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CITY BAR

**COMMITTEE ON COMMERCIAL LAW**  
**& UNIFORM STATE LAWS**

LAWRENCE SAFRAN  
CHAIR  
885 THIRD AVENUE  
NEW YORK, NY 10022-4834  
Phone: (212) 906-1711  
Fax: (212) 751-4864  
larry.safran@lw.com

JANET M. NADILE  
SECRETARY  
825 EIGHTH AVENUE  
NEW YORK, NY 10019-7475  
Phone: (212) 474-1618  
Fax: (212) 474-3700  
jnadile@cravath.com

**To:** Joint Review Committee for Article 9  
**From:** Commercial Law and Uniform State Laws Committee of the  
Association of the Bar of the City of New York  
**Date:** March 22, 2010  
**Subject:** Proposed Amendments to UCC §9-316(h) and §9-322(b)(3), (h)

The committee has followed with interest the proposed revisions to Article 9 of the UCC and commends the Joint Review Committee for their efforts to date. For the reasons set forth below, the committee respectfully disagrees with the position taken by Professors Sepinuck and Rusch in their memorandum dated January 20, 2010 and we urge the Joint Review Committee to proceed with the proposed Amendments to UCC §9-316(h) and §9-322(b)(3) & (h) as set forth in the September 2009 discussion draft.

First, the committee strongly disagrees with the statement of Professors Sepinuck and Rusch that “registered entities do not move” their Article 9 location but only merge into new debtors. While it is true that historically an entity that wished to change its jurisdiction of organization or form of organization would merge with and into a new organization in the desired state, many modern business organization laws present entities other alternatives which can result in a registered organization changing its location for purposes of Article 9 of the UCC. For example, if a New York corporation desires to “reincorporate” as a Delaware corporation it can file a certificate of conversion pursuant to Section 265 of the Delaware General Corporation Law and pursuant to §265(f) of the Delaware General Corporation Law: “When an other entity has been converted to a corporation of this State pursuant to this section, the corporation shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the converting other entity.” Similarly, if that same New York corporation desired to instead become a Delaware limited liability company, §18-214 of the Delaware limited liability company act permits the New York corporation to convert into a Delaware limited liability company by filing a certificate of conversion and pursuant to §18-214(g) of the Delaware limited liability company act “for all purposes of the laws of the State of Delaware, the limited liability company shall be deemed to be the same entity as the converting other entity and the conversion shall constitute a continuation of the existence of the converting other entity in the form of a

domestic limited liability company.” Neither of these events results in the creation of a “new debtor” for purposes of Section 9-316 of the UCC.<sup>1</sup>

Moreover, a great many debtors in secured transactions are not registered organizations. As evidenced by the Joint Review Committee’s considerable work on UCC §9-503, many debtors are natural persons who may well change their state of residence over the course of a secured transaction. Other debtors are common law trusts or general partnerships whose Article 9 location may also easily change over the course of a secured transaction.

Existing 9-316(a)(2) already provides secured parties a four month grace period for perfection if a debtor changes its location to another jurisdiction; however, that section is limited to collateral in existence on the date of the debtor’s change in location. The official comments to Section 9-316 indicate that the four-month grace period is “long enough for a secured party to discover that the law of a different jurisdiction govern perfection and to reperfect (typically by filing) under the law of that jurisdiction.” Thus the comment implicitly recognizes that a secured party may not have immediate knowledge of a change in a debtor’s location. In the experience of many members of the committee, despite the fact that nearly all security agreements require a debtor to give the secured party prior notice of any change in its Article 9 location, many debtors fail to do so. In many secured transactions, particularly those involving inventory or receivables, the debtor is likely to acquire or generate new collateral frequently. Accordingly, the value of the existing grace period is substantially undermined.

There does not appear to us to be any compelling policy reason to justify limiting the grace period to collateral in existence on the date of the change in location. Most new lenders know enough to ask about changes in debtor’s location and would search in the former location in order to determine whether there were any prior secured parties with financing statements naming the debtor with respect to collateral in existence on the date of the change of location. Moreover, proposed §9-322(b)(3) would protect new lenders in any event so there is no increased risk to new lenders as a result in the proposed amendment to UCC §9-316(h). The current rules simply give a windfall to unsecured creditors in the event that a debtor changes its Article 9 location and then files for bankruptcy during the grace period.

The committee did not find the new provisions overly complex and we would respectfully urge the Joint Review Committee to proceed with the proposed amendments.

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<sup>1</sup> Although the committee has not canvassed all states on this issue, we note that Delaware law is not unique. For example, Sections 1150-1160 of the California Corporations Code permits a non-California corporation to convert into a California corporation and remain the same entity. Similarly, Nevada Revised Statutes 92A.195 permits the conversion of a non-Nevada corporation or other business entity into a Nevada corporation and Nevada Revised Statute 92A.250(3)(b) provides that any such conversion “is a continuation of the existence of the constituent entity.”