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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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3. Access to registration and search services

1. The *Secured Transactions Guide* recommends that the registry must accept a notice if: (a) it is presented in the authorized medium of communication (that is, in the prescribed paper or electronic form, as the case may be); (b) it is accompanied by the authorized fee, if any; and (c) provides the grantor identifier and the other information required to be included in the notice (see *Secured Transactions Guide*, rec. 54, subpara. (c)). In addition, as a measure of protection against the risk of unauthorized registrations, the *Secured Transactions Guide* recommends that the registry must request and maintain a record of the identity of the registrant (see *Secured Transactions Guide*, rec. 55, subpara. (b)).

2. To implement these recommendations, the regulation should provide that a person is entitled to have access to the registration services of the registry, if that person: (a) uses the prescribed form of notice; (b) provides its identity in the manner prescribed by the registry; and (c) has paid, or made arrangements to pay, any fees (see draft Registry Guide, rec. 6). For a person to have access to the search services of the registry, the regulation should provide that it is sufficient if the searcher: (a) uses the prescribed search form (including having entered search criteria into the relevant fields of the search form); and (b) has paid or made arrangements to pay the prescribed search fees, if any (see draft Registry Guide, rec. 7). There is no need for the registry to request and maintain a record of the identity of the searcher since, unlike an unauthorized registration, a search of the registry does not create any risk of prejudice to a grantor named in a notice (as to privacy concerns, see para. 3 below). It should be noted that that the search relates to the registry record accessible to the public through the interface that is just a gateway to the database that contains the data, and not the archived information, that is, information in a registered notices removed from the publicly accessible record upon expiry of its period of effectiveness or upon registration of a cancellation office (see paras. 51-53 below and draft Registry Guide, rec. 18).

4. Verification of identity, evidence of authorization or scrutiny of the content of the notice not required

3. As already mentioned (see paras. 1 and 2 above), the *Secured Transactions Guide* recommends that the registry must request and maintain a record of the identity of the registrant (see *Secured Transactions Guide*, chap. IV, para. 48, and rec. 55, subpara. (b)). To facilitate the registration process, the required identification should be minimal (for example, a State-issued identification card, driver's licence or passport) and should be built into the access or payment process. For example, frequent users, such as financial institutions, automobile dealers, lawyers and other intermediaries acting for registrants and searchers, should have the option of setting up a user account with the registry that permits automatic charging of fees and provides them with special secure access codes for entering information and conducting searches.

4. In addition, the *Secured Transactions Guide* recommends that registration of a notice should be ineffective unless authorized by the grantor in writing. However, authorization may be given before or after registration, and a written security agreement is sufficient to constitute authorization (see *Secured Transactions Guide*, chap. IV, para. 106, and rec. 71). Moreover, to avoid overburdening the registration process with unnecessary formalities that could result in delays and costs, the *Secured Transactions Guide* recommends that the registry may not verify the identity of the registrant, or require evidence of the existence of authorization for registration of the notice, or conduct further scrutiny of the content of the notice (see *Secured Transactions Guide*, rec. 54, subpara. (d)). In view of the importance of these recommendations, the regulation may reiterate them (see draft Registry Guide, rec. 8). Accordingly, the function of the registry is to do what is set forth in the recommendations just mentioned. The determination of whether or not the registrant had authority to register a notice is outside the scope of the mandate of the registry. The same applies to amendments and cancellations that must be authorized by the secured creditor, whose rights they may affect. In this connection, it should be noted that, with few exceptions, all amendments may affect the rights of and thus require the authorization of the secured creditor as well. Typically, only two amendments, the addition of a grantor and of encumbered assets, require only the grantor's authorization.

5. Where the system is designed to allow notices to be directly registered electronically, there are effective methods to prevent fraudulent registrations, amendments or cancellations. For example, a secured creditor could be assigned a user identification number to use when effecting a registration. No amendments to or cancellation of a registered notice would be possible unless that number were used. If the secured creditor failed to preserve the confidentiality of that number, it should have no basis for a complaint about unauthorized cancellations or amendments. However, if the secured creditor were careful, it would be virtually impossible for the registration to be changed in any way without the involvement of the secured creditor.

6. However, where the registry system is designed to permit or require notices to be registered in paper form, there is little that the secured creditor can do to prevent an unauthorized amendment or cancellation from being registered fraudulently or without authority. In any case, in order to protect secured creditors, the *Secured Transactions Guide* recommends that a copy of all amendments and cancellations effected to a registered notice be sent to the registrant, that is, the secured creditor named in a notice (see *Secured Transactions Guide*, rec. 55, subpara. (d)). Registry systems sometimes build in "fail safe" mechanisms that provide secured creditors with the opportunity to reinstate or correct a registered notice that was amended or cancelled inadvertently or without authority within a short period after the registration of the amendment or cancellation notice. In States that adopt this approach, reinstatement within the specified period is effective as against third parties other than those that acquire a right in the encumbered asset during the period after registration of the amendment or cancellation notice and before the reinstatement or correction is registered. In other States, all registrations are retained on the registry record available to the public for a certain period of time, while the question whether or not the cancellation is effective is determined outside the registry system.

7. Once a registrant obtains access to the registry services and fills in all the required fields of the notice, the registry has no right to reject the notice. This does not mean that the registered notice will necessarily achieve its objective of making the security right to which it relates effective against third parties. This result depends on the satisfaction of the requirements for the creation of a security right in the secured transactions law that are not a matter of the registry record (conclusion of an effective security agreement, the existence on the part of the grantor of rights in the designated encumbered assets, and the existence of an outstanding obligation owed to the secured creditor or its commitment to extend credit). In addition, for the registered notice to achieve its objective, the registrant must also satisfy the requirements in the regulation and the secured transactions law for registering a notice (all the information required to be included in the notice has to be entered in the appropriate fields in the notice). All these matters are the responsibility of the registrant. If the registry had to scrutinize the notice and confirm its completeness, accuracy and legal sufficiency, the result would be delay, cost and potential for error, a result that would run counter to the kind of efficient registry envisaged in the *Secured Transactions Guide*.

5. Rejection of a registration or search request

8. As already mentioned (see para. 7 above), the fact that a registrant or searcher gained access to the registry services does not necessarily mean that a notice will be automatically accepted or a search result will automatically be produced. The *Secured Transactions Guide* recommends that a notice must contain certain information, such as the identifier and address of the grantor and the secured creditor, a description of the encumbered assets and, if the secured transactions law requires it, a statement as to the period of effectiveness of the registered notice and the maximum amount for which the security right may be enforced (see *Secured Transactions Guide*, chap. IV, paras. 92-97, and rec. 57).

9. In view of the importance of these requirements, the regulation should provide that the registry is permitted to reject registration of a notice only if it does not contain in a legible way the information required in the designated fields (for the information required in an initial amendment or cancellation notice, see A/CN.9/WG.VI/WP.52/Add.3, paras. 1 and 2, A/CN.9/WG.VI/WP.52/Add.4, para. 4, and draft Registry Guide recs. 21, 28 and 30). In addition, the regulation should provide that the registry may reject a search request only if it does not provide in a legible manner the search criterion in the designated field. Moreover, the regulation should clarify that the registry must provide grounds for such a rejection of a registration or search request immediately or as soon as practicable (in the case of other registries) (see draft Registry Guide, rec. 9).

10. It should be noted that the registry may reject non-conforming notices and search requests submitted in paper form, while in a registry system that allows a notice or search request to be entered electronically, the registry system will be designed so as to reject automatically non-conforming requests. In addition, while in the case of notice submitted in paper form the grounds for rejection will be communicated as soon as practicable, in the case of an electronic registry, the system should be designed to enable them to be immediately displayed on the electronic screen to the user.

B. Recommendations 4-9

[*Note to the Working Group: The Working Group may wish to consider recommendations 4-9, as reproduced in document A/CN.9/WG.VI/WP.52/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.*]

III. Registration

A. General remarks

1. Time of effectiveness of registered notice

11. The *Secured Transactions Guide* recommends that the registration of a notice or an amendment becomes effective when the information contained in the notice or the amendment is entered into the registry record so as to be available to searchers (see *Secured Transactions Guide*, chap. IV, paras. 102-105, and rec. 70).

12. In view of the importance of the effective time of registration for determining the third-party effectiveness and priority of a security right, the regulation could restate this recommendation (see draft Registry Guide, rec. 10, subpara. (a)). In particular, the regulation should provide that: (a) the effective time of registration (that is, the date and time when the notice became searchable) should be indicated on the registry record; and (b) the regulation should provide that a unique registration number must be assigned to an initial notice so that all subsequent amendment notices or a discharge notice are associated with that initial notice (see draft Registry Guide, rec. 10, subpara. (b); see also A/CN.9/WG.VI/WP.52, section B, terminology and interpretation, term "registration number"). In the unlikely but possible case where notices registered by competing secured creditors became searchable at the same date and time and, therefore, are assigned the same date and time of registration the secured transactions law could provide that, if there is even a slight time difference in the time the notices were received, priority should be resolved according to the exact sequence in which they were received or, if they were received at exactly the same time, they simply should have the same order of priority.

13. Where information in notices is entered into a computerized registry record, the registry software should be designed to ensure that the information becomes publicly searchable immediately or virtually immediately after it is entered. With modern advances in technology, this should not be a problem. As a result, any time lag between the entry of the information in a notice into the record and the time when the information will become available to searchers of the registry record will be all but eliminated. This is important because any time lag would create a priority risk for secured creditors as their rights would be subordinate to third-party rights acquired in the encumbered assets before the registration becomes effective by becoming publicly searchable. In systems that permit the direct electronic entry of a notice, registrants will have control over the timing and efficiency with which their registrations would become effective. However, to the extent there is a time lag (in particular in registry systems that permit or require notices to be submitted using a

paper form), before being confident in advancing funds, registrants should make an "advance registration" (see *Secured Transactions Guide*, chap. IV, paras. 98-101, and rec. 67). In addition, registrants should verify that: (a) the information in the notice has been entered by the registry staff into the registry record and is searchable; and (b) no notices of competing rights have been registered in the period between the submission of the paper notice and the time when the information became searchable.

14. To deal with the time lag problem associated with paper notices, the regulation could provide that the registry must enter the information in notices into the registry record in the order in which the paper notices were received by the registry (see draft Registry Guide, rec. 10, subpara. (c)). This approach would ensure that a notice received on 1 January at 08:00 would be entered and become available to searchers so as to be legally effective before a notice received by the registry on the same date at 08:01.

15. It should be noted that this recommendation would not necessarily protect a secured creditor that was the first to submit a paper notice in a hybrid registry that allows both paper and electronic submission of notices. Where, for instance, the paper notice is received at 08:00 am and is entered into the registry record by the registry staff and becomes searchable at 08:30, but a competing secured creditor enters a notice electronically at 08:05 and it becomes searchable at 08:10, the latter would have priority since its notice was the first to become searchable and therefore the first to be registered. In systems that adopt a hybrid approach, registrants who elect to use paper notices should be educated as to this risk.

16. In some legal systems, to deal with the time lag problem, search results are assigned a "currency date" indicating that the search result is designed to disclose only all registrations made as of the currency date and time (for example, a day before the search) and not as of the real time of the search. While this approach may not solve the problem, it provides warning to a prospective secured creditor that, after registering its security right, it would then have to conduct a second search to make sure no intervening notices have been registered before being confident in advancing funds. Prospective buyers and other third parties would similarly need to conduct a subsequent search before parting with value or otherwise acting in reliance on the registry record.

2. Period of effectiveness of registered notice

17. The *Secured Transactions Guide* recommends that an enacting State may adopt one of two approaches to the period of effectiveness (or duration) of a registered notice (see *Secured Transactions Guide*, chap. IV, paras. 87-91, and rec. 69).

18. Under option A, all registered notices are subject to a uniform statutory period of effectiveness. It follows that, where the secured transaction to which the registered notice relates has a longer duration, the secured creditor must ensure that the period of effectiveness is renewed before the expiry of the statutory period. This approach provides certainty as to the period of effectiveness of a registered notice, but limits the flexibility of the registrant to match the period of effectiveness of the registered notice to the likely duration of the secured financing relationship. Under option B, the registrant would be permitted to self-select the desired period of effectiveness with the option to renew the notice for an additional self-selected

period by registering an amendment notice. In such a case, the indication of the period in the notice would be a required component of the notice and without it a notice would be rejected. In legal systems that adopt the second approach, it may be desirable to base registration fees on a sliding tariff related to the duration selected by the registrant in order to discourage the selection of excessive terms that do not correspond to the expected duration of the underlying security agreements (with a cushion of extra time to allow for delays in payment of the secured obligation).

19. In view of the importance of this issue, the regulation should restate it (see draft Registry Guide, rec. 11, options A and B). In addition, the regulation could provide an option C, which is a hybrid of the first two options. Under this approach, the registrant would be entitled to select the period of effectiveness of the registered notice subject to a maximum temporal limit, so as to discourage the selection of excessive terms (see *Secured Transactions Guide*, chap. IV, para. 88, and draft Registry Guide, recommendation 11, option C).

20. If a State selects option A, it may wish to consider allowing the registrant to reduce the legal period of effectiveness of a registered notice if the anticipated duration of their security agreement is less than the specified statutory period of effectiveness of a registered notice. However, this approach would unnecessarily result in additional expense in the design of the registry, since the registrant would always be able and obligated, in any event, to cancel a registered notice if the secured obligation was satisfied and the security agreement was terminated before the expiry of its statutory period of effectiveness.

21. The requirement in options B and C for the registrant to indicate in the notice the period of effectiveness of the registered notice is a mandatory requirement with the result that a notice could be rejected if it did not indicate its period of effectiveness. States may wish to consider the possibility of designing the registry to automatically include a default period of effectiveness if the registrant failed to do so. A rule in the regulation implementing this approach could be drafted along the following lines: “When no period of time is indicated in the notice, the registration is effective for [a short period of time, such as 5 years, to be specified by the enacting State] years”.

22. Where option B or C is selected by an enacting State, it would be desirable to design the registry in a way that permits the registrant to easily select and indicate in the notice the desired period without the risk of inadvertent error, for example, by limiting the choice to whole years from the date of registration. In order to ensure consistency between its secured transactions law and its registry regulation, the option a State decides to enact in its regulation should correspond to the option selected in its secured transactions law.

23. Whether a State enacts option A, B or C, the rules applying to the calculation of the period of effectiveness in national law will apply to the period of effectiveness of a registered notice, unless the secured transactions law provides otherwise. For example, national law may provide that where the calculation is from the day of registration or from the anniversary of the day of registration, a year runs from the beginning of that day. In addition, it should be noted that where the law requires the registrant to enter the period of effectiveness of registration in a notice, the requirement is a mandatory requirement. This means that, if the period of

effectiveness of registration is not entered in a notice, the notice will likely be rejected.

24. Regardless of the approach an enacting State may take to determining the period of effectiveness of a registration, under the recommendations of the *Secured Transactions Guide*, the third-party effectiveness of a security right is lost once the period expires unless: (a) the security right is made effective against third parties prior to the lapse by some other permitted method for that type of encumbered asset (see *Secured Transactions Guide*, rec. 46); or (b) an amendment notice is registered extending the period of effectiveness of the registration. While the third-party effectiveness of that security right could be re-established by registering a new notice, the security right would take effect against third parties only from the time of the new registration and it would as a general rule be subordinate to prior registered secured creditors (see *Secured Transactions Guide*, recs. 47 and 96).

3. Time when a notice may be registered

25. The *Secured Transactions Guide* recommends that it should be possible for a notice to be registered before the creation of the security right or the conclusion of a security agreement; this is often referred to as "advance registration" (see *Secured Transactions Guide*, chap. IV, paras. 98-101, and rec. 67). This rule typically would be stated in the secured transactions law. Depending on the drafting conventions in the enacting State, it may be included in the regulation (see draft Registry Guide, rec. 12).

26. As already explained (see A/CN.9/WG.VI/WP.52/Add.1, paras. 32), registration does not create and is not necessary for the creation of a security right (see also *Secured Transactions Guide*, rec. 33). Consequently, until the security agreement is actually entered into and the other requirements for the creation of a security right are satisfied, the secured creditor may be defeated by a competing claimant, such as a buyer that acquires rights in the encumbered assets in the period between advance registration and the creation of the security right. However, registration will generally ensure that the secured creditor, once the security right is created, has priority over another secured creditor that registers subsequently, regardless of the order of creation of the competing security rights.

27. If the negotiations are aborted after the registration is effected or for some other reason no security agreement is ever entered into between the parties, the creditworthiness of the person named as grantor in the registration may be adversely affected by the existence of the registration unless it is cancelled. The *Secured Transactions Guide* recommends that the registrant (or, in the case of an electronic registry, the registry system) should be required to notify the person identified in the notice as the grantor in a timely manner about the registration of the notice (see *Secured Transactions Guide*, rec. 55, subpara. (c)). Generally, the registrant will be willing to cancel the registration either unilaterally or at the request of the person named as grantor in the notice if no security agreement has been concluded between the parties or if the security right to which the notice relates has been extinguished. However, in the event the registrant refuses or neglects to do so, the *Secured Transactions Guide* recommends a summary judicial or administrative procedure to enable the person identified in the notice as the grantor to compel the cancellation of the notice (see *Secured Transactions Guide*, rec. 72, subpara. (b)). The *Secured Transactions Guide* further recommends that, if a security agreement is entered into

after the registration of a notice but its terms do not correspond to the content of the registered notice, the person identified in the notice as the grantor may also use this procedure to compel the amendment of the notice (see *Secured Transactions Guide*, rec. 72, subpara. (a), recs. 54, subpara. (d), and 72, subparas. (b) and (c), as well as A/CN.9/WG.VI/WP.52/Add.4, paras. 28-30).

4. Sufficiency of a single notice

28. In a notice registration system of the kind contemplated by the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. IV, paras. 10-14, and rec. 57, as well as A/CN.9/WG.VI/WP.52/Add.1, paras. 22-31 and draft Registry Guide, rec. 21), there is no reason why a single notice should not be sufficient to give third-party effectiveness to present or future security rights arising under multiple security agreements between the same parties covering the assets described in the notice (see *Secured Transactions Guide*, rec. 68). Requiring a one-to-one relationship between each notice and each security agreement would generate unnecessary costs and undermine the ability of the secured creditor to flexibly respond to the grantor's evolving financing needs without having to fear a loss of the priority position it holds under the initial registration. Accordingly, the *Secured Transactions Guide* recommends that the registration of a single notice should be sufficient to achieve the third-party effectiveness of one or more than one security right, whether they exist at the time of registration or are created later and whether they arise from one or more than one security agreements between the same parties (see *Secured Transactions Guide*, rec. 68). This rule typically would be stated in the secured transactions law. However, depending on the drafting conventions in the enacting State, it may be included or reiterated in the regulation (see draft Registry Guide, rec. 13).

29. It should be emphasized that a registration achieves the third-party effectiveness of security rights arising under multiple security agreements only to the extent that the description of the encumbered assets in the notice corresponds to their description in any new or amended security agreement (see *Secured Transactions Guide*, rec. 63). Otherwise, the registration would not serve the function of alerting third-party searchers to the potential existence of a security right. Accordingly, to the extent that any security agreement concluded between the parties covers additional assets that were not described in the initial notice, a new notice or an amendment of the initial notice would be needed and the third-party effectiveness and priority of the security right in these additional assets would date only from the time of registration of the new notice or the amendment.

5. Indexing or other organization of information in the registry record

30. The *Secured Transactions Guide* recommends that the primary indexing criterion for the purposes of searching and retrieving notices registered in the security rights registry should be the identifier of the grantor (see *Secured Transactions Guide*, chap. IV, paras. 31-36, and rec. 54. subpara. (h)). To implement this recommendation, enacting States should elaborate on it in the regulation (see draft Registry Guide, rec. 14).

31. Although the *Secured Transactions Guide* refers to the indexing of information in the registry record, indexing as a technical matter is not the only mode of organizing information in a data base so as to make it searchable. Accordingly, the

term indexing in the context of the *Secured Transactions Guide* should be understood as referring to any method of organizing the information contained in notices entered into the registry record that ensures that the information may be retrieved by a search using the identifier of the grantor as the search criterion.

32. The recommendation of the *Secured Transactions Guide* that the grantor's identifier should be used as the primary indexing and searching criterion (see *Secured Transactions Guide*, chap. IV, paras. 31-36, and rec. 58) is based on two considerations. First, unlike immovable property, most categories of movable asset do not have a sufficiently unique identifier to enable useful asset-based searching. Indeed, in light of the flexibility in describing encumbered assets (see *Secured Transactions Guide*, recs. 14, subpara. (d), and 57), there are many ways to describe them that will suffice (e.g., listing them by specific item or by category, etc.). Second, taking security in future assets and circulating pools of assets, such as inventory and receivables, would be administratively impractical and prohibitively expensive if the secured creditor had to continuously update its notice to add a description of each new asset acquired by the grantor. A grantor-based searching system resolves these problems by enabling the secured creditor to make its security right effective against third parties by a single one-time registration covering security rights, whether they exist at the time of registration or are created thereafter (see *Secured Transactions Guide*, rec. 68).

33. In cases in which the encumbered asset has only one unique description, as compared to a registry system that is organized so as to permit searching according to the identifier of the asset, grantor-based indexing and searching has a drawback in a specific transactional context. Under the recommendations of the *Secured Transactions Guide*, unless the grantor sells or disposes of an encumbered asset in the ordinary course of business, the security right will generally follow the asset into the hands of the transferee (see *Secured Transactions Guide*, recs. 79 and 81). Yet the security right will not be disclosed on a search of the registry record against the identifier of the transferee, potentially prejudicing third parties that deal with the asset in the hands of the transferee and that may not be aware of the historical chain of title. Suppose, for example, that B, after granting a security right in its automobile in favour of A, sells the automobile to C, who in turn proposes to sell or grant security in it to D. Assuming D is unaware that C acquired the asset from the original grantor B, he or she will search the registry using only C's identifier. That search will not disclose the security right granted by B in favour of A because it was registered against the name of the original grantor B. This problem is often referred to as the "A-B-C-D problem" (on the question whether a secured creditor should be obligated to amend its registration to add the transferee as a new grantor, see A/CN.9/WG.VI/WP.52/Add.4 paras. 8-11).

34. In response to the so-called "A-B-C-D problem", some secured transactions laws provide for supplementary asset-based indexing and searching so as to enable a remote transferee in the position of D in the above-mentioned example to determine from a search of the publicly available registry record whether a security right has been granted by a predecessor in title to the person with whom D is dealing. Generally, asset-based indexing and searching is available only for specific categories of high-value and durable movable assets with a significant resale market and for which unique and reliable serial numbers or equivalent alphanumerical identifiers are available (for example, road vehicles, trailers, mobile homes,

aircraft frames and engines, railway rolling stock, boats and boat motors, hereinafter generally referred to as "serial number assets"). The motor vehicle market is a good example. Motor vehicles typically are of quite high value with a relatively significant resale market. Moreover, the automotive industry assigns a unique alphanumerical identifier, commonly referred to as a vehicle identification number, to identify individual motor vehicles according to a system based on standards issued by the International Organization for Standardization (ISO). Requiring registration of the vehicle identification number, and permitting searching by reference to that number, solves the so-called "A-B-C-D problem", since a search by that number will disclose all security rights granted in the particular motor vehicle by any owner in the chain of title. Other types of assets for which certain regimes have adopted this type of "serial number" approach include trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors.

35. The *Secured Transactions Guide* discusses but makes no recommendation on the question of using the serial number or equivalent alphanumerical identifier of an asset as an indexing and search criterion (see *Secured Transactions Guide*, chap. IV, paras. 34-36). The main reasons for this approach are that a multiplicity of search criteria would complicate searches and create unnecessary burdens on searchers. In any case, a serial number or equivalent is not a feasible search criterion for most types of movable asset or for circulating pools of present and future assets, such as inventory and receivables. Accordingly, if a State does choose to implement a system that uses the serial number of an asset as a supplementary indexing and search criterion, it should be limited to the types of high-value asset described above. In addition, under the secured transactions law of States that have adopted this approach, serial number registration is required for the purposes of achieving third-party effectiveness and priority only as against those classes of competing claimants that are most potentially prejudiced by the so called "A-B-C-D problem" (notably, transferees of the encumbered assets). As against other classes of competing claimants, for example, the grantor's judgment creditors or insolvency administrator, registration of a notice that does not include entry of the serial number in the designated field is still effective against third parties so long as the notice otherwise sufficiently describes the encumbered asset.

6. Integrity of the registry record

36. The *Secured Transactions Guide* recommends that, while the day-to-day operation of the registry may be delegated to a private authority, the State retains the responsibility to monitor the operation of the registry to ensure that it functions in conformity with the secured transactions law to meet the needs of its users (see *Secured Transactions Guide*, chap. IV, para. 47, and rec. 55, subpara. (a)). In addition, the *Secured Transactions Guide* recommends a number of other steps to ensure the integrity and security of the registry record. These steps include: (a) the obligation of the registry to request and maintain the identity of the registrant; (b) send promptly copies of any amendment or cancelation to the registrant; and (c) maintain back-up copies of the registry record (see *Secured Transactions Guide*, chap. IV, paras. 48-54, and rec. 54, subparas. (b)-(f)). In order to ensure the integrity of the registry record, the regulation should include rules implementing these recommendations.

37. Additional measures to ensure that the integrity of the registry record is preserved include the following. First, the regulation should provide that the registry staff should not alter information in, or remove information from, the registry record, except as specified in the law and the regulation (see draft Registry Guide, rec. 15). Second, the regulation should provide that information in a registered notice may be amended only by registration of an amendment notice in accordance with the regulation (see Registry Guide, rec. 17).

38. In addition, the potential for registry staff corruption should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any other information entered by a registrant; (b) eliminating any discretion on the part of registry staff to reject users' access to the registry services; (c) instituting financial controls that strictly limit staff access to cash payments of fees (for example, by requiring the payment of fees to be made to and confirmed by a bank or other financial institution); and (d) designing the registry system to ensure that the archived copy of cancelled registrations preserves the original data submitted.

39. In addition, it should be made clear to registry staff and registry users, inter alia, that the registry staff are not allowed to give legal advice on the legal requirements for effective registration and searching or on the legal effects of registrations and searches. Moreover, it should be clear that the registry staff are only responsible for ongoing monitoring of the way the registry is working (or not working) in practice, including gathering statistical data on the quantity and types of registrations and searches that are being made, in order to be in a position to suggest any necessary adjustments to the registration and search processes and the relevant regulation.

40. Furthermore, as already discussed (see A/CN.9/WG.VI/WP.48/Add.1, paras. 48-55), the registry should be designed, if possible, to enable registrants and searchers to submit information for registration and conduct a search directly and electronically as an alternative to having registry staff do this on their behalf (see *Secured Transactions Guide*, rec. 54, subpara. (j)). In such a purely electronic registry, the role of the registry staff should essentially be limited to managing and facilitating electronic access by users, processing fees and overseeing the operation and maintenance of the registry system. If this approach is adopted, the regulation should make it clear that users bear sole responsibility for any errors or omissions they make in the registration or search process and carry the burden of making the necessary corrections or amendments (see draft Registry Guide, rec. 8).

7. Liability of the registry

41. The enacting State will need to assess how responsibility for loss or damage due to any of the following causes is to be allocated: (a) incorrect or misleading advice or information or unjustified rejection of a registration or search request by the registry staff; and (b) delay or erroneous or incomplete registrations or search results caused by a system malfunction or failure. As already mentioned (see paras. 36-40 above), while in cases where the registry permits direct registration and searching by registry users the law recommended in the *Secured Transactions Guide* limits the responsibility of the registry to system malfunction, it generally leaves this matter to enacting States (see *Secured Transactions Guide*, rec. 56). In some States, part of the registration and search fees are put into a fund to cover possible

liability of the registry for loss or damage suffered by secured creditors or third-party searchers. In other States, there are other insurance schemes aimed at covering such liability of the registry. In yet other States where data are being entered into the registry record by registry staff and thus the risk of error and liability is too great, there may be no back-up compensation or a maximum amount of recovery for any single loss.

8. Copy of registered notice

42. In view of the importance of the effective registration of a notice to the third-party effectiveness and priority of a security right, it is essential for the registrant to obtain verification that information in the notice has been successfully entered into the registry record and the date and time thereof. Accordingly, the *Secured Transactions Guide* recommends that a registrant should be able to obtain a record of the registration as soon as the information contained in a notice is entered into the registry record (see *Secured Transactions Guide*, chap. IV, paras. 49-51, and rec. 55, subpara. (e)).

43. In addition, the registrant needs to be informed of any changes to a registered notice to be able to take prompt steps to protect its position in the event that an amendment or cancellation was erroneous. Accordingly, the *Secured Transactions Guide* further recommends that the registry must send promptly a copy of any changes to a registered notice to the person identified as the secured creditor in the notice (see *Secured Transactions Guide*, chap. IV, para. 52, and rec. 55, subpara. (d)). The regulation should include provisions implementing these recommendations (see draft Registry Guide, rec. 16).

44. Moreover, for the grantor, receipt of a copy of the registered notice or a verification statement is necessary to ensure that the information in the notice: (a) corresponds to the authorization provided by the grantor in the security or other agreement, if any; and (b) conforms to the scope of the grantor's authorization for registration. Accordingly, the *Secured Transactions Guide* recommends that the registrant is obligated to send a copy of the registered notice to the grantor (see *Secured Transactions Guide*, rec. 55, subpara. (c)). This recommendation should likewise be reflected in the regulation.

45. Placing the obligation on the registrant, rather than the registry, to send a copy of the notice to the grantor is intended to avoid creating an additional burden for the registry which could negatively affect its time- and cost-efficiency. On the assumption that in most cases registrations will be made in good faith and will be accurate, failure of the registrant to meet this obligation results only in nominal penalties and any proven damages resulting from the failure (see *Secured Transactions Guide*, chap. IV, para. 51, and rec. 55, subpara. (c)).

46. In the interests of efficiency, the registry should be designed, if possible, so as to automatically generate an electronic record of the registration and send it electronically or by, for example, electronic mail attachment, to the registrant. If the registry needs to send paper copies to the registrant by mail and the registrant has to forward the copy to the grantor also by mail, delays and problems are likely to arise.

9. Amendment of information in a registered notice

47. The *Secured Transactions Guide* recommends that a registrant may amend information in a registered notice by registering an amendment notice at any time (see *Secured Transactions Guide*, chap. IV, paras. 110-116, and rec. 73). The *Secured Transactions Guide* also recommends that a grantor may, in certain circumstances, seek an amendment through a judicial or administrative process (see *Secured Transactions Guide*, chap. IV, paras. 107 and 108, and rec. 72). In view of the importance of these recommendations, the regulation may restate them and, in addition, set out the information that an amendment notice should contain (see draft Registry Guide, rec. 17).

48. A notice may not reflect, or may no longer reflect, an existing or contemplated financing relationship between the secured creditor and the grantor identified in the registration. This may happen because, after the registration, the negotiations between the parties broke down, the parties agreed to add or delete encumbered assets, or the financing relationship to which the registered notice relates came to an end. In such a case, the continued presence of the information on the registry record will limit the ability of the person identified as grantor to sell or create a new security right in the assets described in the registered notice. This is due to the fact that a prospective buyer or secured creditor will be reluctant to enter into any dealings with the person identified as the grantor unless and until the existing notice is cancelled.

49. While an amendment by the secured creditor would require appropriate authorization by the grantor, an amendment due to the assignment of the secured obligation, subordination or change of address of the secured creditor or its representative should not require authorization by the grantor. Typically, the grantor would authorize registration of an initial notice as well as any amendment in a single authorization document. This single authorization would not require the secured creditor to request individual authorizations for individual amendments (such as, for example, to extend the period of effectiveness of a registered notice).

50. It should be noted that an amendment will change the substance of the registry record through another notice, but it will never change the information of the initial notice, which will remain searchable in the publicly available registry record and, upon expiry of the period of effectiveness or cancellation of the notice, retrievable in the registry archives (see paras. 51-53 below).

10. Removal of information from the publicly available registry record and archival of such information

51. The *Secured Transactions Guide* recommends that information contained in a notice should be removed from the publicly available record once the period of effectiveness of the relevant registered notice expires or a cancellation notice is registered; such information must then be archived (see *Secured Transactions Guide*, chap. IV, para. 109, and rec. 74). The regulation should include rules implementing these recommendations (see draft Registry Guide, recs. 18 and 19).

52. In particular, the regulation should make it clear that information removed from the publicly available registry record must be archived so as to be capable of being retrieved for a period established at the discretion of enacting States (for example, at least twenty years). The archival period may be influenced by the length

of the period within which claims may be submitted under a loan agreement. For example, in some legal systems, no action may be brought later than fifteen years from the date on which the act that would be the basis of a claim occurred. In those systems, the registry regulation provides that information in all registered notices must be kept in the registry archives for fifteen years; and while it is possible that the fifteen year period can be extended through acknowledgment by the debtor of the debt, the registry is not obligated to keep the information in its archives beyond the initial limitation period. It should be noted that retrieval of archived information may be necessary for various purposes, such as, for example, for the purpose of establishing priority in the case of prolonged court or insolvency proceedings, or for the purposes of tax or money-laundering legislation. In many States, information in expired or cancelled notices may be retained in the registry record accessible to the public with an indication that it has expired or has been cancelled.

53. In other States, where information submitted to the registry is entered in the registry record by the registry, the registry may correct errors that it made in the process of entering information in the registry record. This is intended to ensure that the registry may correct errors made in entering into the record information submitted in a paper form (correctness of the information on the form being the responsibility of the registrant), but may not scrutinize and correct information entered by a registrant electronically, as this would run counter to the *Secured Transactions Guide* (see *Secured Transactions Guide*, rec. 54, subpara. (d), which is intended to limit the role of the registry and accordingly the scope of error and liability for error). The registry may effectuate the change correcting its error by registering a correction form that identifies the clerk making the corrections and the corrections made. Enacting States that may wish to allow such corrections by the registry will need to provide rules on the legal consequences of errors made by the registry in entering information in the registry record and in particular whether a "correction" may change the order of priority.

11. Language of a notice

54. The *Secured Transactions Guide* discusses but makes no recommendation with regard to the language of a notice (see *Secured Transactions Guide*, chap. IV, paras. 44-46). In view of the importance of the matter, it should be addressed in the regulation (see draft Registry Guide, rec. 20).

55. Two issues arise in this regard. First, the language in which information in a notice should be expressed and, second, the set of characters in which the information should be entered into the notice. The regulation should specify the language but need not deal with the permissible set of characters as long as they are publicized to users (for example, on the registry's website). This would allow the registry to revise the set of characters from time to time.

56. The language to be used to enter information in the registry typically would be the official language or languages of the State under whose authority the registry is maintained, but could also include any other language specified by that State. In any case, search results should be displayed in the language in which the information was entered in the registry record. In addition, where the grantor's name is the relevant identifier and the correct name is in a set of characters other than that used by the registry, the registry could be designed to adjust or transliterate some characters in the grantor's name to conform to the characters used by the registry.

The same applies to secured creditor's name, the description of the encumbered assets or other information in the notice if, for example, the language used in the foreign State of the manufacturer has to be used in the notice. The characters to be transliterated and the form to which they will be transliterated may need to be made public (for example, on the registry's website).

57. Where the grantor is a legal person and the law under which it is constituted allows the use of alternative linguistic versions of its name, the regulation should specify that all linguistic versions of the name must be entered as separate grantor identifiers to the extent that this is compatible with the specified language of the registry. This is necessary to protect third parties that may be dealing or have dealt with the grantor under any one of the alternative versions of its name and would therefore search the registry using that version.

58. A way to mitigate the various problems that might arise from the fact that the identifier of the grantor is expressed in a language other than that used by the registry would be to use personal identity card numbers as the identifier of the grantor in lieu of the name of grantor (for a discussion of this matter, see A/CN.9/WG.VI/WP.52, paras. 11 and 12).

B. Recommendations 10-20

[*Note to the Working Group: The Working Group may wish to consider recommendations 10-20, as reproduced in document A/CN.9/WG.VI/WP.52/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.*]