

SECTION ___ [located in criminal code]. RECORDS FILED WITH INTENT TO HARASS OR DEFRAUD.

(a) No person shall cause to be communicated to the filing office as defined in [*cite to definition of filing office in UCC Section 9-102*] for filing a record if:

(1) The person is not authorized to file the record under [*cite to UCC Sections 9-509, 9-708, or 9-808*];

(2) The record is not related to an existing or anticipated transaction that is or will be governed by [*UCC Article 9*]; and

(3) The record is filed with the intent to harass or defraud the person identified as debtor in the record.

(b) A person that violates subsection (a) is [guilty of a [*insert classification of crime*]] for a first offense and a [*insert classification of crime*] for a second or subsequent offense][liable for a civil fine of [\$500]].

Comment

This section, if enacted, will not be part of the Uniform Commercial Code. It is provided for use in states that do not already have statutes imposing criminal or civil liability for the filing of fraudulent UCC records.

SECTION 9-510. EFFECTIVENESS OF FILED RECORD.

(a) **[Filed record effective if authorized.]** A filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509 or by the filing office under Section 9-513A.

(b) **[Authorization by one secured party of record.]** A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record.

(c) **[Continuation statement not timely filed.]** A continuation statement that is not filed within the six-month period prescribed by Section 9-515(d) is ineffective.

[Legislative note: The indicated change to the existing language of Section 9-510(a) is necessary in any state that adopts Section 9-513A.]

SECTION 9-513A. TERMINATION OF WRONGFULLY FILED FINANCING STATEMENT; REINSTATEMENT.

(a) [**Trusted filer**] “Trusted filer” means a person that:

(i) regularly causes records to be communicated to the filing office for filing and has provided the office with the person’s current contact information and information sufficient to establish the person’s identity using criteria established by the office; or

(ii) satisfies either of the following conditions:

(A) the office has issued the person credentials for access to online filing services;

or

(B) the person has established a prepaid or direct debit account for payment of filing fees, regardless of whether the account is used in a particular transaction.

Comment

This term is used in subsection (k). If an affidavit claiming that a filing was intended to harass or defraud the affiant is delivered to the filing office and the filer was a trusted filer, the office must commence an administrative review and will not file a termination statement under subsection (c) unless its review indicates that the filing was intended to harass or defraud the affiant.

(b) [**Affidavit of wrongful filing.**] A person identified as debtor in a filed financing statement may deliver to the filing office a notarized affidavit[, signed under penalty of perjury,] that identifies the financing statement by file number, indicates the affiant’s mailing address, and states that the affiant believes that the filed record identifying the affiant as debtor was not authorized to be filed and was caused to be communicated to the office with the intent to harass or defraud the affiant. The office may reject an affidavit that is incomplete or that it believes was delivered to it with the intent to harass or defraud the secured party. The [*Secretary of State*] shall adopt a form of affidavit for use under this section.

(c) [**Termination statement by filing office.**] Subject to subsection (k), if an affidavit is delivered to the filing office under subsection (b), the office shall promptly file a termination statement with respect to the financing statement identified in the affidavit. The termination statement must identify by its file number the initial financing statement to which it relates and must indicate that it was filed pursuant to this section. A termination statement filed under this subsection is not effective until [20] days after it is filed.

Comment

This time period should be at least 20 days and states should consider adopting a longer time period. A relatively long time period reduces the risk that the security interest of a

secured party that filed a record without intent to harass or defraud the affiant will be subject to avoidance as a preferential transfer.

(d) **[No fee charged or refunded.]** The filing office shall not charge a fee for the filing of an affidavit under subsection (b) or a termination statement under subsection (c). The office shall not return any fee paid for filing the financing statement identified in the affidavit, whether or not the financing statement is reinstated under subsection (g).

(e) **[Notice of termination statement.]** On the same day that a filing office files a termination statement under subsection (c), it shall send to the secured party of record for the financing statement to which the termination statement relates a notice stating that the termination statement has been filed and will become effective [20] days after filing. The notice shall be sent by certified mail, return receipt requested, to the address provided for the secured party of record in the financing statement with a copy sent by electronic mail to the electronic mail address provided by the secured party of record, if any.

Comment

The filing office's duty is complete when the notice is sent by certified mail without regard to whether the secured party of record receives the notice.

(f) **[Administrative review; action for reinstatement.]** A secured party that believes in good faith that the filed record identified in an affidavit delivered to the filing office under subsection (b) was authorized to be filed and was not caused to be communicated to the office with the intent to harass or defraud the affiant may do the following:

(1) Before the termination statement takes effect, the secured party may request that the office conduct an expedited review of the filed record and any documentation provided by the secured party. The office may as a result of this review remove from the record the termination statement filed by it under subsection (c) before it takes effect and conduct an administrative review under subsection (k).

(2) At any time commence, the secured party may commence an action against the office seeking reinstatement of the financing statement to which the filed record relates. The action must be commenced before the expiration of six months after the date on which the termination statement filed under subsection (c) becomes effective. If the affiant is not named as a defendant in the action, the secured party shall send a copy of the [complaint] to the affiant at the address indicated in the affidavit. The exclusive venue for the action shall be in the [*insert the name of appropriate court*] for the county where the filing office in which the financing statement was filed is located. The action shall be considered by the court on an expedited basis.

Comment

A secured party that acts before a termination statement becomes effective may of course seek injunctive or other appropriate relief to prevent the termination statement from becoming effective.

The term “complaint” is bracketed so that a state may use appropriate alternate terminology (*e.g.*, petition).

(g) [**Office to file notice of action for reinstatement.**] Within 10 days after being served with process in an action under subsection (f), the filing office shall file a notice indicating that the action has been commenced. The notice must indicate the file number of the initial financing statement to which it relates.

(h) [**Action for reinstatement successful.**] If, in an action under subsection (f), the court determines that the financing statement was authorized to be filed and was not caused to be communicated to the office with the intent to harass or defraud the affiant, it shall order that the financing statement be reinstated. If an order of reinstatement is issued by the court, the office shall promptly file a record that identifies by its file number the initial financing statement to which the record relates and indicates that the financing statement has been reinstated.

(i) [**Effect of reinstatement.**] Upon the filing of a record reinstating a financing statement under subsection (h), the effectiveness of the financing statement is reinstated and the financing statement shall be considered never to have been terminated under this section. A continuation statement filed as provided in Section 9-515(d) after the effective date of a termination statement filed under subsection (c) or (k) becomes effective if the financing statement is reinstated.

(j) [**Liability for wrongful filing.**] If, in an action under subsection (f), the court determines that the filed record identified in an affidavit delivered to the filing office under subsection (b) was not authorized to be filed and was caused to be communicated to the filing office with the intent to harass or defraud the affiant, the [office and the] affiant may recover from the secured party that filed the action the costs and expenses, including reasonable attorneys’ fees, that the [office and the] affiant incurred in the action. This recovery is in addition to any recovery to which the affiant is entitled under Section 9-625.

Comment

A state should consider whether it is practical to include the provision permitting the office to recover attorney’s fees. For example, an office might be represented by an attorney employed by it or another state agency and the attorney might not maintain time

records in a manner that permits attorney's fees allocable to a particular action to be determined.

(k) **[Procedure for record filed by trusted filer.]** If an affidavit delivered to a filing office under subsection (b) relates to a filed record communicated to the office by a trusted filer, the office shall promptly send to the secured party of record a notice stating that the affidavit has been delivered to it and that it is conducting an administrative review to determine whether the record was not authorized to be filed and was caused to be communicated with the intent to harass or defraud the affiant. The notice shall be sent by certified mail, return receipt requested, to the address provided for the secured party in the financing statement with a copy sent by electronic mail to the electronic mail address provided by the secured party of record, if any, and a copy shall be sent in the same manner to the affiant. The administrative review shall be conducted on an expedited basis and the office may require the affiant and the secured party of record to provide any additional information that the office deems appropriate. If the office concludes that the record was not authorized to be filed and was caused to be communicated with the intent to harass or defraud the affiant, it shall promptly file a termination statement under subsection (b) that will be effective immediately and send to the secured party of record the notice required by subsection (e). The secured party may thereafter file an action for reinstatement under subsection (f) and the provisions of subsections (g) through (j) are applicable.

SECTION 9-516. WHAT CONSTITUTES FILING; EFFECTIVENESS OF FILING.

Prefatory Note. The proposed amendments to UCC § 9-516 provide a mechanism for a filing officer who reasonably believes that a record communicated to the filing office is a harassment filing, to refuse to accept the record.

There are potential risks and costs to the system if this mechanism is adopted. The filing officer might mistakenly refuse to accept a legitimate filing; indeed, the chances of interfering with a legitimate filing may be higher under these amendments than under proposed Section 9-513A inasmuch as filing officer determinations under these provisions are made without a response from the person indicated as debtor in the filing. Even if the rejection of a legitimate filing is remedied quickly, an actual secured party might be permanently harmed.

The risk of filing office mistake is higher if Alternative B to proposed Section 9-516(b)(8) is adopted in that Alternative B goes beyond filings made with the intent to harass or defraud and covers filings made for another unlawful purpose. The costs and

benefits of expanding the filing office's power to reject in this context should be carefully weighed before adopting Alternative B.

(b) [**Refusal to accept record; filing does not occur.**] Filing does not occur with respect to a record that a filing office refuses to accept because:

- (6) ...;
- (7) ...; or

Alternative A

(8) in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record was not communicated to the office by a trusted filer and the office reasonably believes that the record was caused to be communicated to it with the intent to harass or defraud the person identified as debtor. The office has no duty to form a belief as to whether a record was caused to be communicated with the intent to harass or defraud the person identified as debtor and has no duty to investigate or ascertain facts relevant to whether such intent was present.

Alternative B

(8) in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record was not communicated to the office by a trusted filer and the office reasonably believes that the record was caused to be communicated to it with the intent to harass or defraud the person identified as debtor or for another unlawful purpose. The office has no duty to form a belief as to whether a record was caused to be communicated with the intent to harass or defraud the person identified as debtor or for another unlawful purpose and has no duty to investigate or ascertain facts relevant to whether such intent or purpose was present.

Comment

A state considering either option, especially Alternative B, should consider whether doing so will impose on the office additional costs for technology, staffing, or otherwise.

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(e) A record that the filing office initially refuses to accept under subsection (b)(8) but that it later accepts after it receives additional information is effective as if the office had not initially refused to accept it except as against a purchaser of the collateral that gives value in reasonable reliance upon the absence of the record from the files.