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**UCC Security Interests in
Real Estate Financings**

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ATTACHMENTS

Form of UCC-1 Financing Statement

Form of UCC-1 Financing Statement Addendum

UCC SECURITY INTERESTS IN REAL ESTATE FINANCINGS

I. INTRODUCTION

In addition to real property, a Deed of Trust in a real estate financing transaction would typically grant liens and security interests in one of more of the following categories of collateral (herein referred to as the “*UCC Collateral*”): (a) fixtures; (b) certain types of personal property (*e.g.*, certain equipment, general intangibles, and accounts); and (c) as-extracted collateral (in the case of oil and gas financings). The perfection of security interests in these categories of collateral is governed by the Uniform Commercial Code (the “*UCC*”) of the relevant state. The UCC typically requires that certain steps be taken in order to create and perfect security interests in UCC Collateral. Failure to properly perfect and maintain a security interest can have disastrous consequences for a creditor or other secured party, including (x) treatment as an unsecured creditor upon a bankruptcy of the debtor, and (y) other creditors who have properly perfected having priority claims against the UCC Collateral. The purpose of this paper is to discuss the steps that are necessary to create and perfect security interests in the UCC Collateral.

II. CAUTIONARY TALE: BE CAREFUL WHEN DEALING WITH THE PERFECTION OF SECURITY INTERESTS IN COLLATERAL

JPMorgan Chase Bank served as administrative agent under two separate financing transactions with General Motors: (a) a synthetic lease in which the amount financed was approximately \$300 million, and (b) a term loan in the amount of \$1.5 billion. Two UCC-1 financing statements had been filed in connection with the synthetic lease, while a single separate financing statement was filed in connection with the term loan. JPMorgan was named as the secured party of record for both the synthetic lease and the term loan. JPMorgan entered into a transaction by which the synthetic lease would be repaid in full. A paralegal working for General Motors’ outside counsel intended to prepare UCC-1 terminations and releases that related only to the two financing statements relating to the synthetic lease, but by mistake the terminations and releases also terminated and released the financing statement relating to the term loan. The error was not detected, and when General Motors filed for bankruptcy in 2009, the relevant courts held that the termination and release of the financing statement relating to the term loan was effective notwithstanding the fact that it was filed by mistake.

III. CREATION OF SECURITY INTERESTS; NON-UCC COLLATERAL

A. Creation of Security interests

In general, under Section 9.203(b) of the Uniform Commercial Code as currently in effect in the State of Texas (the “*Texas UCC*”) in order to create a security interest in UCC Collateral (a) the creditor must give value, and (b) the debtor must sign a security agreement that provides a description of the collateral. Unlike a UCC-1 Financing Statement, a description of collateral as “all assets” or “all personal property” is insufficient for the purposes of creating a security interest. Deeds of Trust would therefore typically contain a description of personal property collateral by UCC categories (*e.g.*, accounts, general intangibles, fixtures, equipment, goods, and as-extracted collateral). The Deed of Trust should also preferably contain language that expressly grant a

security interest in the relevant UCC Collateral; some Deeds of Trust contain separate provisions by which a debtor grants security interests in the UCC Collateral.

B. Non-UCC Collateral

The creation and perfection of liens and security interests in certain collateral covered by a Deed of Trust may not be governed by UCC, including, for example (i) real property; and (ii) the a transfer of an interest or an assignment of a claim under a policy of insurance. In addition, in order perfect a lien on vehicles and other equipment covered by the Texas of Certificate of Title Act, the lien must be notated on the certificate of title for such vehicle or other equipment; the filing of a UCC-1 financing statement would not be sufficient to perfect a security interest in such property.

IV. UCC-1 FINANCING STATEMENTS

A. Central Filing Collateral

1. Central Filing Collateral and Deeds of Trust

Many Deeds of Trust contain provisions granting security interests in some collateral (herein referred to as “*Central Filing Collateral*”) for which the perfection of such security interests is achieved by the filing of a UCC-1 financing statement in a central filing office, which in Texas and in many other states, is the Office of the Secretary of State. Central Filing Collateral includes, among other things, accounts, equipment, general intangibles and inventory. This part of the paper will discuss the perfection rules for such Central Filing Collateral.

2. Law Governing Perfection for Central Filing Collateral

As is noted above, in order to perfect a security interest in Central Filing Collateral, a UCC-1 financing statement should be filed in the appropriate filing office. Under Section 9.301(1) of the Texas UCC, with certain exceptions, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in the collateral.

3. Where is the Debtor Located and Where do you File for Central Filing Collateral?

a. U.S. Registered Organizations

Section 9.102(a)(71) of the Texas UCC defines the term “registered organization” to mean an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the state or the United States. Registered Organizations generally include corporations, limited partnerships, and limited liability companies, but do not include general partnerships since no filing of a “public organic record” is required to form a general partnership. Under Section 9.307(e), a registered organization that is organized under the law of

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