both the debtor’s social security number (for an individual) and federal employer identification number (for an organization). Completion of these blanks are optional, not required. Most lawyers believe that these numbers are confidential and should not be included on the financing statement. If the debtor is an organization, the type of organization **must be** specified (corporation, general partnership, limited liability company). If the debtor is a registered organization, the debtor’s organization number **must be** indicated, and if the debtor is not a registered organization, the form must indicate that the debtor has no organization number. The organization number for a Texas corporation is its charter number as indicated on the certified copy of its articles of incorporation

²² *Id.* at § 9.503(C).

²³ *Id.* at § 9.503(a)(3).

²⁴ *Id.* at § 9.506(c).

issued by the Texas Secretary of State. The form must contain the name and mailing address of the secured party.

7. Where to File/Location of Debtor. The basic approach in revised Article 9 is that perfection centers on the debtor's location, rather than on where the collateral is or may be located. Further, revised Article 9 defines the location of the debtor in ways that, for many entities including corporations, change prior law by focusing on the place of incorporation or registration, rather than on the location of the chief executive office. Attached as Exhibit C is a list of the addresses and phone numbers of the most likely locations for filing financing statements under revised Article 9.

(a) Registered Organization. A registered organization is one organized under the laws of a state or the United States. Examples are corporation, a limited liability company and a limited partnership. For registered organizations that are organized under the law of the state, the filing location of the debtor is the state of organization (regardless of whether the debtor's actual business location or headquarters is in that state). Thus, for a Delaware limited liability company doing business in Texas and having all of its assets in Texas, the place of filing is the Delaware Secretary of State.

(b) Organizations That Are Not Registered. For an organization that is not "registered," the filing location is in the jurisdiction of the place of business or, if there is more than one place of business, the jurisdiction of its chief executive office. Examples of organizations that are not "registered" include a general partnership and an unincorporated association. A source of confusion occurs when the debtor is a trust. It is not clear whether a trust is viewed as an unregistered organization or as one or more individuals who are acting in their capacities as trustees or settlors of the trust. Until the law with respect to trusts is settled, it is best to file in all possible locations: for individuals their jurisdiction of residence and for the trust, the jurisdiction of its place of business or chief executive office, if it has one. It is most important that you file at least in the jurisdiction where the trustee is "located" if, under applicable law, the trustee is the owner of the collateral (which is most likely the case in Texas).

(c) Individuals. For individuals, the filing location is the state of the individual's principal residence, with respect to both business and personal assets of the individual. Thus, if an individual lives in Arkansas, but does business as a sole proprietorship in Texas, under revised Article 9 the place of filing would be the Arkansas Secretary of State.

(d) Change in Location/Change of Debtor's Name. If the debtor changes its location, the security interest must be perfected in the new jurisdiction within four months. Similarly, if the debtor changes its name, a financing statement amendment must be filed within four months.

(e) Transfer of Collateral. If the collateral is transferred, subject to the security interest, to another debtor, and the new debtor is located in a different jurisdiction (as determined by the rules above), a financing statement must be filed within one year in the new jurisdiction.

E. PERFECTION BY POSSESSION

1. Generally. A secured party may perfect a security interest by having possession, itself or through a third party, of the collateral. Possessory security interests are the oldest form of security interests in personal property. As commerce has expanded, however, possessory security interests are increasingly less common. This tendency has been accelerated by the advent of electronic handling systems for various forms of semi-intangibles. Article 9 does not contain a definition of what constitutes “possession.” Clearly, however, what is intended is the **establishment of physical control** of the tangible asset by the secured party or the secured party’s agent.

2. Types of Collateral that may or must be Perfected by Possession.

(a) Money. The **only way** a secured may perfect its security interest in money is by possession.²⁵

(b) Instruments. A secured party may perfect a security interest in an instrument by either filing or possession. Priority as between a secured party having possession and the secured party having a filing goes to the secured party **having possession**. A security interest arising out of a sale of a promissory note (which is an instrument) is perfected automatically, without additional action, when it attaches.²⁶

(c) Letter-of-Credit Rights. Under Article 9, possession of a written letter-of-credit does not perfect a security interest in proceeds under the letter-of-credit. A security interest in a letter-of-credit right that is a supporting obligation is automatically perfected if the security interest in the related collateral is perfected.²⁷ If a letter-of-credit right is original collateral, and not a supporting obligation to other collateral, a security interest therein can be perfected only by control.²⁸

(d) Certificated Securities. Under Article 9 a secured party’s possession of a security certificate, without any necessary endorsement, constitutes perfection.

(e) Chattel Paper. Article 9 limits perfection by possession to tangible chattel paper. Electronic chattel paper may not be perfected by possession; rather it may be perfected by control or filing.²⁹

²⁵ TEX. BUS. & COM. CODE ANN. § 9.312(b)(3).

²⁶ *Id.* at § 9.304(4).

²⁷ *Id.* at § 9.308(d).

²⁸ *Id.* at § 9.312(b)(2).

²⁹ *Id.* at § 9.312(a).

(f) Other Collateral. Other collateral that may be perfected by the secured party's taking possession of the collateral include goods and negotiable documents.³⁰

3. Possession by Third Parties. Under Article 9, if the collateral is in the possession of a third party, the secured party's perfection depends upon the third party authenticating a record (i.e. signing a writing or otherwise authenticating an electronic record) **acknowledging that the third party possesses the collateral for the benefit of the secured party.**³¹

F. PERFECTION BY CONTROL

1. Generally. "Control" is essentially a means of asserting an interest in collateral held by a third party through an agreement. Article 9 permits perfection of a security interest by control not only for investment property but also for deposit accounts, electronic chattel paper and letter-of-credit rights. The most important of these are deposit accounts and investment property.

2. Deposit Accounts. The only way to perfect a security interest in a deposit account is by obtaining control of the deposit account. The filing of a financing statement does not work.³² A secured party has control of a deposit account if it is the depository bank, or if the deposit account in the depository bank is in the secured party's name. A secured party also has control if the depository bank agrees with the secured party that the depository bank will comply with the instructions from the secured party concerning the deposit account without the further consent of the debtor.³³

3. Investment Property. "Investment property" is a catch-all term to include certificated securities, uncertificated securities, security entitlements, and securities accounts. If the collateral does not qualify as "investment property" it is probably a "general intangible."³⁴

(a) Key Definitions. The following definitions are key definitions for purposes of "investment property."

- "Security" is defined in 8.102(a)(15) to include stocks and bonds traded in the markets.
- "Certificated security" is one that is represented by a paper certificate.

³⁰ *Id.* at § 9.313(a).

³¹ TEX. BUS. & COM. CODE ANN. § 9.313(c)(1).

³² *Id.* at § 9.312.

³³ *Id.* at § 9.104(a).

³⁴ *Id.* at § 9.102(a)(49).

- “Uncertificated security” is not.
- “Securities account” is an account to which financial assets such as stocks, bonds and mutual funds are credited.
- “Securities intermediary” is a broker or bank that maintains securities accounts for others.
- “Security entitlement” means the bundle of rights of a beneficial owner (i.e., the retail customer) in his or her securities account.
- “Entitlement holders” are the customers who own the securities account.

(b) Perfection. Perfection of a security interest in investment property occurs either by control (which includes delivery of certificated securities to the secured party or a control agreement with the securities intermediary that maintains the securities account), or by filing. The secured party that has perfected by control **has priority** over the secured party who perfects by filing. Perfection by filing is usually done as a backstop.

(c) Control. Control of investment property includes (i) delivery, with endorsement, of a certificated security to the secured party, (ii) an agreement by the issuer of an uncertificated security that the issuer will honor instructions from the secured party without further consent of the debtor, and (iii) an agreement by a bank, a broker or another securities intermediary holding a securities account that it will honor the instructions from the secured party concerning the securities account without further consent of the debtor. Control also includes registering a security or a securities account in the name of the secured party. Also, if the secured party is also the debtor’s securities intermediary, the secured party automatically has control.

(d) Partnership Interests and Limited Liability Company Interests. An interest in a partnership or a limited liability company **is not a security** unless it is dealt in or traded on a securities exchange or in securities markets, or unless its partnership agreement or articles of organization expressly state that it is governed by Article 8.³⁵ Thus, under the general rule, partnership interests and membership interests in LLCs will fall in the catch-all category of general intangibles. This means that the only way to perfect is to file a UCC financing statement in the state where the debtor is located. The financing statement might describe the collateral as:

“All of debtor’s interests, now owned or hereafter acquired, in [Newco, LLC] [Newco Partnership] including, without limitation, debtor’s [member’s] [partner’s] interest therein, and all distributions and proceeds of the foregoing.”

³⁵ TEX. BUS. & COM. CODE ANN. § 8.103(c).

Exceptions to this general rule arise infrequently. Neither partnership interests nor membership interests in LLCs are normally traded on the securities exchanges or markets. They do not normally qualify as “investment company securities” like mutual funds. They are not normally carried as part of a brokerage or similar securities account and thus would not qualify as a “security entitlement.” The biggest concern is that the partnership or the LLC may have opted into Article 8 by making a statement to that effect in its partnership agreement or organizational articles or operating agreement. If so, then a UCC filing would not protect against a competing lender who had “control” of the security by possession (if it were certificated) or through a control agreement with the partnership or LLC (if it were uncertificated).

(e) Due Diligence Review for Partnerships and LLCs. Accordingly, when the collateral is a partnership interest or an LLC interest, the lender must verify that the partnership or LLC has not opted into Article 8 and that the partnership interest or LLC interest is not held in a brokerage account. The other important due diligence inquiry is whether any other members of the partnership or LLC must consent to the grant of the security interest. The partnership agreement or the LLC’s operating agreement or articles of organization may provide that a partner or a member cannot transfer its interests, without the consent of the other equity owners. A restriction on transfers may be narrowly drafted to include only outright sales, or may be broadly drafted to include security interests. The lender must obtain all necessary consents to the granting of the security interest to the lender or the buyer at a foreclosure becoming a substitute partner or member. At a minimum, the lender should obtain consent to its enjoyment of all economic rights attributable to the encumbered partnership or LLC interest; that is, the right to receive income distributions and a share in the remaining capital of the partnership or LLC on its dissolution.

G. UCC PRIORITY RULES: THE BASICS

1. Priorities Generally. Article 9 establishes a system of priorities to determine which party gets the prize. The system highlights the significance of perfection. A detailed examination of lien priorities among the classes of competitors against whom the secured party will compete for the assets of the debtor in case of the debtor’s default is beyond the scope of this presentation. However, we will hit the highlights in order to understand the importance of perfection.

2. Secured Creditor vs. Unsecured Creditors and Judgment Creditors. Generally, the secured party holding a perfected security interest in the assets of the debtor has priority over unsecured creditors and lien creditors in those assets. A lien creditor is one who has acquired a lien against the debtor’s property by attachment, levy or the like – i.e., an unsecured creditor which has obtained a judgment against the debtor.

3. Secured Creditor vs. Secured Creditor. Priority between conflicting security interests in the same collateral is determined in general by who is the first to file or perfect the security interest, whichever occurs first. This is the so-called “first-to-file-or-perfect” rule. Actual knowledge of an unperfected security interest is irrelevant. It is a “pure race” system.

4. Purchase Money Security Interests. The most important exception to the “first-to-file-or-perfect” rule is the super priority of the purchase money security interest (the “PMSI”). These rules protect a supplier of inventory against an earlier filer whose interest includes after acquired inventory, as well as those who finance equipment, consumer goods and farm products against a prior floating lien that would otherwise have priority under the first-to-file rule. Without the purchase money priority, secondary sources of credit would be “chilled” out of the picture, unless they were willing or able to obtain a subordination agreement from the floating lienor. The purchase money priority, an outgrowth of conditional sales financing, breaks up what would otherwise be a complete monopoly on the debtor’s collateral. In exchange for this super priority, however, the purchase money creditor must jump through various hoops. If it fails to jump through these hoops, the prior filer will maintain its priority security interest in the collateral obtained because it filed first.

(a) Definition of Purchase Money Security Interest. Generally, a PMSI is a security interest taken or retained by a seller of the collateral to secure all or a part of its purchase price, or “for value given, to enable the debtor to acquire rights or use the collateral if the value is in fact so used.”³⁶ The key is find a “direct nexus” between the loan proceeds and the collateral. Comment 3 to 9.103 states:

“The concept of ‘purchase-money security interest’ requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if the debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.”

(b) Intangible Collateral. Intangible collateral is non-goods collateral. It is personal property that you cannot touch. Under Article 9, the only intangible collateral that can be subject to a PMSI is software purchased for the principal purpose of using in goods that are themselves taken under a PMSI. In other words, the PMSI is permitted in software in an integrated transaction with the acquisition of the related hardware.

(c) Goods Other Than Inventory or Livestock. Article 9 gives a perfected PMSI in goods other than inventory or livestock that are farm products (as opposed to inventory) priority over a conflicting security interest in the goods and the identifiable cash proceeds, if the PMSI is perfected **within twenty days** after the debtor receives possession.

(d) Inventory and Livestock. To get a PMSI in inventory, the secured party must go through some hoops. The PMSI has priority if (1) it is perfected when the debtor receives possession of the inventory, (2) the holder of the PMSI sends an authenticated notice to the holder of the conflicting security interest, (3) the competing secured party receives the notice within five years (six months in the case of livestock constituting farm products) before the debtor receives possession; and (4) the notice states that the PMSI holder expects to acquire a

³⁶ TEX. BUS. & COM. CODE ANN. § 9.103(a)(2).

PMSI in inventory and describes the inventory. Under a non-uniform Texas amendment the notice requirement is excused for a secured party who is an interest owner selling to the first purchaser of oil and gas. However, remember that purchase money priority in inventory attaches to the proceeds of that inventory only to a very limited extent. A prior filer on accounts, for example, will have priority on accounts arising from the sale of inventory unless the creditors agree otherwise.

5. Priority by Subordination Agreement. One of the most important priority provision of Article 9 is 9.339 which says that “This article does not preclude subordination by agreement by any person entitled to priority.” Any of the priority rules can be reversed by a subordination agreement. In many situations, subordination agreements are answers to the prayers of the debtor. For example, if a bank has previously filed a financing statement covering all of the debtor’s assets now owned or hereafter acquired, and a finance company is contemplating a term loan to the debtor, the finance company will be trapped by the first-to-file rule if it does not qualify for a purchase money priority. In such a situation, the finance company always has the option of contacting the bank and demanding subordination to the extent of its loan. If such subordination is not agreed to, the finance company can simply refuse to make the loan. If the bank agrees to such a subordination, the priorities are reversed to the extent specified. In many instances it is advantageous to both the bank and the debtor to permit such financing.

The most sophisticated type of subordination agreement is an intercreditor agreement executed by a number of creditors, usually secured creditors, of a single borrower. The intercreditor agreement seeks to establish priorities in a matter of contract, rather than relying on the priority rules of Article 9. Sophisticated intercreditor agreements typically address issues such as (a) payment blockage of the junior lender’s debt when the debtor has defaulted in the payment of the senior debt, (b) a remedies standstill period during which the junior lender cannot exercise its remedies against the collateral, and (c) bankruptcy issues such as debtor-in-possession financing, use of cash collateral, and the right of the senior lender to vote the claim of the junior lender in the debtor’s bankruptcy. The great commercial utility of such agreements is that they are flexible and help avoid litigation. They are frequently used in workouts.

6. Secured Party vs. Bank’s Right of Setoff. Prior to the adoption of revised Article 9 in July 2001, the classic priority clash that was the subject of intense litigation for many years occurred when an Article 9 secured creditor, normally financing a dealer’s inventory and receivables, sought to recover cash proceeds of the collateral deposited into the debtor’s operating bank account. If the debtor had fallen into default, the depository bank would seek to exercise its common law or statutory right of setoff. Who had priority as between the two claimants? Prior to July 1, 2001, the law applied in many jurisdictions gave the secured creditor at least some priority over the bank’s right of setoff on the theory that the bank is merely a general creditor or that there is no right to exercise setoff against funds in which a third party has a lien. However, numerous complicated tracing theories were applied to allocate the funds since in most (but not all) jurisdictions a security interest could not be perfected in a debtor’s bank account with a third party. Revised Article 9 establishes a clear uniform rule. A depository bank’s common law right of setoff has priority over security interest held by another secured

party, including one who claims the deposit accounts as cash proceeds of an asset based loan.³⁷ This is the so-called “depository bank always wins” rule, and it is intended to protect the payment system. Only if the competing secured party takes “control” of the deposit account or gets a subordination agreement is its security interest senior to the bank’s right of setoff. See generally Section E2 of this paper.

7. Debtor’s Trustee in Bankruptcy. The acid test of a security interest under Article 9 is its resistance to attack by the debtor’s trustee in bankruptcy. A lender who fails to perfect or who makes a last minute perfection must face a formidable array of avoidance powers possessed by the bankruptcy trustee. A discussion of bankruptcy issues – the strong-arm clause, preferences, post-petition security interests, setoff, fraudulent conveyances, and the automatic stay and adequate protection – is beyond the scope of this presentation and worthy of its own presentation at a future time. However, there is one issue that is present in the majority of secured transactions which will be touched upon briefly – constructive fraudulent transfers.

(a) The Transactional Context. In the context of a secured loan, constructive fraudulent disposition issues arise when a party **other than the Borrower** guarantees or grants a lien in its assets to secure the borrower’s loan and does not receive proceeds of the borrower’s loan or otherwise benefit in an obvious and easily quantifiable way. The fraudulent conveyance analysis must be made where a shareholder or a subsidiary or another affiliate of the borrower guarantees the borrower’s loan or grants a lien in its own assets to secure the borrower’s debt. Such third party transactions are typical in a secured transaction. For purposes of the discussion below, the term “grantor” means a shareholder, a subsidiary or an affiliate of the borrower which has guaranteed the borrower’s debt or has pledged its assets to secure the borrower’s debt.

(b) Section 548 of the Bankruptcy Code. The grounds for avoiding a third party’s guarantee or collateral pledge are contained in Section 548 of the Bankruptcy Code and the Uniform Fraudulent Transfer Act, which is Chapter 24 of the Texas Business and Commerce Code. In substance, a court can find constructive fraud, and set aside the “transfer”, where the debtor received less than “reasonably equivalent value” and was insolvent at the time of the transfer or became insolvent thereby.

(c) Adequacy of Consideration. “Reasonably equivalent value” does not require dollar-for-dollar equality between the property the grantor gives up and the property the grantor receives in return. There is room for some imbalance and hence the “reasonably equivalent” standard. Courts try to balance the need to permit parties to make deals, some good and some not so good, and the need to establish a point at which transfers will be invalidated that too profoundly impair the transferor’s ability to discharge its obligations to its creditors. Generally, courts will find “reasonably equivalent value” if the grantor received some of the loan proceeds or if the “transfer” was “downstream” – a shareholder guaranteeing the debts of the borrower is “reasonably equivalent” consideration, at least unless the Borrower is hopelessly insolvent. However, “adequacy of consideration” becomes more problematic when the “transfer” is from an affiliate (two entities owned by a common shareholder which is a “cross-

³⁷ TEX. BUS. & COM. CODE ANN. § 9.340(a).

stream” transaction, and where the “transfer” is in the “upstream” context – subsidiary guaranteeing the debt of its parent.

(d) Insolvency. Even if the guarantee or security interest lacks fair consideration (i.e., the debtor received less than reasonably equivalent value), the transfer **cannot be set aside** as a constructive fraudulent transfer unless the grantor also fails the solvency test. Legal insolvency occurs if the sum of the grantor’s debts is greater than all of the grantor’s assets at fair valuation. “Equitable” insolvency is a pragmatic test which equates insolvency with the lack of liquid funds or an ability to pay debts generally as they become due.

(e) The Bottom Line. It takes **two things** for a “transfer” to be set aside as a constructive fraudulent conveyance. First, the transfer must be for something less than “reasonably equivalent value”. Second, the effect of the transfer must create legal or equitable insolvency. Thus, so long as a party is financially viable, the law of constructive fraudulent dispositions will not provide a means to review the transaction. Solvent grantors can make bad deals. Conversely, insolvent grantors are free to dispose of their property so long as they receive fair consideration or “reasonably equivalent value” in return. For the constructive fraud provisions to operate, the bankruptcy trustee must show that the grantor was both insolvent at the time of or as the result of the conveyance and received in exchange for the property conveyed less than a “sufficient” value.

H. SECURED CREDITOR VERSUS FEDERAL TAX LIEN

1. Background. The U.S. Treasury Department, Internal Revenue Service (IRS) uses the tax lien machinery of the Internal Revenue Code (IRC) to recover unpaid taxes. Failure to pay income, withholding, social security and other taxes leads to a delinquency assessment, which in turn constitutes a lien in favor of the United States on all property and rights of property belonging to the taxpayer; the lien continues until the tax liability is paid. Federal law determines the priority of claims in property competing with the federal tax lien.

2. General Scheme of the Federal Tax Lien Act. A tax lien “shall not be valid as against any purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor until notice thereof which meets the requirements of Subsection (f) has been filed by the Secretary or his delegate.”³⁸ Thus, although the lien arises on assessment, it does not become valid against third parties **until it is filed**. The place of filing is (a) in the appropriate office where real estate is physically located if realty is involved, and (b) in a single office designated by state law where the taxpayer resides when the filing is made if tangible or intangible personal property is involved. As to personal property that would be subject to an Article 9 security interest, the **residence** of a partnership or corporation is place at which the principal executive office of the business is **located**. The document that is filed is called a “Notice of Tax Lien,” and in general it must be refiled at ten-year intervals. Texas has designated the Secretary of State as the filing office for corporations and partnerships. The statewide UCC Central Filing Office has been designated by about two-thirds of the states as the place to file federal tax lien notices

³⁸ Internal Revenue Code § 6323(a).

including Arkansas and Oklahoma (the Oklahoma state level is the Oklahoma County Recorder). Louisiana's federal tax lien filings are filed in the parish. New Mexico's federal tax lien filings are filed in the county. Also, only about a dozen states which have designated the statewide UCC Central Filing Office as the place of filing federal tax lien notices run searches for tax lien notices separately from their Article 9 searches. Thus, lenders must "multiple search": search the jurisdiction of formation of the corporation, the central filing office of the state where the corporation has its principal executive office, the county where the corporation has its principal executive office and the county where the corporation has real property.

(a) Lien Search Example No. 1. Assume that ABC Corp is a Delaware corporation with its chief executive office in Texas and all of its assets, which consist of personal property and leases of office space, located only in Dallas and Harris Counties, Texas. The search to find UCC financing statements would be with the Delaware Secretary of State. The search to locate federal tax lien notices would be with the Texas Secretary of State (placed designated by Texas for filing tax liens against corporations and partnerships) and with the Dallas and Harris County Clerks (location of leases of real estate).

(b) Lien Search Example No. 2. Assume that ABC Corp is an Oklahoma corporation with its principal place of business in Oklahoma City and with personal property assets located in New Orleans and with both personal and real property assets located in Dallas County, Texas. The search to find prior UCC financing statements would be with the Oklahoma County Clerk (this is the place of central filing in Oklahoma) for personal property other than fixtures, and in Dallas County, Texas for UCC fixture filings. The federal tax lien search would be (a) with the Oklahoma County Clerk (this is the location designated in Oklahoma for tax lien filings), (b) the Dallas County Clerk, because this is the location of real estate, (c) the Texas Secretary of State (this is the place designated in Texas for filing tax liens against personal property located in Texas that is owned by corporations or partnerships, and (d) in Orleans Parish, Louisiana (Louisiana's federal tax lien filings are filed in the parish).

3. Special Filing Problem: Debtor Names. Due diligence practices for secured lenders must be "ratcheted up" due to a significant 2005 decision from the Sixth Circuit holding that the IRC is exempt from UCC filing requirements regarding debtors' names. The court gave an IRC tax lien priority over the secured lender's prior perfected security interest even though the IRS's tax lien filing did not use the registered corporate name of the debtor in the "public records" of the State of Michigan. The bank filed under the correct name of "Spearing Tool and Manufacturing Co.," and the IRS filed under the name "Spearing Tool & Mfg. Company, Inc." The IRS notice was prior to the bank's security interest. The IRS won.³⁹ In view of this case, secured lenders should obtain the borrower's tax returns for several years back and perform UCC searches and tax lien searches under all names used by the debtor on its returns. Request searches using all possible name variations.

³⁹ United States v. Crestmark Bank (In re Spearing Tool & Manufacturing Co.) 412 F.3d 655 (6th Cir. 2005), cert. denied, 127 S. Ct. 41 (2006).

4. Future Advances and After-Acquired Property. A filed tax lien is subordinate to a security interest that comes into existence after a tax lien filing by reason of optional future advances made within 45 days of such filing.⁴⁰ However, the super priority applies only when (a) the secured party makes the future advance without actual knowledge of the tax lien filing, (b) the security interest is in property existing at the time of the tax lien filing under a written security agreement entered into before that time, and (c) the security interest is “protected under local law against a judgment lien arising as of the time of the tax lien filing, out of an unsecured obligation.” What this means is that, in a typical revolving credit facility, advances made within 45 days of a federal tax lien filing are prior to the tax lien if the bank does not know about the tax lien and the bank’s lien was perfected prior to the tax lien filing. What this also means is that under Article 9, the lender needs to check the tax lien records every 45 days if it intends to make future advances available under a line of credit; if it discovers a notice of lien, it must refuse to make any further disbursements.⁴¹ **In general, a tax lien check every 45 days is enough to protect the holder of an Article 9 floating lien as to both optional future advances and after-acquired property such as inventory and accounts.** Of course, the pretax lien security agreement must contain an after-acquired property clause and a future advance provision to take advantage of this super priority.

⁴⁰ Internal Revenue Code § 2323(d).

⁴¹ TEX. BUS. & COM. CODE ANN. § 9.232.

EXHIBIT A

Table Summarizing Methods of Perfection

COLLATERAL	PERFECTION
Accounts	Filing 9.310
Agricultural Liens	Attachment 9.308; Filing 9.310
Chattel Paper*	Filing 9.312; possession 9.313; control (electronic c.p.) 9.314
Commercial Tort Claims [no perfection in after-acquired commercial tort claims]	Filing 9.310 [Note: different description requirements for this type of category.]
Commodity Accounts (a subset of Investment Property)*	Attachment 9.309 (security interest created by an intermediary); otherwise, filing 9.312; control 9.314
Consumer Goods** other than vehicles, boats, etc.	Attachment 9.309 (purchase money); otherwise filing 9.310
Deposit Accounts (includes non-negotiable CDs)	Control 9.312 and 9.314
Equipment**	Filing 9.310
Farm Products**	Filing 9.310
Fixtures	Filing 9.310
General Intangibles (includes most LLC and partnership interests)	Filing 9.310; sale of payment intangible – attachment 9.309
Goods subject to a statute or treaty such as boats, cars, aircraft	Compliance with applicable federal or state regulations 9.309(1) and 9.311
Health Care Insurance Receivables assigned to service provider	Attachment 9.309
Instruments	Filing 9.312; possession 9.313
Inventory** (including motor vehicles, boats, manufactured homes)	Filing 9.312
Investment Property*	Filing 9.312; control 9.314
Letter of Credit Rights	Control 9.312 and 9.314
Manufactured Home**, motor vehicles**, boats**	Filing 9.311 if inventory; possession 9.313; compliance with state regulations 9.311 (non-inventory)

COLLATERAL	PERFECTION
Membership Interest in Limited Liability Company (a subset of either General Intangibles or Investment Property)*	Filing as a General Intangible 9.312; if LLC has opted into Article 8, filing 9.312 or control 9.314 as Investment Property.
Money	Possession 9.312
Negotiable Documents*	Filing 9.312; possession 9.313; control (electronic documents)
Partnership Interest (a subset of either General Intangibles or Investment Property)*	Filing as a General Intangible 9.312; if Partnership has opted into Article 8, filing 9.312 or control 9.314 as Investment Property.
Proceeds	9.315
Promissory Note (Sale)	Attachment 9.309
Securities (a subset of Investment Property)*	Attachment if created by broker or intermediary 9.309; Filing 9.310(a); Control 9.314
Software (a subset of General Intangibles) that is not part of goods	Filing 9.310(a) unless other statute governs 9.310(b)(3).

* With respect to collateral in which a security interest may be perfected by filing or control, perfection by control is preferable.

** For goods other than goods covered by a certificate of title possession is always an option to perfect.

EXHIBIT B

UCC-1 Financing Statement

UCC-1 Financing Statement Instructions

UCC-1 Financing Statement Addendum

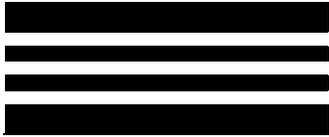
UCC-1 Financing Statement Addendum Instructions

UCC-3 Financing Statement Amendment

UCC-3 Financing Statement Amendment Instructions

UCC-3 Financing Statement Amendment Addendum

UCC-3 Financing Statement Amendment Addendum Instructions



UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]
B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME – insert only one debtor name (1a or 1b) – do not abbreviate or combine names
1a. ORGANIZATION'S NAME

OR 1b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

1c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

1d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION	1f. JURISDICTION OF ORGANIZATION	1g. ORGANIZATIONAL ID#, if any
				<input type="checkbox"/> NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME – insert only one debtor name (2a or 2b) – do not abbreviate or combine names
2a. ORGANIZATION'S NAME

OR 2b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

2d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL ID#, if any
				<input type="checkbox"/> NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) – insert only one secured party name (3a or 3b)
3a. ORGANIZATION'S NAME

OR 3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION (if applicable): LESSEE/LESSOR CONSIGNEE/CONSIGNOR BAILEE/BAILOR SELLER/BUYER AG. LIEN NON-UCC FILING

6. This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum if applicable

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [ADDITIONAL FEE] (optional) All Debtors Debtor 1 Debtor 2

8. OPTIONAL FILER REFERENCE DATA

Instructions for UCC Financing Statement (Form UCC1)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1; correct Debtor name is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice.

Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy; otherwise detach. If you want to make a search request, complete item 7 (after reading Instruction 7 below) and send Search Report Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, you are encouraged to use either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP).

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1. **Debtor name:** Enter only one Debtor name in item 1, an organization's name (1 a) or an individual's name (1 b). Enter Debtor's exact full legal name. Don't abbreviate.

1a. **Organization Debtor.** "Organization" means an entity having a legal identity separate from its owner. A partnership is an organization; a sole proprietorship is not an organization, even if it does business under a trade name. If Debtor is a partnership, enter exact full legal name of partnership; you need not enter names of partners as additional Debtors. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed charter documents to determine Debtor's correct name, organization type, and jurisdiction of organization.

1b. **Individual Debtor.** "Individual" means a natural person; this includes a sole proprietorship, whether or not operating under a trade name. Don't use prefixes (Mr., Mrs., Ms.). Use suffix box only for titles of lineage (Jr., Sr., III) and not for other suffixes or titles (e.g., M.D.). Use married woman's personal name (Mary Smith, not Mrs. John Smith). Enter individual Debtor's family name (surname) in Last Name box, first given name in First Name box, and all additional given names in Middle Name box.

For both organization and individual Debtors: Don't use Debtor's trade name, DBA, AKA, FKA, Division name, etc. in place of or combined with Debtor's legal name; you may add such other names as additional Debtors if you wish (but this is neither required nor recommended).

1c. An address is always required for the Debtor named in 1a or 1b.

1d. Reserved for Financing Statements to be filed in North Dakota or South Dakota only. If this Financing Statement is to be filed in North Dakota or South Dakota, the Debtor's taxpayer identification number (tax ID#) — social security number or employer identification number must be placed in this box.

1e,f,g. "Additional information reorganization Debtor" is always required. Type of organization and jurisdiction of organization as well as Debtor's exact legal name can be determined from Debtor's current filed charter document. Organizational ID #, if any, is assigned by the agency where the charter document was filed; this is different from tax ID #; this should be entered preceded by the 2-character U.S. Postal identification of state of organization if one of the United States (e.g., CA12345, for a California corporation whose organizational ID # is 12345); if agency does not assign organizational ID #, check box in item 1g indicating "none."

Note: If Debtor is a trust or a trustee acting with respect to property held in trust, enter Debtor's name in item 1 and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a decedent's estate, enter name of deceased individual in item 1b and attach Addendum (Form UCC1Ad) and check appropriate box in item 17. If Debtor is a transmitting utility or this Financing Statement is filed in connection with a Manufactured-Home Transaction or a Public-Finance Transaction as defined in applicable Commercial Code, attach Addendum (Form UCC1Ad) and check appropriate box in item 18.

2. If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. To include further additional

Debtors, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction I for determining and formatting additional names.

3. Enter information for Secured Party or Total Assignee, determined and formatted per Instruction 1. To include further additional Secured Parties, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names. If there has been a total assignment of the Secured Party's interest prior to filing this form, you may either (1) enter Assignor S/Ps name and address in item 3 and file an Amendment (Form UCC3) [see item 5 of that form]; or (2) enter Total Assignee's name and address in item 3 and, if you wish, also attaching Addendum (Form UCC1Ad) giving Assignor S/P's name and address in item 12.

4. Use item 4 to indicate the collateral covered by this Financing Statement. If space in item 4 is insufficient, put the entire collateral description or continuation of the collateral description on either Addendum (Form UCC1Ad) or other attached additional page(s).

5. If filer desires (at filer's option) to use titles of lessee and lessor, or consignee and consignor, or seller and buyer (in the case of accounts or chattel paper), or bailee and bailor instead of Debtor and Secured Party, check the appropriate box in item 5. If this is an agricultural lien (as defined inapplicable Commercial Code) filing or is otherwise not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box in item 5, complete items 1-7 as applicable and attach any other items required under other law.

6. If this Financing Statement is filed as a fixture filing or if the collateral consists of timber to be cut or as-extracted collateral, complete items 1-5, check the box in item 6, and complete the required information (items 13,14 and/or 15) on Addendum (Form UCC1Ad).

7. This item is optional. Check appropriate box in item 7 to request Search Report(s) on all or some of the Debtors named in this Financing Statement. The Report will list all Financing Statements on file against the designated Debtor on the date of the Report, including this Financing Statement. There is an additional fee for each Report. If you have checked a box in item 7, file Search Report Copy together with Filing Officer Copy (and Acknowledgment Copy). Note: Not all states do searches and not all states will honor a search request made via this form; some states require a separate request form.

8. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 8 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtor's name or other identification, state in which form is being filed, etc.) that filer may find useful.

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

9. NAME OF DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

OR	9a. ORGANIZATION'S NAME		
	9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME, SUFFIX

10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME – insert only one name (11a or 11b) – do not abbreviate or combine names

OR	11a. ORGANIZATION'S NAME			
	11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
11c. MAILING ADDRESS		CITY	STATE	POSTAL CODE COUNTRY
11d. <u>SEE INSTRUCTIONS</u>	ADD'L INFO RE ORGANIZATION DEBTOR	11e. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID#, if any <input type="checkbox"/> NONE

12. **ADDITIONAL SECURED PARTY'S** or **ASSIGNOR S/P'S NAME** – insert only one name (12a or 12b)

OR	12a. ORGANIZATION'S NAME			
	12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX
12c. MAILING ADDRESS		CITY	STATE	POSTAL CODE COUNTRY

13. This FINANCING STATEMENT covers timber to be cut or as extracted collateral, or is filed as a fixture filing.

14. Description of real estate

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest)

16. Additional collateral description

17. Check only if applicable and check only one box.

Debtor is a Trust or Trustee acting with respect to property held in trust or Decedent's Estate

18. Check only if applicable and check only one box.

- Debtor is a TRANSMITTING UTILITY
- Filed in connection with a Manufactured-Home Transaction – effective 30 years
- Filed in connection with a Public Finance Transaction – effective 30 years

International Association of Commercial Administrators (IACA)

FILING OFFICE COPY – UCC FINANCING STATEMENT ADDENDUM (FORM UCC1Ad) (REV. 05/22/02)

Instructions for UCC Financing Statement Addendum (Form UCC1Ad)

9. Insert name of first Debtor shown on Financing Statement to which this Addendum relates, exactly as shown in item 1 of Financing Statement.
10. Miscellaneous: Under certain circumstances, additional information not provided on Financing Statement may be required. Also, some states have non-uniform requirements. Use this space to provide such additional information or to comply with such requirements; otherwise, leave blank.
11. If this Addendum adds an additional Debtor, complete item 11 in accordance with Instruction 1 of Financing Statement. To include further additional Debtors, attach either an additional Addendum (Form UCC1 Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement for determining and formatting additional names.
12. If this Addendum adds an additional Secured Party, complete item 12 in accordance with Instruction 3 of Financing Statement. To include further additional Secured Parties, attach either an additional Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement for determining and formatting additional names. In the case of a total assignment of the Secured Party's interest before the filing of this Financing Statement, if filer has given the name and address of the Total Assignee in item 3 of Financing Statement, filer may give the Assignor S/P's name and address in item 12.
- 13-15. If collateral is timber to be cut or as-extracted collateral, or if this Financing Statement is filed as a fixture filing, check appropriate box in item 13; provide description of real estate in item 14; and, if Debtor is not a record owner of the described real estate, also provide, in item 15, the name and address of a record owner. Also provide collateral description in item 4 of Financing Statement. Also check box 6 on Financing Statement. Description of real estate must be sufficient under the applicable law of the jurisdiction where the real estate is located.
16. Use this space to provide continued description of collateral, if you cannot complete description in item 4 of Financing Statement.
17. If Debtor is a trust or a trustee acting with respect to property held in trust or is a decedent's estate, check the appropriate box.
18. If Debtor is a transmitting utility or if the Financing Statement relates to a Manufactured-Home Transaction or a Public- Finance Transaction as defined in the applicable Commercial Code, check the appropriate box.



UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE #	1b. This FINANCING STATEMENT AMENDMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. <input type="checkbox"/>
2. <input type="checkbox"/> TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.	
3. <input type="checkbox"/> CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.	
4. <input type="checkbox"/> ASSIGNMENT (full or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 9.	
5. AMENDMENT (PARTY INFORMATION): This Amendment affects <input type="checkbox"/> Debtor <u>or</u> <input type="checkbox"/> Secured Party of record. Check only <u>one</u> of these two boxes. Also check <u>one</u> of the following three boxes <u>and</u> provide appropriate information in item 6 and/or 7. <input type="checkbox"/> CHANGE name and/or address: Please refer to the detailed instructions in regards to changing the name/address of a party. <input type="checkbox"/> DELETE name: Give record name to be deleted in item 6a or 6b. <input type="checkbox"/> ADD name: Complete item 7a or 7b, and also item 7c; also complete items 7d-7g (if applicable)	
6. CURRENT RECORD INFORMATION:	
6a. ORGANIZATION'S NAME	
OR 6b. INDIVIDUAL'S LAST NAME	FIRST NAME MIDDLE NAME SUFFIX
7. CHANGED (NEW) OR ADDED INFORMATION:	
7a. ORGANIZATION'S NAME	
OR 7b. INDIVIDUAL'S LAST NAME	FIRST NAME MIDDLE NAME SUFFIX
7c. MAILING ADDRESS	CITY STATE POSTAL CODE COUNTRY
7d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR
7e. TYPE OF ORGANIZATION	7f. JURISDICTION OF ORGANIZATION
7g. ORGANIZATIONAL ID #, if any <input type="checkbox"/> NONE	
8. AMENDMENT (COLLATERAL CHANGE): check only <u>one</u> box. Describe collateral <input type="checkbox"/> deleted or <input type="checkbox"/> added, or give entire <input type="checkbox"/> restated collateral description, or describe collateral <input type="checkbox"/> assigned.	
9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment). If this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here <input type="checkbox"/> and enter name of DEBTOR authorizing this Amendment.	
9a. ORGANIZATION'S NAME	
OR 9b. INDIVIDUAL'S LAST NAME	FIRST NAME MIDDLE NAME SUFFIX
10. OPTIONAL FILER REFERENCE DATA	

International Association of Commercial Administrators (IACA)

FILING OFFICE COPY – UCC FINANCING STATEMENT AMENDMENT (FORM UCC3) (REV. 05/22/02)

Instructions for National UCC Financing Statement AMENDMENT (Form UCC3)

Please type or laser-print this form. Be sure it is completely legible. Read all Instructions, especially Instruction 1a; correct file number of initial financing statement is crucial. Follow Instructions completely.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. Filing office cannot give legal advice. Do not insert anything in the open space in the upper portion of this form; it is reserved for filing office use.

An Amendment may relate to only one financing statement. Do not enter more than one file number in item 1a.

When properly completed, send Filing Office Copy, with required fee, to filing office. If you want an acknowledgment, complete item B and, if filing in a filing office that returns an acknowledgment copy furnished by filer, you may also send Acknowledgment Copy, otherwise detach. Always detach Debtor and Secured Party Copies.

If you need to use attachments, use B-1/2 X 11 inch sheets and put at the top of each sheet: "AMENDMENT" and the file number of the initial financing statement to which this Amendment relates; you are encouraged to use Amendment Addendum (Form UCC3Ad).

Always complete items 1 a and 9.

A. To assist filing offices that might wish to communicate with filer, filer may provide information in item A. This item is optional.

B. Complete item B if you want an acknowledgment sent to you. If filing in a filing office that returns an acknowledgment copy furnished by filer present simultaneously with this form a carbon or other copy of this form for use as an acknowledgment copy.

1a. **File number:** Enter file number of initial financing statement to which this Amendment relates. Enter only one file number. In some states, the file number is not unique; in those states, also enter an item 1a, after the file number, the date that the initial financing statement was filed.

1b. Only if this Amendment is to be filed or recorded in the real estate records, check box 1b and also, in item 13 of Amendment Addendum, enter Debtor's name, in proper format exactly identical to the format of item 1 of financing statement, and name of record owner if Debtor does not have a record interest.

Note: Show purpose of this Amendment by checking box 2, 3, 4, 5 (in item 5 you must check two boxes) or 8; also complete items 6, 7 and/or 8 as appropriate. Filer may use this Amendment form to simultaneously accomplish both data changes (items 4,5, and/or 8) and a Continuation (item 3), although in some states filer may have to pay a separate fee for each purpose.

2. To terminate the effectiveness of the identified financing statement with respect to security interest(s) of authorizing Secured Party, check box 2. See Instruction 9 below.

3. To continue the effectiveness of the identified financing statement with respect to security interest(s) of authorizing Secured Party, check box 3. See Instruction 9 below.

4. To assign (i) all of assignor's interest under the identified financing statement, or (ii) a partial interest in the security interest covered by the identified financing statement, or (iii) assignor's full interest in some (but not all) of the collateral covered by the identified financing statement: Check box in item 4 and enter name of assignee in item 7a if assignee is an organization, or in item 7b, formatted as indicated, if assignee is an individual. Complete 7a or 7b, but not both. Also enter assignee's address in item 7c. Also enter name of assignor in item 9. If partial Assignment affects only some (but not all) of the collateral covered by the identified financing statement, filer may check appropriate box in item 8 and indicate affected collateral in item 8.

5,6,7. To change the name of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is a name change; also enter name of affected party (current record name) in items 6a or 6b as appropriate; and enter new name (7a or 7b). If the new name refers to a Debtor complete (7c); also complete 7e-7g if 7a was completed.

5,6,7. To change the address of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is an address change; also enter name of affected party (current record name) in item 6a or 6b as appropriate; and enter new address (7c) in item 7.

5,6,7. To change the name and address of a party: Check box in item 5 to indicate whether this Amendment amends information relating to a Debtor or a Secured Party; also check box in item 5 to indicate that this is a name/address change; also enter name of affected party (current record name) in items 6a or 6b as appropriate; and enter new name (7a or 7b). If the new name refers to a Debtor complete item 7c; also complete 7e-7g if 7a was completed.

5.6. To delete a party: Check box in item 5 to indicate whether deleting a Debtor or a Secured Party; also check box in item 5 to indicate that this is a deletion of a party; and also enter name (6a or 6b) of deleted party in item 6.

5.7. To add a party: Check box in item 5 to indicate whether adding a Debtor or Secured Party; also check box in item 5 to indicate that this is an addition of a party; and enter the new name (7a or 7b). If the new name refers to a Debtor complete item 7c; also complete 7e-7g if 7a was completed. To include further additional Debtors or Secured Parties, attach Amendment Additional Party (Form UCC3AP), using correct name format.

Note: The preferred method of filing against a new Debtor (an individual or organization not previously of record as a Debtor under this file number) is to file a new Financing Statement (UCC1) and not an Amendment (UCC3).

7d. Reserved for Financing Statement Amendments to be filed in North Dakota or South Dakota only. If this Financing Statement Amendment is to be filed in North Dakota or South Dakota, the Debtor's taxpayer identification number (tax ID#) – social security number or employer identification number must be placed in this box.

8. Collateral change. To change the collateral covered by the identified financing statement, describe the change in item 8. This may be accomplished either by describing the collateral to be added or deleted, or by setting forth in full the collateral description as it is to be effective after the filing of this Amendment, indicating clearly the method chosen (check the appropriate box). If the space in item 8 is insufficient, use item 13 of Amendment Addendum (Form UCC3Ad). A partial release of collateral is a deletion. If, due to a full release of all collateral, filer no longer claims a security interest under the identified financing statement, check box 2 (Termination) and not box 8 (Collateral Change). If a partial assignment consists of the assignment of some (but not all) of the collateral covered by the identified financing statement, filer may indicate the assigned collateral in item 8, check the appropriate box in item 8, and also comply with instruction 4 above.

9. Always enter name of party of record authorizing this Amendment; in most cases, this will be a Secured Party of record. If more than one authorizing Secured Party, give additional name(s), properly formatted, in item 13 of Amendment Addendum (Form UCC3Ad). If the indicated financing statement refers to the parties as lessee and lessor, or consignee and consignor, or seller and buyer, instead of Debtor and Secured Party, references in this Amendment shall be deemed likewise so to refer to the parties. If this is an assignment, enter assignor's name. If this is an Amendment authorized by a Debtor that adds collateral or adds a Debtor, or if this is a Termination authorized by a Debtor, check the box in item 9 and enter the name, properly formatted, of the Debtor authorizing this Amendment, and, if this Amendment or Termination is to be filed or recorded in the real estate records, also enter, in item 13 of Amendment Addendum, name of Secured Party of record.

10. This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 10 any identifying information (e.g., Secured Party's loan number, law firm file number, Debtors name or other identification, state in which form is being filed, etc.) that filer may find useful.

Instructions for National UCC Financing Statement AMENDMENT Addendum (Form UCC3Ad)

11. Enter information exactly as given on item 1a on Amendment form.
12. Enter information exactly as given in item 9 on Amendment form.
13. If space on Amendment form is insufficient or you must provide additional information, enter additional information in item

EXHIBIT C

Addresses and Phone Numbers of Most Likely Locations for Revised Article 9 Filings

Set forth below are the addresses, phone numbers and other contact points which may be helpful for some of the most likely locations for revised Article 9 filings.

A. Organization States

The most likely states where corporations, limited liability companies and limited partnerships are formed are first Texas and then probably Delaware, Nevada, California and New York.

TEXAS: Texas Secretary of State
Uniform Commercial Code Section

Mailing address: P.O. Box 13193
Austin, TX 78711-3193

Street address: 1019 Brazos Street, Suite 505
Austin, TX 78701

Phone: (512) 475-2700 (Main)
(512) 475-2703 (UCC filing information)
(512) 475-2740 (Online filing information)

Fax: (512) 463-1425

Website: <http://www.sos.state.tx.us>

DELAWARE: Delaware Secretary of State
Division of Corporations

Mailing address: P.O. Box 793
Dover, DE 19903

Street address: John G. Townsend Bldg.
401 Federal Street, Suite 4
Dover, DE 19901

Phone: (302) 739-4279

Fax: (302) 739-3812 or 739-3813

Website: <http://www.state.de.us/corp/ucc.shtml>

NEVADA: Nevada Secretary of State
UCC Division

Mailing address: 200 North Carson Street
Carson City, NV 89701

Phone: (775) 684-5708

Fax: (775)-684-5630

Website: <http://esos.state.nv.us/nvucc/ucc>

CALIFORNIA: California Secretary of State
UCC Division

Mailing address: P.O. Box 942835
Sacramento, CA 94235-0001

Street address: 1500 11th Street, Room 255
Sacramento, CA 95814

Phone: (916) 653-3516

Website: <http://www.ss.ca.gov/business/ucc/ucc.htm>

NEW YORK: New York State Department of State
Uniform Commercial Code Division

Mailing address: P.O. Box 7021
Albany, NY 12225

Street address: 41 State Street
Albany, NY 12231

Phone: (518) 474-4763

Fax: (518) 474-4478

Website: www.dos.stat.ny.us

B. Contiguous States

With the shift in focus from the location of the collateral to the location of the debtor in determining where to file financing statements, Texas creditors may need to file in one of the states contiguous to Texas in addition to Texas.

ARKANSAS: Arkansas Secretary of State
Commercial Services Division

Mailing address: State Capitol
Little Rock, AR 72201

Street address: Victory Building, Suite 250
1401 West Capitol Avenue
Little Rock, AR 72201

Phone: (501) 682-5078
(888) 233-0325 (Toll free)

Fax: (501) 682-3500

Website: <http://www.sosweb.state.ar.us>

LOUISIANA: Louisiana Secretary of State
Uniform Commercial Code Section

Mailing address: P.O. Box 94125
Baton Rouge, LA 70804-9125

Street address: 8549 United Plaza Blvd.
Baton Rouge, LA 70809

Phone: (225) 925-4701 or 800-256-3758

Fax: (225) 342-0452

Website: <http://www.sec.state.la.us/comm/ucc-index.htm>

NEW MEXICO: New Mexico Secretary of State
Secretary of State

Mailing address: State Capitol Building North, Suite 300
325 Don Gaspar
Santa Fe, NM 87503

Phone: (505) 827-3600
(800) 477-3632 #3610

Fax: (505) 827-3611

Website: <http://www.sos.state.nm.us>

OKLAHOMA: UCC Recorder
Oklahoma County Clerk

Mailing address: Oklahoma County Office Building
320 Robert S. Kerr Avenue, Room 107
Oklahoma City, OK 73102

Phone: (405) 713-1521

Website: <http://www.oklahomacounty.org/coclerk/default.asp>

<http://sos.state.ok.us/>

Note: State level UCCs are filed at the Oklahoma County Clerk's Office.