



BACKGROUND MATERIAL CONCERNING SENATE BILL No. 1226

**AN ACT ADOPTING REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL
CODE ON SECURED TRANSACTIONS**

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On Behalf of

THE CONNECTICUT BAR ASSOCIATION

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On Behalf of
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March 5, 2001

I. INTRODUCTION

- A. **Introduction to Article 9:** Article 9 of the Uniform Commercial Code (generally referred to herein as “**Article 9**”) states the law regulating security interests in personal property and with the sales of accounts, contract rights and chattel paper. It states the methods of creating and perfecting security interests in tangible and intangible personal property and the priority rules governing conflicts between interests of parties, such as other lien creditors, in property subject to such security interests. Article 9 is enacted as part of the Uniform Commercial Code in Title 42a of the Connecticut General Statutes.

Article 9 has been adopted by all of the states in the United States and the provisions of Article 9 are the primary basis upon which financing of personal property by borrowers within the United States is accomplished. However, in addition, after the initial enactment of Article 9 other statutory schemes were enacted in Connecticut using the Article 9 filing system for perfecting and establishing the priority of interests not created under Article 9. These non-Article 9 liens include state tax liens (under CGS §12-35a), municipal tax liens (under CGS §12-195a et seq.), federal lien registration (under CGS §49-32a), judgment liens on personal property (under CGS §52-355a) and numerous other provisions regarding financing by state agencies and authorities and coordination of lien provisions scattered throughout the General Statutes.

- B. **General Legislative History of Article 9:** Article 9 was originally enacted in Connecticut as part of the Uniform Commercial Code in 1959 as P.A. 133. The last major revision to Article 9 was proposed in 1972 and enacted in Connecticut in 1976 as P.A. 76-369. Since that date minor amendments were enacted to conform Article 9 provisions with changes to other Articles of the Uniform Commercial Code, however, no major revision was contemplated until the preparation and the approval by the American Law Institute and the National Conference of Commissioners of Uniform State Laws in 1998 of the subject major revision.

C. **General Legislative History of Revised Article 9:** In 1990, as part of the continuing review and revision of the Uniform Commercial Code, the Permanent Editorial Board of the Uniform Commercial Code, with the support of the American law Institute and the National Conference of Commissioners of Uniform State Laws, appointed a study committee to review Article 9 and the case law and issues that arose since its enactment and to recommend whether revisions should be made to correct any problems which were identified. In 1993, in response to the report of the Article 9 study committee, a drafting committee was appointed, which sought and incorporated the views of a wide variety of affected parties, interest groups, professional associations and academic leaders. The drafting committee met periodically and drafted, what can be best characterized as, a total re-write of Article 9. The apparent thrusts of the revision were to correct problems and uncertainties in the scope of Article 9, to bring Article 9 into the internet age by making its provisions “medium neutral” and to provide more explicit rules for many transactions, so to reduce the considerable volume of litigation relating to Article 9 provisions. [As a non-scientific illustration, note that the Uniform Commercial Code Digest, a publication that reports on cases under the Uniform Commercial Code throughout in the United States, currently consists of 37 volumes, of which 13 volumes, or approximately 35%, is devoted to cases under Article 9 alone.] In May and July of 1998, the American Law Institute and the National Conference of Commissioners of Uniform State Laws, respectively, approved the drafting committee’s draft on revised Article 9 (referred to herein as “**Revised Article 9**”), final drafting committee comments were then prepared, and Revised Article 9 was submitted in 1999 to the states for approval. Revised Article 9 was drafted with a uniform effective date of July 1, 2001, to permit all of the states to enact Revised Article 9 before it became effective. Based upon information from the National Conference of Commissioners on Uniform State Laws, as of this writing twenty nine (29) jurisdictions have adopted Revised Article 9¹ and Revised Article 9 has been introduced and is currently pending in another nineteen (19) states², including Connecticut.

In March of 2000 the Judiciary Committee of the Connecticut General Assembly requested the Connecticut Law Revision Commission to study revised Article 9 and to report to it for the 2001 session. The Advisory Committee was established with members of the Bar from the commercial law and bankruptcy, real property and consumer sections of the Connecticut Bar Association, as well as affected interest groups and departments and agencies of the State Government agencies, including the Office of the Secretary of the State. The Committee met, generally on a bi-weekly basis, from May, 2000 through January 11, 2001, reviewed Connecticut law impacts as well as revisions in the other

¹ States that have adopted Revised Article 9 are Alaska, Arizona, California, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and West Virginia. The District of Columbia has also adopted Revised Article 9.

² States in which Revised Article 9 has been introduced and are pending are Alabama, Arkansas, Colorado, Connecticut, Georgia, Idaho, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Wisconsin and Wyoming. Enactment is also pending in the U.S. Virgin Islands.

states that had adopted revised Article 9, and prepared recommended text for adoption in Connecticut. The Law Revision Commission approved the Advisory Committee's recommended text and referred it to the Judiciary Committee. This is, essentially, the subject proposed Bill.

II. OVERVIEW OF REVISED ARTICLE 9

- A. **Overview of Official Version of Revised Article 9:** The following discussion in this sub-section is reprinted, with permission, from the web site of the National Conference of Commissioners of Uniform State Laws, at www.nccusl.org/uniformact_summaries/uniformacts-s-uccra9st1999.htm:

The Uniform Commercial Code has eleven substantive articles. Article 9, Secured Transactions, may be the most important of the eleven. Article 9 provides the rules governing any transaction (other than a finance lease) that couples a debt with a creditor's interest in a debtor's personal property. If the debtor defaults, the creditor may repossess and sell the property (generally called collateral) to satisfy the debt. The creditor's interest is called a "security interest." Article 9 also covers certain kinds of sales that look like a grant of a security interest.

The operation of Article 9 appears deceptively simple. There are two key concepts: "attachment" and "perfection." These terms describe the two key events in the creation of a "security interest." Attachment generally occurs when the security interest is effective between the creditor and the debtor, and that usually happens when their agreement provides that it take place. Perfection occurs when the creditor establishes his or her "priority" in relation to other creditors of the debtor in the same collateral. The creditor with "priority" may use the collateral to satisfy the debtor's obligation when the debtor defaults before other creditors subsequent in priority may do so. Perfection occurs usually when a "financing statement" is filed in the appropriate public record. Generally, the first to file has the first priority, and so on.

Article 9 relies on the public record because it provides the means for creditors to determine if there is any security interest that precedes theirs--a notice function. A subsequent secured creditor cannot complain that his or her grant of credit was made in ignorance of the prior security interests easily found in the public record, and cannot complain of the priority of the prior interests as a result. Every secured creditor has a priority over any unsecured creditor.

The somewhat simple description in the prior paragraphs should not mislead anyone. Article 9 is not simple. There are substantial exceptions to the above-stated perfection rule, for example. Filing is not the only method for perfection. Much depends upon the kind of property that is collateral. Possession of collateral by the secured party is an alternative method of perfection for many kinds of collateral. For some kinds of property, control (a defined term) either perfects the

interest or provides a better priority than filing does. There are kinds of transactions for which attachment is perfection. Priority is, also, not always a matter of perfecting a security interest first in time.

The following numbered topics highlight Article 9 as revised in 1999. They are not a treatise on Revised Article 9, but are a schematic summary of its relevant changes.

1. **The Scope Issue**: The 1999 revision expands the "scope" of Article 9. What this means literally is that the kinds of property in which a security interest can be taken by a creditor under Article 9 increases over those available in Article 9 before revision. Also, certain kinds of transactions that did not come under Article 9 before, now come under Article 9. These are some of the kinds of collateral that are included in Revised Article 9 that are not in original Article 9: sales of payment intangibles and promissory notes; security interests created by governmental debtors; health insurance receivables; consignments; and commercial tort claims. Nonpossessory, statutory agricultural liens come under Article 9 for determination of perfection and priority, generally the same as security interests come under it for those purposes.

2. **Perfection**: Filing a financing statement remains the dominant way to perfect a security interest in most kinds of property. It is clearer in Revised Article 9 that filing a financing statement will perfect a security interest, even if there is another method of perfection. "Control" is the method of perfection for letter of credit rights and deposit accounts, as well as for investment property. Control was available only to perfect security interests in investment property under old Article 9. A creditor has control when the debtor cannot transfer the property without the creditor's consent. Possession, as an alternative method to filing a financing statement to perfect a security interest, is the only method for perfecting a security interest in money that is not proceeds of sale from property subject to a security interest. Automatic perfection for a purchase money security interest is increased from ten days in old Article 9 to twenty days in Revised Article 9. Attachment of a purchase money security interest is perfection, at least for the twenty-day period. Then another method of perfection is necessary to continue the perfected security interest. However, a purchase money security interest in consumer goods remains perfected automatically for the duration of the security interest.

3. **Choice of Law**: In interstate secured transactions, it is necessary to determine which state's laws apply to perfection, the effect of perfection and the priority of security interests. It is particularly important to know where to file a financing statement. The 1999 revisions to Article 9 make two fundamental changes from old Article 9. In old Article 9, the basic rule chooses the law of the state in which the collateral is found as the law that governs perfection, effect of perfection, and a creditor's priority. In Revised Article 9, the new rule chooses the state that is the location of the debtor. Further, if the debtor is an entity created by

registration in a state, the location of the debtor is the location in which the entity is created by registration. If an entity is a corporation, for example, the location of the debtor is the state in which the corporate charter is filed or registered. In old Article 9, the entity that is a debtor is located in the state in which it has its chief executive office. These changes in basic choice of law rules will change the place in which a financing statement is filed in a great many instances from the place it would have been filed under old Article 9. At the same time, the location of the debtor establishes a more certain place to perfect than the old rule does. Collateral shifts location much easier than the debtors do.

4. **The Filing System:** Improvements in the filing system in the 1999 revisions to Article 9 include a full commitment to centralized filing--one place in every state in which financing statements are filed, and a filing system that escorts filing from the world of filed documents to the world of electronic communications and records. Under Revised Article 9, the only local filing of financing statements occurs in the real estate records for fixtures. Fixtures are items of personal property that become physically part of the real estate, and are treated as part of the real estate until severed from it. It is anticipated that electronic filing of financing statements will replace the filing of paper. Paper filing of financing statements is already disappearing in many states in 1999, as Revised Article 9 becomes available to them. Revised Article 9 definitions and provisions allow this transition from paper to electronic filing without further revision of the law. Revised Article 9 makes filing office operations more ministerial than old Article 9 did. The office that files financing statements has no responsibility for the accuracy of information on the statements and is fully absolved from any liability for the contents of any statements received and filed. Financing statements may, therefore, be considerably simplified. There is no signature requirement, for example, for a financing statement.

5. **Consumer Transactions:** Revised Article 9 makes a clearer distinction between transactions in which the debtor is a consumer than prior Article 9 did. Enforcement of a security interest that is included in a consumer transaction is handled differently in certain respects in the 1999 revisions to Article 9 than it was pre-1999. Examples of consumer provisions are: a consumer cannot waive redemption rights in a financing agreement; a consumer buyer of goods who pre-pays in whole or in part, has an enforceable interest in the purchased goods and may obtain the goods as a remedy; a consumer is entitled to disclosure of the amount of any deficiency assessed against him or her, and the method for calculating the deficiency; and, a secured creditor may not accept collateral as partial satisfaction of a consumer obligation, so that choosing strict foreclosure as a remedy means that no deficiency may be assessed against the debtor. Although it governs more than consumer transactions, the good faith standard becomes the objective standard of commercial reasonableness in the 1999 revisions to Article 9.

6. **Default and Enforcement**: Article 9 provisions on default and enforcement deal generally with the procedures for obtaining property in which a creditor has a security interest and selling it to satisfy the debt, when the debtor is in default. Normally, the creditor has the right to repossess the property. Revised Article 9 includes new rules dealing with "secondary" obligors (guarantors), new special rules for some of the new kinds of property subject to security interests, new rules for the interests of subordinate creditors with security interests in the same property, and new rules for aspects of enforcement when the debtor is a consumer debtor. These are some of the specific new rules: a secured party (creditor with security interest) is obliged to notify a secondary obligor when there is a default, and a secondary obligor generally cannot waive rights by becoming a secondary obligor; a secured party who repossesses goods and sells them is subject to the usual warranties that are part of any sale; junior secured creditors (subsequent in priority) and lienholders who have filed financing statements, must be notified when a secured party repossesses collateral; and, if a secured party sells collateral at a low price to an insider buyer, the price that the goods should have obtained in a commercially reasonable sale, rather than the actual price, is the price that will be used in calculating the deficiency.

B. **Notable Connecticut Law Revision Commission Changes to Official Draft**: Following are a number of the more significant changes made by the Connecticut Law Revision Commission (the "**Commission**") as the result of the Advisory Committee recommendations and comments received. The following is not intended to be a complete list or discussion of these changes, reference should be made to the Commission report for a complete list of changes from the Revised Article 9 Official Draft and reasons for such changes.

1. **Scope Changes**: In response to comments by the Office of the Treasurer, the Commission excepted public finance transactions from Article 9 by deleting Revised Article 9 §9-109(c)(2) and adding a new Revised Article 9 §9-109(d)(14) to preserve the existing exception in Article 9. Exceptions to the scope of Revised Article 9 were also added in Revised Article 9 §§9-109(d)(15), 9-406(i), 9-408, and elsewhere in Revised Article 9, for assignments of lottery winnings, workers compensation payments and structured settlement payments pursuant to other state statutes and mirroring changes made by other states.

2. **Real Estate Interests**: Numerous changes were made throughout Revised Article 9 to conform it to the Connecticut "title" theory of real estate mortgages. For example, a change was made to Revised Article 9 §9-607(b), relating to enforcement of assigned real estate interests by power of sale, to permit such enforcement only if power of sale provisions are permitted under other Connecticut law, which is not currently permitted – all such enforcement actions are currently pursuant to a foreclosure action in Connecticut Superior Court.

3. **Article 2A References**: References to Article 2A of the Uniform Commercial Code were deleted in the Commission draft, since Connecticut has

not adopted Article 2A. The Advisory Committee felt that Connecticut should adopt Article 2A, since it is the only remaining state to do so, however such recommendation was beyond the scope of the Advisory Committee mandate. However, in the event that Connecticut adopts Article 2A, in this legislative session or after, changes will be required to Revised Article 9 to restore the deletions.

4. **Changes to Consumer Provisions**: The following changes were made to the Revised Article 9 to satisfy the concerns of consumer representatives on the Advisory Committee and to make clear to practitioners the interplay between Revised Article 9 and Connecticut consumer protection statutes, such as the Retail Instalment Sales Financing Act (CGS §36a-770 et seq., cited as Part XI of Chapter 669 in the Commission draft).

- a. **Payment Allocation Provisions for Consumer Purchase Money Security Interests**: Revised Article 9 § 9-103(2) was added to the Commission draft incorporating rules for allocation of payments in consumer transactions, which among other things, extinguishes interests with purchase money priority first. This is similar to the provision adopted in Tennessee.
- b. **Cumulative Exercise of Remedies**: An amendment to revised Article 9 §9-601(c) negates the ability to cumulatively exercise remedies in a consumer transaction if law other than Revised Article 9 provides such a restriction. This permits other state statutes, such as the Retail Instalment Sales Financing Act, to limit such cumulative exercise of remedies if provided in such statutes.
- c. **Agreement of Standards of Performance**: Revised Article 9 §9-605(a) permits the parties to agree upon the standards by which fulfillment of duties under Revised Article 9 are fulfilled. Revised Article 9 permits such standards if they are not “manifestly unreasonable”. The Commission modified Revised Article 9 §9-605(a) in consumer cases to allow invalidation of such agreed standards if they are merely “unreasonable”.
- d. **Evidence of Actual Agreement to Retain Collateral In Satisfaction of Obligation**: Revised Article 9 §9-620(b) does not permit a secured party to be “deemed” to have accepted collateral in satisfaction of its indebtedness unless it is set forth in an agreement authenticated by the secured party and the other requirements of the section are met. The Commission draft adds a new sub-section (h) permitting a consumer to prove such an actual agreement by the secured party by evidence other than an authenticated agreement.

- e. **Deficiencies:** Revised Article 9 generally adopts the “rebuttable presumption” rule in the event of secured party noncompliance with Revised Article 9, but leaves the rule in consumer cases to other law. [Connecticut cases had adopted the “rebuttable presumption” rule under Article 9, so this does not result in a change from current law.] The Commission draft cross-references the Retail Instalment Sales Financing Act as one source of such other law in consumer cases in Revised Article 9 §9-626(b) and in a new §9-627(e).
 - f. **Secured Party Penalty for Failure to Send Deficiency or Surplus Notice:** The Commission draft deletes Revised Article 9 §9-628(d), which excepted secured parties from the consumer penalty provisions for failure to send required notices of surplus or deficiency.
 - g. **Restriction of Security Interest in Household Furniture:** The Commission draft recommends that the Connecticut non-uniform provision in CGS §42a-9-209 be retained. This provision restricts security interests in household furniture to purchase money security interests in such goods.
5. **Duties of Secured Party to Apply Interest:** The Commission draft of Revised Article 9 §9-207(c) expressly permits agreements, other than by consumers, for the secured party to hold interest or other money constituting proceeds of collateral as additional collateral without applying such proceeds to the indebtedness. The Advisory Committee wanted to be sure that the current practice of using cash collateral or pledge accounts would not be changed by Revised Article 9.
6. **Additional Time to Discover Collateral Moved to New Jurisdiction:** The Commission draft adds a new Revised Article 9 §9-207(c) allowing a secured party up to one (1) year to discover and to perfect its security interest in collateral moved to a new jurisdiction. This change is the same as the provision adopted in Maryland and make it clear that the secured party has one (1) year to perfect, regardless of whether the party in possession of the collateral becomes an “obligor” under the security agreement.
7. **Duty to Forward or Return Payment Received After Assignment:** An amendment to Revised Article 9 §9-406(a) imposes a statutory duty on a former secured party that receives a payment from an account debtor (not limited to consumers) after notice of an assignment of the obligation to another party was given to the account debtor to either forward that payment to the new secured party or to return the payment to the debtor. Since the account debtor would remain liable to the new secured party notwithstanding such payment, the Advisory Committee recommended that such a statutory obligation be expressly provided, notwithstanding the availability of common law remedies, such as unjust enrichment, to achieve the same end.

8. **Damage Due to Removal of Collateral**: The Commission draft changes Revised Article 9 §9-335, relating to accessions, and §9-604(d), relating to real property or fixtures, to require the secured party to pay the debtor, as well any other party, for the repair of any physical injury to the remaining property resulting from such removal. The Advisory Committee felt that this provision would reduce waste or “spite” enforcement by a secured party.

9. **Filing Provisions**: A number of changes were made by the Commission to Part 5 of Revised Article 9 relating to the filing provisions to conform them to the Connecticut filing offices and real property recording practices. The Commission draft amended Revised Article 9 §9-521 to permit the Secretary of the State to adopt and to change the required forms by regulation, rather than requiring amendment of the statute, in accordance with the approach also adopted in several other states. Sections 5-519 and 9-520 were also modified to permit the Office of the Secretary of the State up to five (5) business days, rather than three (3) business days, to perform its obligations under those sections.

10. **Limit on Exculpation If No Address of Debtor or Obligor**: Revised Article 9 §9-605(b) excuses the secured party from liability if the secured party does not know how to communicate with the debtor or obligor. The Commission draft added a sub-section (b) to this section, making it clear that the knowledge of the secured party of such address is subject to the general obligation of good faith under the Uniform Commercial Code, so the secured party cannot escape liability by acting in bad faith – for example, by ignoring change of address notices. This change is not limited to consumer debtors or obligors.

11. **Electronic Self Help**: The Commission draft adds a new Revised Article 9 §9-609(d) restricting the right of the secured party to take any action to enforce its rights by “electronic self help” until fifteen (15) days advance notice is given to the debtor of its intention to take such action, the nature of the claimed default and the name and contact information for a person with whom the debtor may discuss the matter. This section also permits consequential damages for violations of such restrictions by a secured party. This restriction is not limited to consumers.

C. **Notable Connecticut Law Revision Commission Changes to Other Statutes**: Following are a number of the changes to other Connecticut Statutes utilizing the Article 9 filing system and priority provisions to establish or determine rights:

1. **Connecticut State Tax Liens**: CGS §12-35a and CGS §12-195b(a) would be amended to allow a filing in the Office of the Connecticut Secretary of the State to perfect a tax lien on personal property located within the State of Connecticut. This was necessary since Connecticut enactment of Revised Article 9 would not permit the filing or perfection by filing in the UCC records of another

state. This is in accordance with the approach taken by other states that have adopted Revised Article 9.

2. **Municipal Tax Liens**: The same approach, perfecting municipal tax liens on property located in the State of Connecticut by filing in the Office of the Connecticut Secretary of the State is adopted for municipal tax liens under the proposed amendment to CGS §12-195e.

3. **Post-Judgment Liens**: Judgment liens on tangible personal property located within the State of Connecticut may be perfected by filing in the Office of the Connecticut Secretary of the State under the proposed revisions to CGS §52-355a(a). Priorities would be established based upon the date and the time of such filing, although enforcement of such liens would only be by execution, as provided under CGS §52-355a(c).

III. CRITICAL NEED FOR ENACTMENT OF REVISED ARTICLE 9 WITH JULY 1, 2001 EFFECTIVE DATE OR NEED FOR STOP-GAP LEGISLATION

Revised Article 9 §9-701 contains a uniform effective date of July 1, 2001. The Official Comments to Revised Article 9 §9-701 state that “horrendous complications” will result if Revised Article 9 is not uniformly enacted by this date. The problem stems from the fact that strikingly different conflicts of law rules exist between Article 9 and Revised Article 9.

The problem can be illustrated by the example of a debtor corporation that is formed under the law of Delaware (which has adopted Revised Article 9 with the July 1, 2001 effective date) that is doing business within the State of Connecticut. If the State of Connecticut does not adopt Revised Article 9, or delays its effective date or the effective date of its filing provisions beyond July 1, 2001, the issue of whether a security interest is perfected would be governed by different law depending upon which state was the forum for the litigation. If litigation was commenced in Delaware, or in any other jurisdiction that had adopted Revised Article 9, Revised Article 9 §9-301(1) would use the law where the debtor was organized (i.e. Delaware) to determine whether the security interest was perfected. If, in this example, the action was litigated in Connecticut or in any other state operating under the current Article 9, the current rules, generally pointing to the law of the State of Connecticut would be applied to determine whether the security interest was perfected. The result would then turn on where the action was litigated. Further, in this example, the debtor, or a creditor with an intervening lien, such as the Internal Revenue Service, could shop for the most advantageous forum to file a bankruptcy proceeding or otherwise to litigate the perfection issue – the one certain thing is that Connecticut, in this example, would not be the forum of choice. One effect would be to allow additional bankruptcy “strong arm” attacks on perfection – directly contrary to the policy of Revised Article 9 to expand the reach of perfection so to preserve security interests from avoidance in bankruptcy.

The expected response of secured lenders to this situation is obvious. Financing entities with operations in, or organized under, jurisdictions with differing law will become difficult and more expensive to obtain, since lenders will insist upon complying with both the current Article 9 and Revised Article 9 rules and each such loan will require greater scrutiny by counsel for lenders and consequent increased costs to debtors. Secured parties may also require, as a condition of their loans, that debtors “redomesticate” into more favorable jurisdictions.

Simply delaying the effective date of the filing provisions, alone, will result in worse problems, since with respect to foreign entities the conflicts of law problem will remain and the problem will be compounded by the fact that the law will be applicable to transactions wholly within the State of Connecticut and that the provisions with do go into effect will be inconsistent with the old statutory filing system. An example of one inconsistency is that the Secretary of State will have to reject financing statements not signed by the debtor, under current CGS §42a-9-401, even though “authentication” of the filing of such financing statements is provided for the security agreement and is contemplated in the remainder of the Revised Article 9. Another example is that a delay in the effectiveness of the filing provisions alone, will limit the one-year “safe harbor” provided in the Revised Article 9 transition rules. Revised Article 9 §9-703(b) allows one year of continued perfection after the “effective date” of Revised Article 9 to avoid unfair surprise and to allow secured parties to make appropriate filings to continue the perfection of their security interests. Delay in implementing the filing provisions will not delay the running of this “safe harbor” period, even though appropriate transition filings will not yet be permitted in Connecticut.

In short, uncertainty and legal challenges will result from failure to adopt Revised Article 9 with the uniform effective date – currently July 1, 2001. Although complex “stop-gap” conflict of law provisions might be able to be drafted to lessen the impact of failure to adopt Revised Article 9, it is clear that the “horrendous complications”, including uncertainty and increased costs, will be upon us if Connecticut does not adopt Revised Article 9 with the uniform effective date.

For the foregoing reasons, the Board of Governors of the Connecticut Bar Association and the Executive Committee of the Commercial Law and Bankruptcy Section and the Business Law Section have taken positions supporting the adoption of Revised Article 9 and urge such adoption with a July 1, 2001 effective date. Since discussions with the Office of the Secretary of the State indicate that implementation on July 1, 2001 is possible provided that there is sufficient lead time between passage of the Bill and the effective date, we urge that Revised Article 9 be adopted early in the legislative session as possible, to permit implementation in time for the uniform effective date.

IV. RESPONSE TO SPECIFIC QUESTIONS RAISED TO DATE RELATING TO ENACTMENT OF REVISED ARTICLE 9

A. **Effect of Drafting Committee Official Comments**: Although the Connecticut General Assembly does not adopt the Official Comments to the Uniform Commercial Code as part of the adoption of specific Articles, the Commission draft of revised Article 9 noted that

. . . Because the proposed revisions are to existing Article 9, which Connecticut has substantially enacted, the summary of the proposed revision that is set out in the commentary to the Official draft applies to the Connecticut draft except with respect to the limited nonuniform amendments noted [in the Commission draft]. The introductory commentary to the Official draft provides an overview of the revisions. With respect to proposed revisions to particular sections, resort should be made to the official comments to those sections in the Official draft. . . .

The Official Comments are particularly important with respect to Revised Article 9, since a number of problems presented in case law, as well as guidance to courts and attorneys as to the proper interpretation of the Official draft, are contained in the Official Comments. For example, in the Connecticut case of Dick Warner Cargo Handling Corp. v. Aetna Business Credit, Inc., 746 F.2d 126, 39 UCC Rep. Serv. 762 (2d Cir, 1984), the United States Court of Appeals for the Second Circuit stated that “the conclusion is irresistible that a drafting failure occurred with respect to §9-301(4)” of Article 9, as adopted in Connecticut – this problem was addressed in Comment 4 to the Official Comment to Revised Article 9 §9-323.

B. **Loss of Filing Revenue**: Questions have been raised as to the negative impact upon the UCC filing office of the Office of the Connecticut Secretary of the State resulting from the loss of revenue from the change in place of UCC filings in Revised Article 9³. Based upon my years of practice and review of the provisions of Revised Article 9, I do not believe that the impact will be significant for several reasons. First, the vast majority of corporations, limited liability companies and limited partnerships in Connecticut have been organized under the law of the State of Connecticut and would not be subject to this change – individuals, general partnerships, trusts and similar non-registered entities located in Connecticut would continue to require filings in Connecticut. Second, Revised Article 9 adopts an “open file” concept, in which additional filings, such as correction statements, partial assignments and amendments are permitted – these additional filings should provide additional volume for the Connecticut filing offices. Third, as noted above, post-judgment lien filings, state and municipal tax liens and similar non-UCC liens will continue to be filed in Connecticut for property located in the state, regardless of the location of the organization of the debtor. Finally,

³ Please note that the provisions for filing of fixture filings in the office of the Town Clerks for fixtures or other real estate interests located there has not changed, so Revised Article 9 should not have an impact upon the filing volume in the office of the Town Clerks.

for the foreseeable future, it is likely that secured parties will adopt a “belt and suspenders” approach to filing of financing statements, requiring filings under the new and the old Article 9 schemes, particularly if adoption has not occurred in all jurisdictions in the United States.

C. **Dual Filing Requirement**: A question has been posed as to the advisability of requiring filing of a financing statement in Connecticut, in addition to the requirements for filing in the jurisdiction in which a registered organization debtor is organized. Such a requirement would likely not be effective and could lead to significant problems. Since Revised Article 9 provides that the law of the jurisdiction where the registered organization debtor is organized governs perfection, Connecticut’s provision would not be applicable to foreign organizations – it would only be applicable to organizations located within or organized under the laws of the State of Connecticut, where such a requirement is not necessary. In addition, such a requirement would lead to uncertainty if the debtor fails to file such a financing statement in Connecticut – such a failure would constitute a failure to perfect and would allow the same forum-shopping and bankruptcy or lien creditor invalidation of perfected security interests that would occur if Connecticut were to fail to adopt Revised Article 9. If Connecticut attempts to amend these conflict of law rules, the same problem will occur. Finally, such an action might impel other states to pass similar laws, restricting perfection with respect to Connecticut entities unless a financing statement is filed there. In short, this would create a considerable mess.

D. **Consumer Provisions**: A concern has been expressed that Revised Article 9 is less “consumer friendly” than the current Article 9. This is not so. The Official Drafting Committee, after significant debate and compromise, adopted the consumer protection provisions which were present in current Article 9 and explicitly excepted consumer transactions from new rules for determination of deficiencies and other enforcement matters for commercial transactions – these consumer provisions were left to other state case law and statutes relating to consumers. The Connecticut Commission draft, as noted from the extensive discussion of Connecticut revisions in section II. B.4 above, added significant nonuniform amendments protecting consumers and debtors – these provisions were extensively discussed and afford consumers far greater protections than most other states adopting Revised Article 9 have enacted.

E. **No Unfair Surprise to or Burden on Debtors From Filing Changes**: Debtors will not be unfairly surprised by enactment of Revised Article 9 with a July 1, 2001 effective date. As noted above, the transition rules provide a period of at least one (1) year from the effective date of continued perfection during which filing of financing statements or other required actions can be taken by secured parties to continue the perfection of their security interests. Further, since Revised Article 9 provides that by signing a security agreement the debtor authorizes the *secured party* to file financing statements to perfect its interest, the burden is on the secured party, not the debtor, to properly perfect within the applicable one-year (or longer) time frame.

V. CONCLUSION

Article 9 is a complex body of commercial law underlying a vast array of financial and business transactions. Revised Article 9 has been drafted to correct problems experienced during the last 30 years of its existence, to simplify procedural and filing requirements and to anticipate the age of electronic documents and paperless commercial transactions. However, given the changes in scope and more detailed rules for specific situations the drafting of Revised Article 9 is more complicated than current Article 9.

The Connecticut Law Revision Commission draft of Revised Article 9 incorporates the efforts of experienced practitioners of commercial law and bankruptcy, as well as consumer interests and the needs of state agencies. The limited nonuniform amendments in the Commission draft of Revised Article 9 reflect their concerns and properly incorporate Revised Article 9 into the body of Connecticut law.

As noted above “horrendous complications” will result from failure of Connecticut to adopt Revised Article 9 or to delay its effective date or the effectiveness of its filing provisions. For this reason the Connecticut Bar Association as a whole, as well as its Commercial Law and Bankruptcy Section and Business Law Section, urge the adoption of Revised Article 9 with the uniform effective date of July 1, 2001. We recommend adoption of Revised Article 9 as early in the legislative session as possible to permit the Office of the Secretary of the State to implement the filing provisions on that date, as well as to permit the members of the Bar and businesses sufficient time to become acquainted with its provisions.