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## SECURED LENDING ALERT

### UCC Financing Statements – Miscellaneous Rules

This article focuses on various filing rules involving UCC Financing Statements under Revised Article 9 of the Uniform Commercial Code (the "Code").

1. Filing UCC Prior to Closing. A secured party may pre-file its UCC filing against a debtor prior to loan closing if the debtor authorizes such pre-filing in writing. Otherwise, the debtor's signing of a security agreement is deemed the debtor's automatic authorization to the secured party to file a UCC filing covering the collateral described in the security agreement.
2. Place to file UCC Financing Statements (excluding UCC fixture filings which must be filed in the county where the fixtures are located, and more specifically in the office where real estate mortgages are recorded):
  - a. Registered organizations (such as corporations, limited liability companies and limited partnerships) – file in the state where the registered organization was formed (most states have designated the secretary of state or another central filing office as the office to file against a registered organization).
  - b. Individual debtors – file in the state where the individual debtor maintains his or her principal residence (caution where an individual debtor has a second home in another state). In most states, filings against individuals are filed in the central filing office of the state of primary residence.
  - c. Foreign debtors that would otherwise be located in a foreign country without a public filing system in such country are deemed to be located in Washington, D.C. and filing for such foreign debtors would be in Washington, D.C.
3. Trade Names. Under the Code, filing against a trade name (assumed name) of the debtor is ineffective. The debtor's legal name in the UCC filing should never include the trade name (e.g., ABC Corp. d/b/a Sully's Plumbing) as that could render the UCC filing ineffective depending on whether the filing office's search logic would pick up that UCC filing when searching the exact legal name (ABC Corp.). If a lender insists on filing against a trade name

despite its ineffectiveness, it should file against only the exact legal name in the first debtor box in the UCC Form, and against only the trade name in the second debtor box.

4. Post-Filing Change in Name of Debtor. If a debtor changes its name, a name change amendment should be filed within four (4) months of the change in name.

5. Post-Filing Change of Name of Secured Party. Although the Code does not expressly cover the situation of a post-filing change of name of the secured party, many lenders prepare amendments to reflect the change of name of the secured party.

6. Post-Filing Change of Address of Debtor or Secured Party. Although the Code does not expressly cover the situation of a post-filing change of address of a debtor or a secured party, many lenders prepare amendments to reflect a change of address.

7. New Debtors Becoming Bound Under Security Agreement. If a "new debtor" becomes bound under a security agreement previously entered into by another person (e.g., the new debtor is a surviving entity in a merger with the original debtor), a new UCC filing should be filed against the new debtor within four (4) months after the new debtor became so bound: (i) if the difference between the names of the original debtor and the new debtor causes the UCC filing against the original debtor to be seriously misleading as to the new debtor's name, or (ii) if the state of formation of the new debtor is different than the state of formation of the original debtor.

8. Priority of Security Interest in Collateral added by Amendment. When a secured party amends an existing UCC filing and adds collateral, the secured party's priority in the added collateral dates from the date of the filing of the UCC amendment, and does not relate back to the date of the original UCC filing.

9. Unauthorized UCC Termination Is Ineffective. A filed UCC Termination which was not authorized by the secured party of record is not an effective UCC Termination and the UCC Filing remains effective despite the filing of such unauthorized UCC Termination.

10. Termination by all Secured Parties. If the initial UCC filing named more than one secured party, or one or more subsequent amendments to such UCC filing added one or more secured parties, all secured parties of record must terminate the UCC filing. A termination by only one of multiple secured parties will not terminate the UCC filing as to the remaining secured parties.

11. Priority in Accounts. The first secured party to file against either "all accounts" or "all inventory" will have a first priority security interest in accounts. The reason for this is that a UCC filing against "all inventory" automatically picks up accounts as proceeds of the inventory.

12. UCC Continuations. UCC filings are effective for five years, and a continuation statement must be filed within six months prior to the end of the five-year period. Subsequent continuations must be filed every five years within six months prior to the end of the applicable five-year period. Each five-year period runs from the original UCC filing date and not from the date of the continuation statement filing. For example, a UCC filing which was filed March 28, 2005 and is properly continued within six months prior to March 28, 2010, is effective until March 28, 2015 (and if subsequently timely continued, would be effective until March 28, 2020, and so on).

13. Evaluating UCC Priority When "In-Lieu" Filing made. It's very important that persons reviewing UCC searches need to remember the legal effect of timely filing an "In-lieu" filing in the debtor's state of formation. If you'll recall, under Revised Article 9 that took effect in most states on July 1, 2001, if a UCC filing was filed in the correct office under former Article 9 prior to July 1, 2001 (the "Pre-Effective UCC"), but such Pre-Effective UCC would not be effective under Revised Article 9 since it was not filed in the debtor's state of formation, an "in-lieu" filing transferring the Pre-Effective UCC to the debtor's state of formation could be filed in the debtor's state of formation within a special grace period described as the earlier of (i) the date the Pre-Effective UCC would have lapsed under the laws of the state where it was filed; or (ii) June 30, 2006 (in most states). The timely filing of the "in-lieu" financing statement in the debtor's state of formation would continue the effectiveness of the Pre-Effective UCC from the date of the filing of the Pre-Effective UCC for the period provided in Rev. UCC Section 9-515 (which is five years from the date of the filing of the "in-lieu" filing).

Assume a Delaware corporation had its sole office and assets in Illinois and that Bank A filed a Pre-Effective UCC against the Delaware corporation covering "all present and future accounts, inventory and equipment" in the office of the Illinois Secretary of State under former Article 9 on January 1, 2001. Assume further that Bank A continued the perfection of its Pre-Effective UCC in Delaware by filing an "in-lieu" financing statement on December 31, 2005 in the office of the Delaware Secretary of State. Such "in-lieu" filing was timely filed within the permitted grace period of the earlier of its lapse date in Illinois (January 1, 2006) or June 30, 2006.

Assume Bank B had filed a blanket UCC filing against such Delaware corporation in the office of the Delaware Secretary of State on January 1, 2004. Bank B obtains a UCC search on such Delaware corporation and mistakenly believes it is in first position because its UCC blanket filing was made on January 1, 2004, two years before Bank A's "in-lieu" filing was filed in Delaware. However, since Bank A timely continued its Pre-Effective UCC in Delaware within the permitted grace period, Bank A would have priority ahead of Bank B in the Delaware corporation's accounts, inventory and equipment because the "in-lieu" filing continued the effectiveness of Bank A's Pre-Effective UCC from January 1, 2001 (the date the Pre-Effective UCC was filed in Illinois).

Bank A would need to continue its Delaware "in-lieu" filing within six months prior to December 31, 2010, because for continuation purposes, "in-lieu" filings are treated as new filings with their own lapse date. As indicated earlier, UCC filings (including in-lieu filings) are effective for five years.

The important thing to remember is that if you come across an "in-lieu" UCC filing in a UCC search made by another secured party, you must carefully evaluate the priority of your bank's security interest, in light of such "in-lieu" filing. To determine priority, you need to focus on the date of the filing of the Pre-Effective UCC in the original state of filing rather than the date the "in-lieu" filing was filed in the state of formation.

Although this subject may seem highly academic, we've recently encountered UCC searches in two different loan transactions in which an "in-lieu filing" gave another creditor a priority over a lender's UCC filing in the state of formation.

This article is for informational purposes only and is not intended as legal advice to any recipient.

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#### **About the Author**

Bennett L. Cohen is a partner in the law firm of Cohen, Salk & Huvar, P.C. Bennett concentrates his practice in secured lending. He regularly represents banks, commercial finance companies, insurance companies and other institutional lenders in the structuring, documentation and closing of secured lending transactions, including asset-based loans, commercial loans, commercial real estate mortgage and construction loans, mezzanine loans, leveraged acquisitions, equipment lease loans and factoring transactions. He served for fifteen years as general counsel to the Midwest Association of Secured Lenders, a trade association of over eighty banks and finance companies located in Chicago and outlying areas. Bennett is a member of the American Bar Association and serves on the ABA Committee on Commercial Financial Services and the ABA Subcommittees on Secured Lending, Loan Documentation and the Uniform Commercial Code. He is a member of the ABA Joint Task Force on Deposit Account Control Agreements, the ABA Model Intercreditor Task Force, and the ABA Joint Task Force on Filing Operations and Search Logic.