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Draft UNCITRAL Guide on the Implementation of a Security Rights Registry

Note by the Secretariat

Contents

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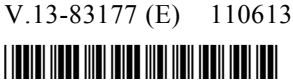

I. Preface (A/CN.9/WG.VI/WP.54)

1. At the end of the preface, the following paragraph should be added (see A/CN.9/767, para. 16): "At its twenty-third session, the Working Group considered a note by the Secretariat entitled "Draft Technical Legislative Guide on the Implementation of a Security Rights Registry" (A/CN.9/WG.VI/WP.54 and Add.1-6). At that session, the Working Group adopted the draft UNCITRAL Guide on the Implementation of a Security Rights Registry (the "draft Registry Guide"), referred it to the Commission for adoption at its forty-sixth session and requested the Secretariat to revise the draft Registry Guide to reflect the deliberations and decisions of the Working Group (A/CN.9/767, para. 15)".

2. An additional paragraph should be added after the Commission session to summarize the deliberations and decisions of the Commission. The Commission may also wish to consider giving to the Secretariat the mandate to make the changes necessary to implement the decisions of the Commission and to ensure the internal consistency and logical structure of the final text of the draft Registry Guide.

II. Introduction (A/CN.9/WG.VI/WP.54 and A/CN.9/WG.VI/WP.54/Add.1, paras. 1-23)

3. In paragraph 3, second sentence, after the words "effective against third parties", the following words should be added: "or at least as a method for determining priority" (see A/CN.9/767, para. 17, (a)).

4. In paragraph 4, after subparagraph (g), a new subparagraph should be added that would read as follows: "(h) Making Security Interests Public: Registration Mechanisms in 35 Jurisdictions (The World Bank/IFC) (2012)" (see A/CN.9/767, para. 17, (b)).

5. Paragraph 6, subparagraph (e) should be revised to read as follows: "The general legal community (including academics, judges, arbitrators and practising lawyers)" (see A/CN.9/767, para. 17, (c)).

6. Changes to the explanations of the terms in section B (terminology and interpretation) are reflected in document A/CN.9/781/Add.1. Changes to the commentary in section B are reflected in paragraphs 7-9 below.

7. Paragraph 10 should be revised to read as follows: "Registration of an amendment notice does not result in the deletion or modification of information in previously registered notices to which the amendment notice relates in the sense that a search result will continue to disclose that information in its original state. However, the legal consequence of the registration of an amendment notice is that the effect of the information in the previously registered notice to which the amendment notice relates is modified to the extent specified in the amendment notice. Under recommendation 11 of the draft Registry Guide, an amendment notice is effective from the time it is accessible to searchers of the public registry record" (see A/CN.9/767, para. 18, (b)).

8. At the end of paragraph 11, the following sentence should be added: "Under recommendation 11 of the draft Registry Guide, a cancellation notice is effective

from the time the previously registered notice to which the cancellation notice relates is no longer accessible to searchers of the public registry record" (see A/CN.9/767, para. 18 (c)).

9. To explain the term "registration", a new paragraph should be added that would read as follows: "Registration of an initial or amendment notice should be understood as the entry of information into the public registry record so that it is accessible to searchers of the public registry record. Registration of a cancellation notice, however, results in the information in the cancellation notice (along with the information in the registered notices to which the cancellation notice relates) being entered in the registry archives rather than in the public registry record" (see A/CN.9/767, para. 19 (c)).

10. In paragraph 19, first sentence, before the words "property right", the word "limited" should be added (see A/CN.9/767, para. 19 (a)).

11. At the end of paragraph 30, footnote 9 should be deleted and the following words should be added: "for the exclusion of securities, and payment rights arising under or from financial contracts and foreign exchange contracts, see para. 37 below)" (see A/CN.9/767, para. 19 (b)).

12. At the end of paragraph 31, the following words should be added: "except to the extent intellectual property law provides otherwise (see *Secured Transactions Guide*, recs. 4, subpara. (b), and 38)" (see A/CN.9/767, para. 19 (b)).

13. In paragraph 37, second sentence, the words "As already mentioned (see footnote 9 above)" should be deleted (see para. 11 above).

14. In paragraphs 38, 39 and 46 (and throughout the draft Registry Guide), reference should be made to "a security right made effective against third parties by registration in the general security rights registry" rather than to "security right registered in the general registry" (see A/CN.9/767, para. 19 (c)).

15. In paragraph 39 (and throughout the draft Registry Guide), reference should be made to "a security right made effective by registration in an immovable property registry" rather than to the registration of a notice in the immovable property registry.

16. In paragraphs 40-45, reference should be made to "buyers, lessees or licensees" rather than to "buyers or other transferees" (see A/CN.9/767, para. 19 (c)).

17. In paragraph 48, first sentence, the words "against the grantor" should be replaced by the words "with respect to the grantor" (see A/CN.9/767, para. 19 (c)). And at the end of the penultimate sentence the wording in parenthesis should be revised to read as follows: "(however, a secured creditor may, under insolvency law, take action to preserve the third-party effectiveness of a security right even after commencement of insolvency proceedings; see para. 50 below)" (see A/CN.9/767, para. 19 (c)).

18. Paragraph 53 should be revised to read as follows: "The *Secured Transactions Guide* discusses but does not make any recommendation on whether notices with respect to preferential claims may or must be registered in the general security rights registry and the priority implications of such registration (see *Secured Transactions Guide*, chap. V, para. 90). Enacting States will need to determine their

own policy. Some States require notices of preferential claims to be registered in the general security rights registry and subject them to the first-to-register priority rule to the same extent as security rights created by agreement. In other States, registration of preferential claims is permitted or required, but a registered preferential claim nonetheless has priority over prior-registered security rights created by agreement. It should be noted that there is limited value in permitting or requiring registration of preferential claims in States that adopt the latter approach since third-party searchers must be taken to understand that a subsequently registered preferential right will still have priority over any right they may acquire in the relevant assets in the interim. As already noted, the *Secured Transactions Guide* seeks to minimize the uncertainty that the lack of registration might create for third parties by recommending that the law of the enacting State limit, both in type and amount, preferential claims and describe them in a clear and specific way (see para. 52 above)" (see A/CN.9/767, para. 19 (d)).

[*Note to the Commission: The Commission may wish to note that paragraphs 19-24 below apply to document A/CN.9/WG.VI/WP.54/Add.1*.]

19. The heading of section D.6 should be revised to read as follows: "extended scope of the registry" (see A/CN.9/767, para. 19 (e)).

20. Paragraph 5 should have a new heading that would read as follows: "(c) Preferential claims" and should be revised to read as follows: "As already explained, the *Secured Transactions Guide* discusses but does not make any recommendation on whether notices with respect to preferential claims may or must be registered in the general security rights registry and the priority implications of such registration (see A/CN.9/WG.VI/WP.54, para. 53)" (see A/CN.9/767, para. 19 (e)).

21. In paragraph 6, third and fourth sentence, the words "does not recommend this approach. Instead, the *Secured Transactions Guide*" should be deleted (see A/CN.9/767, para. 19 (f)).

22. In paragraph 15 (and throughout the draft Registry Guide) reference should be made to the "grantor" rather than to the "debtor", unless the context required otherwise (see A/CN.9/767, para. 19 (g)).

23. A new subsection should be added under the heading "12. International coordination among national security rights registries" with a paragraph that would read as follows: "States would benefit from coordinating and harmonizing their registry rules and procedures to the greatest extent possible in order to reduce transaction costs for registrants and searchers of the registry record. Accordingly, registrars would be well-advised to consult with registrars in other States and take into consideration the rules and procedures of registries in those States" (see A/CN.9/767, para. 20)).

24. Paragraphs 31 and 32 should form a new subsection in Section D under the heading "13. Transitional considerations", while paragraphs 24-30 should be deleted and paragraph 33 should be placed after paragraph 39 (see A/CN.9/767, para. 21).

III. Establishment and functions of the security rights registry (A/CN.9/WG.VI/WP.54/Add.1, paras. 34-49)

25. In paragraph 35, first sentence, after the words "empowered to appoint" the following words should be added: "a natural or legal person as the …", and references should be made to the "registrar's duties" rather "his or her duties" (see A/CN.9/767, para. 23).

IV. Access to the services of the registry (A/CN.9/WG.VI/WP.54/Add.1, paras. 50-65)

26. In paragraph 56, the third sentence should be deleted (see A/CN.9/767, para. 26).

27. After paragraph 57, first sentence, the following wording should be added: "If access to registration services is denied because the registrant does not meet these requirements, the registry should be obliged to give the specific reason (for example, the prescribed registry notice form was not used, credit card limit exceeded or identity card expired) in order to enable the registrant to address the problem and gain access (this may also be the result of law dealing, for example, with access to public services). Reasons should be given by the registry "as soon as practicable", which, in the case of an electronic form, means in practice almost immediately, and, in the case of a paper form, within a reasonable period of time such as a few hours (see draft Registry Guide, rec. 6, subpara. (b))" (see A/CN.9/767, para. 28 (c) and (f)). In addition, the last sentence of paragraph 57 should be moved to become the first sentence of paragraph 58 (to clearly separate the discussion on rejection of access from the discussion on the rejection of a notice).

28. After paragraph 59, first sentence, the following wording should be added: "The registrant is the person who submits the prescribed registry notice form to the registry (rather than the person who completes it, as, unless the form is completed in the presence of a member of the registry staff, the registry has no way of obtaining information about the identity of the person who actually completed the form and, in any case, it is the identity of the person who is responsible for the registration that is relevant). The registrant may be the secured creditor or a person acting on behalf of the secured creditor. The registry requires the identity of the registrant (regardless of whether the registrant is the secured creditor) as a precaution against registrations that may not be authorized by the grantor" (see A/CN.9/767, para. 18 (e) and A/CN.9/781/Add.1, note to the term "registrant").

29. In paragraph 60, third sentence, the following words should be inserted after the words "rec. 71" in parenthesis: "; with respect to the effectiveness of the registration of types of amendment notice that require the grantor's authorization, see A/CN.9/WG.VI/WP.54/Add.4, para. 3; with respect to the effectiveness of the registration of an amendment or cancellation notice that was not authorized by the secured creditor, see A/CN.9/WG.VI/WP.54/Add.4, paras. [28-37]" (see A/CN.9/767, para. 27 (b) and para. 70 below). In addition, at the end of the third sentence of paragraph 60, after the word "authorization" the words "by the grantor" should be inserted.

30. The second sentence of paragraph 63 should be placed in parenthesis. In addition, at the end of the paragraph a new sentence should be added to read as follows: "If a searcher does not use the prescribed registry notice form or pay (or makes arrangements to pay) any fee required, it may be denied access to the searching services of the registry in the sense that its search request will not be executed by the registry. As in the case of denying access to registration services, the registry should be obliged to give the specific reason for the denial of access to searching services as soon as practicable so that the searcher can remedy the problem (see draft Registry Guide, rec. 9, subpara. (b))" (see A/CN.9/767, para. 28 (c)).

31. Paragraph 64 should be revised to state that "the regulation should also provide"; the words "submitting a search request" in the first sentence of paragraph 65 should be replaced by the words "obtaining access to the searching services of the registry; and the order of paragraphs 64 and 65 should be reversed.

V. Registration (A/CN.9/WG.VI/WP.54/Add.2, paras. 1-49)

32. In sections A.1-A.13 (and throughout the draft Registry Guide), where a rule is discussed that is typically found in secured transactions law, reference should be made to A/CN.9/WG.VI/WP.54/Add.1, para. 32, which deals with legislative technique and drafting. Where necessary, wording along the following lines could be added: "Typically, this rule would be included in the secured transactions law of the enacting State. However, depending on its particular legislative method and drafting conventions, an enacting State may decide to place it or reiterate it in the regulation" (see A/CN.9/767, para. 31).

33. In paragraph 1, first sentence, the words "a notice" should be replaced by the words "an initial or amendment notice".

34. After paragraph 2, a new paragraph should be added that would read as follows: "While the *Secured Transactions Guide* deals with the time of effectiveness of the registration of an initial notice or an amendment notice, it does not specifically deal with the time of effectiveness of the registration of a cancellation notice. However, it does recommend that, promptly upon registration of a cancellation notice, the information in previously registered notices to which the cancellation notice relates should be placed in the registry archives as to be no longer accessible to searchers of the public registry record (see *Secured Transactions Guide*, rec. 74). As a practical matter, it follows that, when the registry accepts a cancellation notice submitted to it, its first step will be to remove the information in the related notices from the public registry record. Accordingly, the time of effectiveness of the registration of a cancellation notice should be the time when the information in previously registered notices to which the cancellation notice relates is no longer accessible to searchers of the public registry record (see draft Registry Guide, rec. 11, subpara. (d)). As in the case of an initial or amendment notice, the effective date and time of registration of a cancellation notice should also be recorded by the registry (see draft Registry Guide, rec. 11, subpara. (e))" (see A/CN.9/767, para. 36 (c)).

35. Paragraph 11 should be revised to read as follows: "If a State adopts option A, it is not necessary to design its registry system to allow the secured creditor to

reduce the legal period of effectiveness. This is because a registrant is obligated, in any event, to register a cancellation notice if no security agreement has been concluded, the security right has been extinguished by full payment or otherwise or the registration of a notice is not authorized by the grantor (see A/CN.9/WG.VI/WP.54/Add.4, paras. 38-41)" (A/CN.9/767, para. 30 and editorial change made for reasons of consistency with rec. 72).

36. In paragraphs 15 and 17 (and throughout the draft Registry Guide), reference should be made to a "security right", rather than to a "secured creditor" having priority or being subordinated (for reasons of consistency with the formulation of the *Secured Transactions Guide* and the draft Registry Guide; see A/CN.9/767, para. 19 (c)).

37. In paragraphs 29 and 38-40 (and throughout the draft Registry Guide), reference should be made to the obligation of the registry to send a copy of the registered notice to the secured creditor, rather than to the registrant (see A/CN.9/767, paras. 32 (a) and 33). In addition, paragraph 29, second sentence, should be revised to read as follows: "Nonetheless, enacting States may wish to consider whether the registry should be authorized to correct errors the registry staff made in entering into the registry record information submitted by a registrant in a paper notice form" (see A/CN.9/767, para. 32 (b)).

38. After the penultimate sentence of paragraph 41, the following sentence should be inserted: "Where there are multiple secured creditors, it is sufficient if one of the secured creditors sends a copy of the registered notice to the grantor" (see A/CN.9/767, para. 36 (g)).

39. At the end of the first sentence of paragraph 44, the words in parenthesis should be replaced by the following words: "(as to the archival of notices that expired or were cancelled, see *Secured Transactions Guide*, chap. IV, para. 109, and rec. 74; as to the archival of notices that were cancelled without the secured creditor's authorization, see A/CN.9/WG.VI/WP.54/Add.4, paras. [28-37])" (see A/CN.9/767, para. 34 and A/CN.9/781, para. 70).

40. Paragraph 49 should be revised to read as follows: "In the event that the law of the State under which a grantor that is a legal person is constituted authorizes the use of multiple official linguistic versions of its name, enacting States may adopt different approaches. One approach would be to require that all official linguistic versions of the grantor's name be entered as separate grantor identifiers in the notice. This approach would have the advantage of protecting third-party searchers that deal or have dealt with the grantor under any one of the linguistic versions of its name and would therefore search the registry using that version. This approach, however, would expose the secured creditor to the risk of having its registration treated as ineffective if it failed to indicate correctly all the official linguistic versions of the grantor's name. If an enacting State follows this approach, the regulation should specify that the obligation of the secured creditor to enter all official linguistic versions of the grantor's name in the notice as separate grantor identifiers is subject to the rules prescribed by the regulation regarding how names expressed in a foreign set of characters are to be adjusted or transcribed to conform to the language or languages of the registry. Another approach would be to require that only one of the official linguistic versions of the grantor's name must be listed in the notice. This approach would reduce the risk of error for the secured creditor,

but would expose third-party searchers to the risk of not finding the registered notice if they dealt with the grantor using a different linguistic version of the grantor's name and therefore conducted a search according to that other name" (A/CN.9/767, para. 35).

VI. Registration of initial notices (A/CN.9/WG.VI/WP.54/Add.2, paras. 50-71 and A/CN.9/WG.VI/WP.54/Add.3, paras. 1-35)

41. The right column of the third row of the table after paragraph 56 should be revised to read as follows: "(1) Name on citizenship certificate or passport, (2) If no citizenship certificate or passport, name on equivalent official document such as an identification card or driver's licence" (for consistency with rec. 24, subpara. (e)(iii); see A/CN.9/781/Add.1).

42. The third row "syndicate or joint venture" and the fifth row "other entity" in the table following paragraph 66 should be deleted (see A/CN.9/767, para. 38 (a)) and the text in the rows "insolvency estate" and "trustee or other representative of an estate" should be aligned with the text of recommendation 26 (see A/CN.9/781/Add.1, rec. 26).

43. The text in paragraph 42 above should be followed by the text in the first sentence of paragraph 68 of document A/CN.9/WG.VI/WP.54/Add.2, properly revised to read as follows: "Where the encumbered assets are those of a person that is subject to insolvency proceedings, secured creditors must, in addition to entering in the appropriate grantor field the name of the person that is subject to insolvency proceedings, also specify in a separate field that the grantor is insolvent and the name of the insolvency representative, if any (see draft Registry Guide rec. 26, subpara. (a)). This approach will ensure that a search of the registry according to the name of the person that is subject to insolvency proceedings will disclose all notices registered in respect of the assets of that person, whether they relate to security rights granted before or after the commencement of insolvency proceedings and whether the person granting the security right was that person or the insolvency representative, if any" (see A/CN.9/767, para. 38 (b) and A/CN.9/781/Add.1, rec. 26, subpara. (a)).

44. If the Commission revises recommendation 26, subparagraph (b), as suggested (A/CN.9/781/Add.1. rec. 26, note to the Commission), paragraph 68 of document A/CN.9/WG.VI/WP.54/Add.2 should be replaced by the following text:

> "68. If a security right is created in assets that are part of the estate of a deceased natural person by the representative of the estate of the deceased person, the grantor identifier is the name of the deceased person determined in accordance with the rules for determining the name of a grantor that is a natural person (see draft Registry Guide, rec. 24). In addition, in a separate designated field, the fact that the encumbered assets are part of the estate of the grantor and the name of the representative of the estate should be indicated (see draft Registry Guide, rec. 26, subpara. (b)). This approach ensures that a search under the name of the deceased person will retrieve notices registered against the name of the deceased person prior to his or her death relating to security rights in assets that may at the time of the search form part of the deceased person's estate.

"69. Where a security right is created in trust assets and the trustee is a professional trustee, a search according to the name of the trustee will retrieve notices of security rights relating to the assets of all the trusts for which the professional trustee is acting (that is, not just the actual encumbered assets of the specific trust in which the searcher is interested). In addition, if the original trustee is replaced, the substitution would constitute a change of grantor identifier with the consequences indicated in recommendation 61 of the *Secured Transactions Guide*.

"70. Accordingly, if a security right is created in the assets of a trust by the trustee and the instrument creating the trust designates the name of the trust, the grantor identifier is that name, followed by the word 'trust' unless the name of the trust already contains the word 'trust', determined in accordance with the rules for determining the name of a grantor that is a legal person. This approach is not practically feasible where the encumbered assets are trust assets but the trust is not named, In that scenario, the grantor identifier should be the name of at least one of the trustees, determined in accordance with the rules for determining the name of a grantor that is a natural person or a legal person the case may be, with the specification in a separate designated field that the grantor is a trustee. Alternatively, the grantor identifier in the case of an unnamed trust should be the name of at least one of the persons that constituted the trust" (see A/CN.9/781/Add.1, rec. 26, note to the Commission).

45. A new paragraph 71 should be added that would read as follows: "Enacting States may wish to address other types of special cases where guidance on how to enter the grantor identifier may be needed. For example, where a security right is granted on the combined assets of a syndicate or joint venture operating under a combined name but which has not been constituted as a separate legal person guidance may be needed as to what name constitutes the grantor identifier" (for reasons of consistency with A/CN.9/WG.VI/WP.54/Add.2, para. 66, which states that the table lists some examples).

46. Paragraph 67 (about sole proprietorships) should be renumbered as paragraph 72 (see A/CN.9/767, para. 38 (b)).

47. Paragraphs 69-71 (renumbered as paras. 73-75) should be revised to read as follows (see A/CN.9/767, para. 38 (c)):

"73. Under the *Secured Transactions Guide*, the address of the grantor is part of the required content of the notice (see *Secured Transactions Guide*, rec. 57, subpara. (a)). It may also be used as additional information to uniquely identify a grantor where the name of the grantor is a very common name (along with other information, such as a birth date or official identity card number; see paras. 59-61 above). However, it is not part of the grantor identifier (see *Secured Transactions Guide*, rec. 59 and draft Registry Guide, recs. 23, subpara. (a)(i) and 24, subparagraph (a)) and thus is not a search criterion (see draft Registry Guide, rec. 34, subpara. (a)). Accordingly, the prescribed registry notice form should designate a field for entering the grantor's address that is separate from the field designated for entering the grantor's identifier (see A/CN.9/781/Add.2, notice A).

"74. In view of the variety of types of address used in communications, the draft Registry Guide takes the approach that any address should qualify as an 'address' of the grantor for the purpose of completing a registered notice, including a physical, street or post office box address, an electronic address or any address that would be effective for communicating information. However, where personal security concerns necessitate that an individual's address details not be disclosed in a public registry record, the regulation may specify the entry of a post office box or similar non-residential mailing address (see the term 'address' in section B, terminology and interpretation, above).

"75. The address of the grantor is also particularly relevant for the purpose of the secured creditor's obligation to send a copy of a registered notice to the grantor (see *Secured Transactions Guide*, rec. 55, subparas. (c) and (d)). This raises the issue of what constitutes the 'correct' address of the grantor for this purpose. It would seem that the grantor's 'correct' address should be, for the purpose of sending the initial notice, the address indicated in the initial notice, and, for the purpose of sending an amendment notice, the actual, current address of the grantor, provided that the secured creditor knows that address (see draft Registry Guide, rec. 18, subpara. (b))" (as to the "correct" address of the grantor where the secured creditor does not know the grantor's current address, see A/CN.9/781/Add.1, note to the Commission after rec. 18).

[*Note to the Commission: The Commission may wish to note that paragraphs 48-60 below refer to document A/CN.9/WG.VI/WP.54/Add.3*.]

48. Paragraphs 2 and 4 should be replaced by the following paragraphs (A/CN.9/767, para. 39):

"2. The regulation should specify that the same identifier rules that apply to the grantor should apply also to the secured creditor. The name entered in the "secured creditor" field may be either the name of the actual secured creditor or the name of its representative.

"3. Permitting the entry of the identifier of the representative of the actual secured creditor is intended to protect the privacy of the secured creditor. The rights of the grantor are not affected since the grantor is in a direct relationship with the secured creditor and already knows the secured creditor's identity. The rights of third parties also are not affected as long as the representative identified in the notice as the secured creditor is authorized to act on behalf of the actual secured creditor in any communication or dispute connected to the security right to which the notice relates. The secured creditor's entry of the name of a representative in the notice automatically operates as the secured creditor's authorization of the representative to act for the secured creditor in this respect

"4. This approach is also intended to facilitate, for example, syndicated lending, since only the identifier of the trustee or agent for the syndicate of lenders would need to be entered in a notice. In this connection, it should be noted that an agent or trustee of a syndicate of lenders would be a 'representative' of the secured creditor if the security right is granted to the syndicate of lenders, but a 'secured creditor' if the security right was 'granted' (even nominally) to the agent. A third-party service provider, who may submit a notice on behalf of the secured creditor, is neither the secured creditor nor its

representative in the sense of the *Secured Transactions Guide*, and the draft Registry Guide, unless the service provider's name is inserted in the secured creditor field in the registered notice (but such a third-party service provider may be the registrant; see the term 'registrant' in section B of the Introduction to the draft Registry Guide and A/CN.9/WG.VI/WP.54, para. 14)."

49. Paragraph 3 should follow the paragraphs set forth in paragraph 48 above (see A/CN.9/767, para. 39).

50. After paragraph 4, a new paragraph should be added as follows: "As already discussed in the context of grantor information (see A/CN.9/WG.VI/WP.54/Add.2, paras. 66-68, there may be types of secured creditor that do not squarely fit into the category of natural or legal person. While each enacting State will need to decide to what extent special identifier rules are needed for particular cases, possible examples include a secured creditor that is subject to insolvency proceedings, a trustee and a representative of a deceased person. While it would be rather rare that a person subject to insolvency proceedings, a trustee or a representative of a deceased person would be a secured creditor, the regulation should deal with this matter (see draft Registry Guide, rec. 27, subpara. (c))" (see A/CN.9/767, para. 43 (f)).

51. If the Commission decides to revise recommendation 28, subparas. (b) and (c) as suggested in the note to that recommendation (see A/CN.9/781/Add.1, rec. 28), the words "unless otherwise indicated in the notice" should be inserted in the third sentence of paragraph 6 at the end of the sentence.

52. At the end of paragraph 10, the following sentence should be added: "In this connection, it should be noted that, if the proceeds of an encumbered asset are included in the description of the asset in the security agreement and in an initial or amendment notice, they would not be really proceeds but rather form part of the original encumbered assets" (see A/CN.9/767, para. 40).

53. In paragraph 11, after the words "When the proceeds", the following words should be inserted: "(that is, assets received in respect of encumbered assets, provided that they were of a type not covered by the description of the encumbered assets in a previously registered notice)" (see A/CN.9/767, para. 40).

54. After the first sentence of paragraph 20, the following words should be added: "The fact that a notice may be ineffective does not mean that the information in the notice would not be entered in the public registry record but rather that the legal consequences of the registration (that is, the third-party effectiveness of a security right) would not be achieved" (see also para. 58 below). In addition, after the second sentence of paragraph 20, the following wording should be added: "It follows that an error that may seem minor or trivial in the abstract may mean that the registration is not effective to achieve third-party effectiveness if the error would cause the information in the registry record not to be retrieved by a searcher using the grantor's correct identifier as the search criterion. On the other hand, if the registry is designed to retrieve close matches (see A/CN.9/WG.VI/WP.54/Add.4, para. 48), a minor error in the grantor's identifier in the notice may not render the notice ineffective if the information in the notice would be retrieved as a close match on a search using the correct identifier" (editorial change made for reasons of consistency and better understanding of the text).

55. At the end of paragraph 23, the following sentence should be added: "Subparagraph (d) of the recommendation, which deals with a notice that identifies multiple grantors, refers to an "insufficient" (rather than "incorrect") identifier, because under subparagraph (a), the registration of a notice would be effective even if the grantor's identifier in the notice was incorrect, as long as the notice would be retrieved (because, for example, the registry was designed to retrieve close matches; see para. 20 above and A/CN.9/WG.VI/WP.54/Add.4, para. 48)" (editorial change for reasons of explaining the change the Working Group made to this recommendation; see para. 55 above and A/CN.9/767, para. 43, (i)).

56. At the end of the first sentence of paragraph 24, the following sentence should be added: "The reference to the "registration of a notice being ineffective" does not mean that the entry into the public record of the information contained in the notice would be rejected, but rather that the legal consequences of registration would not be achieved" (see A/CN.9/767, para. 43 (h)). In addition, after this text, the following text should be inserted: "Reference to a "reasonable" searcher indicates that the test is an objective one. This means that a competing claimant would not need to establish that it was actually seriously misled (see *Secured Transactions Guide*, chap. IV, para. 84; the same objective test applies with respect to an error in the address of the grantor (see para. 22 above) and the description of the encumbered assets (see para. 25 below), but not with respect to an error in the period of effectiveness or the maximum amount where the test is a subjective one (see paras. 28 and 33 below)" (editorial change for reasons of internal consistency of the text and consistency with the *Secured Transactions Guide*).

57. In paragraph 27, reference should be made to the part in the draft Registry Guide that discussed serial number indexing and thus the wording in parenthesis should be revised to read as follows: "(see A/CN.9/WG.VI/WP.54/Add.2, paras. 24-27, and paras. 8 and 9 above)" (see A/CN.9/767, para. 42 (a)).

58. Paragraph 30 and the last sentence of paragraph 31 should be deleted, while the first two sentences of paragraph 31 should be placed at the end of paragraph 28, revised to read as follows: "As already discussed (see para. 22 above), the seriously misleading test with respect to the address of the grantor, the secured creditor information or the description of the encumbered assets is an objective one. With respect to the period of effectiveness (and the maximum amount; see para. 33 below), however, the serious misleading test is subjective in the sense that a competing claimant that challenges the period of effectiveness indicated in the notice needs to establish that it was actually seriously misled by the error (for the reason, see para. 29" (see A/CN.9/767, para. 42 (b)).

VII. Registration of amendment and cancellation notices (A/CN.9/WG.VI/WP.54/Add.4, paras. 1-41)

59. In subsection A.1. and throughout the draft Registry Guide, reference should be made to the "secured creditor", rather than to the "registrant", as the person entitled to submit an amendment notice (see A/CN.9/767, para. 45 (a)).

60. In paragraph 3, third sentence, after the words "a voluntary subordination of the priority of the security right to which the registration relates" the following words should be inserted in parenthesis: "(an amendment with respect to a

subordination agreement is optional; see para. 13 below)" (see A/CN.9/767, para. 45 (b)).

61. The first few words of paragraph 5 should be revised to read as follows: "The following paragraphs discuss some of the reasons why a secured creditor …" (see A/CN.9/767, para. 45 (c)).

62. In paragraph 8, third sentence, the words "adding the identifier of an additional grantor" should be replaced by the words "changing the identifier of the grantor (whose name will also be included in the registry index)" (see A/CN.9/767, para. 45 (d)).

63. At the end of paragraph 10, the following words should be added: "However, with respect to security rights in intellectual property, the *Supplement* recommends a specific approach (see *Supplement*, rec. 244)" (see A/CN.9/767, para. 45 (e).

64. At the end of the second sentence of paragraph 11, the following words should be added: "(this is the approach recommended in the *Supplement* for registrations that relate to security rights in intellectual property specifically)" (see A/CN.9/767, para. 45 (e)).

65. The second sentence and the first word of the third sentence of paragraph 13 should be revised to read as follows: "The registry may be designed to accommodate the registration of an amendment notice to disclose a subordination agreement, but adding new features to the registry could increase the design and operational cost of the registry. In any case, …" (see A/CN.9/767, para. 45 (f)).

66. At the end of paragraph 22, before the reference to recommendation 31, the following wording should be added: "Depending on the approach they choose to take, enacting States would need to design a form for a secured creditor to implement a global amendment directly or an application for the secured creditor to request the registry to make that amendment. In any case, where there are multiple secured creditors, a secured creditor should be able to amend only information relating to it, unless all secured creditors join in on the global amendment (see A/CN.9/767, para. 54 (b) and A/CN.9/781, rec. 31, note to the Commission).

67. At the end of paragraph 27, the following words should be added: "To minimize the risk of inadvertent cancellations, the prescribed registry notice form may be designed to include a note alerting the secured creditor to the legal consequences of a cancellation (see para. 25 above; see also A/CN.9/781/Add.2, Form III, Cancellation notice). The risk of inadvertent cancellations by secured creditors may also be reduced, for example, by: (a) requiring additional information, such as the grantor identifier to be included in a cancellation notice and designing the registry system so as to reject the cancellation notice if the registration number does not match the grantor identifier; or (c) designing an electronic registry system so as to have the entire record relating to the notice to be cancelled appear on a screen upon entry of the registration number" (see A/CN.9/767, para. 56 (c)).

68. Paragraphs 28-37 should be replaced by the following text (see A/CN.9/767, para. 46 and A/CN.9/WG.VI/XXIII/CRP.2):

> "28. As already discussed (see A/CN.9/WG.VI/WP.54/Add.1, para. 60, and A/CN.9/WG.VI/WP.54/Add.4, para. 3), while the registration of an initial notice and certain amendment notices by the secured creditor must be

authorized by the grantor in writing, the grantor's authorization may be obtained before or after the registration and the entry into of the security agreement, the existence of which constitutes sufficient authorization in itself. In the absence of authorization, the registration is not effective (see *Secured Transactions Guide*, rec. 71). The reason for this approach lies in the negative effect that unauthorized registrations have on the ability of the grantor to sell, grant security in, or otherwise deal with, the assets described in a registered notice.

"29. Different policy considerations arise where the registration of an amendment or cancellation notice is not authorized by the secured creditor. An unauthorized registration of this type may occur, for example, as a result of fraud or error by a third party or even the negligence or fraud of a staff member of the registry. The issue in this case is to what extent conclusive effect should nonetheless be given to the registry record in the secured creditor's contest with a competing claimant or third parties must conduct off-record inquiries to verify that the secured creditor authorized the registration of the amendment or the cancellation.

"30. The *Secured Transactions Guide* does not deal with this issue explicitly and fully. As already noted (see A/CN.9/WG.VI/WP.54/Add.4, paras. 25-27), recommendation 47 provides that, where a secured creditor registers a cancellation notice in error, the third-party effectiveness and priority of its security right is lost and can be re-established only with effect from the time a new initial notice is registered. However, recommendation 47 does not deal with the issue of whether this is also the result if the registration of the cancellation notice was not authorized by the secured creditor (although it should be noted that bona fide third-party searchers would have no way of distinguishing between a situation where the secured creditor inadvertently cancelled its registration in error and a situation where the cancellation was registered by another person acting without the authority of the secured creditor). Nor does the *Secured Transactions Guide* address the effectiveness of an unauthorized amendment notice, the purported effect of which is equivalent to a cancellation (for example, where the amendment purports to delete an encumbered asset). In addition, recommendation 55, subparagraph (d), obligates the registry to send promptly a copy of a registered amendment or cancellation notice to the secured creditor which would enable the secured creditor to check the legitimacy of the amendment or cancellation. However, the *Secured Transactions Guide* does not go on to address the issue of whether an unauthorized amendment or cancellation is nonetheless effective in the event of a priority competition between the secured creditor and a competing claimant (see *Secured Transactions Guide*, chap. IV, para. 52, recommendation 55, subpara. (d), and A/CN.9/WG.VI/WP.54/Add.2, paras. 38-40). Moreover, recommendation 74 provides that the registry should "remove" information contained in a registered notice from the public registry record if the registered notice has been cancelled where no security right has been created, the security right has been extinguished, or the registered notice has not been authorized by the grantor. But recommendation 74 does not explicitly require removal and archiving where the registration of a cancellation notice is not authorized by the secured creditor, leaving open the question whether such cancellation notices must be archived. On the other hand, under

recommendation 74, the registry would have to remove the relevant notice from the public registry record, irrespective of whether registration of the cancellation notice was in fact authorized by the secured creditor or not, as the registry would have no way of verifying whether or not the secured creditor had authorized its registration.

"31. To fully address the effectiveness of amendment or cancellation notices not authorized by the secured creditor, enacting States will need to examine and make a decision on the following issues: (a) what administrative or technological security processes (if any) should be put in place concerning access to the registry for the purposes of amending or cancelling an initial notice; (b) what processes (if any) should be put in place to inform registrants and secured creditors that an amendment or cancellation has been registered; (c) what processes (if any) should be put in place to enable secured creditors whose registration has been amended or cancelled without authorization to reinstate or file a corrected notice; (d) whether there should be some protection for secured creditors whose registrations have been amended or cancelled without their authorization; and (e) if so, whether the secured creditor should nonetheless be subordinated to competing claimants that acquired rights in the grantor's assets after the unauthorized amendment or cancellation notice has been registered or only to competing claimants that relied on the registry record in the sense of entering into a particular transaction on the assumption that, because a cancellation or amendment notice had been registered, the relevant asset was unencumbered. Once an enacting State has made a decision as to how to address these policy issues in its secured transactions law, it will have to craft the registry regulations so as to provide for the technical regime necessary to effectuate these policy choices.

"32. Currently, States that have established registries to support secured transactions laws of the type recommended by the *Secured Transactions Guide* have taken different approaches to resolving these policy issues. The various interests in play have obliged States to develop relatively complex rules to achieve what they consider to be a fair balancing of these interests. Given the significant impact that these policy choices will have on the registry regulations, the draft Registry Guide does not make any recommendation as to how these policy issues should be addressed, but leaves it to each enacting State to determine for itself how to proceed.

"33. Some States place paramount importance on the conclusiveness of the registry record in resolving priority competitions. In those States, a secured creditor may reinstate its registration, but the reinstatement takes effect only from the time of the new registration. Third-party effectiveness is lost against competing claimants whose rights arose prior to the reinstatement regardless of whether: (a) they actually searched the registry; (b) the secured creditor authorized the registration of the amendment or cancellation; or (c) the competing claimant's claim arose before the amendment or cancellation. At the other end of the spectrum are States that place paramount importance on the protection of the secured creditor. In those States, an amendment or cancellation is legally effective only if it was authorized by the secured creditor and thus the registry record is not conclusive for the purposes of resolving priority competitions. Even if an asset appears to be no longer

encumbered as a result of the registration of an unauthorized amendment or cancellation, the secured creditor can challenge the priority of a competing claimant, including a competing claimant that relied on the registry record, on the basis of off-record evidence that the secured creditor did not authorize the change to the registry record.

"34. States that place paramount importance on the conclusiveness of the registry record may nonetheless permit a secured creditor to reinstate its registration with effect from the time of the original registration for the limited purpose of a priority competition with a competing claimant over whom the reinstating secured creditor had priority prior to the registration of the amendment or cancellation. On the other hand, an exception along these lines creates the potential for circular priority problems to arise. The issue is illustrated by the following scenario. Suppose that prior to the unauthorized cancellation of SC1's security right, SC1 had priority over SC2 under the first-to-register priority rule. After the cancellation (but before SC1 reinstates its registration), SC3 takes and registers a security right in reliance on a search result that shows the grantor's assets are now unencumbered. In this scenario, SC1 retains its priority over SC2 but is subordinated to SC3, while SC3 has priority over SC1 but is subordinated to SC2. Where SC2 makes further advances to the grantor after the registration of the cancellation but before reinstatement, the additional question arises whether SC2 should have priority over SC1 with respect to these further advances. Accordingly, an enacting State that adopts this approach will need to provide guidance in its secured transactions law on how to resolve these potential circular priority problems. In addition, it will need to consider whether it should reduce the potential for circular priority contests to arise by limiting the period of time available to a secured creditor to register a reinstatement. Provided, as recommended in the *Secured Transactions Guide*, that secured creditors are promptly notified of the registration of an amendment or cancellation notice, the imposition of a temporal limit on reinstatement may be an appropriate compromise.

"35. Enacting States that place paramount importance on the protection of the secured creditor may also elect to create exceptions to that starting policy of reinstating lapsed registrations as of the time of the original registration. For example, an enacting State may elect to protect competing claimants that can show that they factually relied on a clean search result following the registration of the unauthorized amendment or cancellation. Under this approach, the secured creditor, despite not having authorized an amendment or cancellation, would be subordinated to a purchaser or competing secured creditor that is able to prove that it in fact entered into the transaction with the grantor in reliance on a search result that showed that the relevant asset was no longer encumbered as a result of the registration of an amendment or cancellation. The same protection in principle would be extended to an intervening judgment creditor if the enacting State has decided to enable judgment creditors to register their judgments in the security rights registry for the purposes of obtaining priority over subsequent competing claimants. As against other categories of intervening competing claimants, the secured creditor would retain its priority whether or not the registry record is ever corrected. It should be noted that this type of limited protection also creates the potential for the types of circular priority problems addressed in the

preceding paragraph to arise which will need to be addressed by the enacting State.

"36. An enacting State's underlying paramount policy (that is, to ensure the conclusiveness of the registry record for the purposes of resolving priority competitions according to the rules set forth in the secured transactions law or to permit off-record evidence of the secured creditor's lack of authorization for the registration of an amendment or cancellation notice in order to protect secured creditors) is also relevant to the issue of access to registry services for the purposes of making changes to an initial notice. Enacting States that favour the first policy will need to provide secured creditors with the ability to control the risk of unauthorized registrations in order to make that policy more palatable. This result could be accomplished by adopting secure access procedures for registering amendments and cancellations. For example, the registry system could assign unique access codes to secured creditors when they apply for access to the registry's registration services for the first time and then require that access code to be entered on any amendment or cancellation notice submitted for registration that relates to an initial notice registered by that secured creditor.

"37. A similar secure access code system could also be introduced in enacting States that place paramount importance on protecting secured creditors against unauthorized registrations. However, the introduction of such a system may have an impact on the question of what constitutes an unauthorized registration. For a secured access code system to provide real added value, the secured creditor would typically bear the risk of errors made by agents employed by the secured creditor to make registrations on its behalf, and with whom the secured creditor shares its confidential access code for that purpose. Otherwise, there is little point in implementing this system since the entry of the secured creditor code would not by itself imply authorization by the secured creditor. Third parties would still need to conduct an off-record investigation to verify whether the registration was effected by the secured creditor itself or by an agent acting outside the scope of the secured creditor's authority whether through negligence or outright mischief. That said, where there is a secure access code, third parties might conclude that the risk of unauthorized registrations is so low that off-record investigations are not always necessary as a practical matter.

"38. An enacting State's policy starting point also has an impact on the question of whether cancelled notices can and should be removed from the publicly searchable record. In enacting States that elect to make the conclusiveness of the registry record paramount, cancelled notices can be archived, since search results are conclusive regardless of whether a registered cancellation was authorized. In these States, the registry nonetheless would be subject to the duty recommended by the *Secured Transactions Guide* to inform the secured creditor of the registration of a cancellation or amendment so that, if the registration were unauthorized, the secured creditor could re-register so as to at least protect its rights as against third parties that subsequently acquired rights in the encumbered assets. In enacting States that elect to make protection of the secured creditor paramount, cancelled notices must remain searchable at least until the date they would have lapsed in the absence of a

cancellation in order to enable searchers to conduct off-record inquiries with respect to whether the secured creditor authorized the cancellation. As noted in the commentary above, the *Secured Transactions Guide* recommends archival of cancelled notices but it does not explicitly require this where the cancelled notice was not authorized by the secured creditor. Accordingly, enacting States that elect to make unauthorized cancellations ineffective as their starting policy position will need to design the registry system so as to enable the registry to verify whether a secured creditor has authorized the registration of a cancellation notice in order to reconcile this recommendation with that policy."

69. At the end of paragraph 41, the following wording should be added: "Enacting States would need to decide how to deal with a number of matters in this regard, including: (a) whether a copy of the entire order (including the factual findings, the reasoning and the actual decision) or only the actual decision would need to be attached; and (b) whether a certified copy should be attached, and, if so, what constituted a certified copy under the law of the enacting State" (see A/CN.9/767, para. 55 (d)).

VIII. Search criteria and search results (A/CN.9/WG.VI/WP.54/Add.4, paras. 42-51)

70. The last sentence of paragraph 46 should be deleted (as it replicates the same point made in the first sentence of paragraph 47; see A/CN.9/767, para. 49 (a)). In addition, after the first sentence of paragraph 46, the following words should be added: "If no search criterion is entered by a searcher on a search request form that is attempted to be submitted electronically to the registry, the registry system will typically be designed to prevent the search request from being accepted by the registry system and the searcher will be alerted by a notice on the screen or equivalent method to enter the missing criterion in the relevant field. Where a search request is submitted on a paper form, the registry will issue a rejection form indicating that the search could not be conducted because no criterion was entered on the search request form (see A/CN.9/781/Add.2, Form VIII. Rejection of a registration or search request)" (see A/CN.9/767, para. 60 (f)). Moreover, at the end of paragraph 46 (as revised), the following wording should be added: "Enacting States would need to consider the kind of information to be provided to a searcher in a search result. For example, all information relating to notices that matched the search criterion may be provided in an attachment or a summary of that information may be presented in a tabular format (see A/CN.9/781/Add.2, Form VII. Search results)" (see A/CN.9/767, para. 59 (c)).

71. At the end of paragraph 47, the following text should be added in a footnote: "The issue of whether the registry system should be designed to return close matches to the search criterion submitted by a searcher arises only where the search criterion is the grantor identifier and not the registration number since the only categories of searchers that will use the registration number for searching as a practical matter are those that are familiar with the initial registration and they will know that the registration number was wrong when the search result discloses a notice relating to a different grantor. Moreover, if notices whose numbers closely match the registration number had to be disclosed on a search result, this would

result in very lengthy search results containing information in unrelated notices in all cases)" (see A/CN.9/767, para. 49 (b)).

IX. Registration and search fees (A/CN.9/WG.VI/WP.54/Add.4, paras. 52-58)

72. No changes were made to this section.

X. Annex I. Terminology and recommendations (A/CN.9/WG.VI/WP.54/Add.5)

73. The changes to annex I, terminology and recommendation are reflected in document A/CN.9/781/Add.1. The terminology will also appear in section B of the introduction and each recommendation will appear at the end of the relevant chapter.

XI. Annex II. Examples of registry forms (A/CN.9/WG.VI/WP.54/Add.6)

74. The changes to annex II, examples of registry forms are reflected in document A/CN.9/781/Add.2.