Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

OMNIBUS UNIFORM COMMERCIAL CODE MODERNIZATION ACT

Legislative Memorandum Relating to Chapter XXX

Memorandum in Support, New York State [Assembly] [Senate]

Text of Law, See Chapter XXX.

BILL NUMBER: [A xxx]

[S xxx]

SPONSOR:

PURPOSE OR GENERAL IDEA OF BILL: To modernize the Uniform Commercial Code (the "UCC") and bring New York up to date with comparable revisions enacted in other states. Historically, New York has been a leading state for commercial law and this status generates substantial economic activity and employment in the State of New York. Section 5-1401 of the General Obligations Law evidences a legislative desire to permit parties who may be located outside of the State to select New York law to govern their transactions. Unfortunately, New York has fallen significantly behind its sister states in modernizing its commercial law. Forty states have now enacted Revised Article 1 of the UCC and the revision is currently pending in two other states. Every state other than New York has enacted the 1990 revision to Articles 3 and 4 of the UCC. Forty states have now enacted Revised Article 7 of the UCC and the revision is currently pending in two other states. Eight states have now enacted the 2010 Amendments to Article 9 of the UCC and the amendments are currently pending in five other states.

ARTICLE 1

SUMMARY OF SPECIFIC PROVISIONS: Other articles of the UCC have been revised and amended to accommodate changing business practices and developments in the law, and these changes need to be reflected in an updated Article 1. Revised Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections and adding gender-neutral terminology. In addition, revised Article 1 contains several changes to add greater clarity with regard to provisions of Article 1 that have been identified as confusing or imprecise. Finally, revised Article 1 contains certain substantive changes where developments in the law have led to the conclusion that substantive change was needed, such as: (1) revised section 1-102 clarifies the scope of Article 1 by expressly stating that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the UCC; (2) revised section 1-103 clarifies the application of supplemental principles of law with clearer distinctions as to when the UCC is preemptive; (3) the statute of frauds requirement aimed at transactions beyond the coverage of the UCC has been deleted; and (4) under revised Article 1, evidence of "course of performance" may be used along with course of dealing and usage of trade to interpret a contract.

JUSTIFICATION: Article 1 impacts every transaction governed by the UCC, including any sale of goods, any transfer of a check or other negotiable instrument, any commercial electronic funds transfer, any letter of credit, any warehouse receipt or bill of lading, any transfer of an investment security, and any credit transaction in which a security interest is taken in specific collateral. These are the transactions governed by specific articles of the UCC and encompass the bulk of commercial activity in the American economy. The rules and definitions of Article 1 apply across these specific articles, binding these various articles together into one code. Because of this interrelationship, enactment of the articles discussed below without Revised Article 1 would require numerous spot amendments to those articles in order to "patch in" the appropriate Article 1 definition or rule.

ARTICLES 3 AND 4

SUMMARY OF SPECIFIC PROVISIONS: Article 3 governs negotiable instruments – checks and some notes. Article 4 governs bank deposits and collections, and establishes the legal framework for the customer's dealings with its bank. Together these Articles comprise a unit that governs instruments (and the debits and credits resulting therefrom) from the time they are issued until the time when final payment is made or the instrument is dishonored.

Revised Article 3 treats additional types of instruments as "negotiable," and therefore subject to the Article 3 rules. Included in the new definition are notes with variable rates of interest (such as variable rate mortgage notes), as well as checks that are not expressly made payable to order or to bearer. Because there are no legal rules covering non-negotiable instruments (except as courts may apply Article 3 by analogy), the revisions provide clarification of the rules that govern such instruments.

Likewise, Article 4 expands the definition of “bank” to include financial institutions other than commercial banks.

Many negotiable instruments are endorsed not by a writing on the back of the instrument, but by a writing on a separate piece of paper known as an “allonge.” The revisions clarify the status of such writings, permitting them to qualify as endorsements even if not pasted or stapled to the instrument and even if there is ample space on the instrument itself for an endorsement.

The revisions eliminate wasteful circular litigation in instances in which a check is stolen and the payee endorsement is forged. They clarify that the intended payee, having never received the check, retains its right to be paid by the drawer, although it cannot sue for conversion. The drawer retains its right to be recredited by its bank for unauthorized payment of the check, although it likewise cannot sue for conversion. The drawer’s bank recovers against the bank that dealt with the thief, thus, the loss falls on the bank that was best able to prevent it.

The revisions expressly state that a cashier’s check and a teller’s check are within the definition of “check,” and provide some new rules to protect payees of such checks from the bank’s unjustified refusal to pay such instruments at the behest of a customer who originally instructed the bank to issue the instrument, but has now decided to abort the payment. The revised rules discourage dishonor by making the bank liable for the damages caused to the payee, including, if advance notice has been given, the payee’s consequential damages.

New York law on accord and satisfaction – the practice of endorsing a check in payment of a disputed amount with the words “in full satisfaction” – is altered by the revisions. The revisions permit a debtor to discharge its debt by making a payment that conspicuously states that it is in full satisfaction of the debt, but offers protection to an organizational creditor by enabling it to avoid inadvertent discharge by notifying its debtors to send payment of such disputed amounts to a specific location other than the location at which payments are normally received. (A non-organizational creditor that inadvertently cashes such a check can reverse the discharge by returning the funds to the debtor.)

Automated processing is recognized in a number of places in the amendments. First, because most checks are not manually inspected, it is the customer’s obligation, upon issuing a postdated check, to inform its bank of that fact so that it is not inadvertently paid. Likewise, a customer that wishes to stop its check must describe the item with reasonable certainty so that the check can be flagged electronically.

Current Article 4 establishes the time when a stop order, legal process, or other instruction is received too late to affect payment of an instrument as the moment the check is “posted,” a term that contemplates a manual clerical process that is inconsistent with electronic processing. The revisions permit a bank to arbitrarily establish the cut-off time and date, within prescribed parameters.

The revisions provide for electronic presentment of checks and for retention of check images when checks are truncated. The rules governing electronic collection of checks and funds availability, however, have increasingly been federalized, largely as a result of New York’s long-standing failure to enact the revisions.

Finally, the revisions establish a comparative negligence standard in an instance in which both the bank and its customer were negligent with respect to a loss arising from an unauthorized signature or alteration of a check. Although this standard may have been novel when the revisions were first drafted, it is substantially identical to the Federal Reserve’s Regulation CC (governing check collection), which currently provides that: *“(c) Comparative negligence. If a person, including a bank, fails to exercise ordinary care or act in good faith under this subpart in indorsing a check (§ 229.35), accepting a returned check or notice of nonpayment (§§ 229.32(a) and 229.33(c)), or otherwise, the damages incurred by that person under § 229.38(a) shall be diminished in proportion to the amount of negligence or bad faith attributable to that person”*(12 C.F.R. 229.38(c)).

JUSTIFICATION: When the current versions of Articles 3 and 4 were enacted, in 1962, payments were paper-based, check processing was in its infancy, and banks were limited in their ability to branch within New York, much less nationally. Today these transactions are electronic, processing may be virtually instantaneous, and banks operate across state and national lines. Yet New York currently remains governed by an antiquated set of commercial laws that is increasingly no longer taught to law students, even within New York. These laws present a trap for the unwary advisor, who is likely to consult the uniform version of these Articles, not realizing that New York is the only state that has failed to enact even the 1990 amendments. Additionally, they present troublesome choice of law problems for practitioners when part of a transaction takes place in a “new statute” jurisdiction, and part in New York, resulting in a lack of predictability as to outcome.

The result of the failure to enact the revisions has been to render New York law increasingly irrelevant, as parties to banking transactions have sought to elect the law of another jurisdiction, whenever possible, and to resolve risk allocation issues governed by these Articles by contract or system rule. Additionally, federal agencies are now addressing by regulation payment issues that fall within the scope of Article 4, on the assumption that New York will not enact such revisions if they become part of the Uniform Commercial Code. Enactment of the revisions cannot erase the damage done, but will prevent the further erosion of New York’s payments law.

ARTICLE 7

SUMMARY OF SPECIFIC PROVISIONS: Article 7 governs “documents of title” – items such as bills of lading and warehouse receipts that control the right to the goods described therein during commercial storage and shipment. When goods are imported, they are frequently paid for by means of a letter of credit (issued pursuant to Article 5 of the Uniform Commercial Code) calling for payment against specific documents of title, as described in Article 7. Thus, although documents of title may appear to be obscure instruments, they are in fact utilized on a daily basis by New York businesses and residents importing goods into the State.

New York’s current Article 7 does not recognize electronic documents of title, and therefore does not permit goods covered by electronic documents to be transferred or financed. Revised Article 7 recognizes electronic documents of title, and establishes rules for the transfer of rights embodied therein from one person to another. Control of an electronic document of title is the equivalent of possession and indorsement of a tangible document of title. Revised Article 7 permits the conversion of electronic documents to tangible documents and vice versa. In addition, revised Article 7 extends statute of frauds requirements to include electronic records and signatures by creating new definitions of “record” and “sign”. The new definitions recognize information stored in electronic format and electronic symbols, respectively, as the term “writing” is replaced with the term “record” wherever used in the Article.

JUSTIFICATION: The revisions to Article 7 are consistent with the increasing recognition of electronic documents and instruments as equal in status to their paper counterparts under both New York and federal law.

ARTICLE 9

SUMMARY OF SPECIFIC PROVISIONS: Article 9 governs security interest in personal property. The Article was substantially revised and enacted in New York in 2001. The current bill contains targeted amendments (the “Amendments”) to Article 9 relating to the rules for the system for filing and searching financing statements, other discrete changes and some transition rules.

I. Changes Relating to the Filing Rules

The Amendments contain a number of changes related to the rules for the filing system.

A. Name to be Provided on a Financing Statement When the Debtor is an Individual

The most important change effected by the Article 9 revisions is that they establish the name to use when filing a UCC financing statement against a debtor who is an individual. Presently, there is no law that establishes the "legal name" of an individual. Many official documents issued to the same person – birth certificate, passport, and driver's license – frequently appear with different names, or variations of names. None of these may correspond with the name actually used by that person for business transactions. Foreign naming conventions further complicate matters, as the person's family name, rather than the given name, may appear first. Yet it is the responsibility of the secured party making a UCC financing statement filing to establish the correct legal name of the individual, at the risk of making a filing that is legally ineffective.

To provide greater guidance, any of the following names for an individual debtor would be sufficient as the debtor's name on the financing statement: (1) the debtor's name as shown on the debtor's driver's license if the debtor holds an unexpired driver's license issued by the state whose law governs perfection under Article 9's conflict of laws rules, (2) the individual name of the debtor, as under current Article 9, or (3) the debtor's surname and first personal name. If the debtor holds two driver's licenses issued by the state, the most recently issued driver's license is the one to which reference should be made to determine the debtor's name to be provided on the financing statement.

B. Definition of "Registered Organization"

The Amendments modify the definition of "registered organization" to reflect that an organization is a registered organization if it is formed or organized solely under the law of a single state by the filing of a public record with the state rather than, as under current Article 9, by the state merely being required to maintain a public record showing that the organization has been organized. This change will more accurately reflect that a registered organization includes an organization whose "birth certificate" emanates from the act of making a public filing.

Furthermore, the Amendments expand the definition of "registered organization" to include a common law trust that is formed for a business or commercial purpose and is required by a state's business trust statute to file with the state an organic record, such as the trust agreement for a common law trust. This change will mean that a Massachusetts business trust, for example, will be considered to be a registered organization rather than, as would appear to be the case under current Article 9, an organization that is not a registered organization.

C. Name of Registered Organization

The Amendments clarify that, for a financing statement to be sufficient, the name of the registered organization debtor to be provided on the financing statement is the name reflected on the "public organic record" of the registered organization. In most cases, a registered organization's "public organic record" is the publicly available record filed with the state to form or organize the registered organization.

D. Name of Debtor When Collateral is Held in Trust

The Amendments require that, when the collateral is held in a trust that is not a registered organization, the filer must provide in a separate part of the financing statement a statement that the collateral is held in trust. The reference to "collateral held in trust" replaces the reference under current Article 9 to the debtor being the trust or the trustee. The reference to the debtor being a trust or trustee was thought to be confusing in practice especially because typically under a common law trust in most states the debtor would be the trustee.

If the name of the settlor or testator is provided as the debtor's name, the filer must provide in a separate part of the financing statement sufficient information to distinguish the trust from other trusts of the same settlor or testator. That distinguishing information often could be, for example, merely the date of the trust agreement.

The requirement that this information be inserted in a separate part of the financing statement was intended to reduce the risk that a secured party would provide the information in the debtor's name block of the financing statement. Under the search logic of the filing office in some states, additional information provided in the debtor's name block may cause the financing statement to be ineffective if a search of the debtor's name without the additional information would fail to disclose the financing statement.

E. Name of Debtor When Collateral is Administered by a Personal Representative

Current Article 9 refers to the possibility that the debtor may be an estate. The amendments more accurately refer to collateral that is being administered by a personal representative of a deceased debtor. In such a case the name of the deceased debtor on the financing statement will be sufficient as a "safe harbor" if the name provided is the name of the debtor on the court order appointing the personal representative. If the appointment order contains more than one name for the debtor, the first name of the debtor on the appointment order is sufficient.

F. Debtor's Change of Location

Under current Article 9, if a debtor changes its location to a new jurisdiction, a secured party whose security interest was perfected by filing in the original jurisdiction has a period of up to four months to continue the perfection of its security interest by filing a financing statement in, or otherwise perfecting the security interest under the law of, the new jurisdiction. The four month grace period applies, however, only to collateral in which the secured party's security interest was perfected at time of the change of location. Of course, a security interest in property acquired by the debtor after the time of the change of location will not be perfected at the time of the change because the security interest in the after-acquired property will not attach until the property is acquired by the debtor and the debtor then has rights in the collateral. There is no grace period under current Article 9 for perfection of any security interest that may attach to post-change of location after-acquired property of the debtor.

The amendments add a grace period for the after-acquired property. They do so by providing that the financing statement filed in the original jurisdiction is effective with respect to collateral acquired within the four months after the debtor's location changes. The secured party can continue perfection beyond the four-month period by filing a financing statement or otherwise perfecting under the law of the new jurisdiction.

The amendments will provide greater protection for a secured party with a security interest in after-acquired property of its debtor if the debtor changes its location.

G. New Debtor

The Amendments provide similar protection for a security interest in after-acquired property if a new debtor becomes bound by the original debtor's security agreement and the new debtor is located in a different jurisdiction from the jurisdiction in which the original debtor was located. For example, if Old Debtor located in State A merges into New Debtor located in State B, under current Article 9 there is a grace period of up to one year for the secured party of Old Debtor to file a financing statement against New Debtor in State B to continue the effectiveness of the financing statement that the secured party filed in State A against Old Debtor. But the grace period applies only to a security interest that was perfected by filing in State A at the time of the merger. There is no grace period for perfection of any security interest that may attach to post-merger after-acquired property. Using an approach similar to that taken with respect to property acquired by a debtor after it relocates, the Amendments provide for a grace period of up to four months in the case of such an interstate merger.

As under current Article 9, a security interest in post-merger after-acquired property that is perfected solely by the financing statement filed by the secured party against Old Debtor in State A will be subordinate to a security interest of a competing secured party perfected by the filing of a financing statement against New Debtor in State B. This result for an interstate merger is consistent with the treatment of after-acquired property of a new debtor in the case of an intrastate merger.

H. Other Filing Related Changes

The Amendments provide for other changes to the filing rules in Part 5 of Article 9:

- Only an initial financing statement may indicate that the debtor is a transmitting utility, in which case the financing statement does not lapse. Current Article 9 suggests that an initial financing statement may be amended to indicate that the debtor is a transmitting utility. The statutory change will make the transmitting utility filing provision consistent with the public-finance and manufactured-home transactions filing provision.

- A filing office will no longer be permitted to reject a financing statement that fails to provide the type of organization of the debtor, the jurisdiction of organization of the debtor, or the organizational identification number of the debtor or a statement that the debtor has none. This information was not considered to be sufficiently useful in practice and often added cost and delay to the filing process.

- The term "correction statement" as used in current Article 9 has been changed to the more accurate "information statement." Under the Amendments, an information statement may, but need not, be filed by a secured party of record who believes that an amendment or other record relating to the financing statement of the secured party of record was filed by a person not entitled to do so. Under current Article 9 a correction statement may be filed only by the debtor.

- The uniform forms of initial financing statement and amendment have been updated to reflect the Amendments.

II. Changes Unrelated to Filing

The Amendments contain some changes that are less connected to the filing rules in Part 5 of Article 9.

- Current section 9-406 renders unenforceable an anti-assignment term of a payment intangible or promissory note that secures an obligation. By way of contrast, current section 9-408 permits a sale of a payment intangible or promissory note notwithstanding an anti-assignment term but does not require the account debtor or maker to attorn to or otherwise recognize the buyer. The Amendments clarify that effectiveness of an anti-assignment term of a payment intangible or promissory note in the case of a sale or other disposition of collateral under section 9-610 or an acceptance of collateral under section 9-620 is governed by section 9-406 and not by section 9-408.

- The Amendments modify the definition of the term “authenticate” to conform to the definitions of “sign” in the revisions contained in the bill to Article 1 and Article 7.

- The Amendments modify the definition of “certificate of title” to take into account state certificate of title systems that permit or require electronic records as an alternative to the issuance of certificates of title.

- The Amendments modify the requirements for control of electronic chattel paper to conform them with those in revisions contained in the bill for Article 7 for electronic documents of title and in the Uniform Electronic Transactions Act for transferable records. The result is that the new requirements set forth the current requirements as a “safe harbor” but permit other control systems as well.

- The Amendments clarify that a registered organization organized under federal law, such as a national bank, that, by authorization under federal law, designates its main or home office as its location is located in the state of that office for purposes of Article 9.

- The Amendments expand the list of collateral for which a licensee or buyer takes free of a security interest if the licensee or buyer gives value without knowledge of the security interests and before it is perfected.

- The Amendments confirm that a secured party’s authorization to record an assignment of a mortgage securing a promissory note assigned to the secured party in order for the secured party to conduct a non-judicial foreclosure sale of the mortgaged real property applies when there is a default by the mortgagor. The language in current Article 9 could arguably have been read to refer to a default by the assignor of the promissory note rather than by the mortgagor.

- The NY Amendments contain non-uniform provisions modeled on the Delaware UCC that are intended to clarify when a secured party has “control” over deposit accounts and securities accounts.

JUSTIFICATION: The Amendments provide greater certainty for the sufficiency of the name of a debtor on a financing statement by tying the concept of “legal name” to “license name.” By so doing, the revisions may help to reduce the current practice of requiring debtors who are individuals to incorporate or establish limited liability companies (whose legal name is easily determined) to qualify for continuing commercial credit. In addition, the Amendments address a number of filing system concerns under current Article 9 raised by International Association of Commercial Administrators, and resolve ambiguities and address technical issues discovered in current Article 9 where there were substantial problems in practice or as to which some states have enacted non-uniform amendments.

PRIOR LEGISLATIVE HISTORY: This bill has not been previously introduced.

FISCAL IMPLICATIONS: New York is under increasing competition to maintain its rank as a leading commercial jurisdiction. Today, significant commercial transactions may be domiciled in a U.S. jurisdiction that has modernized its law, or in a foreign locale that has a mature legal system. While sophisticated and complex commercial transactions are not themselves taxed, they generate both jobs and income for New Yorkers, particularly in the financial services sector. It has been estimated that for each professional job that is lost, there are at least one to two additional nonprofessional jobs that are lost as well. Keeping New York's commercial law as modern as any in the nation will help maintain its status as a preeminent commercial jurisdiction.

EFFECTIVE DATE: This Act shall take effect on the day it shall become a law, except that the revisions to Article 9 shall take effect on July 1, 2013.