

**PERMANENT EDITORIAL BOARD
FOR THE UNIFORM COMMERCIAL CODE**

REPORT

**MAINTAINING PERFECTION BEYOND JUNE 30, 2006 OF SECURITY INTERESTS
CREATED AND PERFECTED BY FILING UNDER FORMER ARTICLE 9**

A. Introduction

Revised Article 9 of the Uniform Commercial Code has been in effect since July 1, 2001¹ (the “effective date”), yet aspects of former Article 9 still have legal effect. In particular, revised UCC Section 9-705(c) provides that a financing statement that was effective under former Article 9 remains effective under revised Article 9 (even if the financing statement was filed in a jurisdiction that is not the jurisdiction whose law governs perfection under the conflict of laws rules in revised Article 9). The period of effectiveness of such a financing statement under revised Article 9 is limited, though. UCC Section 9-705(c) goes on to provide that the pre-effective-date financing statement ceases being effective under revised Article 9 at the earlier of (i) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it was filed and (ii) June 30, 2006 (the “cutoff date”). As the cutoff date approaches, secured parties must plan carefully to assure that the perfected status of their security interests that remained effective under UCC Section 9-705(c) continues after that date. This Report generally describes the effect of the cutoff date and the actions that secured parties may take to maintain the perfection of their security interests and analyzes in particular detail the effect of the cutoff date on certain financing statements that were continued during the first half of 2001.

As discussed in detail below, there is an interpretive issue concerning the further continuation of certain financing statements that were continued during the first half of 2001. In particular, application of UCC Section 9-705(c) to such continued financing statements that are filed in the same office in the same state as required by revised Article 9 is particularly problematic and may not have been intended by the drafters.² Consequently, resolution of the interpretive issue must be accomplished either by interpretation of UCC Section 9-705 in light of both its text and the absence of clear evidence of statutory intent or by concluding that Section 9-705 does not address such continued financing statements and, thus, the cutoff date is inapplicable to them. This Report takes no position as to the correct interpretation. As this Report indicates, though, under any interpretation a secured party wishing to continue such a financing statement can

¹ See UCC § 9-701. All references in this report are to the Uniform Commercial Code are to the 2004 Official Text, unless otherwise indicated. The analysis in this report assumes the enactment of the Official Text. It should be noted, though, that four states enacted non-uniform versions of § 9-701, resulting in effective dates of October 1, 2001 (Connecticut) and January 1, 2002 (Alabama, Mississippi, and Florida).

² While this situation brings about uncertainty with respect to further continuation of those financing statements, it should be noted that this uncertainty will affect only a small number of financing statements inasmuch as the affected class of financing statements is not large and only a small number of financing statements are continued twice.

avoid the risk of an untimely³ (and, therefore, ineffective) continuation if it files a new continuation statement during a period that begins six months before the effectiveness of the financing statement would otherwise lapse without regard to the June 30, 2006, cutoff date and that ends on June 30, 2006. It should be noted, however, that this “safe harbor window” for filing a continuation statement does not provide the full six-month period for filing continuation statements contemplated by both former UCC Section 9-403(3) and revised UCC Section 9-515(d)⁴.

B. Effect of the Cutoff Date – Generally

As stated above, revised UCC Section 9-705(c) provides that the effectiveness of a pre-effective-date financing statement terminates at the earlier of the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it was filed and June 30, 2006. Continuation of effectiveness of such a financing statement beyond that date may be accomplished only by following the appropriate procedure set out in Part 7 of revised Article 9. Part 7 sets out two different procedures, each applying to one of two mutually exclusive scenarios. First, if the pre-effective-date financing statement was filed in the same office in the same jurisdiction as would be required by the conflict of laws rules and filing office rules of revised Article 9, UCC Section 9-705(d) provides that the effectiveness of that financing statement can be continued by the filing of a continuation statement. Second, if the first rule does not apply, the secured party must file an “initial financing statement in lieu of continuation statement” (an “in lieu” financing statement) under revised UCC Section 9-706. This “in lieu” filing must be made in the jurisdiction whose law governs perfection under the conflict of laws rules of revised Article 9.

The vast majority of filings made under former Article 9 (*i.e.*, before July 1, 2001) had only a five-year lifespan⁵ and, thus, will cease to be effective on or before the June 30, 2006, cutoff date under the first prong of UCC Section 9-705(c). Thus, the number of situations in which the cutoff date could shorten the period of effectiveness of a pre-effective-date financing statement is minimal. Indeed, it might appear at first that, except for situations in which a pre-effective-date financing statement had a lifespan of longer than five years under former Article 9 (because either former UCC Section 9-403(6) or a non-uniform rule in effect in the relevant state provided for a longer duration), the cutoff date established by the second prong of UCC Section 9-705(c) would have no effect.

C. Effect of the Cutoff Date on Certain Financing Statements Continued in 2001

As noted above, however, there is another set of cases in which the June 30, 2006, cutoff date is relevant even in states that had a five-year lifespan for financing statements filed in that state

³ As described in more detail in this Report, a continuation statement is effective to continue the effectiveness of a financing statement only if it is filed within a statutorily described window. See generally UCC § 9-515(d). Thus, a continuation statement may be untimely if it is filed either too early or too late.

⁴ Indeed, as noted in Part F of this Report, the safe harbor period grows progressively shorter as the date on which effectiveness of the financing statement would otherwise cease if § 9-705(c) were inapplicable is later in 2006.

⁵ The only exceptions in the Official Text of former Article 9 were for filings that identified the debtor as a transmitting utility and for real estate mortgages effective as fixture filings. See former UCC § 9-403(6).

under former Article 9. For some of these cases, as explained below, the structure of Part 7 of Article 9 does not work well to provide clear answers to questions about maintaining effectiveness after June 30, 2006, of a financing statement filed under former Article 9. The drafters may not have anticipated and considered these specific cases in crafting the rules in Part 7.

Consider a financing statement that originally was filed under former Article 9 in the second half of 1996. Under former Article 9, that filing would have expired five years later – in the second half of 2001, *after* the effective date of revised Article 9. Although the second half of 2001 was after the effective date, former Article 9 provided that a continuation statement filed at any time in the six-month period prior to the expiration of a financing statement’s five-year lifespan continued the effectiveness of that financing statement for an additional five years from the original lapse date.⁶ Thus, the six-month continuation window for a financing statement originally filed in the second half of 1996 began sometime in the *first* half of 2001 – while former Article 9 was still in effect. As a result, it was possible to file a continuation statement under former Article 9 to continue the effectiveness of such a financing statement, even though its effectiveness would have continued until after revised Article 9 came into effect. Under the rules of former Article 9, such a continuation statement continued the effectiveness of the financing statement for an additional five years from its original lapse date in the second half of 2001 and, therefore, to a date after June 30, 2006. For example, if the original financing statement was filed on November 1, 1996, the secured party could have filed a continuation statement under former Article 9 as early as May 1, 2001 (before the effective date of July 1, 2001). Under the rules of former Article 9, this would have continued the effectiveness of that financing statement until November 1, 2006.

At this point, several questions must be answered. First, when does the effectiveness of such a financing statement (an “affected financing statement”) lapse under the rules of revised Article 9? Second, what actions must be taken by a secured party who wishes to continue the effectiveness of an affected financing statement beyond that date? Third, when must such actions be taken? The first two questions are addressed immediately below. The third question is addressed in Parts D and E of this Report.

1. When Does Effectiveness of an Affected Financing Statement Lapse?

To answer this question, the analysis must first return to revised UCC Section 9-705(c), which tells us that financing statements that were effective before the effective date of revised Article 9 cease to be effective no later than June 30, 2006. If action is not taken by that date to continue the effectiveness of an affected financing statement, UCC Section 9-705(c) tells us that the effectiveness of the financing statement will cease and, thus, that any later action will be too late to maintain continuity of perfection. Because many secured parties wait until shortly before the expiration of the initial five-year period of effectiveness (or any additional five-year period obtained by virtue of a continuation statement) or rely on automated or other calendaring systems that might have been programmed to remind the secured party of the necessity to continue the effectiveness of such filings only shortly before the expiration of that five-year period, it is

⁶ Former UCC § 9-403(2).

critically important for secured parties to be aware that application of the cutoff rule in UCC Section 9-705(c) would lead to the conclusion that affected financing statements would cease to be effective on the cutoff date – *before* the expiration of that five year period⁷.

The preceding discussion assumes that the cutoff date in UCC Section 9-705(c) applies to all affected financing statements. An argument could be made, though, that there is a class of affected financing statements to which that subsection is inapplicable. If the affected financing statement is filed in the same office and same jurisdiction as would be required for an initial financing statement under revised Article 9 and also meets all of the requirements of Part 5 of revised Article 9 for an initial financing statement (such as the rules for the debtor’s name and the indication of collateral), it might be argued that UCC Section 9-705(b) (which provides that the filing of a financing statement before the effective date is effective to perfect a security interest after the effective date to the extent the filing would satisfy the applicable requirements for perfection under revised Article 9) governs this affected financing statement and UCC Section 9-705(c) was not intended by the drafters to address this particular case and is inapplicable.⁸ In such a case,⁹ because UCC Section 9-705(b) contains no cutoff date, the affected financing statement would remain effective until the end of its full five-year period of effectiveness – even if (as in the case of a financing statement that would have expired on or after July 1, 2001, but was continued by the timely filing of a continuation statement before that date) that occurs after June 30, 2006. Similarly, it can be argued that, in light of the Comments to UCC Section 9-705,¹⁰ neither subsection (b) nor subsection (c) applies to these affected

⁷ While the primary focus of this Report is identification of the time period during which the effectiveness of an affected financing statement must be continued in order to remain effective, even a secured party who does not expect again to continue the effectiveness of an affected financing statement beyond the five-year continuation period should note the effect of § 9-705(c). For example, a secured party who expects the secured obligation to be satisfied after June 30, 2006, but before the expiration of the existing five-year continuation period and who, therefore, does not take action on or before the cutoff date to continue the effectiveness of its affected financing statement (expecting to file a continuation statement only if the obligation is not satisfied by the expiration of the five-year period) would also be adversely affected by the application of the cutoff date of § 9-705(c)(2). To avoid the possibility of such an adverse effect, such a secured party should take action to continue the effectiveness of its affected financing statement on or before the cutoff date in accordance with the suggestions of this Report.

⁸ Comment 3 to revised UCC Section 9-705 suggests that subsection (b) was not intended to apply to this situation, which provides some evidence against this argument. Moreover, Example 1 to Comment 4 to the same section applies the June 30, 2006 cutoff date of subsection (c) to a financing statement that would have expired in July 2001 but was continued by the filing of a continuation statement under former Article 9 before July 1, 2001, further suggesting that subsection (c) rather than subsection (b) is applicable. Comment 4, however, as stated in its first sentence, appears to be discussing the application of subsection (c) only in the circumstance where “this Article would require filing of a financing statement in a different jurisdiction or in a different office in the same jurisdiction” and the facts in Example 1 involve that circumstance. Comment 4 is not directed to the circumstance of affected financing statements on file in the same jurisdiction and same office as required by revised Article 9. This would be consistent with a conclusion that the drafters did not intend to address that particular issue in the statute and, thus, leaves it open to interpret the text of the statute to mean that the cutoff date in subsection (c) is not applicable to the particular circumstance of the affected financing statement.

⁹ As noted in the previous sentence, the affected financing statements to which this argument applies are those that are filed in the same office and same jurisdiction as would be required for an initial financing statement under revised Article 9 and also meet all of the requirements of Part 5 of revised Article 9 for an initial financing statement.

¹⁰ See note 8, *supra*.

financing statements and, therefore, that nothing in Section 9-705 shortens their period of effectiveness as originally determined under former Article 9.

2. What Actions Must Be Taken to Continue the Effectiveness of an Affected Financing Statement?

What can secured parties in this circumstance do on or before the date on which their affected financing statements will cease to be effective in order to assure that their perfected status will continue without interruption beyond that date? The answer depends on whether the affected financing statement is filed in the same office and same jurisdiction as would be required for an initial financing statement under revised Article 9. If the affected financing statement is filed in that office in that jurisdiction, revised UCC Section 9-705(d) indicates that the secured party may continue the effectiveness of that financing statement by filing a continuation statement in that office.¹¹ If, on the other hand, the current financing statement is filed in a different state than the state whose law governs perfection of the security interest under revised Article 9 or, even if filed in that state, is not filed in the office in that state mandated by revised Article 9, the secured party must file an “in lieu” financing statement under revised UCC Section 9-706.

D. When May an “In Lieu” Financing Statement be Filed in Order to Continue the Effectiveness of a Financing Statement Whose Effectiveness is Cut Off by UCC Section 9-705(c)(2)?

For cases in which the effectiveness of an affected financing statement may be continued only by the filing of an “in lieu” financing statement, two questions about the timing of the filing of the “in lieu” financing statement must be answered. First, by when must the “in lieu” financing statement be filed in order to continue the effectiveness of an affected financing statement and maintain continuity of perfection? The answer is obvious – the date by which such a filing must be made is the date on which effectiveness would otherwise cease under revised UCC Section 9-705(c) (*i.e.*, the earlier of the date on which the affected financing statement would cease to be effective under the law of the jurisdiction in which it was filed and June 30, 2006).¹² Second, what is the *earliest* date on which such an “in lieu” filing can be made? The answer here is quite simple as well – an “in lieu” financing statement may be filed at any time.¹³

E. When May a Continuation Statement be Filed in Order to Continue the Effectiveness of an Affected Financing Statement?

For cases in which the effectiveness of an affected financing statement may be continued by the filing of a continuation statement in the same office and same state as the original financing statement, the same two questions must be answered about the timing of the continuation

¹¹ Note, however, that § 9-705(f) provides that, taken together, the pre-effective date financing statement and the post-effective date continuation statement must satisfy the requirements of Part 5 of revised Article 9 for an initial financing statement.

¹² For cases in which an “in lieu” financing statement is required, there is no doubt that § 9-705(c) provides the applicable cut-off date. By its own terms § 9-705(b) does not apply to such a situation and it is clear from Comment 4 to § 9-705 that § 9-705(c) is intended to apply.

¹³ See § 9-706, comment 1, par. 2.

statement. First, by when must the continuation statement be filed in order to continue the effectiveness of an affected financing statement and maintain continuity of perfection? The answer, of course, is the date on which effectiveness of the affected financing statement would cease under revised Article 9 – either June 30, 2006, or the expiration of the standard five-year period of continued effectiveness, depending on which interpretation described in Part C1 of this Report is adopted. Second, what is the *earliest* date on which such a continuation statement may be filed?

The answer to the second question is uncertain. Revised UCC Section 9-705(d) states that effectiveness of the pre-effective-date financing statement may be continued “upon the timely filing” of a continuation statement. What is a “timely filing” in the context of an affected financing statement? Both former UCC Section 9-403(3) and revised UCC Section 9-515(d) provide that a continuation statement may be filed “within six months *prior to the expiration of the five-year period* [of effectiveness of the existing financing statement].”¹⁴ In contexts other than those involving affected financing statements, the application of revised UCC Section 9-515(d) is clear. Yet, in the case of affected financing statements whose effectiveness may be continued by the filing of a continuation statement under revised Article 9, the analysis is more complicated – in part because of the uncertainty described in Part C1 of this Report as to when such financing statements cease to be effective.

Under the interpretation described in the first paragraph of Part C1, UCC Section 9-705(c)(2) is applicable to an affected financing statement, and the application of its June 30, 2006, cutoff date shortens the period of effectiveness of an affected financing statement to less than five years. Thus, applying the cutoff date of UCC Section 9-705(c)(2), the rules for the continuation period in revised UCC Section 9-515(d) cannot be applied literally to such affected financing statements because there is no five-year period of effectiveness. The statutory language lends itself to two possible constructions. First, the continuation period could begin six months prior to the “early” expiration of the financing statement on the cutoff date (June 30, 2006), even though that lapse date is less than five years after the start of the most recent period of effectiveness of the financing statement. This would mean that an affected financing statement whose effectiveness is brought to an “early” end (*i.e.*, on the June 30, 2006, cutoff date) by operation of UCC Section 9-705(c)(2) could be the subject of a continuation statement filed at any time during the six months preceding June 30, 2006. Alternatively, the continuation period could begin six months prior to the expiration of the five-year period of effectiveness that the affected financing statement would have had but for the cutoff date. For example, this would mean that an affected financing statement that, but for the cutoff date, would lapse on November 1, 2006, could be continued only during a period beginning six months before November 1, 2006 – *i.e.*, no earlier than May 1, 2006 – even though, as a result of the cutoff date, effectiveness of the financing statement would cease on June 30, 2006, with the result being a continuation period shorter than the standard six months. Indeed, under this interpretation the period for filing a continuation statement could be as short as one day if the affected financing statement would lapse, but for the cutoff date, on December 30, 2006.

¹⁴ Emphasis added.

While the PEB does not believe that it was the intent of the drafters of revised Article 9 that the period for filing a continuation statement in these circumstances would be less than the standard six months (as would occur under the second construction described in the previous paragraph), the possibility that a court could read the relevant provisions of Article 9 to bring about such a result cannot be dismissed.

Under the interpretation described in the second paragraph of Part C1 above, UCC Section 9-705(c)(2) does not cut off on June 30, 2006, the effectiveness of an affected financing statement whose effectiveness may be further continued by the filing of a continuation statement. Rather, under this interpretation, such a financing statement remains effective until the end of the five-year period of additional effectiveness resulting from the filing of the previous continuation statement under former Article 9. Thus, under the interpretation described in the second paragraph of Part C1, there is no difficulty in applying the rules in UCC Section 9-515(d) to a continuation statement filed under revised Article 9 inasmuch as the previous filing did have a five-year period of effectiveness. Accordingly, if this interpretation is applied, the continuation statement may be filed at any time within six months prior to the expiration of the five-year period of continued effectiveness of the affected financing statement. For example, if the affected financing statement will lapse on November 1, 2006, under this interpretation, a continuation statement with respect to that financing statement may be filed at any time during the six month period prior to November 1, 2006.

F. What Can Secured Parties Do to Avoid Uncertainty Created by Different Possible Interpretations?

In the case of affected financing statements that are on file in the same state and same office as are required by revised Article 9 (and, thus, whose effectiveness may be continued under revised Article 9 by the filing of a continuation statement), this Report has described uncertainty as to two important matters: (i) the date on which the effectiveness of the affected financing statement will cease if a continuation statement is not filed, and (ii) the period during which a continuation statement may be filed with respect to such an affected financing statement. The PEB does not take a position as to how that uncertainty should be resolved by courts if either issue becomes the subject of litigation.

The PEB notes, however, that a secured party wishing to maintain continued effectiveness of such an affected financing statement has a course of action available to it that will enable it to be successful in maintaining continued effectiveness under any of the possible statutory interpretations described in this Report. So long as such a secured party files its continuation statement *no earlier* than six months before the date on which the effectiveness of the affected financing statement would have ceased under former Article 9 (in order for the continuation statement to be timely if the cutoff date of UCC Section 9-705(c)(2) does not apply), but *no later* than June 30, 2006 (in order to be timely if the cutoff date does apply), its continuation statement will be timely under any of those interpretations. Accordingly, secured parties in this situation are well-advised to file their continuation statements for affected financing statement during the “safe harbor window” described in the previous sentence to avoid litigation and uncertainties that would otherwise arise from the interpretative difficulties described in this Report.

The duration of the safe harbor window will vary, though, depending on when the effectiveness of the affected financing statement would have ceased under former Article 9. The later that the effectiveness would have ceased under former Article 9, the shorter the window is. Assume, for example, that an initial financing statement was originally filed on July 2, 1996, and was continued by the timely filing of a continuation statement on June 30, 2001. In that case, the safe harbor window will “open” on January 2, 2006 – six months before the date on which effectiveness of the affected financing statement would have ceased under former Article 9 – and “close” on June 30, 2006. By way of contrast, assume that an initial financing statement was originally filed on December 30, 1996, and was continued by the timely filing of a continuation statement on June 30, 2001. In that extreme case, the window will “open” on June 30, 2006 – six months before the date on which effectiveness of the affected financing statement would have ceased under former Article 9 – and “close” on the very same day. Thus, the safe harbor window identified in this paragraph can, in an extreme case, be as short as one day.