

Financial Services Group

To: Our Clients and Friends

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Recent Legislative Action Regarding Changes to Article 9 of Georgia's Uniform Commercial Code (The "Georgia UCC")

I. CHANGES TO ARTICLE 9 OF THE GEORGIA UCC

During the last legislative session in Georgia which ended on March 28, 2013, legislation amending several sections of Article 9 of the Georgia UCC passed both the House and Senate. The legislation, Senate Bill 185, was introduced in February primarily to enact the 2010 Amendments to the Uniform Commercial Code promulgated by The American Law Institute and the National Conference of Commissioners on Uniform State Laws (the "2010 Uniform Amendments"). The amendments to the Georgia UCC will become effective on July 1, 2013. The following is an overview of some of the changes.

1. O.C.G.A. § 11-9-102(a)(70)¹ - Registered Organizations

Under the pre-amendment Georgia UCC, it is unclear what constitutes a "registered organization" or what document a secured creditor should consult in order to determine the organization's legal name for purposes of completing a financing statement. Under amended § 11-9-102(a)(70), "registered organizations" will be defined as organizations formed or organized by filing "public organic records."

The amendments make clear that the name listed on the financing statement for a "registered organization" should match the name found on the debtor's "public organic record," described as a document available to the public for inspection and which meets one of three criteria set out in § 11-9-102(a)(67). Such documents include articles of incorporation for a Georgia corporation, articles of organization for a Georgia limited liability company, and certificates of limited partnership for a

¹ Code references are to the post-amendment Code unless otherwise noted.

Georgia limited partnership. Notably, certificates of existence and listings on the Georgia Secretary of State's website or database do not pass muster under this amended definition.

The term "registered organization" also includes statutory trusts formed pursuant to a state statute requiring the trusts to file their organic records with the state, as opposed to common law trusts which are not formed by statute. Pre-amendment Article 9 makes no distinction between statutory trusts and common law trusts. Secured creditors should now look to the "public organic records" of these statutory trusts to determine the name to be provided on the financing statement as the name of the organization.

2. O.C.G.A. §11-9-316 - Continued Perfection of Security Interest Following Change in Governing Law

(i) Change in Location

Pre-amendment Article 9 of the Georgia UCC provides for continued perfection for four months following a change in the jurisdiction in which the debtor is located. O.C.G.A. §11-9-316(a)(2). However, the continued perfection extends only to collateral owned by the debtor at the time of the change in jurisdiction. The amendment will extend this four-month period of continued perfection to collateral acquired after the debtor's change in jurisdiction. O.C.G.A. §11-9-316(h). This change is particularly useful for secured creditors with security interests in after-acquired collateral. The grace period eliminates the risk of being unperfected in after-acquired collateral following the change in jurisdiction prior to the secured creditor filing a new financing statement in the new jurisdiction.

(ii) New Debtor in addition to Change in Location

Secured creditors are faced with a similar risk when a new debtor becomes bound by an existing security agreement. A secured creditor may encounter this situation when an existing corporation merges with another entity incorporated in another jurisdiction (reincorporation by merger). Pre-amendment Article 9 provides for a one-year grace period but only with respect to collateral existing at the time the new debtor became bound by the existing security agreement. The secured creditor would be unperfected in after-acquired collateral until the secured creditor files a new financing statement naming the new debtor. To address this problem, §11-9-316(i) will be amended to provide a four-month grace period for filing a new financing statement (or an amendment to add the name of a new debtor) during which the secured party will maintain a perfected security interest in collateral existing at the time the new debtor became subject to the security agreement and in after-acquired collateral. However, under §11-9-326(a), the security interest in the collateral acquired after the change in jurisdiction will be subordinate to other perfected security interests granted by the new debtor in the new jurisdiction prior to the existing secured party's perfection in the new jurisdiction.

3. O.C.G.A. § 11-9-503 - Name of Debtor and Secured Party

(i) Individual Debtor

The amendments provide clarity with respect to the name of an individual debtor to be stated on the financing statement, settling years of uncertainty in that regard. The possibility of an individual's name being stated differently on several government-issued documents has given rise to inconsistent application of O.C.G.A. § 11-9-503. It has created problems in knowing which name(s) to search to determine if existing security interests exist. In many instances, particularly with names of non-western origin, the English translation of individuals' names often differs, thus presenting additional uncertainty regarding the correct name to be provided on a financing statement. Pre-amendment § 11-9-503's provision that a financing statement "provides the name of a debtor" if it provides the "individual ... name of a debtor" is at least tautological, but provides no meaningful guidance in resolving these issues. Georgia has adopted what is referred to as Alternative A which provides that the name to be used on the financing statement should be the name appearing on a valid Georgia driver's license. O.C.G.A. § 11-9-503(a). If the individual does not have a valid Georgia driver's license, the financing statement should use the debtor's "individual name" (which is the current law) or the debtor's surname (usually the same as the last name) and first personal name.

(ii) Deceased Debtor

Situations involving deceased debtors present additional complications regarding the name to be provided on the financing statement. Because the debtor is deceased, the individual debtor's assets as well as the debts pass on to the individual debtor's estate, making the estate the new debtor. Pre-amendment Article 9 requires the provision of the name of the deceased debtor qualified by some indication that the debtor is an estate. Since the estate succeeds to the debtor's debts, this transfer should be viewed as a situation where a new debtor has become bound under the existing security agreement. The amendments acknowledge that the estate is essentially a new debtor but eliminate the need for filing a new financing statement in most cases by providing that the name on the financing statement should be the name of the decedent as indicated on the order appointing the personal representative of the decedent by a court with jurisdiction over the collateral in which the secured creditor has a security interest. O.C.G.A. § 11-9-503(f). An existing financing statement will remain valid as to the existing collateral so long as the location of the debtor does not change.

(iii) Common Law Trusts

As outlined above, statutory trusts will be included in the definition of "registered organizations" under O.C.G.A. § 11-9-102(a)(70) and will be treated as such by secured creditors in determining the name which should appear on the

financing statement. For common law trusts, including testamentary trusts, the name appearing on the financing statement should be the name of the trust or the name of the trust settlor when the trust has no name. O.C.G.A. §§ 11-9-503(a)(3) & 9-503(h). The name of the trustee will no longer be accepted as the correct name to be listed on a financing statement for a common law trust. The amendment also requires that the financing statement indicate that the collateral is held in trust. O.C.G.A. § 11-9-503(a).

4. O.C.G.A. § 11-9-518 - Inaccurate or Wrongfully Filed Record

“Correction statements” under pre-amendment O.C.G.A. § 11-9-518 will now be referred to as “information statements.” This new terminology will more accurately reflect the fact that the original statement remains of record and the subsequently-filed statement only provides information regarding the original statement. A secured party also will be authorized to file information statements if the secured party believes that an amendment to its financing statement of record was unauthorized. O.C.G.A. § 11-9-518(c).

5. O.C.G.A. § 11-9-406 & § 11-9-408 - Restrictions on Assignment of Promissory Notes

Practitioners and courts alike have struggled with reconciling § 11-9-406 with § 11-9-408 of the Georgia UCC regarding restrictions on the assignment and other transfers of promissory notes. Pre-amendment, both subsections provide that the grant of a security interest is effective notwithstanding underlying terms in a promissory note which prohibit assignments and transfers of such note. Section 11-9-406(e) provides that restrictions on the sale of a promissory notes would, however, be effective. Unlike § 11-9-406 which is a broader override of restrictive terms in the note, § 11-9-408(d) provides that, if the underlying prohibition or restriction on transfer is otherwise enforceable under non-UCC law, the transfer remains valid under § 11-9-408(a), but the assignee will be unable to enforce the note directly against its maker.

Section 11-9-406 will now provide that restrictions on sales will not be effective in the cases of sales pursuant to the enforcement of a security interest under § 11-9-610 (which addresses the disposition of collateral after a default) and § 11-9-620 (which allows for the acceptance of collateral in satisfaction of a debt after default). The amendment to § 11-9-408 is somewhat less clear as drafted but it appears that the drafters intended to allow assignees to enforce their security interests pursuant to §§ 11-9-610 and 9-620 directly against the maker of the underlying note.

Commentary further indicates that the drafters intended for the effectiveness (or lack of effectiveness) of anti-transfer or anti-assignment terms in a promissory note in a post-default situation to be governed by § 11-9-406 instead of § 11-9-408.

6. O.C.G.A. § 11-9-102(a) - Definitions

In addition to the definitions discussed above, a few other definitions will be amended. The definition of a "Certificate of Title" under O.C.G.A. § 11-9-102(a)(11) will be amended to include alternatives to a certificate of title maintained in the records of the issuing entity if certain statutory provisions are in place. The amendments also make changes to § 11-9-102(a)(7)'s definition of "authenticate" and § 11-9-102(a)(51)'s definition of "jurisdiction of organization."

7. O.C.G.A. §§ 11-9-502 and 11-9-515 - Record of Mortgage as Fixture Filing or Financing Statement

In addition to the adoption of the 2010 Amendments to the Uniform Commercial Code, Senate Bill 185 contains a very significant amendment to Article 9 of the Georgia UCC. Currently, under O.C.G.A. §§ 11-9-502 and 11-9-515, a recorded mortgage or deed to secure debt is not effective as a fixture filing. This is a non-uniform provision which forces a secured creditor to make separate UCC filings for fixtures. This year's legislation will amend the Georgia UCC to provide that a recording of a mortgage or deed to secure debt can be effective as a fixture filing. This amendment eliminates the need not only for two filings, but also the need for monitoring based on two separate records.

8. Other miscellaneous amendments

There are several other minor amendments that are worthy of mention.

(i) O.C.G.A. § 11-9-105 - Control of Electronic Chattel Paper

O.C.G.A. § 11-9-105 describes how secured creditors can obtain control over electronic chattel paper as a means of perfecting their security interests in such collateral. Currently, the requirements for perfection set out in O.C.G.A. § 11-9-105 establish a high standard which appears to make perfection unnecessarily difficult if not impossible to attain. The amendments will create a safe harbor for chattel paper transferred in compliance with the Uniform Electronic Transactions Act, by providing a test that establishes control under O.C.G.A. § 11-9-105(a) if satisfied. Although the pre-amendment test remains a safe harbor, the new test will likely be the preferred route to perfection by secured creditors.

(ii) O.C.G.A. § 11-9-307 - Location of Registered Organization as Debtor

This subsection will be amended to include the designated main office, home office or "comparable office" as the location of a financial institution organized under federal law. O.C.G.A. § 11-9-307(f).

(iii) O.C.G.A. § 11-9-317 - Interests that take Priority over Existing Security Interests

This section will be amended to broaden the types of collateral which can be purchased or licensed free of an existing security interest where the licensee or buyer has no knowledge of the existing security interest. The amendment will expand the types of collateral that a purchaser or licensee takes free of the existing security interest to include all collateral other than tangible chattel paper, tangible documents, goods, instruments or certificated securities.

- (iv) O.C.G.A. § 11-9-521 - Uniform Form of Written Financing Statement and Amendment.

The amendments incorporate by reference, the safe harbor forms as provided in the 2010 Amendments to the UCC.

- (v) O.C.G.A. § 11-9-516 - Content of Financing Statements

Financing statements will no longer be required to include the type of organization for the debtor or the jurisdiction of organization for the debtor.

- (vi) O.C.G.A. § 11-9-607 - Collection and Enforcement by Secured Party

This section will be amended to provide that a secured creditor may record an assignment of a mortgage or deed to secure debt in a non-judicial foreclosure sale only where the mortgagor or debtor defaults.

II. REPEAL OF ARTICLE 6 - NO ACTION TAKEN

Also of interest is the introduction of House Bill 554. The bill proposes a repeal of Article 6 of the Georgia UCC which relates to bulk transfers and other necessary amendments in light of the repeal. Although no action was taken on House Bill 554 this past legislative session, it is anticipated that the bill will be reintroduced in the next legislative session.

If you have any questions or would like more information about the changes to the Georgia UCC, please contact Don Nelms or Mica Germain:

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