The 2004 NCCUSL Annual Meeting Draft of the Proposed Uniform Certificate of Title Law

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I. Introduction

At the 2002 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL), NCCUSL's Executive Committee authorized the formation of a Drafting Committee to prepare a Certificate of Title Act (COTA). The Drafting Committee was formed, and met three times prior to the 2003 NCCUSL Annual Meeting, in the process generating six COTA drafts. NCCUSL Commissioner Lee McCorkle of Ohio is Chair and your author serves as Reporter of the Drafting Committee. Prior to the 2003 Annual Meeting of NCCUSL, the Executive Committee designated the Act as "Uniform," and the 2003 Annual Meeting Draft of the proposed Uniform Certificate of Title Act (UCOTA) was read. This constituted a first reading of UCOTA under NCCUSL's procedural rules, which require that an Act be read at least twice before being finally approved.

A number of comments and responses were received at and following the 2003 NCCUSL Annual Meeting. The Drafting Committee met again in January 2004 and to date at least some eight drafts have been generated, considered, and revised, leading to issuance of the 2004 NCCUSL

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Annual Meeting draft (UCOTA or the Draft) in June 2004, for consideration at the Annual Meeting on July 30 - August 6, 2004.

The Drafting Committee has continued to consider and refine the Draft, but the broad parameters of that Draft appear to be subject to a sufficient consensus to warrant a brief summary here. Of course, the entire Draft remains subject to consideration, revision, and debate, even though to date the responses have been mostly positive, receptive, and constructive. In addition, the experiences of the Drafting Committee, including the widespread participation in Drafting Committee meetings by representatives of potentially affected parties, *e.g.*, state and federal agencies, financers, and others, suggests that an updated uniform act is needed. However, as with all NCCUSL Acts in draft form, nothing should be taken as final until UCOTA has been approved by NCCUSL.

Five basic purposes of UCOTA may be noted for purposes of this Introduction. First, UCOTA seeks to create a uniform and straightforward legal structure for certificate of title applications, creation, transfers, and terminations, and for the appropriate state titling agencies (to be designated by each state, called the "office" in the draft) which will continue to administer that structure. The administrative details and operational systems (both paper and electronic) of these offices are not specified, except where basic parameters are necessary to legal uniformity (*e.g.*, the requirements for an application for a certificate of title); however, uniform legal standards are provided, in order to provide a floor in terms of clarity, simplicity, and uniformity.

Second, UCOTA seeks to create parallel and compatible systems for electronic and paper certificates of title, designed to permit the seamless integration of UCOTA into existing and future state certificate of title systems, and the simultaneous development of electronic systems in the

context of continuing paper-based systems, without disruption to any systems, parties or transactions. UCOTA is designed to allow seamless implementation by states at all points on the technology spectrum, and to accommodate any desired movements of an office along that spectrum, without uncertainty or disruption.

Third, UCOTA must fit within other state laws, most importantly the Uniform Commercial Code (UCC), including UCC Articles 2, 2A, and 9, and the Uniform Electronic Transactions Act (UETA). This includes integration with both the scope rules and the substantive provisions of the UCC, *e.g.*, Article 9 sections 9-303, 9-311, 9-313, 9-316, and 9-337.[1]

Fourth, UCOTA is designed to clarify the rules governing private commerce, *e.g.*, certificate of title transactions between private parties. This includes rules governing various types of title transfers, the rights of innocent purchasers, priorities between competing claims, errors and omissions, fraud problems, conflicts between written and electronic certificates of title, etc. There are also important provisions governing the perfection of security interests.

Finally, UCOTA is designed to be compatible with federal law, including federal odometer disclosure requirements and the National Motor Vehicle Title Information System.

As noted, all of these matters remain open for further discussion and refinement. In addition, consideration may be given to possible expansion of the scope of UCOTA to cover certificates of title for water craft and manufactured housing certificates of title (the Drafting Committee is currently limited in scope to vehicle issues).

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[1] *See, e.g.*, Alvin C. Harrell, *A Roadmap to Certificate of Title Issues in Revised UCC Article 9*, 53 Consumer Fin. L.Q. Rep. 202 (1999).

Current drafts may be accessed through the NCCUSL website, www.nccusl.org. Interested parties are invited to submit comments and suggestions to the UCOTA Drafting Committee.

II. Overview of UCOTA

The 2004 Annual Meeting Draft of the proposed UCOTA, prepared for consideration at the 2004 Annual Meeting of NCCUSL, was the eighth draft to be generated since formation of the Drafting Committee was authorized in 2002. This Overview briefly describes selected provisions of the 2004 Annual Meeting Draft. It should be emphasized again that no final decisions have been made by NCCUSL or the UCOTA Drafting Committee, and UCOTA remains a "moving target." It is likely that further changes, not reflected in this article, will have been made by the time this article is published.

A review of UCOTA may be enhanced by an overall description of the structure of UCOTA (recognizing that this too may change), outlined below. References are to the 2004 Annual Meeting Draft unless otherwise noted.

The first significant set of provisions is the definitions at UCOTA section 3. These are essential to understanding the remainder of UCOTA. For example, "certificate of title" (CT) can mean a CT in either written or electronic form, and receipt of a security interest statement (which today might be called a lien entry form) constitutes an application for a CT for purposes of the choice of law rules in UCOTA section 4 (and UCC Article 9 section 9-303). But a security interest statement will not constitute a CT for other purposes -- *see infra* this text Parts III. and IV. Moreover, the term CT is limited to a CT created in the forum state unless UCOTA provides otherwise.[2] UCOTA section 4 governs choice of law, and as discussed *infra* in Part IV., must both

[2] For exceptions, *see infra* Pts. III. B. and IV., and UCOTA §§ 4(a), 9(c) and (d), and 16(b).

accommodate and supplement UCC Article 9 section 9-303. Together UCOTA sections 1 through 5 can be viewed as introductory provisions governing scope, definitions, choice of law, and relation to other laws.

UCOTA sections 6 through 15 provide the basic framework for administration of a CT system. Sections 6 and 7 provide rules governing the Vehicle Identification Number (VIN) and a Manufacturer's Certificate of Origin (MCO). Section 7 applies to the manufacture of incomplete vehicles. Section 8 governs cancellation of an electronic CT, *e.g.*, where a written CT is created instead. Sections 9 through 11 govern the creation and content of CTs. Section 12 is a related provision on the effect of judicial process, and section 13 allows for registration of information with the office, without the CT. Sections 14 and 15 deal with maintenance of the files of the office and delivery of CTs.

Sections 16 through 19 deal with transfers and transferees of interests, including innocent purchasers and the priorities of adverse claims. Section 16 describes the requirements and effects of various purchase mechanisms; section 17 permits either party to notify the office of a transfer; section 18 tracks UCC section 2-403 and resolves priorities between certain competing claims; and section 19 deals primarily with transferees including buyers in the ordinary course of business. Section 20 covers errors and omissions.

Sections 21 through 23 govern transfers by operation of law and replacement CTs. Sections 24 through 27 govern perfection and termination of security interests, and section 28 describes duties of the filing office that relate to perfection and other office files. Section 29 is an optional title brand provision. Sections 30 through 34 are the usual uniform law provisions on uniformity, construction, severability, repeal, and transition, etc.

III. Definitions

A. Introduction

As with any comprehensive statute, the definitions in UCOTA are essential and important. In some instances, new definitions or terminology are created to help distinguish prior law.[3] Some of this new terminology may seem challenging at first, if one is comfortable with existing laws and legal terms, but on reflection will be seen to improve the clarity of the rules. A learning process is an inevitable aspect of the movement to a combined paper and electronic system, which will require some new and redefined concepts and terminology. Illustrative examples of important definitions in UCOTA are noted below.

B. "Certificate of Title"

In UCOTA:

> (5) "Certificate of title" means the record, created or authorized by the office, that is evidence of ownership of a vehicle and designated a certificate of title by the office.[4]

This definition is changed slightly from the 2003 NCCUSL Annual Meeting draft.[5] Gone is the earlier inclusion in this definition, "when this [act] so indicates," of CTs created in another jurisdiction. But the result is the same: The term "certificate of title" means one created or authorized in the enacting state, and can include a CT created in another jurisdiction only for stated purposes as provided in another UCOTA section, *e.g.*, for purposes of choice of law under UCOTA

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[3] This is a common approach in the UCC. For example, UCC Article 3 uses the term "accommodation party" to describe what is otherwise known as a surety. One purpose is to alert interested parties that they are dealing with a surety that is covered by Article 3.

[4] UCOTA § 3(a)(15).

[5] *See, e.g.*, Harrell, *Selected Issues in the 2003 NCCUSL Annual Meeting*, 36 U.C.C. L.J. at 47.

section 4.[6] Thus, except as stated elsewhere in UCOTA,[7] as defined at section 3(a)(5) the term CT means a CT created by "the office," which in turn means the title office of the enacting state.[8] The 2004 Annual Meeting Draft also deletes the requirement in the 2003 Annual Meeting Draft that a CT must provide for indication of a security interest on the CT as a means to obtain priority over the rights of a lien creditor. These are largely Article 9 issues that are also addressed elsewhere in UCOTA (*see* sections 24 through 27) and need not clutter this basic UCOTA definition.

Several purposes are accomplished by the definition of CT at UCOTA section 3(a)(5): (1) a CT would no longer have to be created in paper form, but could consist of an electronic record;[9] (2) a CT continues to be deemed evidence of ownership;[10] and (3) the definition of CT is limited to a CT created or authorized by the office in the enacting state and designated as such.[11]

This means that a CT could consist of an electronic record maintained only in the files of the office. This is a change from the current usage of the term, which generally references a formal piece of paper that evidences title, and thus UCOTA may require some adjustment in the way the terminology is commonly used and understood. But this UCOTA definition, or something like it, is essential in order to accommodate emerging electronic practices.[12]

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[6] Which is designed to be consistent with UCC Article 9 § 9-303 on this point. *See* UCOTA § 4(a). *See also* UCOTA §§ 9(c) and (d), and 16(b) for additional examples.

[7] *Id.*

[8] UCOTA § 3(a)(16).

[9] *See also* UCOTA § 2(a)(8) (electronic certificate of title).

[10] *See*, *e.g.*, Toyota Motor Credit Corp. v. C.L. Hyman Auto Wholesale, Inc., 506 S.E. 2d 14 (S. Ct. Va. 1998); Volvo v. McClellan, 69 P. 3d 274 (Okla. Ct. App. 2003). *See also* UCOTA § 19.

[11] For exceptions *see* UCOTA §§ 4(a), 9(c), (d), and § 16(b).

[12] Some 10 or 11 states are already using some form of electronic titles, by your author's count.

UCOTA accommodates this shift without interfering with the existing world of paper CTs.[13] That is, a person with a written CT would have rights that are undiminished under UCOTA; and a state office could continue to create only paper CTs if desired. UCOTA would allow (but not mandate) creation of a parallel world of electronic CTs to supplement (but not contradict) the world of written CTs. If there is a conflict, generally the written CT wold prevail.[14]

Another point in UCOTA is the treatment of a record indicating perfection of a security interest. Under UCOTA section 4, receipt by the office of a security interest statement (the new name for a lien entry form -- *see* UCOTA section 3(a)(26)) may constitute an application for a CT for purposes of choice of law and Article 9 section 9-303. This provides a means of perfection in transactions where the debtor has not (or does not) apply for a CT, and conforms UCOTA to Article 9 section 9-303. Thus, in limited circumstances, under UCOTA section 4 a secured party could file a security interest statement and this would constitute an application for a CT in order to trigger a choice of law under UCOTA section 4 and Article 9 section 9-303, even if there is no other application for a CT. At first glance this may appear unnecessarily cumbersome: If receipt in the office of a security interest statement is sufficient for choice of law and perfection of the security interest, even before the office has otherwise received an application or created a CT,[15] why not just say so, instead of folding the security interest statement into the concept of an application for a CT for purposes of the choice of law rules governing CTs?

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[13] Defined as a "written certificate of title" at UCOTA § 3(a)(34).

[14] *See*, *e.g.*, UCOTA §§ 16, 17, and 19.

[15] *See* UCOTA §§ 3, 26, and 27.

The answer relates partly to the structure of the choice of law rules in UCOTA and UCC Article 9 sections 9-303 and 9-311. By necessity UCOTA section 4 is designed to interrelate with sections 9-303 and 9-311, as these are companion provisions that must be consistent with UCOTA in order to coordinate the scope and conflicts rules of UCOTA and Article 9. Section 9-303 triggers application of the state CT law for perfection purposes upon a valid application for a CT.[16] Thus, in order to create perfection of a security interest pursuant to Article 9 and a CT law, there must be a CT application sufficient to trigger a choice of law and permit perfection under those laws. In UCOTA, the security interest statement is defined as such an application for choice of law under UCOTA section 4, and that security interest statement is also deemed a means of CT perfection pursuant to UCOTA sections 24 and 25, in order to trigger application of the CT law and effectuate the Article 9 choice of law and perfection rules. Otherwise, the CT law would not be applicable under section 9-303 and there would be no adequate means of perfection, unless and until someone applied for a CT in the traditional sense. In some cases this could leave the secured party without a means of perfection for an extended period, *e.g.*, until after the applicable grace periods for perfection.[17]

Perhaps there are other ways this could be done, without making receipt of a security interest statement an application for a CT, *e.g.*, by creating a separate, parallel system of rules for security interest statements, including rules equivalent to the choice of law provisions at UCOTA section 4

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[16] UCC §§ 9-303(b) and 9-311(a). There are important reasons for these rules. *See*, *e.g.*, Alvin C. Harrell, *Certificate of Title Lending Under Revised Article 9*, 32 U.C.C. L.J. 422 (2000). These rules in revised Article 9 were intended to resolve choice of law problems in cases where, *e.g.*, states allow "registration" of a vehicle without application of a CT, or issue a new CT without cancelling the old one from another state, or delay issuance of a new CT for an extended time, by providing a clear, specific, and appropriate event to trigger a change in the choice of law. *Id.* *See also infra* note 44.

[17] *See*, *e.g.*, 11 U.S.C. § 547(c); *infra* notes 18 and 70-72.

and Article 9 section 9-303, *i.e.*, to provide a separate system of rules for security interest statements, essentially identical to the equivalent CT rules, and somehow tie it all into the concept of a CT application under section 9-303. But that could greatly increase the size of UCOTA, and add complexity in terms of integrating three separate systems (for CTs, security interest statements, and Article 9) rather than two (UCOTA and Article 9). And in the end it would all have to be tied into the CT application rule at section 9-303. It seems unlikely that all of this, including the integration of a new and separate choice of law rule for security interest statements into the CT-based rules at UCOTA section 3 and Article 9 sections 9-303 and 9-311, would be more effective or easier to grasp than the current UCOTA approach.[18]

In contrast, it is a relatively simple change to define a CT to encompass certain electronic records, and then to treat a security interest statement as an application for a CT for choice of law purposes under UCOTA section 4. The big change in this is the shift to an electronic record, not defining a security interest statement as an application for a CT. No one has seriously disputed the need to allow recognition of an electronic record as a CT; once that is done, it is a small step to also include a security interest statement as an application for a CT, as in UCOTA section 4.

C. "Create"

To "create" a certificate of title means to bring it into existence by making or authorizing the record that constitutes the CT.[19] Various UCOTA rules relate to creation of a CT.[20] This definition

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[18] For example, UCOTA must address circumstances where the purchase of a vehicle is financed and the buyer fails to apply for a CT. There must be a means to perfect a security interest in these circumstances, yet Article 9 §§ 9-303 and 9-311 defer to the CT law and the current CT law may not provide an adequate means to perfect in these circumstances. UCOTA §§ 4, 24, and 25 solve this problem. *See also infra* this text Pts. IV., V., and X.

[19] UCOTA § 3(a)(6).

[20] *See, e.g.*, UCOTA §§ 8, 10, 11, and 15.

specifies the manner in which the CT comes into existence. The word "create" is used instead of the more traditional term "issue," because the latter is associated with issuance of a written CT and is not as descriptive of an electronic CT.

D. "Deliver"

In UCOTA, various rights and obligations involve delivery of a CT.[21] "Deliver" is defined at UCOTA section 3(a)(7) in a manner consistent with its normal meaning and the UCC.[22] It includes voluntarily giving possession to the recipient and transmission by any reasonable means with the cost of delivery provided. Note that the UCOTA definition of "execute,"[23] also an important UCOTA trigger term for various rights and liabilities,[24] includes delivery of the CT. The UCOTA definition of delivery includes transmission of electronic records.[25]

E. "Execute"

Execute means to sign and deliver a record on, attached to, accompanying, or logically associated with a CT for the purpose of transferring ownership of the vehicle.[26] In UCOTA there are requirements for (or triggered by) execution of a CT (*e.g.*, *see* UCOTA section 16). The definition of "execute" specifies the elements of this event. Where appropriate, it permits electronic execution (including delivery), and extends to CT-related documentation (such as the odometer

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[21] *See*, *e.g.*, UCOTA § 15. *See also infra* Pt. III. E.

[22] Requiring a voluntary change of possession. *See* UCC § 1-201(b)(15), (36) (2003 uniform text).

[23] UCOTA § 2(a)(9), discussed *infra* at Pt. III.E.

[24] *See*, *e.g.*, UCOTA §§ 16-19.

[25] UCOTA § 3(a)(7), (8).

[26] UCOTA § 3(a)(11).

disclosure). The term "sign" is defined at UCOTA section 3(a)(7), to include electronic authentication.[27] "Delivery" is discussed *supra* at Part III.D.

F. "Owner" and "Owner of Record"

These terms are defined in UCOTA.[28] "Owner" means the person with legal title (not equitable or beneficial title) and would include that person's agent or representative. These can be important issues, and the UCOTA definitions reflect current case law.[29] The separate definition of "ownership" in the 2003 NCCUSL Annual Meeting draft has been deleted as unnecessary. "Owner of record" means the owner indicated in the files of the office.[30]

G. "Purchase" and "Transfer"

Purchase is defined at UCOTA section 3(a)(20) consistently with the UCC,[31] essentially to mean any voluntary transfer of an interest in property, including a security interest (but not a nonconsensual lien).[32] This can be contrasted with the term "transfer,"[33] which is broader and includes transfers by operation of law as well as other nonconsensual (and all consensual) transfers.[34]Thus all purchases are transfers, but not all transfers are purchases. Again following the

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[27] Consistent with UCC Article 1, § 1-201(b)(37) (2003 uniform text).

[28] UCOTA § 3(a)(17) and (18).

[29] *See*, *e.g.*, *Volvo*, 69 P. 3d 274.

[30] UCOTA § 3(a)(18).

[31] *See* UCC § 1-201(b)(29) (2003 uniform text).

[32] UCOTA § 3(a)(20). Thus an Article 9 secured party can be a "purchaser." *See* UCOTA § 3(a)(21).

[33] UCOTA § 3(a)(31).

[34] *See*, *e.g.*, UCOTA §§ 16-22.

UCC, one who takes by purchase is a "purchaser" (UCOTA section 3(a)(21)), and one who take by transfer is a "transferee" (UCOTA section 3(a)(32)).

H. Secured Transactions

"Secured party" and "security interest" are defined at UCOTA sections 3(a)(23) and (25), respectively, pretty much as defined in UCC Article 9. "Secured party of record" is defined at UCOTA section 3(a)(24) as the first secured party indicated in the files of the office. *See also* UCOTA sections 24-28; and the definition of "Termination statement" (UCOTA section 3(a)(29)). "Security interest statement" is defined at UCOTA section 3(a)(26) as a record indicating a security interest (what is today commonly called a lien entry form).

I. "Title Brand"

This is defined in the UCOTA as a designation as to previous damage, use, or condition that is otherwise required to be indicated on the CT.[35] UCOTA does not independently require a title brand, but allows for an optional provision to do so,[36] and requires disclosure of any pre-existing title brand.[37]

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[35] UCOTA § 3(a)(30).

[36] UCOTA § 29.

[37] UCOTA §§ 9-11.

J. "Written Certificate of Title"

As noted above, the term "certificate of title" encompasses both electronic CTs[38] and written CTs.[39] There is a similar structure for certificates of origin.[40] In UCOTA the term CT does not necessarily mean a piece of paper; *e.g.*, if the UCOTA reference is limited to a CT in paper form, the term "written certificate of title" is used. If the reference is limited to a CT in the form of an electronic record, the term "electronic certificate of title" is used.[41] The term "certificate of title" can mean either or both a written and/or electronic CT.

Some UCOTA provisions are applicable only to written CTs; some provisions are limited to electronic CTs; some apply to both; and some UCOTA provisions resolve potential conflicts between the two.[42] Thus it is important to recognize these definitions, and to keep in mind that a CT is not necessarily a piece of paper.[43]

IV. Choice of Law

UCOTA section 4, governing choice of law, is important because it governs not only choice of law in the traditional (multi-state) sense, but also the relation of UCOTA to Article 9 and other internal laws of the enacting state. For example, coordination with Article 9 section 9-303 is

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[38] UCOTA § 3(a)(10).

[39] UCOTA § 3(a)(34).

[40] UCOTA § 3(a)(4), (9), (33).

[41] UCOTA § 3(a)(8).

[42] *E.g.*, UCOTA §§ 15 and 19.

[43] This is generally consistent with the Article 9 treatment of "chattel paper." *See*, *e.g.*, UCC §§ 9-102 (a)(11) and (31), 9-330, 9-331.

essential, because that coordination determines the applicability of UCOTA to security interests and other relations to non-CT law, including Article 9.

UCOTA section 4 is patterned on Article 9 section 9-303, and conforms to section 9-303 as closely as possible. As noted, it is important that there be no conflict between Article 9 and UCOTA, so UCOTA section 4 cannot deviate from the basic approach of section 9-303, which defers to the state certificate of title law for purposes of perfection of security interests when there is an application for a CT. Thus the state CT law (*e.g.*, UCOTA) must determine what constitutes an application, what constitutes perfection, and how to make an application and perfect in the usual circumstances surrounding vehicle transactions. All within the confines of the otherwise comprehensive Article 9 system, including section 9-303.

But UCOTA section 4 cannot simply parallel Article 9 and section 9-303, because Article 9 and section 9-303 are limited to security interest issues (in contrast the state CT law implicates various other issues). Moreover, section 9-303 resolves some issues by reference to the state CT law. Thus Article 9 defers certain issues to resolution under the CT law, and the CT law (*i.e.*, UCOTA) must then answer those questions. Therefore UCOTA section 4 must conform to, and be consistent with, yet go beyond, section 9-303.

UCOTA section 4(b) and (c) illustrate this, resembling section 9-303(a) and (c) by providing a basic choice of law rule referenced to coverage of the CT (and application for a CT), but extending the reach of that rule beyond security interest issues to "all issues relating to" the CT. UCOTA section 4(b) resembles Article 9 section 9-303(c), but also incorporates elements from Article 9 section 9-303(a), *e.g.*, making clear that no other relationship is required between the CT state, the

vehicle, and the owner.[44] In addition, UCOTA section 4(d) specifies the circumstances in which a security interest statement can constitute an application for a CT, in order to "cover" the vehicle and trigger a choice of that state's CT law under UCOTA section 4(b) and (c) and Article 9 section 9-303.[45] As noted this is essential, *e.g.*, in order to permit perfection of security interests in circumstances where the seller or buyer of the vehicle delays (or declines) making an application for a new CT. Further safeguards are then required in section 4(d) in order to prevent "rogue" filings of security interests in unrelated states for the purpose of effecting an artificial and inappropriate shifting of the applicable choice of law.[46]

UCOTA subsection 4(f) has no Article 9 counterpart, but is needed to provide a "default" choice of law rule covering potential CT collateral that is not yet covered by any CT law (*i.e.*, a new vehicle covered by a MCO, issued privately by the manufacturer and not by any state). This is patterned on the normal choice of law rules in UCC Article 1.[47] Note also that UCOTA section 4(a) provides a new and broadened definition of CT for purposes of this section (extending to CTs created in other states); this is necessary because in UCOTA section 3(a)(5) a CT is defined as one created or authorized in this state (by the office), whereas UCOTA section 4(a) must include reference to a CT that could have been created in another state and brought into the enacting state as part of an application for a CT submitted to the office in the enacting state. UCOTA

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[44] This was designed in part to reject cases to the contrary and prevent CT validity from depending on arcane conflicts of law analysis. *See, e.g.*, Lightfoot v. Harris Trust Savings Bank, 357 So.2d 654 (Sup. Ct. Ala. 1978); Harrell, *supra* note 1, at 207. *See also supra* note 16.

[45] *Id. See also* discussion *supra* at Pt. III. B.

[46] *See* UCOTA § 4(d), limiting that subsection to transactions with a specified relationship to the CT state..

[47] UCC § 1-301 (2003 uniform text).

section 3(a)(5) thus defines CT as one created by the office in the enacting state, but section 4(a) provides otherwise for purposes of that section.

The rest of UCOTA section 4 is derived from various UCC sections. UCOTA section 4(e) determines when a vehicle ceases to be covered by a CT, and is derived from the second sentence of Article 9 section 9-303(b), extrapolated somewhat to reflect the details of UCOTA. Subsections 4(g) and 4(h) are general choice of law rules drawn from revised UCC Article 1 section 1-301(c) through (f) (2003 uniform text). These serve as a back-up to the foregoing rules, placing limitations on choice of law contract provisions that violate the public policy of the state of the otherwise applicable law, and providing a forum-oriented choice in the event that no other rules apply. States that have enacted nonuniform versions of revised UCC Article 1 section 1-301[48] will need to make conforming revisions to UCOTA section 4(g).

V. Transfers of Ownership and Adverse Claims

UCOTA section 16 allows the purchaser of a vehicle covered by a CT[49] to require the tansferor to "promptly" execute the CT to the purchaser, and provides that such execution transfers the transferor's legal title to the purchaser. Under section 16(d), other forms of transfer also may be effective for some purposes, *e.g.*, between the parties, but not as to third party interests in the vehicle until the CT is executed. Either the transferor or transferee may notify the office of a transfer of ownership, under UCOTA section 17, and the office is allowed to document its files accordingly. This allows, *e.g.*, the seller to establish a public record of the sale even if the buyer does not apply

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[48] At this writing Alabama, Idaho, Minnesota, Texas and Virginia have adopted revised Article 1 but with modification to the language in the uniform text at § 1-301.

[49] *See* UCOTA § 3(a)(5) (definition of CT), § 3(a)(21) ("purchaser"), § 3 (a)(33) (definition of "vehicle"), and § 4 (scope and choice of law).

for a CT. This record does not, however, constitute a CT or transfer ownership until the requirements of sections 9 and 10 (or sections 21 through 22, as applicable) are met, and it does not bind other persons who may take an interest in the vehicle, *e.g.*, under sections 16 and 18.

UCOTA section 18 is drawn almost intact from UCC Article 2 section 2-403. It recognizes the foundational rule of assignment and contract law (*i.e.*, the assignee steps into the shoes of the assignor), subject to the exceptions in favor of a good faith purchaser for value from a person who has voidable title or in a transaction of purchase. UCOTA section 18 adds a new section 18(a)(5) to make clear that execution of a CT is not essential to a transaction of purchase. UCOTA section 18(b) adopts the UCC Article 2 section 2-403 "entrustment" rule, similarly adding language to make clear that execution of the CT is not a prerequisite to the status of a "buyer in ordinary course of business."[50] UCOTA section 19(a) then provides that, except as provided in section 18 or 19, a transferee takes subject to all prior security interests indicated on the CT.

Section 19(b) recognizes the primacy of a written CT, so that a non-dealer buyer who obtains possession of the vehicle and execution of a written CT in good faith, for value, and without notice of a security interest will take free of a security interest not indicated on the CT. This means that a buyer (other than a dealer) who takes by execution of a "clean" written CT will take free of a security interest not indicated on the CT, even if the security interest is otherwise perfected, subject to requirements that the purchaser give value and take possession of the vehicle in good faith, for value,

[50] Addressing a split in the cases and adopting a consumer-friendly rule that reflects common business transactions. Section 18 applies only to the interests of the transferor or entrustor, and does not cut off third party claims such as a security interest, unless, *e.g.*, the secured party is the entruster. *See also* UCOTA § 19.

and without notice of the competing security interest.[51] As noted in the Reporter's Notes to UCOTA section 19, this is patterned somewhat on Article 9 section 9-337, but extends the section 9-337 rule to intrastate transactions while imposing some limits on the buyer not reflected in either section 9-337 or the case law.[52] The net result is that a consumer buyer in an innocent transaction can rely on a valid CT, and will take free of security interests not indicated on the CT.

Section 19(a) states the converse rule: A transferee otherwise takes subject to claims noted on the CT. However, this in turn is subject to an exception in favor of a buyer in ordinary course of business (BIOCB), at section 19(c), reflecting the dealer inventory rule at Article 9 section 9-320 and the entrustment rule at Article 2 section 2-403 (and UCOTA section 18). This is already the law under the UCC, but UCOTA section 19(c) clarifies that the buyer can be a BIOCB without execution of the CT, reflecting common practice and addressing some uncertainty in the case law.

VI. Errors and Omissions

UCOTA section 20 addresses errors and omissions in the CT, MCO, security interest statement, or related documentation. It is patterned generally on the "harmless error" and "search logic" tests in UCC Article 9.[53]

The base-line rule at UCOTA section 20(a) is that errors and omissions do not affect the validity of a CT, except as otherwise provided in section 20(b), so that a CT that contains errors or omissions when the CT is created nonetheless will be valid. UCOTA section 20(b) then qualifies

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[51] *See also Toyota,* 506 S.E. 2d 14; *Volvo*, 69 P. 3d 274. Note that UCOTA § 19(b) imposes limitations on the buyer not reflected in the case law, but nonetheless protects innocent consumer buyers by extending a modified version of UCC § 9-337 to cover intrastate transactions. *See generally* Alvin C. Harrell, Case Note: Volvo v. McClellan — *Can a Buyer and Secured Party Rely on a Certificate of Title?*, 74 Okla. Bar Ass'n. J. 2641 (2003).

[52] *Id*.

[53] *See* UCC § 9-506.

this with an exception: If the CT is seriously misleading because of the error or omission, a purchaser who gives value in reasonable reliance on the CT takes free of any claim that is dependent on the omitted or erroneous information. This is derived from UCC Article 9 section 9-338. This will permit a purchaser to take free of any claim or interest that is dependent on (or prejudiced by) the erroneous or omitted information. Thus the basic validity of the CT is preserved under section 20(a), subject to an exception at section 20(b) protecting innocent purchasers who reasonably rely on significantly misleading errors or omissions.

Under subsection 20(c), a description of the vehicle is sufficient even if the vehicle identification number (VIN) is not accurate, so long as it reasonably identifies the vehicle.[54] But subsection 20(d) qualifies this as to information necessary to index the files of the office, pursuant to a search logic test similar to that in Article 9 section 9-506(c).[55]

VII. Delivery of CT by Office

UCOTA section 15 requires the office to "promptly" deliver the CT to the secured party, and a record of the CT to the owner of record, upon creation of the CT. The secured party may elect to have a written CT created; the owner may do so only if there is no security interest. Section 15(b) requires the office to effectuate this delivery within a reasonable period of time not to exceed fifteen days of a request. The owner can request delivery of the CT to himself or herself or creation of a written CT only if there is no security interest. The party entitled to request delivery can specify either a written or electronic CT (if the office offers electronic CTs). Creation of a written CT

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[54] *See also In re* Suddarth, 222 B.R. 352 (Bankr. Okla. 1998), *aff'd*, 201 F. 3d 449 (10th Cir. 1999) (date of security agreement missing from lien entry form); City Bank & Trust v. Warthen, 535 P. 2d 162 (Nev. 1975) (wrong VIN).

[55] Again this also reflects current case law. *See, e.g.*, Gregory v. Green Tree Financial, No. 97,741, 75 Okla. Bar Ass'n. J. 1887 (Sup. Ct. Ok. July 6, 2004) (manufactured home).

replaces any previous electronic CT and the electronic files of the office thereafter do not constitute a CT.[56]

VIII. Transfers by Secured Party or Operation of Law; Files of the Office

A previous UCOTA section permitting a secured party to utilize a "transfer statement," similar to that provided at Article 9 section 9-619, for purposes of effectuating an Article 9 disposition sale, was deleted as redundant. Section 9-619 specifies that the transfer statement alone does not constitute an Article 9 disposition sale.[57]

UCOTA section 21 provides for a transfer of title by operation of law, *e.g.*, due to death, divorce, merger, consolidation, dissolution, bankruptcy, or enforcement by a lien creditor. A procedure for executing a "transfer-by-law-statement" is provided. Section 21 provides for notice of the procedure and transfer to be sent to all vehicle owners and secured parties of record.

Section 14 requires that all CT files maintained by the office must reflect all interests indicated in CTs created by the office, and requires the office to maintain files reflecting all information required to be contained in a CT, accessible by means that include the VIN. The files must include available information on all known security interests, title brands, and stolen property reports applicable to the vehicle. A legislative note addresses which information is to be deemed a public record.

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[56] *See* UCOTA § 8.

[57] *See* § 9-619(c); *In re* Robinson, 2002 WL 31681082 (Bankr. W.D. Okla.); Motor Acceptance Corp. v. Rozier (*In re* Rozier), 2003 WL 1571937 (M.D. Ga. March 24, 2003). *But cf.* Bell-Tel Federal Credit Union v. Kalter (*In re* Kalter), 292 F. 3d 1350 (11th Cir. 2002); Charles R. Hall Motors, Inc. v. Lewis (*In re* Lewis), 137 F.3d 1280 (11th Cir. 1998).

IX. Transfers Without the CT; Duplicate Titles

UCOTA section 22 provides a procedure for seeking a transfer of title without the CT. It is designed to provide a cost-effective remedy for buyers who pay the purchase price and receive delivery of the vehicle but subsequently cannot obtain execution of the CT, *e.g.*, because the seller is unavailable or refuses to cooperate.[58]

Extensive safeguards are obviously appropriate, and are provided in section 22, including forty-five days notice to interested parties, a provision for required documentation, and possibly a bond or a legend on the CT (for vehicles valued at $1,000 or more).

Section 23 deals with the need of a current owner to replace a lost, stolen, mutilated, destroyed, or otherwise unavailable CT. Sections 22 and 23 are mutually exclusive procedures, applicable in alternative scenarios. Sections 21 and 22, and section 9-619, provide alternatives to sections 9 and 10 and section 16, permitting a transfer of title and creation of a new CT without execution of the existing CT; section 23 does not directly involve a transfer of title, rather it allows the current owner to obtain a replacement CT.

There could be some overlap between sections 21 and 22, and section 9-619. For example, a secured party conducting a disposition sale could proceed under either section 21 or 22, though section 9-619 is designed for that purpose and is therefore likely to be more efficient. A lien creditor foreclosing a lien might proceed under either section 21 or 22, though likewise section 21 should be easier in this context. But an aggrieved buyer whose seller fails t execute a CT cannot qualify under section 21 or section 9- 619; that is the purpose of section 22. And section 23 is alternatively available only to the current owner of record.

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[58] *See also* UCOTA §§ 16-19 regarding transfers of title.

X. Perfection of Security Interests - UCOTA Sections 24 Through 28

Sections 24 through 27 of the 2004 Annual Meeting Draft of UCOTA deal with perfection of security interests. In addition, section 28 ("Duties and Operation of Filing Office") relates to security interests though it is not limited to them. These sections are consistent with the various types of rules that precede them in UCOTA, *e.g.*, administrative rules for the office, and the rules governing transfers and other transactions between private parties. But sections 24 through 28 provide specific rules to cover security interest issues, primarily relating to perfection.[59]

Section 24(a) provides a basic rule, based on Article 9 section 9-516 (a): a security interest statement is effective upon receipt by the office unless section 24 provides otherwise. This provides a safe harbor that assures a secured party of a means to perfect, free of frivolous objections, upon compliance with section 24. It also means the security interest is perfected by a proper submission to the office, whether or not it is indicated on the CT. This is consistent with Article 9 section 9-516(a) and existing CT laws in many states.[60] It is also consistent with the UCOTA rules permitting perfection by filing a security interest statement, even if a written certificate of title is not created.[61]

Section 24(b) provides that the contents of a security interest statement are sufficient if it includes the name of the secured party or its representative, and a description of the collateral, and is authorized by the debtor. This is the equivalent of Article 9 section 9-502. The effects of errors and omissions are covered at UCOTA section 20.

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[59] *See also* UCOTA § 4.

[60] Innocent purchasers who may be misled by a perfection not indicated on the CT are protected by UCOTA § 19(b). *See supra* Pt. V.

[61] Again, subject to limitations. *See, e.g.*, UCOTA §§ 4, 19, 20, and 25(a).

A security interest statement is not effective for perfection if it is rejected by the office because: it is not delivered by a proper means of communication; the proper filing fee is not tendered; the names and addresses of a debtor and secured party are not included; or it does not include the correct VIN.[62] If a security interest is not rejected by the office, its validity is governed by section 24(b) (and section 20, regarding errors and omissions); rejection is governed by section 24(c). A security interest statement can be rejected only for the reasons stated in section 24(c), and only in accordance with the notice and timeliness requirements of section 24(e). If not rejected in accordance with subsections 24(c) and (e), the security interest statement is effective under section 24(a) (and is sufficient to constitute an element of perfection under section 25(a)), subject only to the requirement for basic validity under section 24(b).[63]

Section 24(d) requires the office to maintain a public record showing the date of receipt of each security interest statement, to assist in priority determinations. If a security interest statement is rejected, the office must notify the secured party of the date of rejection, again for possible priority determinations. The notice of rejection required under section 24(e) would have to be sent by midnight of the second business day, a rule inspired by the UCC Article 4 midnight deadline rule.[64] If the notice is not sent within that time, the security interest statement would be deemed effective for purposes of perfection.[65] As noted, the purpose is to protect secured parties from erroneous rejection and a failure of the office to provide timely notice of rejection; this perfection would be

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[62] UCOTA § 24(c).

[63] *See also* UCOTA § 25(c).

[64] *See* UCC §§ 4-104, 4-301, 4-302.

[65] *See* UCOTA §§ 24(a), 25(a), and 25(c).

sufficient against lien creditors and many competing secured parties, but generally not against innocent purchasers who rely on a CT that does not indicate the security interest.[66]

UCOTA section 25 is a companion provision to section 24. Section 25 provides that a security interest is perfected upon receipt by the office of a security interest statement effective under section 24 and attachment of the security interest under Article 9 section 9-203. This satisfies the reference in Article 9 section 9-311 to perfection under the state CT law. A security interest statement is effective for this purpose under section 24(a) if it is valid under section 24(b), unless properly rejected under section 24(e). Filing and indexing errors by the office are deemed not to impair the effectiveness of the form for purposes of perfection.[67]

Section 25(b) recognizes that the CT can indicate the lessor, consignor, secured party, etc. as owner, and the effect is to perfect a security interest, consignment, etc., though the office may otherwise treat the named party as owner.

Section 25(d) allows a secured party to assign its interest without transfer of the CT or indicating the transfer in the files of the office. This merely recognizes the law of assignment, while recognizing the right of third parties to rely on the files of the office (*e.g.*, in obtaining a termination statement). There is also a provision recognizing exclusive perfection by means of a UCC Article 9 filing for vehicles in dealer inventory,[68] and limiting perfection by possession to the circumstances enumerated in Article 9.[69]

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[66] *See* UCOTA §§ 18-20.

[67] UCOTA § 25(c); *cf.* UCC §§ 9-516 - 9-520.

[68] UCOTA § 25(e); UCC § 9-311(d).

[69] UCOTA § 25(f); UCC § 9-316(d).

Section 28 of the 2003 Annual Meeting draft, providing a thirty day grace period for submitting a security interest statement, was deleted. While such grace periods are common in current CT laws, an extended grace period is inconsistent with the twenty day grace periods in the UCC and Bankruptcy Code.[70] There was concern that an extended grace period might induce reliance on a CT rule subject to preemption by other law.[71] Without a separate CT grace period in UCOTA, CT transactions will be subject to the same time limitations as other transactions under the UCC and bankruptcy law.[72] But UCOTA makes it easier to meet these limitations by allowing CT transactions to be perfected by submitting a security interest statement alone, a process analogous to Article 9 perfection by filing.[73]

UCOTA section 26 provides rules governing the termination of security interest statements, supplemented by section 22 (allowing termination of a security interest statement by the debtor in limited circumstances) and section 3(a) (definition of termination statement).

Sections 27 and 28 of the 2004 Annual Meeting Draft provide a sample security interest statement and specify certain duties of the office in processing such forms.

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[70] *See* UCC §§ 9-324(a), 9-334(d); Bankruptcy Code § 547(c)(3)(B).

[71] Fidelity Financial Services v. Fink, 118 S. CT. 651 (1998). *But see In re* Lockhart, 2000 LEXIS 1854 (Bankr. D. Ore., Dec. 15, 2000 (77 day delay).

[72] *See* UCC §§ 9-324(a) and 9-334(d), and Bankruptcy Code § 547(c)(1).

[73] *See* UCOTA §§ 24(a), 25(a).

XI. Conclusion

It should be emphasized again that no final decisions on any of these issues have yet been made by NCCUSL or the UCOTA Drafting Committee. Basic issues relating to scope (*e.g.*, coverage of water craft and manufactured homes) remain subject to further consideration, and many other matters also continue to be debated despite extensive prior discussions.

But the 2004 Annual Meeting Draft reflects considerable progress, including significant compromises and an extensive consensus on basic and important issues. The numerous drafts and Drafting Committee meetings leading to the 2004 NCCUSL Annual Meeting reflect this progress. The result is a 2004 Annual Meeting Draft that represents a core of basic principles likely to form the basis for a new and modern CT system, to help carry UCC and CT transactions into the Twenty-First Century.