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Draft Technical Legislative Guide on the Implementation of a Security Rights Registry

Note by the Secretariat

Addendum

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V. Registration of amendment and cancellation notices

A. General remarks

1. Amendment notices

(a) General

1. A registrant may wish to amend the information in a registered notice for a variety of reasons, for example, to correct an error in a previous registered notice or to update the registration information as a result of subsequent events. This is done by submitting an amendment notice to the registry. The regulation should make it clear that the registrant is responsible for entering the information in relation to the amendment in the manner required by the regulation for entering information of that kind in an initial notice (see draft Registry Guide, recs. 19 and 30).

2. The registry system should be designed to ensure that the registration of an amendment notice does not have the effect of deleting or replacing registration information contained in the initial notice and any previously registered amendment notices. Instead, the information in the amendment notice should be added to the existing registration information so that a search result will show the initial notice and all subsequently registered amendment notices.

3. A secured creditor should be able to register an amendment notice, to the extent appropriate, at any time (see *Secured Transactions Guide*, rec. 73). Some amendments require the grantor's authorization (such as, for example, an amendment to reflect the addition of new encumbered assets or a new grantor, or, if required by the secured transactions law of the enacting State, an increase in the amount for which a security right to which the registration relates may be enforced. Other amendments do not require the grantor's authorization (such as, for example, an amendment to reflect a subsequent change in the grantor's identifier, an assignment of the secured obligation, a voluntary subordination of the priority of the security right to which the registration relates, a change of address of the secured creditor or its representative, or an amendment to reflect a transferee of an encumbered asset from the grantor as an additional grantor. In any event, as noted earlier, to the extent the grantor's authorization is needed, it may be given before or after the registration of a notice, and a written security agreement constitutes sufficient authorization (see *Secured Transactions Guide*, rec. 71 and A/CN.9/WG.VI/WP.54/Add.1, para. 60). Accordingly, where the amendment relates, for example, to the addition of new encumbered assets or a new grantor, the completion of a written security agreement covering the new assets or with the new grantor will itself constitute authorization.

4. To effect an amendment, a registrant must provide in the designated fields in the amendment notice the registration number of the initial notice to which the amendment relates, and the relevant amendment information (see draft Registry Guide, rec. 30, subpara. (a)). As in the case with an initial notice, each amendment notice should be assigned by the registry the date and time when the information in the notice was entered into the registry database so as to be available to searchers of the public registry record (see draft Registry Guide, rec. 12, and A/CN.9/WG.VI/WP.54/Add.2, paras. 1-6). The enacting State may wish to consider whether the registry system and the prescribed form of amendment notice should be

designed to allow the registrant to amend only a single item of information in an amendment notice (e.g., change the grantor's identifier) or to allow multiple items to be amended with a single amendment notice (e.g., add a new grantor and delete some encumbered assets). The latter approach is recommended as it is simpler and more cost-efficient (see draft Registry Guide, rec. 30, subpara. (f)).

5. The following paragraphs discuss the various reasons why a secured creditor may wish to register an amendment notice and the legal implications of registration or failure to register.

(b) Subsequent change of the grantor's name

6. A change in the name of the grantor indicated in a registered notice (for example, as a result of a merger) may undermine the publicity function of registration from the perspective of third parties that deal with the grantor after its name has changed. As the grantor's name is the principal indexing and search criterion, a search using the grantor's new name will not retrieve the notice. In a registry system that uses a State-issued permanent and unique identity or other official number as the grantor's identifier for the purposes of indexing and searching registered notices, it is less likely that this problem will arise since the number is typically permanent and not subject to change. However, under the approach recommended in the *Secured Transactions Guide*, the name of the grantor is the principal indexing and search criterion; an identity number may be required as additional identifier if necessary to uniquely identify the grantor but it is not an indexing or search criterion (see *Secured Transactions Guide*, recs. 58-60, A/CN.9/WG.VI/WP.54/Add.2, paras. 59 and 60, and paras. 42-45 below).

7. To address this problem, the regulation and the prescribed form of amendment notice should make it possible for the secured creditor to register an amendment notice to add the grantor's new name. While failure to submit an amendment notice should not make the security right generally or retroactively ineffective against third parties, third parties that deal with the grantor after the change in its name and before the amendment notice is registered should be protected. Accordingly, the *Secured Transactions Guide* recommends that, if the secured creditor does not register the amendment notice within a specified short "grace period" (for example, fifteen days) after the name has changed, its security right is ineffective against buyers, lessees, licensees and other secured creditors that acquire rights in the encumbered asset after the change in the grantor's name and before the amendment is registered (see *Secured Transactions Guide*, rec. 61). The *Secured Transactions Guide* also recommends that the grace period should begin to run from the date of the change of the name (some States provide it begins only from the date when the secured creditor acquired knowledge of the change). The secured transactions law of the enacting State should also provide guidance on what constitutes a change of name in the context, in particular, of corporate amalgamations and the effect of not making an amendment in the wake of the amalgamation.

8. As already noted (see para. 2 above), the registry system should be designed to ensure that the registration of an amendment notice does not have the effect of deleting or replacing registration information contained in the initial notice and any previously registered amendment notices. As a result, a search using either the old or the new name of the grantor as the search criterion would retrieve the registration. It is thus important for the registrant to understand that it should enter

the grantor's new name in the field designated in the amendment notice for adding the identifier of an additional grantor, without also deleting the old grantor information. Otherwise, a search of the registry record according to the grantor's old name would not retrieve the registration, potentially prejudicing the effectiveness of the security right against third parties that dealt with the grantor prior to the change of name and that would, therefore, likely conduct their search using the grantor's name at that time.

(c) Transfer of an encumbered asset

9. When the grantor transfers, leases or licences an encumbered asset, the transferee, lessee or licensee will ordinarily acquire its right in the asset subject to the security right assuming it has been made effective against third parties (see *Secured Transactions Guide*, rec. 79). If the security right was made effective against third parties by registration, this creates a problem analogous to a post-registration change in the name of the grantor discussed above. Third parties that deal with the encumbered asset in the hands of the transferee, lessee or licensee typically will search the registry record using the name of the transferee, lessee or licensee as the search criterion. That search will not retrieve the registered notice since it was registered and indexed according to the name of the grantor (the transferor, lessor or licensor). To protect third parties that deal with the encumbered asset in the hands of the transferee, lessee or licensee, the registry system and the regulation should enable the secured creditor to submit an amendment notice to record the name and address of the transferee, lessee or licensee as a new additional grantor.

10. The *Secured Transactions Guide* recommends that an enacting State should address the legal implications of the failure of a secured creditor to register an amendment notice in this scenario, but leaves it to each enacting State to decide which of the three approaches discussed in the commentary it should adopt (see *Secured Transactions Guide* chap. IV, paras. 78-80, and rec. 62).

11. The first approach is analogous to that recommended by the *Secured Transactions Guide* to a change in the name of the grantor (see *Secured Transactions Guide*, rec. 61, and paras. 6-8 above). Under this approach, failure to amend the registration to add the transferee, lessee or licensee as a new additional grantor does not make the security right ineffective against third parties generally. However, if the secured creditor does not register the amendment notice within a short "grace period" (for example, fifteen days), its security right is ineffective against buyers, lessees, licensees and secured creditors that acquire rights in the encumbered asset after it was transferred, leased or licensed and before the amendment notice was registered. The second approach is similar subject to the important caveat that the grace period to register the amendment notice begins to run only when the secured creditor acquires knowledge that the grantor has transferred, leased or licensed the encumbered asset. The third approach is different in that registration of the amendment notice is purely optional in the sense that failure to register does not affect the third-party effectiveness or priority of the security right to which the registration relates (see *Secured Transactions Guide*, chap. IV, paras. 78-80).

12. Regardless of which approach an enacting State adopts, it should include in its regulation a provision enabling a secured creditor to register an amendment notice

to add a transferee, lessee or licensee of the grantor as an additional grantor (see draft Registry Guide, rec. 30, subpara. (c)). That is to say, even if the enacting State adopts the third optional approach, a secured creditor should be able to register an amendment of this kind, if it wishes to do so. Registration would provide a measure of practical protection against the risk that the transferee, lessee, or licensee will dispose of the encumbered asset to a new transferee whose whereabouts may not be traceable. Registration would also reduce the risk of disputes as lenders to the transferee, lessee or licensee would be on notice. The registrant should understand that it should enter the name and address of the transferee, lessee or licensee in the fields designated in the amendment notice for adding a new grantor, without deleting the original grantor information. Otherwise, a search of the registry record according to the grantor's name would not retrieve the registration, potentially prejudicing the effectiveness of the security right against third parties that dealt with the grantor before the encumbered asset was transferred, leased or licensed and that would, therefore, likely conduct their search using the grantor's name.

(d) Subordination of priority

13. Under the *Secured Transactions Guide*, a secured creditor with priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant (see *Secured Transactions Guide*, rec. 94). Subordination affects only the rights of the subordinating secured creditor and the beneficiary of the subordination. Accordingly, the registry should be designed to accommodate the registration of an amendment notice to disclose a subordination. However, registration should be purely optional in the sense that an amendment would not be needed to preserve the third-party effectiveness or priority (or subordination of priority) of the security right to which the registration relates.

(e) Assignment of the secured obligation and transfer of the security right

14. A secured creditor may assign the secured obligation. As in most legal systems, the *Secured Transactions Guide* recommends that, as an accessory right, the security right follows the secured obligation, with the result that the assignee of the obligation in effect will be the new secured creditor (see *Secured Transactions Guide*, recs. 25 and 48 that are based on article 10 of the United Nations Convention on the Assignment of Receivables in International Trade). Under the approach recommended in the *Secured Transactions Guide*, an amendment to the initial notice to add the assignee as a new secured creditor is not required in the sense of it being necessary to preserve the effectiveness of the registration (see *Secured Transactions Guide*, rec. 75). As the identifier of the secured creditor is not an indexing and search criterion, searchers will not be seriously misled by the change.

15. While registration of an amendment notice is optional, failure to register may be disadvantageous for the new secured creditor (assignee). As noted earlier, searchers rely on the secured creditor information in registered notices for the purposes of sending various communications under the secured transactions law (such as the notice of an extrajudicial disposition of an encumbered asset which a secured creditor is required to send to other secured creditors that have registered a notice relating to the same grantor and the same encumbered assets; see *Secured Transactions Guide*, recs. 149-151). If the assignee is not added as a new secured

creditor, it will not receive notices of this kind directly and will be dependent on the original secured creditor (assignor) to forward them to it.

(f) Addition of new encumbered assets

16. A secured creditor may wish to register an amendment notice to add new encumbered assets to the description contained in a previously registered notice for a variety of reasons. For example, the grantor may have agreed to grant a security right in additional assets after the prior notice was registered or the secured creditor may have inadvertently omitted to include an encumbered asset in the previously registered notice. To accommodate this possibility, the registry system should enable the secured creditor to amend the description of encumbered assets in a previously registered notice to add new assets. While the secured creditor could achieve the same result by registering a new initial notice with respect to the new assets, the registration of an amendment notice would typically be more efficient and would ensure that the duration of the effectiveness of the registration is the same for both the original and the additional assets. Regardless of which method is chosen, the security right in the new encumbered assets becomes effective against third parties only as of the time the amendment notice or the new notice as the case may be is entered into the registry record so as to be available to searchers (see *Secured Transactions Guide*, rec. 70). The reason for this approach is that a search of the registry record by third parties prior to registration of the amendment notice or the new notice would not disclose that the new encumbered assets were potentially subject to a security right.

(g) Deletion of encumbered assets

17. The secured creditor may wish or be required to register an amendment notice to delete encumbered assets from the description in the initial notice for a variety of reasons. For example, the grantor may have paid a portion of the obligation secured by the related security right on condition that the security right be extinguished against specified assets; or the description in the initial notice may have been overly broad and the grantor may have issued a demand to the secured creditor to amend the initial notice to reflect the true scope of the encumbered assets (as to the obligation of the secured creditor to amend a registered notice in the latter scenario, see paras. 38-41 below). Accordingly, the registry system should be designed to accommodate the registration of an amendment notice to delete specific assets that have been described in a previously registered notice as encumbered assets.

(h) Other changes to the description of encumbered assets

18. A registrant may wish to register an amendment notice to correct an error in the description of the encumbered assets contained in a previously registered notice. The amendment notice would normally take effect with respect to the assets to which it relates only as of the date it is entered into the registry record so as to be available to searchers unless the error is minor and the original description would have allowed the reasonable identification of the encumbered assets even if the amendment notice had not been registered (see *Secured Transactions Guide*, rec. 63).

19. A secured creditor may also wish to amend the description of the encumbered assets contained in a previously registered notice as a result of subsequent changes

to the encumbered assets described in that previously registered notice. For instance, the previously registered notice may have described the encumbered assets as "all cherry wood furniture" but subsequent to its registration the grantor may have painted the furniture in green; or, in the previously registered notice, the encumbered assets may have been described as all inventory located at a specified address and the inventory may have since been relocated to a new address. Since the description in the previously registered notice no longer corresponds to the reality, the secured creditor may wish to submit an amendment notice to update the description. Generally, an amendment is not required in the sense of being necessary to preserve the third-party effectiveness of the security right to which the registration relates. Searchers are expected to understand that aspects of the description of an encumbered asset in a previously registered notice may change as a result of post-registration events and that they may, therefore, need to make further inquiries. Accordingly, where an amendment notice of this kind is registered, the effective date of registration with respect to the encumbered assets to which it relates generally remains the date of registration of the prior notice containing the original description, provided that the description was current as of that time.

(i) Extension of the period of effectiveness of a registration

20. The *Secured Transactions Guide* recommends that a secured creditor should be able to extend the period of effectiveness of a registered notice by the registration of an amendment notice at any time before the expiry of its period of effectiveness (see *Secured Transactions Guide*, rec. 69). If the registration of a new notice were instead required, this would undermine the secured creditor's priority status and the continuity of the third-party effectiveness of its security right, since the new notice would take effect against third parties only from the time of its registration.

21. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 7-15), there are several approaches that States can take with respect to the period of effectiveness of the registration of a notice. In States where the period of effectiveness of the registration of a notice is established by law (option A), the registry system should be designed so that the registration of the amendment notice would automatically extend the period of effectiveness of the registration for an equivalent period. In States that permit the registrant to self-select the period of effectiveness (option B), the prescribed form of amendment notice should permit the registrant to likewise self-select the length of the extension period. Thus, a registrant who, for example, selected a five year term for the initial registered notice should be allowed to select a different period for the extension. In States that permit the registrant to self-select the period of effectiveness subject to a maximum limit (option C), the registry system should be designed to prevent a registrant from entering a period that exceeds the maximum limit.

(j) Global amendment of secured creditor information

22. The identifier or address, or both, of a secured creditor may change as a result of a merger, sale or other post-registration event. To enable the secured creditor information in all notices associated with that secured creditor to be efficiently amended, the registry system should be designed to allow a global amendment to be made either by registry staff at the request of the secured creditor or by the secured

creditor directly (see draft Registry Guide, rec. 31; for the protection of the secured creditor against unauthorized or fraudulent amendments, see paras. 28-37 below).

2. Cancellation notices

23. As in the case of an amendment, the *Secured Transactions Guide* recommends that a secured creditor should be able to register a cancellation notice at any time (*Secured Transactions Guide*, rec. 73). A cancellation should not require authorization by the grantor, as it has no effect or only a beneficial effect on the grantor. As already mentioned, unlike an amendment, registration of a cancellation notice results in the removal of all registered notices to which it relates from the public registry record. Information thus removed is archived for a long period of time in a manner that enables it to be retrieved by the registry staff (see A/CN.9/WG.VI/WP.54/Add.2, paras. 44 and 45, and draft Registry Guide, rec. 21).

24. To facilitate the registration process, the only information that the registrant should be required to enter in the designated field on the cancellation notice is the registration number assigned to the initial notice by the registry and permanently associated with that notice and any related subsequent notices (see draft Registry Guide, rec. 32; for authorization of a cancellation notice by the secured creditors, see paras. 28-37 below).

3. Effect of inadvertent expiration or cancellation of a registered notice

25. In the event that a secured creditor inadvertently fails to extend the period of effectiveness of a registration before it expires or inadvertently registers a cancellation notice, the secured creditor may register a new initial notice. However, the *Secured Transactions Guide* recommends that the third-party effectiveness and priority status of the security right to which the new notice relates should date only from the time of its registration (see *Secured Transactions Guide*, rec. 47). Accordingly, the secured creditor will suffer a loss of priority as against competing claimants whose rights became effective against third parties prior to the expiration or cancellation, including competing secured creditors against whom it previously had priority under the first-to-register rule (see *Secured Transactions Guide*, chap. V, paras. 132-134, and rec. 96). The policy underlying this approach is to avoid requiring a third-party searcher to go beyond the registry record in order to determine if a security right ever existed (see *Secured Transactions Guide*, chap. III, para. 123).

26. Some States adopt a more lenient approach. Under this second approach, the secured creditor is given a short grace period after the lapse or cancellation to revive its registration so as to restore the third-party effectiveness and priority status of its security right as of the date of the initial registration. However, to protect intervening third parties, the secured transactions law in States that adopt this approach provides that the security right is ineffective against or subordinate to competing claimants that acquired rights in the encumbered assets or advanced funds to the grantor after the lapse or cancellation and before the new registration. A third approach is the same except that there is no time limitation on when a lapsed or expired registration may be revived subject to the rights of intervening competing claimants (see *Secured Transactions Guide*, chap. III, para. 123).

27. On the one hand, the *Secured Transactions Guide* recognizes that the second and third approaches also protect third-party searchers. On the other hand, the *Secured Transactions Guide* also recognizes that reinstatement may give rise to a complicated "circular priority" dispute where the secured creditor that reinstates thereby regains a priority over a competing secured creditor that existed before the lapse or cancellation, but not over a third competing secured creditor that has entered the picture in the period between the lapse or cancellation and the reinstatement. In addition, adoption of either of these two approaches requires the registry system to be configured to enable revival of or a reference to the original registration on the reinstatement notice. To avoid these complications and in the interest of providing a clear and efficient registration and priority regime, the *Secured Transactions Guide* recommends that a lapsed or cancelled registration can be revived only by registration of a new notice with the result that the related security right takes effect against competing claimants only from the date of its registration forward (see *Secured Transactions Guide*, chap. III, paras. 124-127, and rec. 47).

4. Effectiveness of amendment or cancellation notices not authorized by the secured creditor

28. As already discussed (see paras. 25-27 above), recommendation 47 of the *Secured Transactions Guide* provides that, where there is a lapse of third-party effectiveness as a result of the expiration of a registration or the registration of a cancellation notice, it can be re-established but only as of the time a new initial notice with respect to the security right is registered. However, recommendation 47 does not seem to deal with the issue of whether third-party effectiveness is lost where the registration of the cancellation notice was not authorized by the secured creditor. Nor does the *Secured Transactions Guide* address this issue in the context 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 from the description in the initial notice or where it purports to delete a grantor). The balance of the discussion in this section also applies to such amendments as well as to cancellations.

29. In addition, as already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 38-40), recommendation 55, subparagraph (d), of the *Secured Transactions Guide* obligates the registry to send promptly a copy of a registered amendment or cancellation notice to the secured creditor. While the commentary in the *Secured Transactions Guide* explains that the purpose of this obligation is to enable the secured creditor to check the legitimacy of a cancellation or amendment, it does not go on to address the issue of whether an unauthorized cancellation or amendment may nonetheless be relied upon by third party searchers (see *Secured Transactions Guide*, chap. IV, para. 52). Moreover, recommendation 71 of the *Secured Transactions Guide* deals in detail with the issue of authorization in the context of the grantor's authorization for registration of an initial or amendment notice but not with the secured creditor's authorization for registration of an amendment or cancellation notice. Finally, recommendation 74 of the *Secured Transactions Guide*, which provides that cancelled notices are removed from the publicly searchable registry record, may also have a bearing on the effectiveness of the registration of an unauthorized cancellation notice (see paras. 33 and 34 below).

30. Legal systems differ on the approach they take to this question. In some legal systems, registration of an unauthorized amendment or cancellation notice is nonetheless effective with the result that a third-party searcher is entitled to rely on a "clean" search result regardless of the lack of authorization from the secured creditor. The policy underlying this approach is to avoid requiring the third-party searcher to go beyond the registry record in order to determine whether a security right ever existed in the case of a cancellation or whether an amendment purporting to delete an encumbered asset or a grantor was authorized. In these legal systems, the registry system is designed to protect the secured creditor against the risk of fraudulent amendments or cancellations by the grantor or a third party by incorporating an authorization mechanism into the process for registering amendments and cancellations. For example, each secured creditor is assigned a unique user code which must be entered in all amendment or cancellation notices it submits for registration. If the secured creditor fails to preserve the confidentiality of its access code, it has no basis for a complaint if a third party uses that number to successfully submit an unauthorized cancellation or amendment.

31. An unauthorized amendment or cancellation may also result from the error of a law firm or other third-party service provider employed by the secured creditor to perform registration services on its behalf. For example, the secured creditor may have instructed the service provider to amend one notice and to cancel another and the service provider mistakenly cancels the wrong notice. In systems that adopt this first approach, the secured creditor bears the risk of third-party error in this scenario and is expected to either seek indemnity from the third-party service provider or to obtain insurance. As noted earlier, some legal systems that adopt the first approach also adopt a "fail safe" mechanism that provides secured creditors with the opportunity to reinstate a registered notice that was cancelled erroneously or without authority. Under this approach, the reinstatement restores the third-party effectiveness of the relevant security right as of the date of registration of the initial notice as against third parties other than third parties that acquire a right in the encumbered asset during the period after registration of the cancellation notice and before the reinstatement notice is registered. Some legal systems extend a similar approach to erroneous or unauthorized amendments in addition to cancellations.

32. In other legal systems, registration of an amendment or cancellation notice is not effective if it was not authorized by the secured creditor. The reason for this approach is that, in these legal systems, anybody may register an amendment or cancellation notice upon payment of the relevant fees. In open access registry systems of this kind it is thought that protecting a secured creditor that has properly registered an initial notice against the greater risk of unauthorized or fraudulent amendments and cancellations outweighs the need to ensure that the registry record can be fully relied upon by third parties. Legal systems that adopt this second approach also place the risk of unauthorized registrations by a law firm or other third-party service provider employed by the secured creditor on third-party searchers. The question of "authorization" in this scenario would typically be based on the State's general law with respect to the power of agents and representatives to bind their principals. Third-party searchers under this second approach cannot rely fully on the registry record. This, however, does not mean that third-party searchers are not protected. It is assumed that prudent third-party searchers will protect themselves by contacting the secured creditor to verify whether the amendment or cancellation was authorized. In cases where the secured creditor fails or refuses to

respond, these legal systems usually build in a procedure for compelling the secured creditor to respond.

33. In legal systems that adopt the second approach, all registered notices remain on the public registry record until they would have expired in the absence of a cancellation, notwithstanding the registration of a cancellation notice. Thus, searchers are expected to obtain direct confirmation from the secured creditor that the cancellation notice was authorized. In the registry system contemplated by the draft Registry Guide (see recs. 20 and 21), in line with the *Secured Transactions Guide* (see chap. IV, para. 109, and rec. 74), notices must be removed from the public registry record once a cancellation notice is registered. Consequently, in the case of an unauthorized cancellation, if the second approach were adopted, searchers could not protect themselves by contacting the secured creditor to determine if the registration of the cancellation notice was authorized. Since the information in the registered notices to which the cancellation notice referred would have been archived, they would have no means of verifying by a search of the public registry record whether a security right may have historically existed in the relevant encumbered asset and, if so, the identity of the secured creditor.

34. On the other hand, the *Secured Transactions Guide* does not explicitly address the question of whether the registry is obligated to archive a notice where the registration of the cancellation notice was not authorized by the secured creditor. 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 as provided in recommendation 72 or 73". Those two recommendations provide for cancellation where no security right has been created, the security right has been extinguished or the registered notice has not been authorized by the grantor. Thus, it may be argued that the registry is not obligated to archive the relevant related notices where the registration of a cancellation notice was not authorized by the secured creditor.

35. Consequently, it would seem that it would not be inconsistent with the *Secured Transactions Guide* if an enacting State that adopted the second approach provided that the registry was not obligated to archive the information in registered notices in the event the secured creditor did not authorize the registration of a cancellation notice. However, in an open access system of the kind contemplated by the second approach, the registry has no means of verifying whether the registration of the cancellation notice was authorized. While the registry could simply not archive any registered notices despite registration of a cancellation notice, this would be contrary to recommendation 74 of the *Secured Transactions Guide*. Accordingly, to be consistent with recommendation 74, implementation of this second approach would require the registry system to modify the open access approach by building into the registration process for cancellation notices some mechanism for verifying whether the secured creditor has authorized the registration. It should be noted that it would not be sufficient for the registry simply to assign the secured creditor a secure access code for the purposes of registering cancellations. This would not catch cancellation notices erroneously submitted by a third-party service provider with whom the secured creditor had shared the access code for the purposes of performing registrations on its behalf. Some additional verification by the registry would be needed to ensure that the cancellation notice has been directly authorized by the secured creditor. Alternatively, the secured transactions law could specify

that, where a cancellation notice that contains the secured creditor's access code is registered, the registration is deemed to have been authorized by the secured creditor.

36. It should finally be noted that, if the second approach is adopted, the registry system also would need to be designed to retrieve a registered notice according to the name of the grantor even where an amendment notice has been registered purporting to delete that grantor. Otherwise, the notice would not be retrieved on a search result and third parties would not know that they need to contact the secured creditor or take other steps to determine whether the deletion was authorized by the secured creditor.

37. An enacting State alternatively might consider a third compromise approach under which a searcher who in fact relied on the registry record would be protected despite the lack of authorization for the registration for an amendment or cancellation, but the related security right would otherwise remain effective against other third parties. This third approach would protect a buyer or secured creditor that entered into a transaction with the grantor in reliance on a "clean" search result. However, the lack of authority for the registration could still be raised by the secured creditor as against third parties such as, for example, the grantor's insolvency representative, who did not in fact rely 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.

5. Compulsory amendment or cancellation

38. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 16-18), the *Secured Transactions Guide* permits a registration to be made before the security right to which it relates is created or any security agreement is concluded between the parties (see *Secured Transactions Guide*, rec. 67). If the negotiations are aborted after the notice is registered, or for some other reason no security agreement is ever entered into between the parties, the creditworthiness of the person named as the grantor in a registered notice may be adversely affected. The same is true where a security agreement has been entered into between the secured creditor and grantor named in a registered notice, but their secured financing arrangement has come to a final end or some of the information in the registered notice exceeds the scope of the grantor's authorization for registration (for example, the description of the encumbered assets in the registered notice is broader than that authorized by the grantor in the security agreement). Accordingly, the *Secured Transactions Guide* recommends that the secured creditor should be legally obligated to register the necessary cancellation or amendment notice, as the case may be. In the event that the secured creditor fails to do so, the *Secured Transactions Guide* further recommends that the grantor should be entitled to send a formal demand to the secured creditor and that the enacting State should establish a summary judicial or administrative procedure to compel cancellation or amendment if the secured creditor fails to act on the request (see *Secured Transactions Guide*, rec. 72).

39. To implement these recommendations, the secured transactions law or the regulation of the enacting State should provide that a secured creditor is obliged to register an amendment or cancellation notice, as the case may be, where: (a) the registration of an initial or amendment notice has not been authorized by the grantor

at all or to the extent described in the notice; (b) authorization has been withdrawn and no security agreement has been concluded; (c) the security agreement has been revised in a way that makes the information contained in the registered notice inaccurate; or (d) the security right to which the registered notice relates has been extinguished by payment or otherwise and there is no commitment to extend further credit (see draft Registry Guide, rec. 33, subpara. (a)).

40. If the secured creditor does not comply with that obligation on its own, the secured transactions law or the regulation should provide that the secured creditor must register the relevant amendment or cancellation notice within a short period of time after receiving a written request from the grantor (see *Secured Transactions Guide*, rec. 72, subpara. (a), and draft Registry Guide, rec. 33, subpara. (c)). To address the possibility that the secured creditor neglects or refuses to respond to the grantor's request, the grantor should be entitled to seek an order compelling registration of the cancellation or amendment notice through a speedy and inexpensive judicial or administrative procedure, which should include appropriate safeguards for the secured creditor in the case of an unwarranted demand by the grantor (see *Secured Transactions Guide*, rec. 72, subpara. (b), and draft Registry Guide, rec. 33, subpara. (e)).

41. Depending on the option chosen by an enacting State in its secured transactions law or regulation, a compulsory amendment or cancellation could be registered by the registry staff at the request of either the grantor or a judicial or administrative officer specified by the enacting State. In either case, the relevant judicial or administrative order should have to be attached to the amendment or cancellation notice presented to the registry (see draft Registry Guide, rec. 33, subpara. (g)).

B. Recommendations 30-33

[*Note to the Working Group: The Working Group may wish to consider recommendations 30-33, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text*.]

VI. Search criteria and search results

A. General remarks

1. Search criteria

42. As already explained (A/CN.9/WG.VI/WP.54/Add.2, paras. 21-23), under the approach recommended in the *Secured Transactions Guide*, information in the registry record must be indexed or otherwise organized so as to be searchable by reference to the identifier of the grantor. Accordingly, the regulation should provide that the identifier of the grantor is the principal criterion by which registration information may be searched and retrieved (see draft Registry Guide, rec. 34, subpara. (a)).

43. The registry should be designed to also allow notices to be searched and retrieved by reference to the unique registration number assigned by the registry to the initial notice and permanently associated with that notice and any related subsequent notices (see draft Registry Guide, rec. 34, subpara. (b)). This approach would give registrants an alternative search criterion to quickly and efficiently retrieve a registration for the purposes of entering an amendment or cancellation. Accordingly, the regulation should provide that the registration number assigned to an initial notice is an alternative search criterion (see draft Registry Guide, rec. 34, subpara. (b)).

44. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 24-27), some States require the serial number of specified kinds of high value encumbered assets to be entered in an initial notice in order for the related security right to be effective against or have priority over certain types of competing claimants. The *Secured Transactions Guide* discusses but makes no recommendation with respect to this approach (see *Secured Transactions Guide*, chap. IV, paras. 34-36). If an enacting State decides to implement this approach, the regulation should provide guidance on what constitutes the correct serial number for the specified categories of serial numbered assets, and include that number as an alternative search criterion.

45. As already mentioned (see para. 22 above), a secured creditor should be able, either directly or through the registry staff to efficiently amend its identifier or address information in all registrations associated with that secured creditor through a single global amendment. However, the identifier of the secured creditor should not be a search criterion for searching by the public generally. The identifier of the secured creditor has limited relevance to the legal objectives of the registry system. Moreover, to allow public searching may violate the reasonable expectations of secured creditors; for example, because of the risk that a credit provider may undertake a search based on the secured creditor identifier to obtain the client lists of its competitors (see *Secured Transactions Guide*, chap. IV, para. 81).

2. Search results

46. The regulation should provide that a search result should either indicate that no registered notice was retrieved against the search criterion entered in the search request or include the registration information in all registered notices that match that criterion (see draft Registry Guide, rec. 35, subpara. (a)). A searcher may rely on the accuracy of a search result only if the searcher entered the correct grantor identifier or other search criterion in its search request (see draft Registry Guide, rec. 35, subpara. (b)).

47. As already noted (see A/CN.9/WG.VI/WP.54/Add.3, paras. 20-23), registration of a notice is effective only if the notice would be retrieved by a search of the registry record by a searcher using the correct identifier of the grantor as the search criterion. Some registry systems are designed to retrieve registrations only if the grantor identifier that was entered in a registered notice exactly matches the grantor identifier that was submitted by the searcher. Where registered notices are stored in an electronic database, some systems program the search logic so as to also retrieve registered notices that contain a grantor identifier that closely matches the grantor identifier entered by the searcher in the search request.

48. In a registry system that is designed to retrieve both exact and close matches, a registration may be considered effective even though the registrant made a minor error in entering the correct grantor identifier if the search in fact retrieves a registration with a minor error (see A/CN.9/WG.VI/WP.54/Add.3, paras. 20 and 21). This is because a search according to the correct grantor identifier may (if the search logic so provides) still retrieve the registration as an inexact but close match. Whether the error would nonetheless make the registration ineffective depends on such factors as whether: (a) a searcher would be able to readily identify the grantor by referring to additional information, such as the grantor's address or any additional information that the enacting State may require to be entered such as the grantor's birth date or identification number; and (b) the list of inexact matches is not so lengthy as to prevent the searcher from reasonably determining whether the grantor which it is interested in is included in the list.

49. In deciding whether search results should also disclose close matches, enacting States should take into account that, while the close-match system may protect the registrant against some minor errors in entering the grantor identifier, it creates greater uncertainty for searchers. As a result, such a close-match system may require recourse to the courts to determine whether a searcher in the particular circumstances should have reasonably realized that a search result that included registrations in which the grantor's identifier is a close match referred to the relevant grantor. Accordingly, the regulation should provide that search results should reflect information in registered notices in which the grantor's identifier matches exactly the grantor identifier entered by a searcher. If the registry system is designed to also include information in registered notices in which the grantor's identifier closely matches the grantor identifier entered in the search request, the rules for determining what constitutes a sufficiently close match should be clearly stated (see draft Registry Guide, rec. 35, subpara. (b)). In some States, when a search using the registry's software retrieves a registration with a minor error, that is treated as a sufficiently close match.

50. The regulation should also provide that, upon request by a searcher and payment of the relevant fee, if any, the registry must issue an official search certificate that reflects a search result (see draft Registry Guide, rec. 33, subpara. (c)). In the case of an electronic search, a search certificate may be simply a printed version of the search result. Whether a search certificate is admissible in a court of the enacting State and, if so, its evidentiary value are matters for the procedural law of the enacting State. However, a search certificate should in principle be admissible as presumptive proof of its contents. It would then be up to the party challenging the certificate to provide evidence to the contrary (for example, by showing that the search certificate is a forgery or is an inaccurate or incomplete record of the search result to which it relates).

51. In some registry systems, search results include a "currency date" indicating that the search result only includes information in notices that were registered as of that date (as opposed to the actual date of the search result). "Currency dates" are included in search results in registry systems in which the registration of a notice becomes legally effective at the date and time when the notice is submitted to the registry. The "currency date" is meant to alert searchers to the possibility that a legally effective registration may have been submitted to the registry in the period between the "currency date" and the actual date of the search. As already mentioned

(see A/CN.9/WG.VI/WP.54/Add.2, paras. 1-6), the *Secured Transactions Guide* recommends that a registration becomes legally effective only when the information in a notice submitted to the registry has been entered into the registry record so as to be publicly searchable (see *Secured Transactions Guide*, chap. IV, paras. 102-105, and rec. 70). Accordingly, under the registry system contemplated by the *Secured Transactions Guide*, there is no need to include a "currency date" in a search result: the "currency date" is the actual date of the search.

B. Recommendations 34 and 35

[*Note to the Working Group: The Working Group may wish to consider recommendations 34 and 35, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text*.]

VII. Registration and search fees

A. General remarks

52. The *Secured Transactions Guide* recommends that registration and search fees should not be used to raise revenue for the enacting State but rather set on a pure cost-recovery basis (see *Secured Transactions Guide*, chap. IV, para. 37, and rec. 54, subpara. (i)). The reason for this approach is that excessive fees and transaction taxes will significantly deter utilization of the registry, thereby undermining the overall success of the enacting State's secured transactions law. In assessing the level of revenue from registry fees needed to achieve cost-recovery, account should be taken not only of the initial start-up costs related to the establishment of a registry but also of the costs necessary to fund its operation, including: (a) salaries of registry staff; (b) upgrades and replacements of hardware and software; (c) ongoing staff training; and (d) promotional activities and training for registry users.

53. Advances in information technology have reduced the difference between the relative start-up costs of establishing an electronic versus a paper-based registry record. In addition, the operation costs associated with an electronic record are lower, especially if the registry system permits registrants and searchers to electronically submit notices and search requests directly without the interposition of registry staff. If the electronic registry record is developed in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure and recoup its investment by taking a percentage of the service fees charged to registry users once the registry is up and running.

54. In some States, in the interest of encouraging use of the registry by creditors, charge no fees or very low fees below the cost-recovery level for registration. While this approach may encourage creditors to take and register security rights in low-value and other transactions that might have otherwise been entered into on an unsecured basis, it means that the registry and the benefits it provides to creditors is

being subsidized with general taxpayer revenue. In other States, only the registration of a cancellation notice is free of charge so as to encourage secured creditors to promptly register cancellations once the secured financing relationship with the grantor has come to an end. In yet other States, electronic searches (as opposed to registrations) are free of charge.

55. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2. paras. 9 and 10), an enacting State may decide to permit registrants to self-select the period of effectiveness of a registered notice. Enacting States that adopt this approach may wish to consider whether registration fees should be based on a sliding tariff related to the period of effectiveness selected by the registrant. This approach has the advantage of discouraging secured creditors from entering an inflated term in the registered notice out of an excess of caution.

56. As also already mentioned (A/CN.9/WG.VI/WP.54/Add.3, paras. 15-19), an enacting State may choose to require a registered notice to specify the maximum amount for which a security right may be enforced. In enacting States that adopt this approach, the fees charged by the registry for registration should not be related to the maximum amount specified in the notice since this approach would be contrary to the cost-recovery approach to setting fees recommended by the *Secured Transactions Guide* (see para. 52 above).

57. Any registration and search fees set by the enacting State should be set out in the regulation (see draft Registry Guide, rec. 36). It is for each enacting State to decide whether "the regulation" in this context means a formal regulation or more informal administrative guidelines that the registry can revise. The latter approach would provide greater flexibility to adjust the fees in response to later events such as, for example, the need to reduce the fees once cost of the initial investment has been recouped. However, this approach has the disadvantage that lack of formality may be abused by the registry to unjustifiably adjust the fees upwards.

58. In setting fees in a hybrid paper and electronic registry system, it may be reasonable for the enacting State to decide to charge higher fees to process paper-based notices and search requests because they must be processed by the registry staff, while electronic notices and search requests that are directly submitted to the registry do not require attention from the registry staff. Charging higher fees will also encourage the user community to eventually transition to using the direct electronic registration and search functionalities.

B. Recommendation 36

[*Note to the Working Group: The Working Group may wish to consider recommendation 36, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, this recommendation is not inserted here at this stage but will be inserted in the final text.*]