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# Summary of the 2010 Amendments to Chapter 9 of the Texas Uniform Commercial Code: Effective July 1, 2013

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# Presentation Outline

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  - Debtor's Name / Registered Organizations
  - Debtor's Location
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  - Miscellaneous Changes Related to Filing
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# Introduction

# Introduction

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- Article 9 of the Uniform Commercial Code, the article dealing with secured transactions, was last substantially revised in 1998 (“Current Article 9”). By January 1, 2002, Current Article 9 had become effective in all fifty states. Revised Article 9 is codified in Texas as Chapter 9 of the Texas Business and Commerce Code (the “Texas UCC”).
- The Uniform Commercial Code’s sponsoring organizations, the American Law Institute (the “ALI”) and the Uniform Law Commission (the “ULC”), elected to further amend Revised Article 9 in light of certain states’, including Texas’s, passage of non-uniform amendments to their enactments of Revised Article 9. These amendments were intended to resolve ambiguity in Revised Article 9’s treatment of the

## Introduction (Contd...)

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name of an individual debtor on a financing statement, and to provide filers greater comfort that their interests would be perfected.<sup>[\*]</sup> The International Association of Commercial Administrators (“IACA”) also sought a number of changes to the filing provisions of Part 5 of Revised Article 9 based on the experiences of filing offices.

- The ALI and the ULC approved certain amendments to Article 9 of the Uniform Commercial Code (the “ULC Amendments”) in 2010. The

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\* See TEX. BUS. & COM. CODE ANN. § 9.503(a)(4) (Vernon 2011); (the 2007 statute created a “safe harbor” for the name of an individual debtor on a financing statement filed in the State of Texas; the financing statement was sufficient if it provides the debtor's name as shown on the debtor's Texas driver's license or Texas identification card).

## Introduction (Contd...)

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ULC Amendments were considered and approved, with minor, non-uniform changes, by Texas in 2011 with a July 1, 2013, effective date. The three most noteworthy ULC amendments impact:

- the required name of an individual on a financing statement (the only truly controversial issue);
  - the perfection of collateral following the debtor's relocation to a new jurisdiction; and
  - collateral acquired by a new debtor.
- This presentation will provide a summary of the three most noteworthy changes along with a brief discussion of less material statutory amendments.

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# Debtor Names

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- Background
    - UCC §9-503(a)(4) provides no guidance for what constitutes a sufficient individual name for a financing statement
  - Representative Case Law
    - In re: Stewart 2006 Bankr. LEXIS 3012 (Bankr. D. Kan. 2006) (financing statement that provided the debtor name as "Richard Stewart" was seriously misleading where the bankruptcy petition identified the debtor's legal name as "Richard Morgan Stewart, IV" and a search of the Kansas Secretary of State records under that name, using the standard search logic, failed to disclose this record).



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- In re Borden, 2007 U.S. Dist. LEXIS 61883 (D. Neb. 2007) (financing statement was seriously misleading as a matter of law where it provided the debtor's nickname of "Mike Borden" and the correct first name was "Michael").
  - In re Miller, 2012 Bankr. LEXIS 70 (Bankr. C.D. Illinois, Jan. 6, 2012) (Debtor name "Bennie Miller" was not sufficient despite the name provided on driver's license and social security card where birth certificate provided the name as "Ben Miller").

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- The Uniform Law Amendments provide states with 2 options – Alternatives A & B – offering greater clarity with respect to the sufficiency of an individual debtor's name.

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## Alternative A (Adopted by Texas and 24 Other States)

- Sufficiency
  - Financing statement is sufficient only if it provides the name indicated on the driver's license.
  - Driver's License Requirements
    - Driver's License must be:
      - unexpired; and
      - issued by "this state."
- Second-Tier Requirements
  - Surname/First Personal Name

## Alternative B (Adopted by 5 States)

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- Sufficiency – Financing Statement is sufficient only if it provides any one of the following:
  - Individual name of the debtor; or
  - Surname/First Personal Name of the debtor; or
  - Name on the driver's license
- Driver's License must be:
  - unexpired; and
  - issued by "this state"
- Alternative B has been called the "safe harbor" approach to the driver's license rule in contrast to the "only if" approach reflected in Alternative A

## Alternative A / Driver's License Issues

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- Incompatibilities between the DMV and UCC filing systems both at the outset and on an ongoing basis;
- Incorrect name sources obtained by creditors operating in multiple states, where some states select Alternative A and others Alternative B;
- Creditors may need to examine debtors' driver's licenses, which is currently voluntary to the extent permitted by state enactments of Revised Article 9;
- Creditors may need to monitor changes in the DMV system, including name format;
- Creditors may need to determine whether a debtor has been issued prior licenses under a different name and to actively monitor whether subsequent licenses are so issued (which may not be feasible on the basis of public records); and
- Because a debtor may commonly use a different name from that on his/her driver's license, a financing statement may contain a different name from that used on other loan documentation, which could cause errors

## Debtor's Name: Registered Organization

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- Under current Article 9, the filer must provide the name of a "registered organization" that is indicated on the public record of the debtor's jurisdiction of organization and which demonstrates
- The ULC determined that the definition of "registered organization" is unclear
- Under the ULC Amendments, the requirement of a city or state to keep and maintain a "public record" is no longer relevant to the definition of "registered organization"
- Revised definition of "registered organization"
  - An entity formed or organized by the filing or issuance of a "public organic record" or the enactment of legislation (See Tex. Bus. Com. Code §9.102(71))

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- New definition of "Public Organic Record"
    - Record initially filed with a state or U.S. to form an entity
    - Record issued by a state or the U.S. to form an entity
    - Legislation that creates an organization
    - Record of a business trust required to be filed by state law
    - Records filed to amend/restate the name for any of the above records
      - See Tex. Bus. Com. Code §9.102(68-a).

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- New Scope of Registered Organizations
    - Corporations, LLC, LPs, etc.
    - Entities created by legislation
    - Business Trusts
    - Chartered Organizations
    - Should not impact common law trusts formed for non-business or commercial purposes



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- New Rule for Sufficiency of Debtor Name:
    - If the debtor is a registered organization, the financing statement is sufficient only if it provides the name on the public organic record most recently filed with or issued/enacted by the registered organization's jurisdiction that purports to state/amend/restate the registered organization's name
      - See 9.503(a)(1)
      - Corporations, LLCs, etc.
        - Articles or equivalent formation record, as amended
      - DO NOT RELY ON THE NAME GIVEN IN A STATE BUSINESS ENTITY DATABASE

## Debtor's Location

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- Current Article 9 provides for a 4-month grace period upon a debtor's relocation to a new jurisdiction, during which period a creditor must file a financing statement or otherwise perfect its security interest pursuant to the laws of the new jurisdiction
  - but current Article 9 does not apply to after-acquired property
  - creditor's interest in any after-acquired collateral pursuant to any security agreement would only be perfected at the time of the creditor's filing of a financing statement.

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- Newly added subsection (h) to Section 9.316 addresses the gap; this section, if enacted in the debtor's original location, provides that the original financing statement shall cover any after-acquired property for a period of 4 months following the debtor's change of location.
  - Practice Note: While 9.316(h) helps existing secured creditors, it introduces risk to secured parties seeking to make a loan to the same debtor after a change in location.
    - Lenders making a secured loan to a debtor on property acquired after a debtor's change of location must thoroughly check for prior UCC filings on the debtor to determine whether or not they will be subordinate to an existing secured party's lien through its original filing in the old jurisdiction.

# New Debtor

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- Newly added subsection (i) to 9.316 of the Texas UCC provides protection for a security interest in after-acquired property following the assumption of debt subject to the creditor's financing statement by a new debtor residing in a different jurisdiction from the old debtor.
  - Under current Article 9, a creditor has a grace period of 1 year to file a financing statement in the jurisdiction of the new debtor in order to preserve its security interest with respect to property held at the time the new debtor assumed the obligation.
    - But the grace period doesn't apply to after-acquired property
  - Amended Section 9.316(i) grants a 4 month grace period to the creditor with respect to after-acquired property analogous to that provided for a change in jurisdiction.

# Miscellaneous Changes Related to Filing / Texas Rejections

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- Section 9.502(c) – Revised Article 9 provides that a mortgage or deed of trust filed as either (a) a fixture filing or (b) a financing statement covering as-extracted collateral or timber to be cut, must satisfy the requirements of a financing statement. New Section 9.502(c) of the Texas UCC provides that the record need not indicate that it is to be filed in the real property records nor provide an individual debtor’s name, if any, in accordance with new Section 9.503(a)(4) (requiring identification of the debtor by the most recently issued and unexpired Texas driver’s license or most recently issued and unexpired Texas ID Card issued by the same office that issues Texas driver’s licenses) if the record otherwise reflects the individual name of the debtor or the surname and first personal name of the debtor.

## Miscellaneous Changes Related to Filing / Texas Rejections (Contd...)

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- Section 9.507(c) – Section 9.507(c) of the Texas UCC now provides that any event (not just a name change, as was the case under Revised Article 9) that causes the name of a debtor on a financing statement to become seriously misleading under Section 9.503(a) of the Texas UCC triggers the four (4) month temporary perfection period under Section 9.507.
- Sections 9.516 and 9.518 - The Texas UCC adopts the ULC Amendments' change of the term “correction statement” to “information statement,” which more accurately describes the statement’s purpose. Whereas only the debtor could file a “correction statement” under Revised Article 9, a secured party of record is allowed, though not required, to file an information statement under new Sections 9.516 and 9.518. Such an information statement would be appropriate where such secured party believes that another party has made a filing affecting the secured party’s financing statement without authorization.

## Miscellaneous Changes Related to Filing / Texas Rejections (Contd...)

- It should be noted that Texas did not adopt the ULC Amendments' deletion of language that allows a filing office to reject any financing statement that does not provide the debtor's type of organization, jurisdiction of organization, or organizational identification number or indication that the debtor does not have such a number.\*\* Section 9.516(b)(5)(C) of the Texas UCC continues to permit the Secretary of State's office to refuse to file a financing statement for a debtor that is a registered organization if any of: (i) the type of organization for the debtor, (ii) the jurisdiction of organization for the debtor or (iii) an organizational identification number for the debtor (or a statement that the debtor has none), are not provided in the appropriate places on the financing statement. **Therefore, financing statements filed in Texas must continue to reflect these three (3) pieces of information.**

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\*\* The ULC Amendments delete 9-516(b)(5)(C).

## Miscellaneous Changes Related to Filing / Texas Rejections (Contd...)

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- Texas Rejected the ULC's new Financing Statement Forms. The ULC Amendments provide for a new form of (i) initial financing statement and (ii) financing statement amendment to reflect the ULC Amendments. **But Texas rejected the financing statement forms promulgated by the ULC and contained in Section 9-521 of the ULC Amendments.** In 2004, Texas repealed Section 9.521 of the Texas UCC and added Section 9.5211 of the Texas UCC instead. Section 9.5211 prohibits the rejection by an officer of a filing office in the State of Texas that accepts written records of either (i) a written initial financing statement or (ii) a written record that is, in each case, made on an industry standard form, including a national standard form or a form approved by the International Association of Commercial Administrators, adopted by rule by the Secretary of State of the State of Texas.



## Miscellaneous Changes Unrelated to Filing

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- Section 9.307(f) - The ULC Amendments codify a comment to Section 9-307 of Revised Article 9<sup>\*\*\*</sup> by expressly providing that where federal law permits a registered organization to designate a main office, home office, or similar office such office is properly designated as the State of location of the registered organization.
- Section 9.607(b) – The ULC Amendments clarify that the triggering default event allowing non-judicial foreclosure sale of a mortgaged property must be a default with respect to the mortgagor’s obligations. This precludes the interpretation that a default by an assignor of such mortgage could trigger such a right. Section 9.607(b)(2) of the Texas UCC implements this change.

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<sup>\*\*\*</sup> See U.C.C. § 9-307 cmt. 5 (2009).

# New Article 9 Part 8 Transition Rules

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- Key Provisions
  - Effective Date July 1, 2013
  - 5 year transition period ends June 30, 2018
  - Return of the Financing Statement in lieu of continuation

# Transition Effect on Filed Records

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- Debtor is currently a "Registered Organization"
  - No transition action required
- Debtor becomes a Registered Organization
  - If change in governing law:
    - File Financing Statement in Lieu of Continuation
  - May change standard for sufficiency of debtor name
    - Amend name with UCC-3 or on in Lieu (as appropriate)
  - Individual Names (Alternative A States (e.g., Texas))
    - File amendment to add name that complies with new §9.503(a)(4)
  - Individual Names/Alternative B states
    - No action required if name is sufficient under current law

## Best Practices / Conclusion

- Before the ULC Amendments become effective in Texas on July 1, 2013, careful consideration should be given to the available options with respect to individual debtor names under Alternative A. Lenders and their counsel need to be familiar with not only the current UCC filing office system but also the DMV's filing system. For individual debtors, obtaining an image of the driver's unexpired license or State Identification Card and tracking the expiration date **must become part of due diligence**. If the driver's license or State ID expires, it is no longer a relevant source for verifying the individual debtor name. And middle names must be considered -- whether spelled out, an initial, or missing (e.g., 11 states do not include the middle name on the driver's license). **The exact name on the license must be used even if it contains an error**. One should list **all variations** of the name on the UCC Financing Statement including the middle name even if that middle name is not provided on the driver's license or State ID. Searching and listing all name variations will become common filing practice.

## Best Practices / Conclusion (contd...)

- And while the ULC Amendments have eliminated the SSN/FEIN and "e,f,g" boxes, providing (i) the type of organization for the debtor, (ii) the jurisdiction of organization for the debtor or (iii) an organizational identification number for the debtor (or a statement that the debtor has none) **is still required in Texas. Therefore, as of today, financing statements filed in Texas must continue to reflect these three (3) pieces of information.** But identifying the corporate structure, state of organization and organizational ID number will no longer be required in virtually all other states that have adopted the ULC Amendments. Since the Section 9-521 Uniform Form of Written Financing Statement and Amendment has eliminated the SSN/FEIN and "e,f,g" boxes, the State of Texas will have a different UCC-1 Financing Statement form than that of most other states. The final decision on what version of the form will be left up to each state.

## Best Practices / Conclusion (contd...)

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- Acknowledging that Section 9.516 is not in line with the new IACA form UCC-1, an amended Section 9.516 has been drafted to bring the current version of Section 9.516 in line with the IACA form changes. Without this amendment, Section 9.516 will continue to require information no longer on the industry standard form and create a disconnect between the form and Texas financing statement requirements; such a disconnect would create the need for an addendum to the financing statement resulting in additional work and costs for the office of the Secretary of State and secured creditors and would also create a potential issue for smaller secured creditors that rely more heavily on industry forms in their daily operations. As of today, proposed Section 9.516 has not been introduced.

## Best Practices/Conclusion (contd...)

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- If filings in other states are required, counsel will need to determine if the ULC Amendments are effective in that state, and, if so, if Alternative A or B is in effect. Until all 50 states effect the ULC Amendments, counsel should be careful to minimize any risks presented by conflict of laws issues.
- If you wish to review the entirety of the ULC Amendments, they can be downloaded in full at:

<http://extranet.ali.org/directory/files/UCC9%20amendments%202010.pdf>.