

Permanent Editorial Board for the Uniform Commercial Code

PEB COMMENTARY NO. []

INDICATION OF COLLATERAL IN A FINANCING STATEMENT

Draft for Public Comment

December 16, 2021

Comments on this draft must be submitted by no later than February 14, 2022.

Comments may be submitted by email to UCCComments@ali.org

**This draft has been approved for publication by the PEB
subject to revisions based on comments received.
The PEB reserves the right to withdraw this proposed PEB Commentary.**

PREFACE TO PEB COMMENTARY

The Permanent Editorial Board for the Uniform Commercial Code acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The PEB has resolved to issue supplemental commentary on the UCC from time to time. The supplemental commentary of the PEB generally will be known as a *PEB Commentary*, to distinguish it from the Official Comments to the UCC. A *PEB Commentary* may be denominated a commentary, a report, or otherwise as determined by the PEB.

The Resolution states that:

The underlying purposes and policies of the *PEB Commentary* are those specified in UCC Section 1-103(a). A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the beginning of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to the inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with UCC Section 1-103(a)(2), to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and federal and state consumer protection statutes) and general principles of law and equity pursuant to UCC Section 1-103(b); or (6) to otherwise improve the operation of the UCC.

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PEB COMMENTARY NO. []
INDICATION OF COLLATERAL IN A FINANCING STATEMENT

Issue: Does a financing statement¹ that provides an indication of collateral solely by reference in the financing statement to a record (including a security agreement) not attached to² the financing statement sufficiently indicate the collateral that it covers for purposes of U.C.C. §§ 9-502(a)(3) and 9-504?

Discussion:

Introduction. Uniform Commercial Code §§ 9-308 – 9-316 set forth the methods by which security interests may be perfected. U.C.C. § 9-310(a) establishes the default rule: unless otherwise provided in U.C.C. §§ 9-310(b) or 9-312(b), a financing statement must be filed to perfect a security interest.³ Under U.C.C. § 9-502(a)(3), a financing statement is sufficient only if, among other things, it “indicates the collateral covered by the financing statement.” U.C.C. § 9-504 states the standard used to determine whether an indication of collateral in a financing statement is sufficient: a financing statement to be sufficient must “provide[]” a “description” of the collateral that meets the standards for the description of collateral in a security agreement under U.C.C. § 9-108⁴ or “provide[]” an “indication” that the financing statement covers all assets or all personal property of the debtor.⁵

This Commentary concludes that a financing statement that does not itself contain a collateral description meeting the standards of U.C.C. § 9-108 or an indication that the security interest covers “all assets” or “all personal property” but refers solely to a record

¹ The term “financing statement” includes “an initial financing statement and any filed record related to the initial financing statement.” U.C.C. § 9-102(a)(39).

² In deference to common parlance, and for ease of comprehension, this Commentary speaks of records that are not “attached to” a financing statement to refer to records that are not included in the filed records comprising an initial financing statement or amendment that adds collateral, as applicable. The term “record” means “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” U.C.C. § 9-102(a)(70).

³ More precisely, the actions described in U.C.C. § 9-310 and the other sections to which it refers will suffice to perfect a security interest that has attached. If the actions so described occur before attachment of the security interest, the security interest is perfected when it attaches. U.C.C. § 9-308(a).

⁴ U.C.C. § 9-504(1). Section 9-108 generally requires that, to be sufficient, the collateral description must “reasonably identify” what is described. This Commentary does not address the determination of whether a particular collateral description satisfies U.C.C. § 9-108 or whether a particular collateral indication satisfies U.C.C. § 9-504(2). Rather, it addresses only whether a financing statement “provides” a sufficient description of the collateral under section 9-108, or “provides” an indication that the financing statement covers all assets or all personal property, if the words of that description or indication are not in the records constituting the financing statement but instead are in a record that is not attached to the financing statement.

⁵ U.C.C. § 9-504(2). Such “supergeneric” indications of collateral were not sufficient under former U.C.C. Article 9. See former § 9-402(1) (financing statement is sufficient if it ... contains a statement indicating the types, or describing the items, of collateral).

not attached to the financing statement that contains additional information does not “provide” a sufficient indication of the collateral even if the record not attached to the financing statement would be sufficient if it were attached to the financing statement.

This conclusion follows both from the text of the Uniform Commercial Code and its underlying purposes and policies.

The text of the U.C.C. While U.C.C. § 9-502(a)(3) states that a financing statement is sufficient only if it *indicates* the collateral covered by the financing statement, that standard is satisfied, according to U.C.C. § 9-504 only if the financing statement “provides” either a description of the collateral meeting the standards of U.C.C. § 9-108 or an indication that the financing statement covers “all assets” or “all personal property” of the debtor. This issue is one of several in which Article 9 requires a record to “provide” certain information to be sufficient. U.C.C. § 9-502(a)(1) states that a financing statement is sufficient only if it “provides” the name of the debtor. When Article 9 requires a record such as a financing statement to “provide” certain information and sets out standards for sufficiency of that information, the plain meaning of the text, and context and purposes, of Article 9 require the information to be in that record.

Consider the requirement that a financing statement “provide” the name of the debtor. A financing statement that contained only a trade name of the debtor followed by a statement that “debtor’s name (as required by U.C.C. . § 9-503) is provided in the security agreement of even date between the parties” would not suffice. This is the case even if the name of the debtor found in the security agreement met the standards of U.C.C. § 9-503, because the *financing statement* – the record filed in the relevant U.C.C. filing office – does not “provide” the debtor’s name. The filing office would be unable to index properly the financing statement without the debtor’s name and would not be expected to search for that information by locating and reviewing the security agreement not provided to it in order to do so. Similarly, the requirement in U.C.C. § 9-502(b)(3) that a financing statement filed as a fixture filing “provide” a description of the related real property would not be satisfied by a statement in the financing statement that “a description of the related real property may be found in the Loan, Mortgage, and Security Agreement of even date between the parties.”

Thus, as a matter of text and context, when the Article 9 rules with respect to financing statements state that, to be sufficient, a financing statement must “provide” certain information, that information must appear in the record that is the financing statement.

The purposes and policy of the U.C.C. Article 9 is but one article of the Uniform Commercial Code. Article 1 – General Provisions – “applies to a transaction to the extent that it is governed by another article.” U.C.C. § 1-102. U.C.C. § 1-103 provides as follows:

- (a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:
- (1) To simplify, clarify, and modernize the law governing commercial transactions;
 - (2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
 - (3) To make uniform the law among the various jurisdictions.

Official Comment 1 to U.C.C. § 1-103 elaborates:

“The Uniform Commercial Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Uniform Commercial Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.”

As stated, among the purposes and policies of the Uniform Commercial Code are simplicity, clarity, and uniformity in the law as enacted in various jurisdictions. Publicly searchable financing statements efficiently, reliably, and inexpensively provide to third parties the information necessary for assessment of the risk that others have certain rights in the personal property indicated in the financing statement. The Comments to sections 9-502 and 9-504 state the purpose served by use of a financing statement (emphasis added):

The *notice* itself indicates merely that a person may have a security interest *in the collateral indicated*.... However, even in the case of filings that do not necessarily involve a series of transactions (e.g., a loan secured by a single item of equipment), a financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral *in the financing statement* is sufficient to cover the collateral concerned.

Section 9-502, Comment 2.

A financing statement sufficiently indicates collateral claimed to be covered by the financing statement if it satisfies the *purpose* of conditioning perfection on the filing of a financing statement, i.e., if *it provides notice* that a person may have a security interest in the collateral claimed.

Section 9-504, Comment 2.

These purposes are best served if the requirement in U.C.C. § 9-504(1) that the financing statement “provide” an indication of the collateral is interpreted to require that an adequate indication appear in the record or records that are attached to the financing statement, not solely in a record that is not “attached” to the financing statement. If the indication is not in the records comprising the financing statement, a searcher would need to make inquiries outside of the records of the filing office to obtain even the most basic information about the collateral covered. Such inquiries are inherently inefficient.⁶ Moreover, those inquiries might not yield the needed information.⁷ The court in *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694, 711 (1st Cir. 2019), considering the comparable rule in former Article 9, adopted this analysis:

“...key goals of the UCC and its filing system ... include fair notice to other creditors and the public of a security interest. ... Requiring interested parties to contact debtors at their own expense about encumbered collateral, with no guarantee of a timely or accurate answer, would run counter to the notice purpose of the UCC.

The court held that a financing statement did not provide a sufficient indication of collateral where the only indication was in a document not attached to the financing statement.⁸

However, any concern about a searcher needing to make inquiries outside of the records of the filing office goes only so far. The inquiry burden on the searcher is balanced against the burden on the filer of providing a sufficient collateral indication in or attached to the financing statement. That balance is evident in that a financing statement with a collateral indication on its face providing sufficient information to

⁶ Requiring that an adequate indication appear in the record or records that are attached to the financing statement seems likely to reduce the cost of credit for borrowers because an efficient, inexpensive, and reliable notice system makes financing less expensive in a holistic sense for lenders.

⁷ While U.C.C. § 9-210 requires a secured party to provide its debtor with information about collateral in which the secured party claims a security interest when requested, the section generally allows the secured party up to 14 days in which to do so. Significantly, the section does not require a secured party to provide the information to a third party such as a searcher. See Official Comment 3 to U.C.C. § 9-210. As stated in *In re Financial Oversight and Management Board for Puerto Rico*, this statutory right is not an efficient or timely alternative to requiring the filer to attach the indication to the financing statement. Nor would it be reliable as the searcher would not have assurance that any record not attached to the financing statement is the latest version of that record.

⁸ The somewhat different wording in current U.C.C. § 9-504 does not change the necessity of having the financing statement itself contain sufficient information about the collateral. Section 9-402(1) of former U.C.C. Article 9 required that a financing statement “contain” a statement “indicating the types, or describing the items, of collateral” (emphasis added). U.C.C. §§ 9-502(a)(3) and 9-504(1) require that a financing statement “indicate[]” (accommodating the wording of 9-504(2)) the collateral covered by “provid[ing]” a description of the collateral pursuant to Section 9-108. Former U.C.C. Article 9 was generally in effect before July 1, 2001, the effective date of current U.C.C. Article 9.

“reasonably identify” the collateral or as an “all assets” indication, which indication in either case also refers to information not attached to the financing statement for *additional* information, may be sufficient. When a financing statement that does provide a collateral indication meeting the standards of U.C.C. § 9-504 also refers to additional information in an unattached record, this does not cause the indication provided in the financing statement to be insufficient.

For example, a financing statement might describe the collateral as “all inventory supplied by secured party to debtor under a supply agreement between debtor and secured party.” This description of the collateral would be sufficient because the description of the collateral as inventory alone would be sufficient⁹ under U.C.C. §§ 9-108 and 9-504(1). The searcher is on notice that a security interest may be claimed in certain inventory even though a determination of the inventory affected may require further due diligence by the searcher, or even the implementation of intercreditor arrangements, if the searcher is considering extending credit against inventory or its proceeds. The searcher may decide not to inquire further if the searcher is considering extending credit only against other collateral.

Conclusion: A financing statement that provides in the financing statement an indication of collateral solely by reference to a record not attached to the financing statement does not comply with the text of Article 9. Thus, the financing statement does not sufficiently provide an indication of the collateral. To the extent that *In re I80 Equipment*, 938 F.3d. 866 (7th Cir. 2019), *rehearing en banc denied* (7th Cir. Oct.10, 2019), *cert. denied*, 140 S. Ct. 1125 (2020) is inconsistent with this conclusion, this Commentary is to the contrary.

Official Comment 2 to U.C.C. § 9-504 is amended by addition of the following sentence at the end of the first paragraph thereof:

“A financing statement that provides an indication of collateral that does not itself meet the standard of section 9-504, but refers solely to a record not attached to the financing statement for the collateral indication, does not satisfy the requirement of section 9-504. See PEB Commentary No. [], dated_____, 202_.”

⁹ This assumes that the debtor in fact holds the goods as “inventory” as defined in U.C.C. § 9-102(a)(48).