

Possible Legislation Concerning Uniform Commercial Code Section 9-705

This legislation addresses interpretive uncertainties concerning the application of UCC Section 9-705 to certain financing statements whose effectiveness was continued shortly before the effective date of revised Article 9. It does not take a position as to either the “correct” interpretation of Section 9-705 or whether filing offices have correctly applied that section. Instead, by providing definitive rules for the effectiveness of continuation statements filed after December 30, 2005, with respect to the narrow class of financing statements as to which there was uncertainty, the legislation provides a clear and certain rule that can guide both filers and filing offices.

It should be noted that we have prepared this possible legislation in our personal capacities and not on behalf of any organization. We are not advocating the enactment of this legislation, but offering it as an effective way to resolve the uncertainties for those states that want to address this issue by legislation.

Note that subsections (g) and (h) of the proposed legislation include alternative bracketed phrases. In both subsections, we encourage the adoption of the first alternative (the specific date of December 30, 2005), rather than the second alternative. The first alternative is not only shorter and simpler, but, more importantly, it assures the effectiveness not only of continuation statements filed after the effective date of the legislation, but also those filed on or after December 30, 2005 (the first date as to which the interpretive uncertainty applies) and prior to the effective date of the legislation. This solution will minimize litigation because it would eliminate almost entirely any need to determine the meaning of current Section 9-705 in the context that poses interpretive difficulties, while there may still be a need to interpret that section if the second alternative bracketed language is chosen. Moreover, choosing the language in the second alternative (the effective date) would benefit many fewer filers, inasmuch as many filings made after the effective date would fall within the “safe harbor” period identified in the Report noted below.

We are aware that choosing the December 30, 2005, alternative would mean that a continuation statement that was tendered for filing on or after that date, and before the effective date of this legislation, and rejected by the filing office on the ground that it was filed too early (because one possible interpretation of Section 9-705 could lead to that conclusion) would not appear in the filing office records. Thus, a later searcher would not see that an affected financing statement had been continued. We believe that such “off-record” continuation statements are likely to affect only a small number of searchers and we note that, as between a person filing the continuation statement and a person doing a later search, the person filing the continuation statement is in the best position to avoid any adverse consequences by filing in the “safe harbor” referred to in the following paragraph. Moreover, until this legislation is enacted the risk can be minimized by filing offices encouraging secured parties whose continuation statements are affected by the uncertainty to file during the “safe harbor” period - either by general publicity or, better

still, by targeted notifications to either all those indicated as secured parties on financing statements within the affected class or to those whose continuation statements are rejected as having been filed too early.

Whether or not this legislation is proposed or ultimately enacted, it remains very important for filing offices and others vigorously to continue publicity and educational efforts to encourage filers with affected financing statements to file continuation statements in the “safe harbor” time period described in the Report of the Permanent Editorial Board for the Uniform Commercial Code posted at:

<https://www.ali.org/ali/DEC2005PEB-report.pdf>

The effectiveness of all continuation statements filed during the safe harbor period with respect to affected financing statements is assured under all possible interpretations of the current text of revised Article 9, whether or not this amendatory legislation is enacted.

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Revision note (April 27, 2006): the revised version of this legislation (i) makes explicit a point that was implicit in subsection (g) and (ii) corrects language in subsection (h) that was garbled in the earlier version.

Neil Cohen

Harry Sigman

Ed Smith

Steve Weise

An Act to Amend Section {9-705} of {the Uniform Commercial Code}

Section 1. Subsection (c) of Section {9-705} of {the Uniform Commercial Code} shall be amended to read as follows:

(c) [Pre-effective-date filing in jurisdiction formerly governing perfection.] This {Act} does not render ineffective an effective financing statement that, before this {Act} takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in {former Section 9-103}. However, except as otherwise provided in subsections (d), ~~and (e)~~, and (g) and Section 9-706, the financing statement ceases to be effective at the earlier of:

- (1) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or
- (2) June 30, 2006.

Section 2. Section {9-705} of {the Uniform Commercial Code} shall be amended by the addition of the following subsections (g) and (h):

(g) [Financing statement effective under subsection (b).] The following rules apply to a filed financing statement that both (i) before this {Act} takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in {former Section 9-103}, and (ii) is effective under subsection (b):

- (1) Subsection (c)(2) does not apply.
- (2) The filing of a continuation statement with respect to the financing statement is timely if the filing occurs before the financing statement ceases to be effective and not before the earlier of [December 30, 2005] [the effective date of this {amending act}] or six months before the effectiveness of the financing statement would lapse.

(h) [Timely filing of certain continuation statements.] The filing of a continuation statement with respect to a financing statement (i) that was filed and effective before this {Act} took effect but does not satisfy the applicable requirements for perfection under this {Act} and (ii) whose effectiveness would lapse after June 30, 2006 but for subsection (c)(2) is timely if the filing occurs no earlier than [December 30, 2005] [the effective date of this {amending act}] and before the time the financing statement ceases to be effective.

Section 3. Nothing in this {amending act} renders ineffective a continuation statement that was filed and effective prior to the effective date of this {amending act}.

Legislative notes:

1. The legislature should either choose *one* of the bracketed phrases in subsection (g)(2) or *neither* of them. If the legislature decides to include neither of the bracketed phrases in subsection (g)(2), then that subsection would be unnecessary and (g) should be written without subsections as follows: “Subsection (c)(2) does not apply to a filed financing statement that is effective under subsection (b).”
2. The legislature should choose only *one* of the bracketed phrases in subsection (h).
3. Section 3 of this amending Act is necessary only if the legislature chooses to include the second bracketed phrase in either subsection (g)(2) or (h) or both. If the legislature chooses the second bracketed phrase in neither subsection, Section 3 should be deleted.
4. The legislature may wish to confer with the [UCC filing office] in making these decisions.