

RA9 Transition Update

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The end of Revised Article 9's transition period is rapidly approaching. Section 9-705(c) causes pre-effective date financing statements to cease to be effective on the original lapse date, or June 30, 2006, whichever comes first. This means all pre-effective date financing statements may cease to be effective on June 30th, unless first brought into compliance with RA9.

The transition cutoff creates a special problem for some financing statements that were scheduled to lapse after the effective date of RA9. If these financing statements were continued during the pre-effective date portion of the 6-month window, they may cease to be effective on June 30th, not the lapse date of record.

If these financing statements need to be continued again in 2006, the secured party must pay close attention to the transition cutoff date. The continuation should be filed during the "safe harbor" portion of the six-month window. The safe harbor runs from the beginning of the window through June 30th.

There are also some states that require special attention due to non-uniform provisions in Old Article 9 ("OA9"), non-uniform RA9 dates or other circumstances. These states include Connecticut, Alabama, Florida, Ohio, Idaho, Tennessee, Missis-

sippi, Maryland and the U.S. Virgin Islands. The applicable dates may be different in these states and, in some cases, there is no safe harbor window. (More details about the effect of §9-705(c) in these jurisdictions can be found through the IncSpot website in the Revised Article 9 Library).

Due to the ambiguity surrounding §9-705(c), secured parties and their legal counsel should be aware of the following best practices through the transition period:

- [1] File continuations on all affected financing statements by June 30, 2006, during the safe harbor window, regardless of lapse date.
- [2] If no safe harbor exists, as in Florida, Connecticut, USVI and, in some cases, Ohio, file a continuation prior to June 30th, save the rejection and consider filing a correction statement. Then file another continuation during the normal six-month window.
- [3] File all financing statements in lieu of continuation no later than June 30, 2006, regardless of the jurisdictions involved. Even if the originating state has a transition end date after June 30th, the receiving state may not recognize the "reach-back" priority of an In-lieu filed after its cutoff date.

[4] Searchers should continue to use transition search rules until at least six months after the end of the transition period. The reason is that if §9-705(c) doesn't apply, financing statements filed under OA9 could remain effective for a short period after the transition end date. The transition search rules require a search in the RA9 jurisdiction using both standard search logic and name variation logic. This will find both post RA9 financing statements and pre-effective date financing statements that may remain effective.

The §9-705(c) problem was little known until the NCCUSL PEB released its report on the issue in late 2005. Since that time, a number of states have taken action to address the issue through legislation. Several states also plan to at least notify secured parties that a potential problem exists.

Fourteen states took the initiative to notify secured parties of the potential §9-705(c) problem by mail. Six of those states sent letters to secured parties that described the problem and included a list of financing statements that may be affected. Recipients of these letters should use the list as a starting point, but should also check their own records to identify other affected financing statements.

The remaining states sent a letter that simply identified the problem. As of mid-May, several other states were still considering whether to send notification letters.

A number of states introduced legislation to address the §9-705(c) problem. Some states, includ-

ing Oklahoma, Montana, Idaho and Tennessee, enacted remedial measures well before the §9-705(c) issue became widely known. This legislation was intended to fix unique problems in each state created by Old Article 9.

One example is Idaho, where OA9 provided that county-level fixture filings did not lapse. They were effective until satisfied. Idaho enacted legislation that established June 30, 2006 as the lapse date for the pre-effective date fixture filings. However, the legislation failed to address the §9-705(c) issue at the state level.

Several other states recognized the §9-705(c) issue and introduced emergency legislation to address the problem. These include Maryland, Kansas, Rhode Island, North Carolina, Pennsylvania and Tennessee.

The Maryland legislation is of particular interest. Under Maryland's OA9, financing statements were effective for twelve years. Maryland also enacted a non-uniform version of RA9 that clearly applied §9-705(c) to all pre-effective date financing statements. This provision failed to provide any guidance for the filing office or secured parties regarding the continuations or new lapse dates.

In response to this situation, the Department of Assessment and Taxation reset all the lapse dates for pre-effective date financing statements to June 30, 2006. However, it was not clear that the filing office had legal authority to do so.

To clear up ambiguity surrounding the new lapse date and ratify the filing office actions, Mary-

land introduced emergency legislation. The legislation became law on May 26th. Now it is clear that all financing statements filed prior to July 1, 2001 in Maryland will have a new lapse date of June 30, 2011, if continued during the first half of 2006.

Several states have considered a legislative fix proposed by Neil Cohen, Harry Sigman, Ed Smith and Steve Weise. This legislation makes it clear that the cutoff provision in §9-705(c)(2) does not apply to financing statements filed in the correct location for both OA9 and RA9. Financing statements that need to be moved to a new location through filing in lieu remain subject to the effect of §9-705(c).

Kansas adopted this legislation in April.

Rhode Island and North Carolina have similar legislation pending as of June 7th.

It appears that those states with more complex transition issues, including Florida, Connecticut and Ohio, have left it to the courts to sort out the effect of §9-705(c).

The good news is that the transition period is almost over. The search and filing process will soon begin to grow simpler and more certain. Until then, secured parties and legal counsel can reduce their risk by following proper transition procedures and paying attention to related state legislation.

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