

Client Alert

From the
Commercial Finance
Group

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Transition to Revised Article 9: Maintaining Perfection After June 30, 2006

UCC lawyers recently recognized an ambiguity in one of the transition rules under Revised Article 9. That transition rule pertains to a relatively small segment of all UCC financing statements: those (i) which were originally scheduled to expire during the second half of 2001, (ii) for which a continuation statement was filed during the first six months of 2001, (iii) which need to be maintained because indebtedness is still owing and (iv) which were originally filed in the jurisdiction of the debtor's organization (the "Affected Financing Statements"). Set forth below is a brief description of this ambiguity, together with our recommendation with respect to it. We welcome you to contact Joel Brown (312-201-3918), David Mason (312-201-3915), Anne Marie Pisano (312-201-3988) or any of our other attorneys to discuss this issue further.

Revised Article 9 sets forth, among other things, a new regime for filing UCC financing statements as well as transition rules designed to transition from former Article 9 ("FA9") to Revised Article 9 ("RA9") between July 1, 2001, its adoption date in most states, and June 30, 2006, the date upon which FA9 is to be fully replaced by RA9. The Permanent Editorial Board for the Uniform Commercial Code ("PEB") recently published a report entitled "Maintaining Perfection Beyond June 30, 2006 of Security Interests Created and Perfected by Filings Under Former Article 9." This report outlines an interpretive issue relating to the Affected Financing Statements caused by the interplay of FA9-403(3), which allowed a secured party to maintain its perfected security interest by filing a continuation statement any time six months prior to the expiration date of the original financing statement (which concept has been preserved in RA9-515(d)), and RA9-705(c), which provides that a financing statement filed under FA9 ceases to be effective upon the earlier to occur of (a) the natural expiration of such financing statement and (b) June 30, 2006.

Take for example, a financing statement originally filed in the jurisdiction of organization of the debtor, continued under FA9-403(3) in the first half of 2001 and which currently has a lapse date in the second half of 2006. **The questions become, does RA9-705(c) apply to such financing statement such that it expires on June 30, 2006 and if so, when can a continuation statement be filed in order to continue the effectiveness of such financing statement.** This problem is peculiar to financing statements filed in the debtor's jurisdiction of organization, as the rules relating to financing statements filed in jurisdictions other than the jurisdiction of organization are clear - file an in lieu of continuation statement any time prior to June 30, 2006.

With respect to the Affected Financing Statements, if RA9-705(c) does not apply and FA9-403(3) controls the expiration date of such financing statements, the continuation statement can be filed any time within the six month period prior to the expiration of such financing statement under RA9-515(d). If the continuation statement with respect to an Affected Financing Statement is filed after June 30, 2006, however, the secured party runs the risk that *(continued . . .)*

a jurisdiction decides that RA9-705(c) controls and rejects the filing as being past the June 30, 2006 cut-off date or that a court ruling on the effectiveness of such financing statement finds that it lapsed on June 30, 2006 and, therefore, was not continued by the later filed continuation statement. As a result, it appears that the safest assumption is that the expiration date of each Affected Financing Statement is June 30, 2006.

If one takes the safe approach and assumes that each Affected Financing Statement will expire on June 30, 2006, the next question is: when can the continuation statement relating to an Affected Financing Statement be filed? The PEB has identified a "safe harbor window" during which the filing of a continuation statement should be effective regardless of whether a court or filing office applies the provisions of FA9 and RA9. This safe harbor window "opens" on the date that is six months prior to the expiration of the Affected Financing Statement assuming the application of FA9-403(3) and "closes" on June 30, 2006. Thus, if under FA9-403(3) an Affected Financing Statement is scheduled to terminate on October 31, 2006, the window would open on May 1, 2006 and close at the end of the day on June 30, 2006. We support this approach, but caution our clients that the resulting window may be particularly short and in the case of an Affected Financing Statement set to terminate on December 31, 2006, may be as short as 1 day. Out of an abundance of caution, we would also suggest that a new UCC-1 financing statement be filed against the debtor in its jurisdiction of incorporation under RA9 (with a corresponding lien search conducted to verify appropriate priority).

The analysis contained in this Client Alert relates to the Uniform Commercial Code as adopted in the State of Illinois. Due to variations adopted in the States of Connecticut, Florida and other jurisdictions, Affected Financing Statements filed in those states deserve special attention.

Please note that it has never been our practice to assume responsibility for filing continuation statements on behalf of our clients. Instead, we trust that you have in place mechanisms for filing such continuation statements during the appropriate statutory period. With respect to the Affected Financing Statements discussed in this Client Alert, please review your current mechanisms or "tickler" system to make sure that you are aware of the opening of each Affected Financing Statement's safe harbor window.

We welcome your thoughts and questions about the foregoing. Please contact any of the following in the Goldberg Kohn Commercial Finance Group:

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