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[The International Factoring Association](#)

555 Chorro Street, Suite B
San Luis Obispo, CA 93405
800-563-1895

www.factoring.org
info@factoring.org

Another Successful Year

The International Factoring Association has just closed out another successful year. We'd like to thank everyone who has utilized the IFA resources for helping this association continue successfully.

The IFA's Board of Directors for 2000 came up with a Code of Ethics for the Association and has done a wonderful job of promoting this code. The Code of Ethics is as follows:

The International Factoring Association (IFA) is an organization comprised of lenders and factors engaged in providing funds to businesses primarily through the purchase of commercial accounts.

The IFA's goals and objectives are:

1. To promote the growth of the factoring industry by educating the general business community as to the nature and benefits of factoring.
2. To provide education and training to the industry through courses and seminars.
3. To encourage cooperation, communication and interaction between factors.
4. To maintain a code of ethics to which members will adhere.

THE INTERNATIONAL FACTORING ASSOCIATION CODE OF ETHICS

1. Members will aspire to the highest level of professional ethics, as generally expected by the business community.
2. Members will aspire to the highest level of industry competence through continued education, and by sharing ideas and experiences with other IFA members.
3. Members shall be honest and thorough in all business dealings, including dealings with clients, client's customers, lenders, and others in our industry.
4. Members shall utilize and maintain accurate accounting systems to track each client's transactions.
5. Members shall treat all client information as confidential. This information shall not be disclosed to any person or entity, other than at the client's direction or by court order.
6. Members will facilitate the move from one factor to another, should a company wish to make a change.
7. Members shall abide by all local,

state, and federal laws.

8. No member shall engage in any activity constituting or leading up to a conflict of interest.

9. Members shall treat all persons fairly and equally, regardless of race, religion, gender, disability, age or national origin.

10. Members shall assist one another in all industry aspects, except for proprietary information. Members shall not use or take advantage of information which may have been obtained in the process.

11. Members shall subscribe to truth in advertising standards.

12. Members shall strive to promote the International Factoring Association and its goals and objectives, as well as the commercial finance industry as a whole, through educational venues, public relations opportunities, and member advertising media.

13. Members shall communicate non-confidential information relating another member's violation of this Code of Ethics to the IFA Board of Directors. In the event of such a violation, the member will be required to change their behavior.

Our web site at www.factoring.org has been used this year more than ever. If you haven't visited the site recently, check it out. If you do not yet have a log-in name or password, just e-mail us at info@factoring.org. Membership is open to all companies currently factoring.

The website is also home to FactorSearch, a service which matches companies that are looking to be factored with factoring firms. This section has been highly used and the feedback we've received from both companies looking to be factored and factors has been very positive. We've had several companies factored through FactorSearch. To be included as a factor on FactorSearch, visit the website at www.factoring.org and select "edit/create search criteria" from the Membership Directory page. Fill in the information and submit the form. The leads will be forwarded to you automatically. Companies looking for funding will find the request page on the website. They fill out a simple questionnaire and submit it.

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SUCCESSFUL continued from page 1

In addition to the website, the IFA has also enjoyed success through our monthly tele-conference calls and the quarterly newsletter, *The Commercial Factor*. Tele-conference calls are posted on the website under Upcoming Events. The cost for these calls is typically \$40.00 and topics have ranged from bankruptcy to Revised Article 9 to closing transactions electronically. Check the web site for our next call and sign up quickly as space is limited. *The Commercial Factor*, our quarterly newsletter, contains articles by attorneys and others in the Factoring industry. The newsletter is distributed electronically and via US mail. By the end of 2001, we will only be distributing the newsletter via e-mail. To continue receiving it, make sure to sign up on our list server. Send your e-mail address to our list server at listserv@disso.com. Just type "subscribe IFA" in the subject line of your e-mail.

We'd like to thank our 2000 Board of Directors for the support in the past year. They are: Charles Dowden with Wells Fargo Business Credit in Texas, Bert Goldberg from Distinctive Solutions in California, Jim Lewis from Philadelphia Factors in Pennsylvania, Richard Kort with Accelerated Business Credit Corporation in California, Tobi Wilkins from Quantum Corporate Funding in New York, and Ron Winicour with Gibraltar Financial Corporation in Illinois.

We are currently looking for board members for the year 2001. If you are interested, please e-mail us at info@factoring.org. Thank you again for another successful year!

Karen Ross is the Director of the IFA. She can be reached at 805-544-8327 x20 or at karen@disso.com.

The Commercial Factor

Newsletter for the Factoring Industry

The International Factoring Association

555 Chorro Street, Suite B
San Luis Obispo, CA 93405
800-563-1895

Publisher
Bert Goldberg

Editor
Karen Ross

Board of Directors

Charles Dowden
Wells Fargo Business Credit

Bert Goldberg
Distinctive Solutions

Richard Kort
Accelerated Business Credit Corporation

Jim Lewis
Philadelphia Factors

Tobi Wilkins
Quantum Corporate Funding

Ron Winicour
Gibraltar Financial Corporation

The International Factoring Association's (IFA) goal is to assist the Factoring community by providing information, training, purchasing power and a resource for the Factors. The IFA provides a way for Commercial Factors to get together and discuss a variety of issues and concerns to the industry. Membership is open to all banks and finance companies that perform financing through the purchase of invoices or other types of accounts receivable.

The Commercial Factor invites the submission of articles of interest to the Factoring industry. For more information on submitting articles or advertisements, please e-mail info@factoring.org, or call 800-563-1895.

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Upcoming Revision of Article 9

The Transition Rules

by Bennet L. Cohen

In our September 28, 2000 Midwest Bulletin, we explored the changes in the law governing debtor default and secured party remedies under the comprehensive revision to Article 9 of the Uniform Commercial Code (the "Revision") which is expected to become law in all or a majority of the states on July 1, 2001.

This Bulletin focuses on the important transition rules for the change-over from current Article 9 to the Revised Article 9. The draftsmen established the distant effective date of July 1, 2001, in the hope that all states would enact the Revision before such date. Failure of all the states to adopt the Revision (in substantially identical form) by July 1, 2001 could lead to some very complicated and unforeseen problems. The Official Comment to Rev. UCC § 9-701 gives the following example of one such problem: "...the proper place in which to file to perfect a security interest (and thus the status of a particular security interest as perfected or unperfected) would depend on whether the matter was litigated in a State in which former Article 9 was in effect or a State in which this Article was in effect." Other transition problems will clearly result if the Revision is not adopted by all of the states (in substantially identical form) by July 1, 2001, due to the Revision's expanded scope, new methods of perfection for some types of collateral, revised priority rules and different choice-of-law rules.

The following is a summary of the basic transition rules contained in the Revision. These transition rules are quite complicated and merit close examination.

In this Bulletin, the writer has made every attempt to simplify these rules, but unfortunately, they cannot be condensed further without risk of eliminating essential information.

... the Revision does not affect an action, case, or proceeding commenced before July 1, 2001

The words "the effective date of the Revision" and "July 1, 2001" are used interchangeably in this Bulletin on the assumption that the Revision will become effective in each state on July 1, 2001. If a particular state does not adopt the Revision with an effective date of July 1, 2001, then with respect to the Revision adopted in such state, references in this Bulletin to July 1, 2001 should be replaced with the applicable effective date set forth in such state's version of the Revision.

1. Pre-July 1, 2001 Transactions Or Liens Created Under Former Article 9. Under Rev. UCC § 9-702(a), transactions and liens entered into or created under former Article 9 will, beginning July 1, 2001, be covered by the Revision. This means that such pre-July 1, 2001 transactions and liens must be terminated, completed, consummated, and enforced under the Revision and not former Article 9.

2. Pre-July 1, 2001 Transactions Or Liens Not Created Under Former Article 9. Under Rev. UCC § 9-702(b), transactions and liens entered into or created before July 1, 2001 that were not governed by former Article 9, but that would be covered under the Revision if they had been entered into or created after July 1, 2001, may be terminated, completed, consummated, and enforced either under the Revision or under the prior law pursuant to which they were entered into or created. Examples of such transactions or liens cited in the Official Comment to UCC § 9-702 are the creation of agricultural liens and security interests in commercial tort claims.

3. Pre-July 1, 2001 Judicial Proceedings. Rev. UCC § 9-702(c) provides that the Revision does not affect an action, case, or proceeding commenced before July 1, 2001.

4. Security Interests Perfected Before July 1, 2001 That Comply With Revision Perfection Rules. Under Rev. UCC § 9-703(a), security interests that are perfected immediately before the Revision takes effect (i.e., on June 30, 2001, such security interests are enforceable and have priority over the rights of a lien creditor), and which satisfy the

Revision rules for enforceability and perfection, remain in force under the Revision without any further action. For example, a security interest in a debtor's accounts receivable perfected prior to July 1, 2001 under former Article 9, by a central filing in the state where the debtor was located, would continue effective under the Revision so long as the Revision rules do not change the state of the debtor's location. Thus, if Bank A properly perfected a security interest in all present and future accounts receivable of its debtor, an Illinois corporation, by filing in the office of the Illinois Secretary of State prior to July 1, 2001, such security interest would continue effective under the Revision without further act, other than the timely filing of a normal continuation statement in said filing office within six (6) months prior to the expiration of five (5) years from the date of such filing.

5. Security Interests Perfected Before July 1, 2001 (By A Method Other Than Filing) That Do Not Comply With Revision Perfection Rules. Under Rev. UCC § 9-703(b), security interests that are perfected (by a method other than by filing) immediately before the Revision takes effect (i.e., on June 30, 2001, such security interests are enforceable and have priority over the rights of a lien creditor), but which do not comply with the applicable requirements for enforceability or perfection under the Revision, will remain perfected under the Revision for one (1) year, and thereafter, if the security interest attaches and is perfected under the Revision before the expiration of such one (1) year period.

Thus, if a secured party has properly perfected its security interest in certain collateral (by a method other than filing) on or before June 30, 2001 under former Article 9 (and remains perfected on June 30, 2001), but such security interest would not be deemed enforceable or perfected under the Revision if it had been created on or after July 1, 2001, the secured party has a one (1) year grace period to properly perfect its security interest under the Revision.

Comment 2 to Rev. UCC § 9-703 provides the following example of a secured transaction in which the attachment or enforceability steps used under former Article 9 would not pass muster under the Revision, and for which the one (1) year grace period for re-perfection would apply:

"Example 2: A pre-effective-date possessory security interest in instruments is perfected by a bailee's receipt of notification under former 9-305. The bailee has not, however, acknowledged that it holds for the secured party's benefit under revised Section 9-313. Unless the bailee authenticates a record acknowledging that it holds for the secured party (or another appropriate perfection step is taken), within the one-year period following the effective date, the security interest becomes unperfected at the end of that period."

It should be noted that the one (1) year grace period created by Rev. UCC § 9-703(b) does not apply in the case of a security interest perfected by filing under former Article 9. Instead, Rev. UCC § 9-705(c) provides the general rule that a financing statement filed prior to July 1, 2001 under former Article 9 will remain effective for all purposes until the earlier of: (i) the date the financing statement ceases to be effective under the law of the jurisdiction in which it was filed, or (ii) June 30, 2006. See Section 8(c) below for a discussion of Rev. UCC § 9-705(c).

6. Interpretation of pre-July 1, 2001 Security Agreements. Comment 3 to Rev. UCC § 9-703 addresses the issue of the effect of the revised definitions of certain collateral under the Revision and whether such collateral definitions contained in a pre-July 1, 2001 security agreement will be construed under former Article 9 or the Revision:

"Example 3: A pre-effective-date agreement covers 'all accounts' of a debtor. As defined under former Article 9, an 'account' did not include a right to payment for lottery winnings. These rights to payment are 'accounts' under this Article, however. The agreement of the parties presumptively created a security interest in

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FACTORING NEWS

LEGAL STATISTICS

Joe O'Banion, a former executive for **Funding Support Services Inc.** and **Southwest Financial Inc.** has been charged on 75 counts by a federal grand jury for his part in schemes that allegedly cheated investors out of \$12 million. In December, O'Banion's partner, Mike McNew, pleaded guilty to conspiracy and eight counts of fraud. McNew also signed an agreement to cooperate with authorities in their investigation. In addition to at least 30 individual investors who were defrauded, the indictment states that **Commercial Bank** (now **Regions Bank**), **Bank of Little Rock** and **One Bank** were also victimized.

The Arkansas Democrat-Gazette, February 9, 2001

The average rate for factoring operations varied between 3.76% and 3.79%, according to the **Brazilian National Association of Factoring (ANFAC)**.

Gazeta Mercantil Invest News, February 12, 2001

Matthew L. Carpenter was promoted to Chief Operating Officer of **Bay View Capital Corporation**. Since 1997, Mr. Carpenter served as President and Chief Executive Officer of **Bay View Commercial Finance Group**, which enjoyed solid growth and profitability under his direction. **Bay View's** principal subsidiary is **Bay View Bank**, which is the largest deposit franchise exclusively serving the San Francisco Bay Area. **Bay View Capital Corporation** has over \$5.3 billion in assets.

PR Newswire, March 9, 2001

It has been reported that **GE Capital Corp.** is preparing a rival rescue package for control of **Finova Group Inc.**, which filed for Chapter 11 bankruptcy protection. The offer would compete with a \$6 billion plan by **Berkshire Hathaway, Inc.** to rescue the business lender. **Berkshire Hathaway** is controlled by billionaire investor Warren Buffett and **Leucadia National Corp.** This would be the second time in a month **GE Capital** has attempted to take control of **Finova**.

The Tennessean, March 13, 2001

Towne Services, Inc. announced it's intent to engage in a strategic merger with **Private Business, Inc.**, a provider of technology-driven solutions that help banks manage accounts receivable financing for small businesses. **Towne Services** is a provider of services and products that process payment and sales information and related financing transactions for small and mid-sized retail and commercial businesses and banks. **Towne** feels the merger "will create a company with broader capabilities and more resources."

Business Wire, March 13, 2001

Tyco International Ltd. Will acquire **The CIT Group, Inc.** in a tax-free stock-for-stock exchange. **Tyco**, a diversified manufacturing and service company, is purchasing **CIT** to create a financing capability to support the growth of their business. **CIT**, the largest independent commercial finance company, "will continue to access funding markets independently and maintain its strong credit ratings", according to Albert R. Gamper, Jr., Chairman, President, and CEO of **CIT**.

Canada NewsWire, March 13, 2001

Greater Bay Bancorp announced that is has signed a definitive agreement to acquire **CAPCO Financial Company, Inc.**, a factoring and asset-based lending company headquartered in Bellevue, Washington. The acquisition, which will cost **Greater Bay Bancorp** \$8.5 million in cash and stock, is subject to regulatory approval and is expected to close in the first quarter of this year. **CAPCO** provides accounts receivable financing to small businesses located in the Pacific Northwest.

Financial News, March 15, 2001

GE Capital is reported to have made an unsolicited approach to **CIT Group** right before **CIT** closed the deal with **Tyco**. Discussions between **CIT** and **Tyco** had broken down at one point, but the deal was quickly wrapped up after **GE's** overture. Some on Wall Street are now wondering if **GE** will set it's sites on **Heller Financial**, the last big independent specialist. Neither **GE** or **Heller** would comment on the speculation.

Wall Street Journal, March 22, 2001

Revised Article 9 by State



● - Passed = 34 ● - *Introduced (Pending) = 17

*Historical introductions (ie. which may currently be dead) are included with current "viable" introductions.

Map and information courtesy of
Intercounty Clearance Corporation
www.intercountyclearance.com

If you have any news items you would like to include in the next issue of The Commercial Factor, please e-mail them to info@factoring.org.

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'accounts' as defined in former Article 9. A different result might be appropriate, for example, if the security agreement explicitly contemplated future changes in the Article 9 definitions of types of collateral—e.g., "Accounts" means "accounts" as defined in the UCC Article 9 of [State X], *as that definition may be amended from time to time.*' Whether a different approach is appropriate in any given case depends on the bargain of the parties, as determined by applying ordinary principles of contract construction."

7. Pre-July 1, 2001 Security Interests That Are Enforceable But Unperfected. Under Rev. UCC § 9-704, a security interest which is enforceable but not perfected immediately before the Revision takes place (because the perfection requirements under former Article 9 were not met) will remain enforceable (but unperfected) for one year after the Revision takes place, and thereafter if within such one year period, the Revision requirements for enforceability are met.

Such pre-July 1, 2001 enforceable but unperfected security interests can become perfected under the Revision under one of the following two scenarios: (1) without further action if, when the Revision takes place, the applicable requirements for perfection under the Revision are satisfied before or at that time, or (2) when the applicable requirements for perfection under the Revision are satisfied.

The Official Comment to Rev. UCC § 9-704 provides the following example of the rule set forth in subsection (1) of the preceding paragraph whereby a pre-July 1, 2001 unperfected security interest is deemed perfected under the Revision without further action:

"A security interest has attached under former Article 9 but is unperfected because the filed financing statement covers 'all of debtor's personal property' and controlling case law in the applicable jurisdiction has determined that this identification of collateral in a financing statement is insufficient. Upon the effective date of this Article, the financing statement becomes sufficient under Section 9-504(2). On that date the security interest becomes perfected. (This assumes, of course, that the financing statement is filed in the proper filing office under this Article.)"

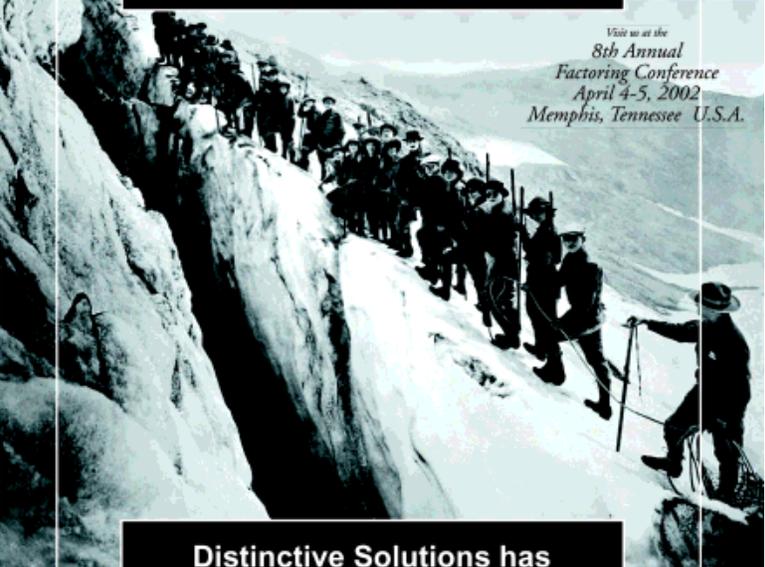
An example of the rule set forth in subsection (2) of the second preceding paragraph would be where the lender inadvertently forgot to file a financing statement on specific equipment collateral for a particular loan. If the lender properly files such financing statement in the proper office after the Revision becomes effective, the security interest would then be perfected.

8. Effect of Filing and Nonfiling Actions Taken Before July 1, 2001. Rev. UCC § 9-705 contains important rules which address the effect of actions (both filing and nonfiling actions) taken before July 1, 2001:

(1) Under Rev. UCC § 9-705(a), if a nonfiling action is taken before July 1, 2001, and such nonfiling action would have been a valid act of perfection under former Article 9 or other law, then provided the security interest attaches within one year after the Revision takes effect, such security interest becomes a perfected security interest upon attachment. However, if the Revision rules for attachment and perfection are not satisfied within such one year period, the security interest becomes unperfected upon the expiration of such one year period (i.e., on July 1, 2002). An example of such a non-filing action is as follows:

Bank A perfects a security interest in its debtor's chattel paper under former Article 9 prior to July 1, 2001 by notice to a bailee (with no acknowledgment by the bailee). The debtor acquires new chattel paper after July 1, 2001 and the security interest attaches to such new chattel paper under the Revision. Such security interest will remain perfected until July 1, 2002. However, if the bailee acknowledges the security interest before such date (a Revision perfection requirement), such perfection will continue beyond that date.

(2) Under Rev. UCC § 9-705(b), a financing statement filed before July 1, 2001 under former Article 9 which was an ineffective filing and did not perfect the security interest under former Article 9 (because, for example, the filing was filed in the wrong place or did not accurately describe the collateral), will be effective to perfect a security interest to the extent the filing complies with the Revision. Secured parties willing to prepare for the new Revision rule requiring the filing of a financing statement against a registered organization (such as a corporation, limited



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partnership or limited liability company) in the state of its organization, can pre-file under this subsection in such state prior to July 1, 2001. However, it should be noted that such pre-filing will have an effective date under the Revision of July 1, 2001.

(3) Rev. UCC § 9-705(c) sets forth the important general rule that a financing statement filed prior to July 1, 2001 in the proper jurisdiction under former Article 9 will remain effective for all purposes until the earlier of: (i) the date the financing statement ceases to be effective under the law of the jurisdiction in which it was filed, or (ii) June 30, 2006. Three exceptions to this general rule are: (1) if a pre-July 1, 2001

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MARKETING A FACTOR

SUCCESSFUL TECHNIQUES USED BY AN INDUSTRY LEADER

by Tobi Wilkins

Factors, unlike other financial services professionals, find themselves filling an important niche in today's commercial financial market. As we have seen over the past several years many banks and other lenders are moving away from some industries and business sectors. This trend offers a unique opportunity for factors who aggressively market themselves.

To find clients, factors (like any other financial services professional) must implement an aggressive marketing and promotional effort. Companies like mine, Quantum Corporate Funding, headquartered in New York, believe in a multiple prong approach to marketing. The following are some of the successful techniques that we have used to grow our business into one of the most successful in the industry.

Networking: Networking is not only a skill, but it is essential for any businessperson seeking to gain business through referrals. In the case of factoring services, we rely heavily on referrals from CPA's, attorneys, bankers, trade associations for specific industries, and industry contacts. The only way to develop relationships with these professionals is to seek them out. CPA's, for example, are a prime market for us at Quantum. Many of our referrals come from CPAs that we have developed relationships with. In many cases members of our firm made initial contact with CPA's at networking events. Networking events allow you to meet people in a casual atmosphere; but always remember that networking is business. Never take these opportunities for granted: always have plenty of business cards ready, and always follow up with people that you meet at networking events. Keep in mind that while a deal may not be around the corner...an opportunity still exists down the road.

Join organizations of professionals: While many professional organizations geared toward CPA's and attorneys limit membership, many companies or individuals can become associate members or sponsors. These memberships also place you at events where you have an opportunity to meet the people that can provide you with referrals. I even belong to a professional women's networking group! Try to arrange to speak at one of their meetings to market your "product" which is, of course, MONEY.

Advertising: While advertising is important it should be done selectively and in publications where the impact can be measured. Find publications where members of your target market make up the vast majority of readers. See if others are advertising there. If so, it's a good place to start. Also remember that advertising is only successful when it is repetitive. Four quarter-page ads over four months are better than a single one-page advertisement.

Marketing mailings: After you have identified a market segment or group of individuals you would like to market your services to, custom design your marketing materials. Draft letters that contain industry specific information and make sure that each letter is individually addressed. We have found that if this is not done your mailings will instantly be thrown in the garbage. It is also essential that follow up calls be made and be made promptly. Do not send a marketing mailing out and follow up with a call two weeks later. If you plan on doing this, don't bother making the call at all, your results will be very poor and disappointing. Try to make calls so that you are speaking with decision makers on the day the information lands on their desk.

Fax broadcasting and e-mailing: Isn't modern technology marvelous? What used to take several days to get to its destination and lots of paper, envelopes and postage (all expensive) now can be done electronically and be received within seconds. All you need do is design a one-page brochure aimed to get inquiries for you. When recipients phone you, that's the time to sell them.

Educational programs and seminars: Professionals such as CPAs, attorneys and others are always looking to provide both corporate clients and individual clients with useful information. On occasion we have worked with some of our best referral sources to offer a breakfast or after-hours seminar describing our services. If you cannot arrange a seminar with a CPA firm, reach out to a local accounting group. Offer to host an event if they give you the opportunity to speak about your company and the services you provide. In addition to sponsoring the event, request a list of group members and follow up with each member with a letter and telephone call. You might also want to contact the asset based divisions of banks and offer to speak at their staff meeting.

Publicity: To attract attention and interest in your company it is essential to attract some attention. For the factor it is important for your referral sources to see you as an industry expert. At Quantum our staff members are regularly quoted in newspaper articles. In addition to newspaper coverage, Quantum is regularly requested to submit articles to trade publications. These efforts have paid off and have been an integral part of Quantum's success in several niche markets.

Marketing a factoring company is not very different than marketing any business. However, because factoring is still a very specialized business and often misunderstood by many business people, it is essential that every factoring company implement marketing programs that contain at least a few of these components.

This article has been provided by Tobi Wilkins, Vice President of Sales & Marketing for Quantum Corporate Funding, Ltd. She can be reached at 212-768-1200. Quantum is a national leader in the area of factoring and asset-based lending with headquarters in New York. Quantum works with clients in most industries and in all parts of the United States.

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NOW WHAT DO I DO?

By David Rains and Ed Hamel, CSAM

It's one of those weeks. If it's not one thing, it's another. You keep a stiff upper lip, because you know it comes with the territory of managing your business. The weekend is almost here. Then it happens. Out of the cloud of chaos like a lightning bolt from a storm, it hits you. Your top producer has resigned.

After an unsuccessful counteroffer attempt and kicking yourself for not seeing this coming, you get a grip and start considering your options. You even get a little philosophical and think this could be one of those blind blessings. Of course your left-brain is screaming, "How am I going to replace that \$360,000 in 'fees generated' that's walking out the door?" How and why did this happen? Then you find out that some recruiter called your rainmaker and offered him some deal that he said was just too good to pass up. If you could get your hands on that recruiter, you would strangle him for messing with your people.

So, how can you stop a recruiter from talking to your people? What will work and will not work? First and foremost, as one of those recruiters, I can tell you that you cannot stop two people from talking. An industry this small and short of great talent is going to have movement between companies. There are some steps that you can take to minimize the risk of having a recruiter offer your people opportunities.

•First, you should know that money is #3 or #4 on the list of reasons people will accept a new opportunity. They may say it is the money; but, I am in the middle of more new hires in one month than most are in a year, and the #1 reason for a change is either opportunity or the lack of opportunity at their present position. Number 2 is visualizing getting more respect in some form.

•Now, this is not to minimize the aspect of money because it is still #3 or #4. So, if you are paying below par, be aware that the good recruiters know this and you will be an easy target.

•It is too late at a counteroffer stage to attempt to keep that rainmaker. Don't even try. If it is known by your people that you cannot be negotiated into concessions, they will not test the waters or leave until it has been carefully thought out and the decision made. You can't counteroffer these people anyway, and the others are just using you. Never give in to the temptation of a counteroffer. Just smile, wish them well, and get them out of your organization as soon as possible.

•A huge key to retaining your people is atmosphere. This counters money and, sometimes, even opportunity. People who feel they are part of a team, part of a great company atmosphere, and that they are accomplishing great things, do not leave. Instill these feelings in your people, and you will keep all of the good ones.

•Internet and websites are great; however, when you publish your key personnel's names and contact numbers on websites, you invite every recruiter in the world to call your people and make them offers. Sooner or later, one of those might sound too good not to look into. Of course, you still cannot stop the very best of recruiters from talking to your people, as the best are very adept at gathering names. After all, that is the recruiter's job, to know who is where and doing what. It will stop the sheer number of recruiters or the lazy recruiter, as they will have to ferret the information out of sources instead of getting on the internet and checking out your website.

•The last and probably the best principle is to engage the best recruiter for yourself. An ethical recruiter never, never sources the company who is his client. This may smack of protection to you; however, I submit that the recruiter who is out there every day, bringing you the best candidate available, is a person you want to have on your team anyway.

David Rains is the Sr. Acct. Exec./Factoring Specialist for MRI, Sales Consultants of Dallas. Ed Hamel, CSAM is the Director of Operations at the SC Dallas office. This office has well over 100 years of experience in the recruiting industry and can be reached at 972-488-9191.

Fraud Story

by Vinnie Galano

I started factoring for a company in January of 2000. It was a little machine shop that did maybe \$75,000 a month in sales with very large chemical companies. Everything was going along smoothly, until we made a collection call in April. The debtor told us that he had paid the client directly because the client told him he was no longer factoring.

We called all of the other debtors to see how many had been called by the client. It turned out that three were called and the client had taken a little over \$70,000. When I called the client, he did not take my call. I immediately faxed over a threatening letter, and also sent it to him by certified mail, attempting to scare him into responding.

Well it worked. Not the responding part but the scaring part. He died.

So that's how you steal and not go to jail (although I wouldn't want to be him at the pearly gates).

Vinnie Galano is with Prime Financial Group in Redbank, NJ.

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Stop The Bleeding

By Dr. Ron



Dr. Ron Presents:

What do you get when you mix Steven King, Freddy Krueger, Godzilla, and Psycho? The answer is... the transition from the existing Article 9 to... **"THE REVISION"**!

"Oh, what a tangled web we weave..." - Sir Walter Scott, Esq.

"Help, I need somebody, help, not just anybody, help, you know I need someone, help." - The Beatles, 1965.

The majority of states are scheduled to adopt the Revision of Article 9 on July 1, 2001 (sometimes referred to as the "Revision" or "RA9"). Most states have already adopted RA9 as law on July 1, 2001. It is assumed that the remainder will adopt RA9 shortly thereafter. How will we, as lenders, comply with the new laws in the states adopting RA9 on July 1st? How will we comply with the existing laws of those states that are not adopting RA9 as of that date? How will we transition from the existing Article 9 to the Revision as the remainder of states come on board?

What follows is a boiled-down version of lots of bits and pieces I have learned about the Revision in addition to all the advice from attorneys to whom I have paid vast sums of hard earned cash in exchange for that education. Let's hope I got more than I paid for.

Before we begin you must know that I am not an attorney, never have been, never will be, don't want to be. This article is an incomplete snapshot of information gathered from many sources and is designed to provide the reader with information regarding operational issues only. This article is not being offered as legal advice. It is strongly recommended that you review these matters with your own counsel.

CHANGES TO THE SECURITY AGREEMENT

Security agreements will need numerous changes. However, only a small portion of these changes are discussed here. Please note that perfection is not discussed now, it will be discussed later.

For clients on your books prior to RA9, there are three conceptual security agreements to choose from.

- 1) You may choose to operate with your existing security agreement and rely on existing laws and interpretations;
- 2) You may use your existing security agreement with additional language to the effect that certain items shall have the meaning described in Article 9 as amended by the Revision should the Revision become law;
- 3) You may introduce an RA9 compliant version of a security agreement for your client to sign, which would become effective if and when RA9 comes into effect.

As stated previously, there are many changes to the security agreement that must be considered. It is worth taking time now to learn about specific changes to a section of the security agreement that is near and dear to our hearts, the collateral. A standard version of an RA9 collateral section might look like this:

All of the personal property of Debtor, wherever located, whether now owned or hereafter acquired, including (but not limited to?) Accounts, Inventory, Equipment, Instruments including Promissory Notes, Chattel Paper, Payment Intangibles, Investment Property, Documents, Deposit Accounts, Letter of Credit rights, General Intangibles, Supporting Obligations, and, to the extent not listed above as original collateral, all products and proceeds of the foregoing.

There are both new and existing terms in the above description, so be careful. Some terms have a different definition under the Revision.

Below are some of the new definitions.

ACCOUNTS are rights to payments arising from the transfer of rights in tangible and intangible personal property including lottery winnings and certain health care receivables. Accounts *do not* include chattel paper, instruments, tort claims, deposit accounts, investment property, letters of credit and rights to monies or funds advanced or sold (other than credit card rights).

INVENTORY is defined as goods, other than farm products, which are held by a person for sale or lease or to be furnished under a contract of service, or consisting of raw materials, work in process, or materials used or consumed in a business. By the way, a Purchase Money Security Interest taken by an Inventory lender or supplier will *not* prime an existing, perfected Accounts lender. Beware: Consignment inventory is an exception.

EQUIPMENT is defined as goods other than inventory, farm products, or consumer goods. **FIXTURES** are still fixtures.

CHATTEL PAPER is defined as written or electronic evidences of monies owed if coupled with a security interest or lease in specific goods or the software used in the goods. Perfect by filing or control.

GENERAL INTANGIBLES are defined as any personal property, including payment intangibles and software, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction.

PAYMENT INTANGIBLES are a general intangible under which the account debtor's principal obligation is a monetary obligation. They are automatically perfected if you have perfected against Accounts.

DEPOSIT ACCOUNTS are included in the Revision, excepting investment property and instruments. Perfection is achieved by obtaining control pursuant to the laws of the state where the depository bank is located. Are all Certificates of Deposit a Deposit Account? No, they are not. Call your lawyer or ask Regis. (A question. If Certificates of Deposit are not always Deposit Accounts, then who is actually buried in Grant's tomb?)

Perfection in goods held by a third person (a **BAILEE**) occurs only when the Bailee acknowledges in writing that it holds the collateral for the secured party's benefit.

Certain **COMMERCIAL TORT CLAIMS** are now defined and governed by the Revision. However, depending on state law, a tort claim may not be assignable. Personal injury lawsuits are excluded.

CONSIGNMENTS are treated as Purchase Money Security Agreements. Watch out for those sneaky clients who request consignment arrangements from their suppliers who then file a PMSI on consigned inventory. Who will own the first priority security interest in the resulting receivable? The supplier, that's who. So, when your client calls and asks "May I please have an advance on receivables arising from consignment inventory on which the supplier filed a PMSI UCC-1 filing", just say no.

DOCUMENTS OF TITLE include bills of lading and warehouse receipts.

HEALTH CARE RECEIVABLES are, well, health care receivables.

INSTRUMENTS are defined as a "negotiable instrument that describes a right to the payment of a monetary obligation, such as a promissory note, but is not itself a security agreement or lease." That is, unless you are a golfer or a doctor in which case the word instrument takes on an entirely different meaning. But regardless of your chosen vocation, investment property and letters of credit are **NEVER** instruments, you must mention them separately. You may perfect by filing or possession.

INVESTMENT PROPERTY is now covered under Article 9 and is perfected in by filing, control, or by delivery of a security certificate. There

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Security agreements will need numerous changes.

REVISION continued from page 5

financing statement filed under former Article 9 was filed in the same state and filing office which is prescribed by the Revision (i.e., no new filing in another state or another filing office in the same state is required to perfect such security interest under the Revision), a continuation statement timely filed after the Revision takes effect will continue such filing for the period provided by the law of that jurisdiction under Rev. UCC § 9-705(d), (2) if the effectiveness of a pre-July 1, 2001 financing statement filed under former Article 9 is continued by the filing of an "in lieu" initial financing statement under Rev. UCC § 9-706 (discussed in Section 9 below), and (3) pre-July 1, 2001 financing statements filed against a transmitting utility may not be limited by such rule under Rev. UCC § 9-705(e).

In light of the above described general rule provided by Rev. UCC § 9-705(c), pre-July 1, 2001 financing statements filed in the proper jurisdiction under former Article 9 could remain effective until June 30, 2006, and thereafter, if one of the above-noted exceptions to such rule applies. As a result of this transition rule, and despite the Revision's goal to simplify the filing and search process, during the early years of the Revision, secured parties will need to conduct UCC searches not only in the jurisdictions where the secured parties will be filing their financing statements under the Revision, but also in the jurisdictions where financing statements were properly filed under former Article 9 prior to July 1, 2001. This means that any cost savings for UCC searches to be realized as a result of the Revision's change in perfection rules will be delayed for at least five years (June 30, 2006), and in some cases, for a longer period.

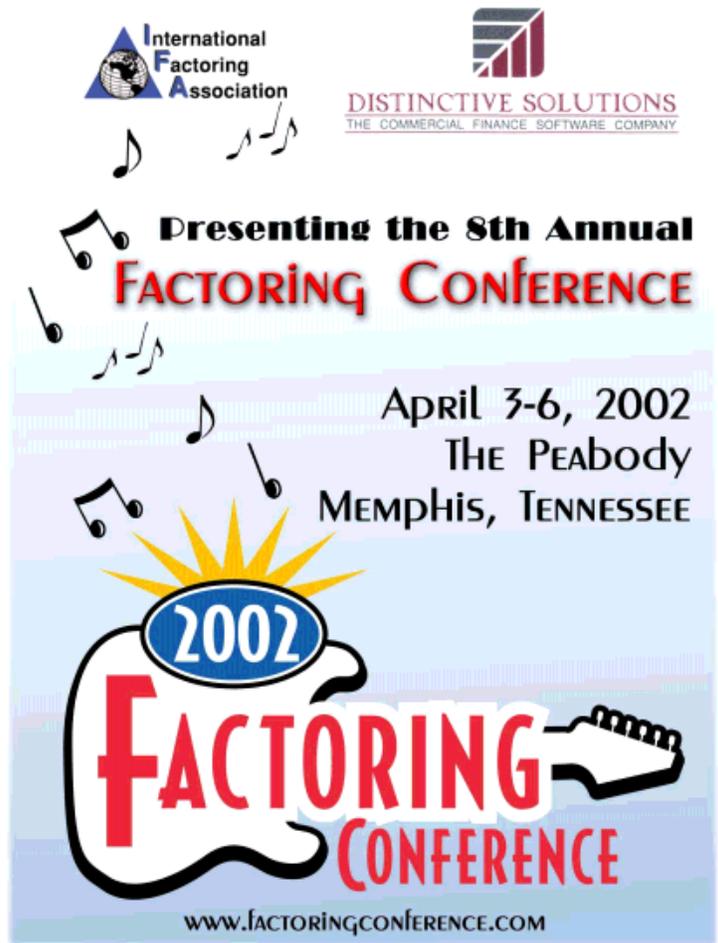
(4) Rev. UCC § 9-705(d) establishes a general rule that a financing statement which was filed in the proper State and office under former Article 9 (prior to July 1, 2001), but which would be filed in the wrong State, or in the wrong office of the proper State, under the Revision will not be continued by the filing of a continuation statement in the office designated by former Article 9 after July 1, 2001. Instead, under Rev. UCC § 9-706 (discussed in Section 9 below), such financing statement is continued by filing an "in lieu" initial financing statement in the office specified in Section 9-501 of the Revision. An exception to this general rule contained in Rev. UCC § 9-705(d) permits continuations to be filed after July 1, 2001 for financing statements filed under former Article 9 prior to July 1, 2001, so long as the Revision rules for perfection prescribe the same state and filing office as the financing statement was actually filed in.

The following example contained in Comment 5 to Rev. UCC § 9-705 demonstrates the foregoing general rule that pre-July 1, 2001 financing statements that would not be effective under the Revision if filed in that same office after July 1, 2001 cannot be continued by filing a continuation statement after July 1, 2001 in the office where the original financing statement was filed:

"Example 2: On November 8, 2000, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On November 15, 2000, SP perfects a security interest in the equipment under former Article 9 by filing in the office of the State Y Secretary of State. See former Section 9-103(1)(b). This Article takes effect in States X and Y on July 1, 2001. Under Section 9-705(c), the financing statement ceases to be effective in November, 2005, when it lapses. See Section 9-515. Under this Article, the law of D's location (State X, see Section 9-307) governs perfection. See Section 9-301. Thus, the filing of a continuation statement in State Y after the effective date would not continue the effectiveness of the financing statement. See subsection (d). However, the effectiveness of the financing statement could be continued under Section 9-706."

The following example contained in Comment 5 to Rev. UCC § 9-705 demonstrates the foregoing exception to the general rule that pre-July 1, 2001 financing statements that would be effective under the Revision if filed in that same office after July 1, 2001 can be continued by filing a continuation statement after July 1, 2001 in the office where the original financing statement was filed:

"Example 3: The facts are as in Example 2, except that D is a



State Y corporation. Assume State Y adopted former Section 9-401(1) (second alternative). State Y law governs perfection under Part 3 of this Article. (See Sections 9-301, 9-307.) Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y continues the effectiveness of the financing statement."

(The above reference to "former Section 9-401(1) (second alternative)" means that State Y required filing in the office of the Secretary of State).

(5) Rev. UCC § 9-705(f) provides that "[a] financing statement that includes a financing statement filed before this [Act] takes effect and a continuation statement filed after this [Act] takes effect is effective only to the extent that it satisfies the requirements of Part 5 for an initial financing statement." Comment 6 to this section explains that due to the Revision's reclassification of certain types of collateral, the pre-July 1, 2001 financing statement and post-July 1, 2001 continuation statement, taken together must "satisfy the requirements of this Article concerning the sufficiency of the debtor's name, secured party's name, and indication of collateral."

The following example contained in Comment 6 to Rev. UCC § 9-705 demonstrates the rule set forth in Rev. UCC § 9-705(f):

"Example 6: A pre-effective-date financing statement covers 'all general intangibles' of a debtor. As defined under former Article 9, a 'general intangible' would include rights to payment for lottery winnings. These rights to payment are 'accounts' under this Article, however. A post-effective-date continuation statement will not continue the effectiveness of the pre-effective-date financing statement with respect to lottery winnings unless it amends the indication of collateral covered to include lottery winnings (e.g., by adding 'accounts', 'rights to payment for lottery winnings,' or the like). If the continuation statement does not amend the indication of collateral, the continuation statement will be effective to continue the effectiveness of the financing statement only with respect to 'general intangibles' as defined in this Article."

9. The Filing Of An "In Lieu" Initial Financing Statement To Continue A Pre-July 1, 2001 Financing Statement. Rev. UCC § 9-706 sets forth special rules for the filing of an initial financing statement (referred to in this Bulletin as an "in lieu" initial financing statement) for the purpose of continuing the effectiveness of a "pre-effective-date financing statement" (i.e., pre-July 1, 2001 financing statement) filed in the proper office under former Article 9.

(1) Under Rev. UCC § 9-706(a), the filing of an "in lieu" initial financing statement in the proper filing office designated by the Revision continues the effectiveness of a pre-effective-date financing statement filed in the proper office in the proper State under former Article 9 if: (i) the pre-effective-date financing statement was filed in an office in another state or another office in the same state, (ii) the pre-effective-date financing statement has not lapsed, either prior to the date the "in lieu" initial financing statement is filed or prior to the date the Revision takes place, and (iii) the "in lieu" initial financing statement: (A) complies with the requirements of Part 5 of the Revision for an initial financing statement, (B) identifies the pre-effective-date financing statement by "indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement", and (C) indicates that the pre-effective-date financing statement remains effective.

(b) Under Rev. UCC § 9-706(b), the filing of an "in lieu" initial financing statement under Rev. UCC § 9-706(a) continues the effectiveness of the pre-effective-date financing statement: (i) if the "in lieu" initial financing statement is filed before July 1, 2001, for the period provided in former Section 9-403 with respect to a financing statement (i.e., the normal expiration date of a pre-effective-date financing statement filed under former Article 9, which in most states, is five years); and (ii) if the "in lieu" initial financing statement is filed on or after July 1, 2001, for the period provided in Rev. UCC § 9-515 with respect to an "in lieu" initial financing statement (which in most cases is five years from the date of the filing of the "in lieu" initial financing statement).

Comment 1 to Rev. UCC § 9-706 explains "[i]n contrast to a continuation statement, which extends the lapse date of a filed financing statement for five years, the "in lieu" initial financing statement has its own lapse date, which bears no relation to the lapse date of the pre-effective-date financing statement whose effectiveness the "in lieu" initial financing statement continues. See subsection (b)."

Thus, regardless of whether the "in lieu" initial financing statement is filed before or after July 1, 2001, the period of its effectiveness, in most cases, will be five (5) years, and such date will be measured from the date on which the "in lieu" initial financing statement is filed, rather than from either the date on which the pre-effective-date financing statement was filed or July 1, 2001.

The Official Comment to Rev. UCC § 9-706 makes the following important observations regarding this important Revision section:

(1) Although an "in lieu" initial financing statement filed pursuant to Rev. UCC § 9-706 has the effect of a continuation statement, it is not one and is governed by the rules applicable to initial financing statements. However, a debtor need not authorize the filing under Rev. UCC § 9-707.

(2) Unlike a continuation statement, the "in lieu" initial financing statement described in Rev. UCC § 9-706 can be filed at any time prior to the lapse of the pre-effective-date financing statement, even before the Revision takes effect. In contrast, a continuation statement must be filed within the six months prior to lapse. It should be noted that filing officers will probably still require the debtor's signature on "in lieu" initial financing statements filed prior to July 1, 2001. Moreover, Comment 1 to Rev. UCC § 9-706 implies that some filing officers may not accept an "in lieu" initial financing statement prior to July 1, 2001: "former Article 9 determines whether the filing office is obligated to accept" an "in lieu"

initial financing statement that is presented for filing prior to July 1, 2001.

(3) Comment 2 to Rev. UCC § 9-706 makes it clear that a single "in lieu" initial financing statement may continue the effectiveness of more than one pre-effective-date financing statement. Thus, for example, if a secured party filed against a Delaware corporation's inventory in six other states prior to July 1, 2001, it can file one "in lieu" initial financing statement in Delaware for the purpose of continuing the effectiveness of all such filings in such six other states.

(4) Comment 2 to Rev. UCC § 9-706 also provides guidance on changes in collateral types under the Revision: "If under this Article the collateral is of a type different from its type under former Article 9-as would be the case, e.g., with a right to payment of lottery winnings (a 'general intangible' under former Article 9 and an 'account' under this Article), then subsection (c) requires that the initial financing statement indicate the type under this Article."

10. The Effect of the Revision's Transition Rules on Priority Conflicts. Rev. UCC § 9-708 establishes the following rules for deciding which priority conflicts will be determined under former Article 9 and those that will be determined under the Revision:

(1) If the relative priorities were established before the effective date of the Revision (July 1, 2001), then former Article 9 governs priority. An example of this rule set forth in Comment 1 to Rev. UCC § 9-708 reads as follows:

"Example 2: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ('account'). SP-1 fails to file a financing statement. In 2000, D creates a security interest in the same account in favor of SP-2, who likewise fails to file a financing statement. This Article takes effect on July 1, 2001. Because the relative priorities of the security interests were established before the effective date of this Article, former Article 9 governs priority, and SP-1's security interest has priority under former Section 9-312(5)(b)."

(2) If the relative priorities were established before July 1, 2001, but change after July 1, 2001, so that the relative priorities become established again after July 1, 2001, the Revision will govern priority. Comment 1 to Rev. UCC § 9-708 provides the following example:

"Example 3: The facts are as in Example 2, except that, on August 1, 2001, SP-2 files a proper financing statement under this Article. Until August 1, 2001, the relative priorities of the security interests were established before the effective date of this Article, as in Example 2. However, by taking the affirmative step of filing a financing statement, SP-2 established anew the relative priority of the conflicting claims after the effective date. Thus, this Article determines priority. SP-2's security interest has priority under Section 9-322(a)(1)."

(3) If the relative priorities were established after July 1, 2001, then the Revision governs priority. Comment 1 to Rev. UCC § 9-708 provides the following example:

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... a debtor need not authorize the filing under Rev. UCC § 9-707

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“Example 1: In 1999, SP-1 obtains a security interest in a right to payment for goods sold (‘account’). SP-1 fails to file a financing statement. This Article takes effect on July 1, 2001. Thereafter, on August 1, 2001, D creates a security interest in the same account in favor of SP-2, who files a financing statement. This Article determines the relative priorities of the claims. SP-2’s security interest has priority under Section 9-322(a)(1).”

CONCLUSION

After reviewing the Revision’s transition rules, it is apparent that all secured parties will need to conduct a detailed audit of their loan and other portfolios to confirm that their security interests will be properly perfected under the Revision. This means that:

(1) If the security interest is perfected by non-filing under former Article 9, make sure that such method of perfection is adequate under the Revision and that no further steps are necessary to achieve perfection under the Revision. If the non-filing action is not adequate under the Revision, take the necessary steps to timely achieve perfection under the Revision.

(2) If the security interest is perfected by a financing statement made prior to July 1, 2001 under former Article 9, the following issues need to be determined:

(1) Is the existing financing statement in place adequate to perfect the security interest under the Revision? If so, nothing need be done under the Revision except (i) making sure the existing financing statement is continued within six (6) months prior to lapse, and (ii) if the security interest involves one or more new collateral types under the Revision, amending the existing financing statement (and security agreement if necessary) to adequately describe such new collateral types.

(2) If the existing financing statement in place is not adequate under the Revision to perfect the security interest (because for example, the debtor is a registered organization and the secured party has not filed a financing statement in the office of the secretary of state where the debtor was organized), the secured party has a number of options:

(1) Pre-file a new financing statement in the state where the debtor was organized. Although pre-filing is an option, secured parties need to note that: (i) as discussed below, such pre-filing does not continue the priority of its financing statement filed prior to July 1, 2001 under former Article 9, (ii) such pre-filing would have an effective date of July 1, 2001 under the Revision for priority purposes, and (iii) as indicated earlier, under Rev. UCC § 9-705(c) the secured party’s financing statement filed prior to July 1, 2001 under former Article 9 will remain effective for all purposes until the earlier of: (i) the date the financing statement ceases to be effective under the law of the jurisdiction in which it was filed, or (ii) June 30, 2006.

(2) If the existing financing statement is scheduled to lapse prior to December 30, 2001, make sure such filing is timely continued in the office where such filing was made (but in any event, such continuation must be timely filed (x) within six months prior to its lapse, and (y) prior to July 1, 2001). This will benefit the secured party under the rule in Rev. UCC § 9-705(c) described in the preceding paragraph. According to the author’s calculation, a filing made under former Article 9 with a lapse date after December 30, 2001 cannot be continued by a “true” continuation, since such filings can not be continued by a “true” continuation filed on or after July 1, 2001. Also see Section 8(e) above regarding changes in collateral types under the Revision and the need to amend the existing financing statement to reflect such new collateral types.

(3) Continue the effectiveness of the existing financing statement by filing an “in lieu” initial financing statement under Rev. UCC § 9-706 (as discussed in Section 9 above). As

discussed in Section 9 above, an “in lieu” initial financing statement can be filed even prior to July 1, 2001 and will be effective to continue the priority of the original financing statement being continued. Also see Section 9(D) above regarding changes in collateral types under the Revision and the need to reflect such new collateral types in the “in lieu” initial financing statement.

Although some secured parties will undoubtedly utilize all three of the above filing options (except to the extent option (2) does not apply to a particular filing) for secured transactions in which the existing financing statement in place is not adequate under the Revision to perfect the security interest, in light of the priority issue discussed in the following paragraph, it appears that exercising option (2) (to the extent applicable) and option (3) above are a must for a secured party. However, this is not to be viewed as discouraging secured parties from exercising option (1). For secured transactions being consummated currently under former Article 9, some secured parties are anticipating the Revision and are

now filing an initial financing statement (as opposed to an “in lieu” initial financing statement) in the state where the registered organization (such as a corporation) was incorporated (even though such debtor has no office or collateral located there). As discussed in Section 8(b) above, this pre-filing is sanctioned by Rev. UCC § 9-705(b). However, secured parties must realize that under the Revision’s “first-to-file-or-perfect” priority rule under Rev. UCC § 9-322(a)(1),

... it is apparent that all secured parties will need to conduct a detailed audit of their loan and other portfolios to confirm that their security interests will be properly perfected under the Revision.

unless such initial financing statement is an “in lieu” initial financing statement, the priority of such security interest generally will be determined by (i) the date the initial financing statement was filed, or (ii) the date the Revision became effective in such state, whichever is later, rather than the date the secured party’s prior financing statement under former Article 9 was filed. As a general rule, only “in lieu” initial financing statements and “true” continuations will result in priority based on a financing statement filed prior to July 1, 2001. The following example is intended to illustrate this priority issue:

Bank A files a blanket financing statement against a Delaware corporation (with its sole office and assets in Illinois) on October 1, 1998 in the office of the Illinois Secretary of State. In anticipation of the Revision, on November 1, 2000, Bank A also files a financing statement in the office of the Delaware Secretary of State. The Revision takes effect in Illinois and Delaware on July 1, 2001. On July 1, 2001, by virtue of the initial financing statement filed by Bank A in the office of the Delaware Secretary of State, Bank A has a perfected security interest against the corporation under the Revision. However, such priority in Delaware dates from July 1, 2001 (the date the Revision became effective in Delaware and such Delaware filing became effective). In order for Bank A to continue its priority from October 1, 1998, it needs to file an “in lieu” initial financing statement in Delaware to continue the effectiveness of such October 1, 1998 Illinois filing (see Section 9 above for a discussion of “in lieu” initial financing statements). Under the general rule in Rev. UCC § 9-705(c), the October 1, 1998 Illinois filing remains effective until October 1, 2003 (being the earlier of its normal lapse date or June 30, 2006). If the October 1, 1998 Illinois filing is not continued by the filing of an “in lieu” initial financing statement in Delaware prior to October 1, 2003, such filing lapses. Bank A’s November 1, 2000 Delaware filing continues to be effective, but Bank A’s priority will then date from November 1, 2000.

Secured parties should now begin planning for the Revision’s transition rules so that systems and procedures will be in place on or before July 1, 2001 to continue the perfection and priority of security interests created under former Article 9.

This Bulletin is informational in nature and is not intended as legal advice to any member or recipient.

Bennett L. Cohen, is General Counsel with Cohen, Salk & Huvard, P.C. He can be reached at 847-480-7800.

DR. RON continued from page 9

are special priority rules under RA9, however.

LETTER OF CREDIT RIGHTS are simply the rights to payment under a letter of credit. With respect to perfection, the governing law is that of the issuer's or nominating party's jurisdiction. However, Article 5 may control if in conflict with Article 9. Once again, call your lawyer.

The revised Article 9 governs **AGRICULTURAL LIENS**. (It does, but I just want to see if you are paying attention. If you are truly serious about agricultural deals, you don't really need counsel. Instead, go directly to bankruptcy court, do not pass "Go", do not collect your receivables.)

A security interest in a **SECURED NOTE** (secured by real estate or otherwise) automatically attaches to the security interest that is securing the note.

PROCEEDS are whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral, rights arising out of collateral, distributions, and collections upon collateral and insurance payable due to damage of collateral. Royalties, dividends, and rents are also proceeds. You automatically perfect in proceeds if you are perfected in the underlying collateral.

SOFTWARE is software that is not a computer program included in the definition of goods.

SUPPORTING OBLIGATIONS are guaranties and letters of credit that support payment of another obligation.

DEBTOR now means the owner of the collateral. **OBLIGOR** now means the person that owes the payment. **SECONDARY OBLIGOR** means a guarantor.

A final thought on Bailees. It goes great with vodka.

PERFECTION OF SECURITY INTERESTS

The place for perfection by filing a UCC-1 will be (except for fixture filings) where the debtor is "located", no longer where the collateral is located. What does "located" mean? It depends. By definition:

- 1). If the debtor is an individual, then the debtor's location is at the debtor's personal residence.
- 2). If the debtor is an unregistered organization with only one place of business, then at that location.
- 3). If the debtor is an unregistered organization and has more than one place of business, then at its Chief Executive Office.
- 4). If the debtor is a registered organization (corporations, partnerships, LLC's, etc), then its location is at the debtor's state of registration, *not* where the debtor is physically located. Foreign entities and Organizations registered under federal law including banks not organized under laws of the United States or a State have special rules. All filings will be central. Dual filing has been eliminated.

With respect to possessory security interests, the law of the state in which the collateral is physically located governs.

MISCELLANEOUS UCC-1 MINUTIAE

The UCC-1 must use the *exact* registered name of the debtor and may contain collateral language such as "all assets" or "all personal property now owned or hereafter acquired". The UCC-1 does not require the debtor's signature. (Note that the security agreement itself *must* delineate all the collateral). If a filing office wrongfully rejects a UCC-1 submitted by lender A, lender A is nevertheless perfected. However, if a subsequent search by lender B does not find lender A's UCC-1 and lender B funds, lender B wins the priority race on the theory that lender A should know if its UCC-1 is rejected. But, if a filing office wrongfully indexes (misfiles) a UCC-1 submitted by lender A, lender A is not only perfected, it will win the priority race vs. a subsequent lender B who does not find lender A's UCC-1.

Hear this! A lender must send its Debtor a termination statement within 20 days of the extinguishment of the debtor's liability to that lender. However, if a lender does not comply, the debtor may file its own termination statement. Since filing officers will have no knowledge of the facts, it is a good thing that all debtors are honest!

If a debtor changes its location, a secured party has four months to perfect in the new jurisdiction. (This was a test. What does "location" mean under RA9? Did you pass?) You may perfect a UCC-1 notwithstanding the fact that the debtor is not in good standing as a registered entity. A secured party may file a financing statement or an amendment that adds collateral without the debtor's signature. However, if you are

adding a debtor to a filing, the debtor added must authorize such amendment. In your security agreement, have the debtor expressly authorize the lender to file financing statements and any amendment adding collateral.

Perfection of negotiable documents, goods, instruments, money, or tangible chattel paper located in a specific jurisdiction is governed by the law of that jurisdiction and requires a fixture filing to be recorded.

With respect to vehicles covered by a certificate of title, the governing law is the jurisdiction that issued the certificate. However, if the vehicles are held for sale or lease as inventory, or under lease, the normal filing rules for inventory apply.

In order to perfect a security interest in a **BENEFICIAL INTEREST IN A LAND TRUST** a UCC filing will be required.

By the way, you no longer "sign" a document. Rather you "authenticate" it. A document may now be referred to as a "record" or as an "authenticated record". Such talk.

OPERATIONS

O.K. So now we know the basic definitions of some new and some old terms. We also know in general how and where to perfect our security interests. We also know that we must change the language in our security agreements. So what do we do with this information? How do we operate?

THE TRANSITION RULES

Before we can decide operational issues, we must learn about the transition rules. **CAUTION: BE VERY CAREFUL. Not all states will be adopting the Revision on July 1, 2001. You will have to think your way around some of these issues. The following assumes that you are dealing in states that will be adopting the new rules as of July 1, 2001.**

1. For most of us, the majority of our clients are registered in the same state as they are domiciled. This will simplify some of these issues. For example, an existing UCC-1, if properly perfected, will continue to afford you the same security you now enjoy, at least until the next revision. You must, of course, follow the existing continuation rules.
2. Existing Security Agreements are O.K. as is, but the language contained therein will be interpreted pursuant to the old laws unless you and your client agree otherwise. Security Agreements for deals booked after June 30, 2001 should be rewritten. By the way, what does "booked" or "closed" really mean? Signed by the debtor? Signed by both the debtor and the secured party? Funded?
3. You may file pursuant to RA9 on existing deals before July 1, 2001, but it will not be effective until July 1, 2001. You must have properly perfected the old way to be properly secured the new way.
4. If you are presently perfected *by a filing* under existing laws and do not "re-perfect", you will remain perfected until the earlier of the normal termination of the existing filing or June 30, 2006. It appears that continuations are allowed but effective only if the old filing complies with all of the rules under the Revision.
5. If a filing on a pre RA9 deal does not satisfy the new rules and you must re-file in a new jurisdiction, you must "continue" the filing in the new jurisdiction by filing an "initial in lieu" UCC filing in that jurisdiction. I trust there will be a form for this. You may file this "in lieu" statement at any time and without the debtor's signature if the jurisdiction will accept it without the debtor's signature before July 1st. I, for one, will file a new UCC *and* an "in lieu" UCC just to be careful.
6. You probably figured out by now that we must search under the old rules and the new rules for a long, long, time. Lovely.
7. Legal proceedings commenced before July 1st will be decided pursuant to the old Article 9 rules.

By the way, Sir Walter Scott was not, to the best of my knowledge, an attorney. To those of you that know the remainder of the quote, I mean no offense to the lawyers. But if you see me in Scottsdale (I'll be the one wearing a belt and suspenders), I know some great lawyer jokes.

I cannot imagine why anybody would want to read this again, but if you would like a copy of this article please send your request via e-mail to drron@gibraltarfinancial.com. In the alternative, mail your request to Dr. Ron at Gibraltar Financial Corporation, 60 Revere Drive, Suite 840, Northbrook, IL 60062. E-mail is preferred. Please, no phone calls. I'll be busy looking for an "in lieu" profession.

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555 Chorro Street, Suite B
San Luis Obispo, California 93405