Lenders often require that the issuer of a limited liability company ("LLC"), general partnership ("GP") or limited partnership ("LP") interest being used as collateral “opt in” to Article 8 of the UCC (so that the interest is treated as a security for purposes of Article 8 and 9 of the UCC) and require that the interest be certificated. While the lender expects specific benefits from requiring the opt-in and certificate under Articles 8 and 9 of the UCC, the “opt in” may also have unintended effects. A lender requiring an “opt in” should take steps to prevent the issuer from opting out of Article 8 at a later time. A lender that does not require an opt-in should take steps to prevent an “opt in.” Insurers may require an “opt in,” a certificated interest and other actions before providing security interest insurance coverage – for example in a real estate “mezzanine” loan secured by an LLC, GP or LP interest.

Treatment of LLC, GP and LP Interests in the Absence of Opt-In

Generally, an LLC, GP or LP interest will be a general intangible (and not investment property) for purposes of Articles 8 and 9 of the UCC. §8-103 provides rules for determining whether certain obligations and interests are “securities” as defined in §8-102(a)(15). Section 8-103(c) provides that “[a]n interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this Article, or it is an investment company security [as defined in §8-103(b) and is limited to registered investment companies and similar entities].” Official Comment 4 to §8-103 states that (i) §8-103(c) establishes the general rule that LLC, GP and LP interests are not securities unless they are in fact dealt in or traded on securities exchanges or in securities markets, and (ii) the issuer, however, may explicitly “opt in” by specifying that the interests or shares are securities governed by Article 8. See also §III(C)(8) of the Prefatory Note to Article 8.

How to Opt in

Section 8-103(c) states that an LLC, GP or LP interest is a security if “its terms expressly provide that it is a security governed by this Article.” Accordingly, the LLC operating agreement or partnership agreement should reflect the opt-in. It should be possible to opt in for some but not all of the same or similar classes of interests. An alternative to an opt-in would be to have the interests maintained as financial assets in a securities account, see §8-103(c), but that often is not a practical means of holding LLC, GP and LP interests.

Effects of an Opt-In under Article 8

If the issuer of the LLC, GP or LP

(Continued on page 2)
interest has opted in (and the interest is an Article 8 security), Article 8 contains numerous provisions that will affect the rights and obligations of the issuer, the holder of the security, the secured party and subsequent transferees of the interest, including the following:

- §§8-204 provides that a restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless (1) the security is certificated and the restriction is noted conspicuously on the security certificate or (2) the security is uncertificated and the registered owner has been notified of the restriction.

- Similarly, §8-209 provides that a lien in favor of the issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate.

- A person who transfers a certificated security or an uncertificated security, or takes other similar actions with respect to such securities, makes the warranties specified in §8-108.

- Transfers of the security must comply with §§8-104 and 8-301.

- §8-202 establishes responsibilities and defenses of the issuer of the security.

- §8-207 establishes rights and duties of the issuer with respect to registered owners of the security.

- §8-401 establishes the duty of the issuer to register transfers.

- §8-402 permits the issuer to seek certain assurances in accordance with requests for transfer.

- §8-403 permits certain parties to demand that the issuer not register the transfer.

- §8-404 establishes the issuer’s liability for wrongful transfer.

- §§8-405 and 8-406 establish procedures with respect to lost, destroyed or wrongfully taken securities certificates, including the effect of failure to notify the issuer if the certificate has been lost, apparently destroyed or wrongfully taken.

A secured party may appreciate the certainty that the applicability of Article 8 would bring to many aspects of the interest that it is taking as collateral. Some issuers may view certainty as a benefit, while others may not want to change from the requirements with which they feel they are familiar or may not want to have potentially different obligations and liabilities than those that would apply to related entities or to different interests issued by the same entity.

Benefits to Lender under Article 9 of an Opt in

Ability to obtain priority by perfection by control or delivery. Priority of a security interest in a general intangible would be determined by the “first to file” rules in Article 9. §9-303 provides that a purchaser (including a secured party) of a certificated security or uncertificated security that meets the requirements to be a protected purchaser acquires its interest in the security free of any adverse claim. A “protected purchaser” means a purchaser of a certificated or uncertificated security, or of an interest therein, who (1) gives value, (2) does not have notice of any adverse claim to the security and (3) obtains control of the certificated or uncertificated security. §8-303(a). “Purchaser” is defined in §1-201 to include a secured party, and value is also defined in §1-201.

- §8-105 describes when a person has notice of an adverse claim. The secured party should consider whether a previously perfected security interest will only be subordinated (by operation of §9-328) rather than extinguished by the “takes free” language in §8-303. See Official Comment 1 to §9-331, which states that “whether a holder or purchaser referred to in §9-331 [including a protected purchaser] takes free or is senior to a security interest depends on whether the purchaser is a buyer of the collateral or takes a security interest in it.” There is no comparable protection available to the holder of a security interest in a general intangible.

Flexibility in method of perfecting a security interest. Perfection of a security interest in a general intangible can only be effected by the filing of a fi-

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A security interest in a security can be perfected by filing or by control (or, in the case of a certificated security, by delivery). §§9-310, 9-312, 9-313 and 9-314, F§§9-115(4) and (6). Temporary perfection is also available with respect to certificated securities. §9-312(g), F§9-304.

There may be circumstances where filing is a burdensome means of perfecting a security interest and control or delivery is more efficient. For example, consider a transaction in which every partner in a partnership has an obligation to contribute capital, if a partner does not contribute the other partners can make the contribution as a deemed loan to the noncontributing partner, and the other partners are granted a security interest in the noncontributor's partnership interest to secure those loans. If there are 10 partners (so that each is a secured party with respect to 9 other partners) then a single control agreement with the partnership (rather than multiple financing statement filings or the cost of a collateral agent arrangement) may be the most efficient way to handle perfection. In states (such as Tennessee) that impose significant recordation or stamp taxes on UCC filings, the ability to perfect by control could be used to reduce transaction costs.

Automatic perfection is available for certain security interests in securities, see §§9-206, 9-309(9) and (10) and F§§9-115(4)(c) and (d), 9-116, although these are not likely to involve LLC, GP or LP interests. There is no comparable provision for a general intangible.

Distributions as Proceeds Under Former Article 9. Under Former Article 9 the limited definition of “proceeds” raised perfection and bankruptcy issues that an opt-in might solve. In FDIC v. Hastie (In re Hastie), 2 F.3d 1042 (10th Cir. 1993), after filing bankruptcy, the debtor received cash dividends on stock in which the secured party claimed a perfected security interest. The court held that ordinary dividends on corporate stock were not “proceeds” of the stock (at the time of the Hastie case, F§9-306(1) provided that proceeds were “whatever is received upon a sale, exchange, collection or other disposition of the collateral or proceeds”), that the security interest in the dividends was not perfected by possession of the stock certificates and that because the secured party did not have a perfected security interest in the post-petition dividends the debtor (as a hypothetical lien creditor under Bankruptcy Code §544) could avoid the security interest. In In re Mintz, 192 B.R. 313 (Bankr. D. Mass. 1996) the secured party had a security interest in rights to distributions from a partnership. The court held that payments of the distributions were not proceeds of the right to receive the distributions and that under Bankruptcy Code §552(a) a security interest in the distributions would be cut off with respect to distributions payable following the filing of the debtor's bankruptcy.

Bankruptcy Code §552(a) provides that property acquired by the debtor after the commencement of the debtor’s bankruptcy proceeding is not subject to a security interest resulting from a security agreement entered into by the debtor before the commencement of the case. Bankruptcy Code §552(b) creates an exception to this general rule, and provides that if a security agreement was entered into prior to the commencement of the case and if the security interest created by such agreement extends to property of the debtor acquired before commencement of the case and to proceeds of such property, then such security interest extends to such proceeds acquired by the debtor after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, based on the equities of the case, orders otherwise.

The 1994 revisions to Article 8 modified the definition of proceeds in F9-306(1) to remove the issues raised by the Hastie case (by adding that any payments or distributions made with respect to investment property collateral were proceeds). The revisions did not, however, remove the issues raised by the Mintz case (or similar issues that could arise even if the LLC, GP or LP interest itself had been pledged) since the addition to the definition of proceeds was limited to payments or distributions in respect of investment property (which in the absence of an “opt in” would not include an LLC, GP or LP interest), rather than in respect of any type of collateral. Therefore, lenders required an opt-in for LLC, GP or LP interests as collateral to bring the distributions in respect of those interests within the Former Article 9 definition of proceeds. Although it was not certain that the opt-in would solve the issue under Bankruptcy Code §552, it at least provided an argument that the distributions in respect of LLC, GP and LP interests were proceeds of the interests within the meaning of §552(b) and therefore not subject to the cut off of security interests rule in §552(a). The Article 9 treatment of the distributions is not dispositive of whether the distributions are proceeds for purposes of Bankruptcy Code §552, but has often been a factor considered in the §552 analysis.

With Revised Article 9’s broader definition of proceeds an opt in is no longer needed to deal with the limits in the Former Article 9 definition of proceeds or the related issue under Bankruptcy Code §552. §9-102(a)(64)

(Continued on page 4)
defines proceeds to include “whatever is collected on, or distributed on account of, collateral” (i.e. the distributions will be proceeds for Article 9 purposes, whether or not there has been an opt in). See also Official Comment 13(a) to §9-102.

Benefits to Lender of a Certificated Interest

Ability to obtain exclusive control. If the secured party takes control or delivery of a certificated security, no other party can obtain control. If a third party has taken delivery of the certificate under §8-301(a)(2), however, then two secured parties could have control of the same certificated security. Under Former Article 9 parties with control had equal priority in the certificated security. F§9-115. Revised Article 9 modified this to impose a “first to obtain control has priority” rule, §9-328, but the secured party must rely on representations of the debtor and the third party that has taken delivery for its assurance that it was the first to obtain control and therefore has priority under Revised Article 9.

Control of an uncertificated security (unless re-registration in the name of the secured party is used, which is not likely to be a satisfactory means of dealing with LLC, GP or LP interests) depends on the actions of the issuer, and multiple parties can acquire control. Under Former Article 9 parties with control had equal priority in the uncertificated security. F§§9-115. Revised Article 9 modified this to impose a “first to obtain control has priority” rule, §9-328, but the secured party must rely on representations of the debtor and the issuer of the uncertificated security for its assurance that it was the first to obtain control and therefore has priority under Revised Article 9.

Means of obtaining control may be easier to put into effect. Because Article 8 provides the means to obtain control of an uncertificated security as well as of a certificated security, requiring the interest to be certificated is not necessary for the secured party to be able to obtain control and the related benefits as to priority and protected purchaser status. Lenders may perceive that it will be easier to obtain control by taking possession of a certificated security with an appropriate assignment than by obtaining control of an uncertificated security (which would require re-registration in the name of the secured party or a control agreement among the issuer, the debtor and the secured party).

Characterization of a certificated interest. Under Article 9, if the LLC, GP or LP interest is certificated, an opt-in provides certainty that the certificate will not be classified as an instrument as defined in §9-102(a)(47), F§9-105(1)(i). Under Former Article 9 a security interest in an instrument could only be perfected by possession (with some limited exceptions for temporary perfection without possession). F§9-304. Revised Article 9 permits perfection of a security interest in an instrument by the filing of a financing statement (in addition to perfection by possession and temporary perfection rules), so the risk of having an unperfected interest if the certificate is an instrument can be eliminated by filing a financing statement (although there will be potential priority issues without possession).

The secured party may prefer to have the non-filing priority rules applicable to a security (§9-328) rather than the non-filing priority rules applicable to an instrument (§9-330) apply to the transaction. For example, on the priority of a security interest in an instrument perfected by possession over an earlier security interest in the instrument perfected by another means, §9-330(d) provides that the priority of the subsequent possessory security interest depends on whether the subsequent secured party took without knowledge that its security interest “violates the rights” of the earlier secured party, while §9-328 does not impose such a limitation on the priority of a subsequent secured party that takes control of a certificated security. Protection against subsequent purchasers and other persons. Having information (such as the fact of the “opt in,” restrictions on modifying the “opt in” or other terms of the LLC operating agreement or partnership agreement and restrictions on assignments of the security) noted on a certificated security may provide the secured party with protections not available if the security is uncertificated. For example, §8-105(a) specifies when a person has notice of an adverse claim for purposes of determining whether that person is a protected purchaser. Information that appears on a security certificate would generally provide sufficient notice; with respect to an uncertificated security it could be more difficult to prove notice. Similarly, §8-202(a) provides that (i) even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture or document and (ii) the terms of an uncertificated security include those stated in any instrument, indenture or document pursuant to which the security issued.

Other effects of the opt-in under Article 9

Anti-assignment provisions may be valid if there is an opt in. The negation of anti-assignment provisions in §§9-406 and 9-408 apply to general intan-
gibles but not to investment property, so an opt-in may result in anti-assignment provisions being effective to prevent the creation, perfection or enforcement of a security interest. Because §§9-406 and 9-408 apply only to restrictions in an agreement between an “account debtor” and a debtor. Restrictions in an LLC operating agreement or partnership agreement, however, may be viewed as being imposed by an agreement between the debtor and the other members or partners rather than by an agreement between the debtor and the account debtor (i.e. the LLC, LP or GP) and therefore not affected by the opt-in.

Note that the negation of anti-assignment provisions may not be available even if there is no opt-in. For example, effective February 1, 2002 Delaware enacted amendments to the Delaware Revised Uniform Partnership Act (adding §15-104(c)), the Delaware Revised Uniform Limited Partnership Act (adding §17-1101(e)) and the Delaware Limited Liability Company Act (adding §18-1101(e)). The amendments provide that §§9-406 and 9-408 of Revised Article 9 do not apply to any interest in a Delaware partnership (including all rights, powers and interests arising under a partnership agreement or the Delaware Revised Uniform Partnership Act), a Delaware limited partnership (including all rights, powers and interests arising under a partnership agreement or the Delaware Revised Uniform Limited Partnership Act) or a Delaware limited liability company (including all rights, powers and interests arising under a limited liability company agreement or the Delaware Limited Liability Company Act), and that these new provisions prevail over §§9-406 and 9-408 of Revised Article 9. An assignment of interests in such entities will be in part governed by §15-503 (with respect to a general partnership), §17-702 (with respect to limited partnerships) and §18-702 (with respect to a limited liability company). 2001 DE H.B. 372, 373 and 374.

**Risks to the secured party of requiring a certificated interest.** If the secured party takes possession of a certificate and then loses the certificate, it may lose perfection of its security interest if it did not also perfect by filing a financing statement. It would also be possible (although not likely) for a protected purchaser to acquire the certificate and take free of (or have priority over) the secured party’s security interest. In addition, the secured party may have liability to the debtor under §9-207 for failure to exercise reasonable care in the custody of collateral in its possession.

**Controlling Distributions**

Requiring an opt-in and a certificated interest will not provide the lender with the right to receive distributions in respect of the LLC, GP or LP interest. If receiving the distributions is important to the secured party, other arrangements with the issuer of the interest are needed.

**Preventing the Issuer from Opting Out**

In addition to an agreement with the issuer that it will not opt out, the lender should consider requiring that the LLC operating agreement or partnership agreement provide that the language opting in to Article 8 cannot be amended without the lender’s consent.

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**“The secured party may prefer to have the non-filing priority rules applicable to a security (§9-328) rather than the non-filing priority rules applicable to an instrument (§9-330) apply to the transaction.”**

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**Preventing the Issuer from Opting In**

A lender that does not require an LLC, GP or LP to opt in should consider taking steps to prevent an opt in (e.g., agreement with the issuer that it will not opt in or amendment of the LLC operating agreement or partnership agreement to prohibit an opt in without the lender’s consent). If the issuer opts in when the lender did not plan to have securities as collateral, a transferee of the interest from the debtor could have priority over the secured party’s security interest or qualify as a protected purchaser and take free of adverse claims (including the secured party’s interest). An opt in could also result in a collateral description or indication no longer describing the collateral (e.g., if collateral is referred to as a general intangible and becomes investment property).

**Other Considerations in Opting in**

Having the issuer opt in may avoid a trap for the unwary. Hedge funds are generally organized as partnerships or LLCs, but with rare exceptions are not registered investment companies. Nonetheless, people on securities industry margin desks, as well as their investing customers, think of hedge fund interests as being securities, just as they do mutual fund shares. In these cases, opting in avoids disappointment of those expectations. The caveat is that expectations for other kinds of LLCs, GPs and LPs, as envisioned by §8-103(c), are just the opposite (i.e. that these interests are not securities subject to Article 8).

**The Author thanks Steve Weise of Heller Ehrman White & McAuliffe LLP, Bob Wittie of Kirkpatrick & Lockhart LLP, Alan Dubin of Arent Fox Kintner Plotkin & Kahn PLLC, Howard Darmstatter of Citigroup, Bob Robbins of Shaw Pittman LLP and Bob Schwartz for their suggestions.**
Message From the Chair: Uniform Commercial Code Committee

by Linda J. Rusch
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I hope all of you enjoyed the Spring Meeting in Boston. The programs, committee forum, subcommittee, and task force meetings were well attended and very interesting. This Newsletter contains reports from several of the UCC Committee’s very active subcommittees and task forces concerning ongoing projects and activities. I hope you take the time to learn about what is going on.

We are now in the final stages of planning for the Annual Meeting in Washington DC, August 10-12. Again, we have a full slate of subcommittee and task force meetings as well as several great programs planned.

- On Saturday, August 10 at 3 p.m. during the general UCC Committee meeting, William Henning, Executive Director of the National Conference of Commissioners on Uniform State Laws, and Amelia Boss, an American Law Institute Council member and a member of many of the drafting committees to revise the UCC, will talk about “Are the Revisions of the UCC Finally Over? Reflections on the Past Decade.”
- On Sunday, August 11 from 10:30 to 12:30, Ed Smith is chairing a program entitled “Retrospective on Revised Article 9.” Revised Article 9 is the law in every state in the United States and there is a lot to learn about how to conduct secured transactions under the new law.
- On Monday, August 12 from 2:30 to 4:30 Leianne Crittenden is chairing a program entitled “Reality Bytes? EContracting in Today’s Environment.” Transactions conducted through electronic means are an important part of commercial law practice today. Come learn about the latest legal and practical considerations in the world of ecommerce.

Last, but not least, Jeff Turner has taken the lead with Bob Wittie in planning a joint dinner for members of the UCC Committee and the Commercial Financial Services Committee at Brasserie Les Halles at 1201 Pennsylvania Ave for Sunday evening. Watch your mail for the invitation. Send in your ticket request early, as space is limited. These dinners are an enjoyable way to spend an evening catching up with old friends and making new ones.

As you undoubtedly know from watching your mail and email, the Annual Meeting format has changed. You may register for the annual meeting for housing and the basic registration fee at http://www.abanet.org/annual/2002/home.html. The basic registration fee will not allow you, however, to attend the CLE programming. To attend CLE programming at the Business Law Section, you may either buy coupons or you may buy a passport. See the following web site for details http://www.abanet.org/buslaw.

I look forward to seeing you at the Annual Meeting.

UCC Task Force on Forms Under Revised Article 9

With the one-year anniversary of the uniform effective date of Revised Article 9 now here, I am happy – and relieved – to announce that Forms Under Revised Article 9 is now finished, and should be available at fine book stores near you soon. [See ad on page 11.]

The product of more than two years of work by the ABA’s Task Force on Forms Under Revised Article 9, the book contains more than thirty thoroughly annotated forms for use in connection with Revised Article 9. Among other things, the book offers: (i) an all personal property assets security agreement; (ii) specialized forms of security agreement for use in connection with intellectual property and agricultural transactions; (iii) various forms of financing statements; (iv) control agreements for deposit accounts and securities accounts; and (v) form third-party opinions for generic and securitization transactions. A cd-rom of the forms (without annotations) accompanies the book. The Task Force has benefited from the contributions of the nation’s leading commercial finance practitioners, including Steve Weise, Ed Smith, Sandra Rocks, Lynn Soukup, Jeff Turner, and Kevin Hochberg. In addition to being the chairman of the Task Force, I also acted as the editor of the book.

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UPCOMING SUMMER MEETING

The Article 1 Subcommittee will meet this August during the ABA Annual Meeting in Washington. Now that revised Article 1 is beginning to be submitted to state legislatures, the Subcommittee will focus on the enactment process and education of the bar. The meeting will start with an update and legislative status report. We will then consider how to help coordinate local efforts to aid legislative consideration and how to organize any appropriate educational programs. The Subcommittee meeting is scheduled for 9:00 to 10:00 a.m. on Monday, August 12, in the Regency Foyer (Ballroom Level) of the Hyatt Regency. Please come and participate. (And please be sure to check the official schedule in case of any last-minute changes.)

COMMITTEE FORUM ON REVISED UCC ARTICLE 1: REWORKING THE FOUNDATION

On Thursday, April 4, 2002, at the Spring Meeting in Boston, the Subcommittee presented a Committee Forum on Revised Article 1. Entitled “Reworking the Foundation -- A Look at Revised Article 1,” the Forum provided a variety of viewpoints on the potential impact of revised Article 1. The panelists discussed three topics: supplementation, good faith, and choice of law. David Snyder, Chair of the Subcommittee, moderated the Forum. Participants included Neil Cohen, from Brooklyn Law School, the reporter for the Article 1 revision, who gave an overview of Revised Article 1; Ann Lousin, from John Marshall Law School, who discussed the impact of the new standard of good faith in §1-201(b)(20). In addition, for the discussion on choice of law, Fred Miller, from the University of Oklahoma School of Law, and former Executive Director of NCCUSL, presented “The Case for the New Rule,” found in §1-301; and Bill Woodward, from Temple Law School, who is the Business Law Section Advisor to the Article 1 Drafting Committee, presented “The Case Against the New Rule.” As can probably be surmised from the panel topics, the most controversial part of the Article 1 revision has been choice of law. Except for certain consumer protections, revised §1-301 will permit the parties in most transactions to choose law that has no relation to the transaction. In representing different perspectives, the panelists helped provide an understanding of the larger issues at stake with this change in revised Article 1. The definition of good faith in revised Article 1 has changed from the narrow, subjective “honesty in fact” standard to the broader, objective standard which includes both “honesty in fact” and “reasonable commercial standards of fair dealing.” The new definition contains an exception, however, “as otherwise provided in Article 5” [§1-201(b)(20)]. The Article 5 definition retains the narrower honesty in fact standard. Almost all articles except Article 5 have already adopted the broader good faith standard, which means that the new definition in revised Article 1, for the most part, will have little, if any, impact on those UCC articles. It may have an impact, however, on non-merchants under Articles 2 and 2A, assuming revised Article 1 is enacted before those two articles are revised, and it could possibly have an impact on Article 5, depending on how the language of Article 5 is construed. The revised rule on supplementation, §1-103, includes preliminary comments that would have the UCC preempt a significantly greater amount of common law and equity than under current interpretations of existing §1-103. See Revised §1-103, prelim. cmt. 2. The Forum discussion focused on the extent to which under the revised section, UCC provisions will expressly or impliedly displace common law or equitable principles, or when such supplemental law will have continuing viability.

THE SPRING MEETING OF THE SUBCOMMITTEE

At the meeting of the Subcommittee on Friday, April 5, 2002, chaired by David Snyder, William Henning reported on the current status of revised Article 1 at the National Conference of Commissioners of Uniform State Laws (“NCCUSL”). He stated that for the moment, NCCUSL is not targeting revised Article 1, which means that there are no specific efforts being made to secure its passage. Individual commissioners are free, however, to propose it in their respective jurisdictions. It has been adopted in the Virgin Islands. NCCUSL is considering perhaps coupling Article 1 at a later date with revised Articles 3 and 4, or revised Article 2, if it survives. Revised Articles 3 and 4 will go to the ALI in May, and to NCCUSL in the summer. Henning stated that NCCUSL may take a more active role in encouraging passage of revised Article 1 in the fall. The Subcommittee discussed preparing a Practitioner’s Guide, the purpose of which would be to explain changes, issues and arguments. It was noted that a discussion of revised Article 1 had been prepared in the publication, The ABC’s of the UCC. The Subcommittee decided to revisit the issue of preparing a Practitioner’s Guide, and to discuss educational programs explaining pertinent issues raised by revised Article 1, at the Annual Meeting in August.

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UCC Subcommittee on Payments

WASHINGTON MEETING PROGRAM
What lies ahead for the payment systems? The program at our August meeting in Washington, D.C. will feature a panel discussion of recent trends and a forecast of future developments in the payment systems. A recent survey by the Retail Payment Products Office of the Federal Reserve Bank shows that, while check volume has decreased as a percentage of all forms of payment, the general migration from the check system to paperless forms of payment, predicted by many in the 1990s, hasn’t happened.

The panelists will be Rich Oliver of the Federal Reserve Bank in Atlanta, Ed Green of the Federal Reserve Bank in Chicago, Bill Nelson of NACHA, and George Thomas of the New York Clearinghouse Association and the Electronic Payments Network. Rich Oliver will set the stage with a review of the Federal Reserve’s retail payments survey. The discussion by the panelists that will follow is expected to include the results of other recent studies, the panelists’ institution’s views of the future of the payment systems, and their personal thoughts on these subjects.

BOSTON MEETING PROGRAM
Our program at the Payments Subcommittee meeting in Boston included a demonstration of the ACH process as it appears on the computer screens of the participants: the originator, the originator’s bank, the Federal Reserve processing facility, a private sector ACH operator, the receiver’s bank, and the receiver. Following the demonstration, Oliver Ireland, formerly Associate General Counsel of the Federal Reserve Bank, spoke to the meeting about the part that ACH payments play in the global system of payments.

PROJECTS
Two new projects of the Payments Subcommittee were announced at the Boston meeting. First, the Subcommittee will be working jointly with the Litigation Subcommittee to develop model jury instructions for jury trials involving UCC Articles 3, 4 and 4A. Second, the Subcommittee will revise the Model Funds Transfer Services Agreement, a monograph published by the Business Law Section in 1994. Revision of the Model Agreement is appropriate in light of the many cases under UCC Article 4A decided since its publication.

Working groups for these projects are in the process of formation. Persons interested in either of these projects are encouraged to contact the Chair or Vice Chair.

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UCC Subcommittee on Sales of Goods

The Subcommittee meets from 1 to 2 p.m. on Monday August 13 at the Annual Meeting in Washington. We will have an update on the ongoing Article 2 revision process and consider the role of the Subcommittee following the long hoped for approval of the revised article.

UCC Subcommittee on Investment Securities

At the Spring Meeting the Investment Securities (Article 8) Subcommittee discussed opting in to Article 8 and the effect of such an opt in on financing transactions. Lynn Soukup, the subcommittee chair, prepared an outline for that discussion. (See Lynn’s article “Opting In to Article 8 and Financing Transactions” beginning on the cover page of this Commercial Law Newsletter.) At the 2002 Annual Meeting, the subcommittee will have a joint meeting (8:30 AM - 9:30 AM at the Hyatt Regency) with the International Commercial Law Subcommittee of the Uniform Commercial Code and Commercial Financial Services Committees, for an update on international conventions.

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July 2002
Message From the Chair: Commercial Financial Services Committee

by Jeffrey S. Turner
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Los Angeles, CA

Dear Commercial Financial Services Committee Members: It seems like the Spring Meeting in Boston was just over and it is already time to finalize preparations for the Annual Meeting in Washington, D.C.

As those of you who attended the Spring Meeting know first-hand, it was one of the best-attended and most substance-packed meetings in recent memory. Our committee hosted several successful subcommittee meetings, programs and forums. Our joint dinner with the UCC Committee at Vinny Testa’s family-style Italian restaurant was a sell-out and a roaring success. We had the best representation of any committee at the First-Timer’s Reception.

We are now looking forward to the August 2002 Annual Meeting in Washington, D.C., where our committee’s meetings will be concentrated over Friday, August 9 through Monday, August 12, with particular concentration during Saturday and Sunday, and with a joint CFS/UCC Committee dinner on Sunday, August 11, at 8:30 pm, after the Business Law Section Reception.

Our meetings this August will take place at the Capitol Hyatt Regency, and we will sponsor an excellent program at 2:30 on Sunday afternoon entitled “Cutting Edge Issues: Where Securitization Meets Insolvency After LTV and Enron,” chaired by me and featuring Meredith Jackson, Professor Jonathan Lipson, Bennett Murphy and Professor Steve Schwarz. You won’t want to miss this program!

Bob Wittie has assisted us in planning a wonderful French brasserie-style dinner at the award-winning Brasserie Les Halles at 1201 Pennsylvania Ave NW, on Sunday evening, August 11, immediately following the Business Law Section Reception, and within walking distance of the reception. A nice dinner at the annual meeting is relatively new tradition for the CFS and UCC Committees and one that we hope you will enjoy. We are continuing the informal and popularly-priced format that worked so well at the recent spring dinner in Boston. We’ve selected a great menu that includes choices of tantalizing appetizers, entrées and desserts, with white and red wine aplenty. Please send in your reservation form and join us. You won’t be disappointed!

Looking ahead, we are planning an exciting program for Wednesday, November 6 in Atlanta (11 am to 4 pm, including lunch), preceding the Commercial Finance Association Annual Meeting, and we are presenting a program on cutting edge debtor-in-possession financing issues to the CFA on Friday, November 8.

Next Spring (2003), our Spring Meeting in early April will be at the Century Plaza Hotel across the street from my office in Century City. You can bet that your Los Angeles committee members, including me, Meredith, Steve Weise and many others, will show our colleagues a good time. I’m already working on the committee dinner!

We have lots of other activities and projects underway, including long-overdue improvements to our presence on the ABA web site. Look for substantial improvements in the near future, shepherded by our new Internet Subcommittee Chair Mike Maglio.

I hope to see you in Washington, D.C. in August.

Catherine E. Bauer, Chair
United States Attorney’s Office
Los Angeles, CA

catherine.bauer@usdoj.gov

CFS Creditors’ Rights Subcommittee

The Creditors’ Rights Subcommittee had a terrific meeting in April at the Spring Meeting. Our main topic was “Recent Appellate Decisions.” The speakers on this were Amy R. Dougherty of Goodwin Procter in Boston, and Jeanne Darcey of Palmer & Dodge in Boston. Among the cases discussed were Cadle Company v. Schlichtmann from the 1st Circuit, Dow Corning Corporation from the 6th Circuit, and Mac Panel Company v. Virginia Panel Corporation from the 4th Circuit.

We also heard an update on the ever-fascinating Stephan Jay Lawrence case (recently ruled on by the 11th Circuit) from William Zweig of Trenam, Kemker, Scharf, Barkin, Frye, O’Neill & Mullis in Tampa. Stay tuned; it isn’t over yet!

There was also a lively discussion of electronic filings. It is always fascinating to hear the experiences of attorneys from all over the country on topics such as this.

Our next meeting will be during the Annual Meeting in Washington, D.C. (Saturday, August 10, 2 - 3:30 at the Hyatt Regency in Congressional E, lobby level). As usual, we will be meeting jointly with the Bankruptcy Litigation Subcommittee of the Business and Corporate Litigation Subcommittee. Please join us!

Catherine E. Bauer, Chair
United States Attorney’s Office
Los Angeles, CA

catherine.bauer@usdoj.gov
At the Spring 2002 Meeting the Aircraft Financing Subcommittee continued its tradition of two sessions on Thursday afternoon and Friday morning with a Subcommittee Dinner on Thursday evening at Lucca, the hot table restaurant at the North End of Boston. The thirty-some attendees enjoyed information-packed sessions that included a summary of the current financial condition of the U.S. airline industry by Philip A. Bagga-ley, CFA, the lead aviation analyst for Standard & Poor’s Ratings Services; a summary of the current situation facing the Brazilian airline industry by Maria Regina M.A. Lynch, Esq., a partner at Xavier, Bernardes Braganca in Sao Paulo, Brazil; a presentation by Michael K. Vernier, Esq., the lead counsel on aviation matters of Standard & Poor’s Rating Services, on the implications of the post 9/11 environment on Portfolio Securitizations and EETCs; a panel discussion, by Elliot Gewirtz, Esq., of Milbank, Tweed, Hadley & McCloy, James D. Tussing, Esq., of Fulbright & Jaworski L.L.P. and Stephen L. Johnson, of America West Airlines, concerning the America West Airlines request for loan guarantees under the Federal Loan Guaranty Program; and a presentation by F. Scott Wilson, Esq., of Pratt & Whitney, concerning the problems associated with war risk clauses in insurance contracts in situations like that presented by 9/11. In addition, the subcommittee topped of a several year long consideration of the Unidroit Accord on aircraft financing with a presentation on the Final Unidroit Accord by Jack P. Gilchrist, Esq. of DeBee Gilchrist & Lidia, in Oklahoma City, Harold S. Burman, Esq., of the Office of the Assistant Legal Advisor of the U.S. Department of State, and F. Scott Wilson, Esq. of Pratt & Whitney, and by adopting a resolution endorsing the Final Unidroit Accord.

In connection with the Annual Meeting in Washington, the Aircraft Financing Subcommittee is looking forward to two sessions on Friday afternoon and Saturday morning, August 9 and 10, at the Hyatt Regency Hotel on Capital Hill and the annual Subcommittee Dinner on Friday evening August 9 at La Colline, a classic French restaurant on Capital Hill two short blocks from the meeting hotel. The sessions will include a presentation by Dana J. Lockhart, Chief Financial Officer of Airbus Industrie of North America, on the state of the industry from the manufacturer’s perspective; a presentation by Thomas J. Whalen, of Condon & Forsyth, on the impact of the U.S. Economic Sanctions (OFAC) Regulations on sales and leases of aircraft; a presentation by Markus Bocker, General Counsel of KGAL Allgemeine Leasing Gmbbt & Co, regarding recent changes in the German trade tax relevant to aircraft transactions; a presentation by Norman M. Powell, Esq., of Morris, James, Hitchens & Williams LLP, regarding developments under the Delaware Revised Article 9 relevant to aircraft financing structures; and a presentation by Timothy J. Lynes, of Kat-ten Muchin Zavis Rosenman, regarding changes in the Transportation Act in response to 9/11. Depending upon the receipt of at least the disclosure draft of the FASB proposal on consolidation of special purpose financing vehicles, we will have a presentation on the implications of that proposal for aircraft financing structures. As is always the case, we reserve the flexibility to address new issues that might move to center stage between now and the meeting.

James H. Hancock, Chair
Seward & Kissel
New York, NY
hancock@sewkis.com

Go to the UCC/CFS Joint Website at www.abanet.org/buslaw/cfs-ucc/home.html and click on (Commercial Finance) Master Calendar

JOIN THE UCC E-MAIL DISCUSSION GROUP
This free discussion group, created and moderated by the editors of the UCC Bulletin (and sponsored by West Group), is conducted using e-mail. Once you have joined, you receive approved messages and are able to send your messages to the group.

To subscribe, go to: http://lists.washlaw.edu/mailman/listinfo/ucclaw-l and follow the instructions.
ABA Business Law Section Publications

**Forms Under Revised Article 9**, by the Uniform Commercial Code Committee, ABA Section of Business Law.
Simplify documentation of secured transactions with this all-new time-saver. Combining the most useful features of traditional forms collections and analytical references, this handy book collects forms prepared by UCC Committee experts and comes with its own CD-ROM. Other special features include a summary of Revised Article 9 terms, incisive commentary for each form, annotations with citations to the new UCC rules, comparisons with prior law, discussions of “best practices” and a thumb-tab index. ($54.95 for BLS Members; $69.95 for others. Product Code 5070394.)

This is no ordinary, dry-as-dust legal writing manual. Howard Darmstadter, award-winning columnist for *Business Law Today*, offers a lively collection of his own musings, reflections, suggestions, anecdotes, and witticisms that will entertain you as it teaches you how to modernize your legal documents. Written by a business lawyer for business lawyers, this enjoyable guide covers the basics of legal drafting as well as specific types of documents, such as agreements, securities prospectuses, and promissory notes. It also addresses the use of boilerplate, examples, and mathematical formulas. Unique among drafting manuals, *Hereof, Thereof, and Everywhereof* includes a chapter on formatting a document — how good choices for typeface and size, line length, and paragraphing can enhance document readability. ($39.95. Product Code 5070393.)

**The NEW Article 9, Second Edition**, edited by Corinne Cooper; Steven O. Weise and Edwin E. Smith, contributing authors.
This handy guide provides a clear, in-depth explanation of Revised UCC Article 9, including the full 1999 text (as modified in January 2000) and Official Comments along with the complete text of former Article 9 (1995) for comparison. This book has all you need, including a plain-English overview of Revised Article 9, a checklist of issues, a detailed analysis of the transition provisions, charts comparing significant provisions of former and Revised Article 9, and a comprehensive index. ($39.95 for 1-25 copies; $29.95 for 26-50 copies; $23.95 for 51 or more copies. Product Code 5070360)

**The Default Provisions of Revised Article 9**, by Timothy R. Zinnecker
This guide examines each of the 28 default provisions in Revised Article 9, providing comparative analysis of current and revised law, offering drafting advice when appropriate, and discussing perceived statutory weaknesses. ($29.95 for 1-9 copies; $26.95 for 10 or more copies. Product Code 5070350)

**The ABCs of the UCC**, Series edited by Amelia Boss
These primers are written for both practitioners and students. Each book avoids footnotes and convoluted discussions and explains just the basic UCC concepts and operation of the Code. ($24.95 each for BLS members; $14.95 for students.)

- **Article 1: General Provisions**, by Fred H. Miller and Kimberly J. Cilke (Product Code 5070306)
- **Article 2: Sales**, by Linda J. Rusch and Henry D. Gabriel (Product Code 5070312)
- **Article 2A: Leases**, by Amelia H. Boss and Stephen T. Whelan (Product Code 5070307)
- **Article 4A: Funds Transfers**, by Thomas C. Baxter, Jr. and Stephanie A. Heller (Product Code 5070309)
- **Article 5: Letters of Credit**, by James G. Barnes, James E. Byrne and Amelia H. Boss (Product Code 5070313)
- **Article 8: Investment Securities**, by Sandra M. Rocks and Carl S. Bjerre (Product Code 5070314)

**The ABCs of the UCC, Related and Supplementary Consumer Law**, by Fred H. Miller and Cindy Hastie. ($24.95 each for BLS members; $14.95 for students. Product Code 5070340)

**A Commercial Lawyer's Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated with Stored-Value Cards and Electronic Money**, by Stephanie Heller, Thomas Baxter, Jr. and the Task Force on Stored Value Cards ($29.95 for 1-9 copies; $26.95 for 10 or more copies. Product Code 5070325)

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# UNIFORM STATE LAWS SCORECARD

## 50 State Survey of Adoptions of Revised Official Text of the UCC<sup>1</sup>, UETA & UCITA

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Please note that the Enactment Date does not necessarily reflect the effective date. Please refer to the applicable statute for the relevant effective date.

Our thanks to John McCabe and Katie Robinson at the National Conference of Commissioners ("NCCUSL") on Uniform State Laws for their help in compiling the information above. These revisions are based on information provided by NCCUSL available as of May 1, 2002.

1. In addition to enactments noted below, all states have adopted the 1995 Official Text of Article 5 of the UCC, other than Georgia (no action), Puerto Rico (no action) and Wisconsin (Intro SB 203). Furthermore, all states have adopted the 1994 Official Text of Article 8 of the UCC and the 1998 Official Text of Article 9 of the UCC other than Puerto Rico (no action).

2. South Dakota has adopted only 1987 Official Text without the 1990 Amendments.

3. States which have repealed Article 6 are identified by indicating "Repeal" next to the state name; states adopting the revisions suggested in Alternative B to the 1989 Official Text are identified by indicating "Revise" next to the state name.


5. In addition to the enactments noted, Puerto Rico has only adopted the following Articles: Article 1, Article 4A, Article 8, the original versions of Article 5 and Article 7, and the 1972 version of Article 9.
## UCC Scorecard - Revisions

**ARTICLE 1 – GENERAL PROVISIONS**  
Final Version: May, 2001  
Status: Approved at ALI May, 2001 meeting and at 2001 NCCUSL Annual Meeting.  
UCC Committee Contact:  
David Snyder (216) 687-2319  
Margaret Moses (312) 915-6430

**ARTICLE 2 – SALES**  
Latest Draft: July, 2002  
Status: Tentatively scheduled for reading at NCCUSL annual meeting in July 2002.  
UCC Committee Contact:  
Rob Beattie (612) 607-7000

**ARTICLE 2A – LEASES**  
Latest Draft: July, 2002  
Status: Tentatively scheduled for reading at NCCUSL annual meeting in July 2002.  
UCC Committee Contact:  
Larry Flick (215) 569-5556  
Ed Huddleson (202) 333-1360

**ARTICLE 3 – NEGOTIABLE INSTRUMENTS**  
Latest Draft: July, 2002  
Status: Approved by ALI at annual meeting in May 2002.  Up for final approval at NCCUSL annual meeting in July 2002.  
UCC Committee Contact:  
Stephanie Heller (212) 720-8198  
Paul Turner (310) 472-5802

**ARTICLE 4 – BANK DEPOSITS AND COLLECTIONS**  
Latest Draft: July, 2002  
Status: Approved by ALI at annual meeting in May 2002.  Up for final approval at NCCUSL annual meeting in July 2002.  
UCC Committee Contact:  
Stephanie Heller (212) 720-8198  
Paul Turner (310) 472-5802

**ARTICLE 7 – WAREHOUSE RECEIPTS, BILLS OF LADING AND OTHER DOCUMENTS OF TITLE**  
Latest Draft: July, 2002  
Status: Last Drafting Committee meeting April 2002; up for first reading at NCCUSL annual meeting in July 2002; next meeting of Drafting Committee October 2002.  
UCC Committee Contact:  
William Towle (406) 721-0720.

**ARTICLE 9 – SECURED TRANSACTIONS**  
Latest Amendments December, 2001  
Status: Adopted by all 50 states.  
UCC Committee Contact:  
Steve Weise (213) 244-7831  
Pete Carson (415) 693-2000

**UNIFORM ELECTRONIC TRANSACTIONS ACT**  
Final Version: 1999  
Status: Approved by 38 states and pending in several more.  
UCC Committee Contact:  
Rob Beattie (612) 607-7000  
Ben Beard (208) 885-6747

**UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT**  
Final Version: 1999  
Status: Approved by 2 states and pending in several more. Standby committee has recommended several amendments.  
UCC Committee Contact:  
Mary Jo Howard Dively (412) 392-2136

**UNIFORM CONSUMER LEASES ACT**  
Latest Draft: May, 2001  
Status: Approved at 2001 NCCUSL Annual Meeting.  
UCC Committee Contact:  
Michelle Hughes (757) 499-8800
Section of Business Law Application for Membership

☐ I, ____________________________, am applying for membership in the ABA Section of Business Law and enclose $__________ as my annual membership dues for the year 2002-2003. I understand that Section dues include $20 for a basic subscription to *The Business Lawyer* for one year and $14 for a basic subscription to *Business Law Today* for one year; these subscription charges are not deductible from the dues, and additional subscriptions are not available at these rates.

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☐ Please send me an application to join the American Bar Association.
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For further information, call (312) 988-5588

ABA member ID: __________________________ Date: __________________________

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*Please sign and date this application*

NOTE: Membership dues in the American Bar Association and ABA Sections, Divisions and Forums are not deductible as charitable contributions for federal income tax purposes. However, such dues may be deductible as business expenses.