Chapter 5

PERFECTION BY FILING

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§ 5.01 GENERAL METHOD — § 9-310(a)

Filing a financing statement is the Code’s default method of perfection. By filing a form that includes a limited amount of required information in a designated public office, a secured party publicly announces the possibility that it holds a security interest to any third parties concerned enough to search the public files. The filing of a financing statement for purposes of perfecting a security interest is somewhat analogous to the public recording of a mortgage to indicate an encumbrance on real estate. Third parties considering a transaction with the debtor concerning personal property capable of being perfected by filing should first examine the filing records for a financing statement evidencing someone else’s possible interest in that property.

The general rule for perfecting an Article 9 security interest is to file a financing statement.\(^1\) Alternative methods of perfection are available in numerous situations, but these alternatives are exceptions to the general rule.\(^2\) Part 5 of Article 9 covers the filing process. This chapter explains and analyzes its provisions.

§ 5.02 WHAT CONSTITUTES FILING — § 9-516

As discussed below, Article 9 envisions the possibility of a number of different filings in the public records, including initial financing statements, various amendments (including continuation and termination statements), and information statements. The generic term “record” refers to any of these filings.\(^3\) If the objective of a filing is the initial perfection of a security interest, the required record is an “initial financing statement.” The term “financing statement” means the sum of the filed records, including the initial financing statement and any subsequent filings that relate to it.

Filing can occur in either of two ways: (1) “communication of a record to a filing office and tender of the filing fee” or (2) “acceptance of the record by the filing office.”\(^4\) Filing does not require completion of the ministerial task of properly entering the information in the record into the files maintained by the office for access by searchers.\(^5\) Because secured parties cannot complete these tasks, which are the responsibility of the filing office, secured parties are not responsible for either their implementation or for any data-entry errors made by filing officers.\(^6\)

\(^1\) U.C.C. § 9-310(a). The same section requires filing to perfect an agricultural lien. Id.

\(^2\) U.C.C. § 9-310(b). See generally Chapter 4 supra.

\(^3\) "Record" means “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” U.C.C. § 9-102(a)(70).

\(^4\) U.C.C. § 9-516(a).

\(^5\) “The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.” U.C.C. § 9-517.

\(^6\) In re Masters, 273 B.R. 773, 47 U.C.C. Rep. Serv. 2d 398 (Bankr. E.D. Ark. 2002) (secured party was properly perfected and did not bear the risk that the filing officer would erroneously terminate the financing statement without the authorization of the secured party); Chattanooga Agricultural Ass’n v. Sapp, 54 U.C.C. Rep. Serv. 2d 114 (Tenn. Ct. App. 2004) (secured party that complied with filing requirements perfected even though financing statement and attached exhibit detailing collateral were never indexed into the records).
The first method of filing requires the communication of a record to the filing office and tender of the filing fee. “Communicate” in the case of the transmission of a record to a filing office is limited to the means of transmission prescribed by filing-office rule. This approach maximizes the opportunities for filing officers to authorize the use of technology in the transmission of records.

A record properly communicated to an office does not become a filed record if the filing office rejects it for certain statutorily defined reasons. The responsibilities of the filing office with regard to acceptance and rejection of a record are purely ministerial; section 9-520(a) provides that “[a] filing office shall refuse to accept a record for a reason set forth in Section 9-516(b) and may refuse to accept a record for filing only for a reason set forth in Section 9-516(b).” Although the discussion below covers the specifics in detail, section 9-516(b) lists as reasons to reject an initial financing statement the following: communication by a method that is not authorized, failure to tender the filing fee, omission of a required description of the real property to which the initial financing statement relates, a failure to provide a name and mailing address for the debtor and the secured party of record, and the omission of certain required information for a debtor that is an organization.

Under section 9-520(a), the list in section 9-516(b) serves not only to establish the exclusive grounds for which a filing officer may reject a record communicated for filing; it provides that the filing officer must reject a record for those reasons. Nevertheless, if a filing office fails in this duty and accepts a record that it should have rejected, filing of the record occurs. If the filing officer neither accepts nor rejects a communicated record but the filing fee is tendered, filing is deemed to have occurred.

Because a filing may be legally effective before the filing officer performs the ministerial act of indexing the filing in the name of the debtor, a gap can exist between the time of perfection and the time a searcher can reasonably learn of the fact of perfection. Anyone conducting a search during this interim may be misled by the failure of the search to show a recent filing that is nevertheless effective. Contributing further to a searcher’s concern is the fact that filings sometimes become backlogged, even though the filing office is required to complete the indexing within two business days after filing occurs. A searcher is additionally vulnerable to effective financing statements that it cannot find because the filing

8 U.C.C. § 9-516(b).
9 See § 5.02 infra.
10 A description of real estate is necessary only for a financing statement that serves as a fixture filing or that covers as-extracted collateral or standing timber. See U.C.C. § 9-502(b).
11 A secured party of record is “a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed.” U.C.C. § 9-511(a).
12 See also § 5.03[A], infra, on the required content for initial financing statements.
13 U.C.C. § 9-516(a).
14 U.C.C. § 9-519(h).
officer has somehow lost or misfiled them.\(^\text{15}\)

As between a searcher and a secured party that communicates a financing statement for filing, the latter might appear to be in the better position to initiate action that might alleviate the misleading appearances attributable to filing delays and errors; that is, the filing party could initiate a search for its own financing statement to determine whether the filing office handled it properly. Imposition of a search obligation on the filing party would, however, shift a significant risk to that party because the timing of effective filing can be crucial in deciding the outcome of a priority dispute.\(^\text{16}\) The drafters chose not to impose this obligation on filers.\(^\text{17}\)

Because parties that conduct searches bear much of the risk of these latent problems in the filing system, those parties should be aware of how to protect their interests as much as possible. For example, they should be aware of the extent of the backlog in filings in the particular jurisdictions in which they conduct searches. A prospective purchaser (e.g., a buyer or a secured party) can then, before consummating a transaction with the debtor, insist upon protecting itself until that time period passes. For example, a secured lender could insist on waiting for the time period to pass after making its filing before giving value.

Article 9 addresses the backlog problem through two approaches. First, it requires the filing office to respond to a search request no later than two business days after receiving it,\(^\text{18}\) and the information provided to the searcher must be current based on a date no earlier than three business days before receipt of the request.\(^\text{19}\) Because filing offices sometimes cannot comply with such time requirements, the drafters included another provision aimed at surmounting the backlog problem. A filing office or the appropriate official must offer to sell or license to the

\[^{15}\] Some courts have held filing officers liable for losses to searchers caused by their errors. See, e.g., Hudleasco, Inc. v. State, 90 Misc. 2d 1057, 396 N.Y.S.2d 1002, 22 U.C.C. Rep. Serv. 545 (Ct. Cl. 1977) (error by filing officer in certifying absence of prior financing statement). The claims lie in negligence, however, and governmental immunity may be available under state tort law. After the Kansas Supreme Court in Borg-Warner Acceptance Corp. v. Secretary of State, 240 Kan. 598, 731 P.2d 301, 2 U.C.C. Rep. Serv. 2d 1725 (1987), upheld negligence liability of the secretary of state for several certifications that failed to disclose a prior filing, the Kansas legislature amended Article 9 to grant immunity to filing officers in conducting searches. A common response in jurisdictions in which filing officers remain potentially subject to claims for loss is for the officers to reduce their risk by offering very little assistance to searchers. In addition to filing officers, abstract companies hired to conduct a search have been sued for negligence. See, e.g., Chemical Bank v. Title Servs., Inc., 708 F. Supp. 245, 9 U.C.C. Rep. Serv. 2d 402 (D. Minn. 1989) (title abstractor found not negligent for failing to conduct search under various misspellings of debtor’s name).

\[^{16}\] Recognizing the critical role of time of filing, Article 9 requires filing officers to mark the time of filing on each financing statement. U.C.C. §§ 9-519(a)(2), 9-523. It does not include a specific requirement on how to determine the time of filing. This determination is to be made by rules adopted by each filing office. U.C.C. § 9-519, Comment 4.

\[^{17}\] U.C.C. §§ 9-519(a), 9-517.

\[^{18}\] U.C.C. § 9-523(e).

\[^{19}\] U.C.C. § 9-523(c)(1). Section 9-526 imposes requirements on the appropriate official or agency to adopt and publish rules consistent with Article 9. Delays beyond the prescribed time limits are excusable for circumstances beyond the control of the filing office, provided that it exercises reasonable diligence under the circumstances. U.C.C. § 9-524.
public, on a nonexclusive basis, copies of all records filed with it.\textsuperscript{20} It must provide the copies in bulk in every medium available to the filing office and make them available at least weekly. This provision facilitates access to the records by private companies that maintain parallel filing systems. If the official filing office fails to meet its mandate to file financing statements in the time prescribed, searchers can choose to rely on such privately-maintained systems.

§ 5.03 WHAT TO FILE

\textbf{[A] Requirements — §§ 9-502, 9-516(b)}

Section 9-502 provides the formal requisites for a filed financing statement to be sufficient to perfect a security interest. To be sufficient, an initial financing statement must include:

- The name of the debtor;
- The name of the secured party or a representative of the secured party;
- An indication of the collateral covered; and
- A real property description if the collateral is as-extracted collateral or timber to be cut, or if the financing statement constitutes a fixture filing.\textsuperscript{21}

An initial financing statement that does not contain this minimal information is not sufficient and thus cannot be effective to perfect a security interest,\textsuperscript{22} even if it is a filed record because the filing office accepts it.\textsuperscript{23}

The filing office is required to reject a record for any of the reasons stipulated in section 9-516(b)\textsuperscript{24} and most omissions of information required under section 9-502 are included as a reason for rejection.\textsuperscript{25} Section 9-516(b) does not list the omission of an indication of the collateral as a ground for rejection; however, a financing statement can only be effective for the indicated collateral and a filed financing statement thus cannot be legally sufficient without an indication of at least some collateral.

Section 9-516(b) lists the following additional information that must be included in an initial financing statement:\textsuperscript{26}

- A mailing address for the debtor;
- A mailing address for the secured party;

\textsuperscript{20} U.C.C. § 9-523(f).
\textsuperscript{21} U.C.C. § 9-502(a), (b).
\textsuperscript{22} U.C.C. § 9-502(a), (b).
\textsuperscript{23} U.C.C. § 9-520(c).
\textsuperscript{24} U.C.C. § 9-520(a). See § 5.02 supra.
\textsuperscript{25} U.C.C. § 9-516(b)(3)(A) (name of the debtor); (b)(4) (name of the secured party); (b)(3)(D) (real property descriptions).
\textsuperscript{26} For discussion of requirements for other records presented for filing, and the filing office’s responsibilities with regard to such records, see § 5.06, infra.
• An indication whether the debtor is an individual or an organization; and
• Until the 2010 amendments, which eliminated the requirement, an
indication in the case of an organizational debtor of (1) the type of
organization, (2) the jurisdiction of organization, and (3) either an
organizational identification number or an indication that the debtor has no
such number.\footnote{27}

Although not included in section 9-502, this additional information is nevertheless
required because a filing officer may,\footnote{28} and in fact must,\footnote{29} reject a financing
statement that does not include it. The distinction is that the additional, required
information is not necessary for the financing statement to be legally sufficient. If
the filing office inadvertently accepts an initial financing statement with the
minimum information required for sufficiency but that omits an additional required
item, the financing statement is still effective,\footnote{30} meaning that the security interest
is perfected.\footnote{31} The relationship between the information required by section 9-502
and that required by section 9-516(b) may be summarized as follows: even though
the filing office is required to reject an initial financing statement for the omission
of any of the information listed in section 9-516(b), the filing is nevertheless legally
sufficient to perfect a security interest if it is accepted for filing and contains the
information required by section 9-502.

If a filing officer rejects a record communicated for filing, the officer must
communicate the reason for the rejection to the person that communicated the
record.\footnote{32} If a filing officer rejects a record for a reason not included in the statutory
grounds, the filing is nevertheless effective “except as against a purchaser of the
collateral which gives value in reasonable reliance upon the absence of the record
from the files.”\footnote{33} The rationale for the exception is that rejections for invalid
reasons should be rare given the severe restrictions on the filing office’s discretion
and in any event the gap in the record caused by an invalid rejection should be
short-lived because the filing office must communicate the reason for the rejection
promptly to the secured party. Because the rejected filing is ineffective only as to
purchasers for value — persons that typically rely on the filing system — a secured
party whose initial financing statement is wrongly rejected will be perfected as
against a lien creditor, including a trustee in bankruptcy.

\footnote{27}{U.C.C. § 9-516(b)(4), (5). The requirements that relate to the debtor aid the searcher in excluding
records revealed in a search that do not pertain to the debtor in question, and to aid in identifying the
proper jurisdiction for filing.}
\footnote{28}{U.C.C. § 9-516(b).}
\footnote{29}{U.C.C. § 9-520(a).}
\footnote{30}{“A filed financing statement satisfying Section 9-502(a) and (b) is effective, even if the filing office
is required to refuse to accept it for filing under subsection (a).” U.C.C. § 9-520(c).}
\footnote{31}{“[A] financing statement must be filed to perfect all security interests and agricultural liens.”
U.C.C. § 9-310(a).}
\footnote{32}{U.C.C. § 9-520(b) (communication of the reason for rejection must be according to filing-office
rules, but in no event more than two days after the filing office receives the record).}
\footnote{33}{U.C.C. § 9-516(d).}
The simplicity of the financing statement stands in sharp contrast to the typical security agreement. Terms in a security agreement that are significant to the parties — such as the extent of indebtedness, the terms for payment, events of default, and covenants regarding the use of the collateral — have no place in a financing statement. Article 9 includes a statutory form which, if completed properly, will be sufficient to qualify as an initial financing statement. Prior to the 2010 amendments the form contained a box for taxpayer identification or social security numbers. Its inclusion was not mandatory but rather for convenience — the information helps searchers distinguish among persons with similar names. The 2010 amendments deleted the box because privacy concerns had caused filing offices in most states to request omission of the information.

[1] Debtor Names — § 9-503(a)–(c)

The names of the parties play significant roles in the filing system. The filing officer places financing statements into the public files according to the name of the debtor, which is logical because a searcher will be interested in ascertaining whether a particular person previously granted a security interest that would undermine the searcher's proposed transaction. Thus the basis of the search is that person's name. If the debtor's name as it appears on the financing statement or as it is indexed is incorrect, a search under the correct name may not reveal the financing statement. Although later discussion covers the effect of mistakes in the debtor's name, it is important to note at the outset that Article 9 has very little tolerance for such mistakes. Any mistake in the debtor's name renders the filing presumptively insufficient, with the presumption rebutted only if a search of the files under the correct name, using the filing office's standard logic, reveals the mistaken filing. This requirement protects a searcher that exercises due diligence but it places pressure on a filer to provide the name with precision. Revised Article 9 provides explicit guidance on how to indicate the debtor's name, but serious problems emerged after it became effective in 2001 and the 2010 amendments addressed these problems.

Registered Organizations

Special rules apply if the debtor is a “registered organization.” As initially defined in revised Article 9, a registered organization was “an organization organized solely under the laws of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have

34 U.C.C. § 9-521(a) (initial financing statement form). The section does not mandate the use of the form; rather, it provides that a filing office that accepts written initial financing statements must accept an initial financing statement in that form. U.C.C. § 9-521(b) provides an all-purpose amendment form.
35 Article 9 requires that filings be indexed in the name of the debtor. U.C.C. § 9-519(c).
36 “Person” includes an individual or organization. U.C.C. § 1-201(b)(27). “Organization” includes, inter alia, corporations, partnerships, associations, and governmental entities.
37 See § 5.03 infra. The section also discusses the effect of post-filing name changes.
38 U.C.C. § 9-506(b), (c).
39 A foreign corporation is not a registered organization; nor is a domestic corporation that has articles filed in more than one state. Such “double domiciliations” are rare.
been organized.” The kinds of organizations covered by the definition are those created by a public filing, the classic examples being a state-created corporation formed by the public filing of articles of incorporation and a limited liability company formed by the public filing of a certificate of formation. Limited partnerships are also registered organizations but general partnerships, which are formed by contract rather than the filing of a public record, are not registered organizations. Their status does not change if the partnership files a public record for the purpose of becoming a limited liability partnership.

The concept of the registered organization was introduced with revised Article 9 and constituted a significant improvement over prior law. The primary advantage relates to choice-of-law rules; under the revision the law of the debtor’s location governs perfection and a state-created registered organization is deemed to be located in the state whose law governs its formation. This designation provides a level of certainty unavailable under prior law and unavailable under the revision for organizations that are not registered organizations. A side benefit is the ease of determining the name to use on a financing statement. The 2001 revision contained a potential ambiguity, however; it referred to the “name of the debtor on the public record of the debtor’s jurisdiction which shows the debtor to have been organized.” The public record intended by the drafters was the document that created the organization (e.g., the articles of incorporation or certificate of formation), but many states maintain online lists of all organizations of a particular type created under the law of that state — and sometimes the name on the list differs from the name on the formation document. This discrepancy created a trap for the unwary secured party.

The 2010 amendments resolve the problem by introducing the term “public organic record,” which clearly designates the formation document. The debtor-name rule under the amendments is very precise: the name to be used is “the name that is stated to be the registered organization’s name on the public organic record most recently filed with . . . the registered organization’s jurisdiction of organization.

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41 The filing provides partners with a liability shield but does not relate to the creation of the partnership. See Permanent Editorial Board Commentary No. ___, Limited Liability Partnerships Under the Choice of Law Rules of Article 9 (as of the printing of this book, a Commentary number is not yet assigned).
42 U.C.C. § 9-301(1).
43 U.C.C. § 9-307(e).
44 An organization that has more than one place of business is located at its chief executive office. U.C.C. § 9-307(b)(3). The determination of which office qualifies may be difficult if management is decentralized and a prudent secured party will file in every jurisdiction where the chief executive office might be located.
46 U.C.C. § 9-102(a)(68). To qualify as a public organic record a formation document must be available to the public for inspection.
47 The reference to the name “stated to be the name” resolves a problem that arises where, for example, the caption at the top of the articles of incorporation states the name differently than the body of the articles. For example, the caption might state “XYZ, Inc.” and the first paragraph of the articles
tion which purports to state, amend, or restate the registered organization's name."

The 2010 amendments also expand the types of organizations that qualify as registered organizations. A state or federal organization might be formed not by the filing of a public organic record but rather by the issuance by the government of a formation document (e.g., a charter for a state bank), or it might be formed as a result of legislation without the necessity of a formation document. Both types of entities are registered organizations under the amendments and the name to be used is the name on the government-issued formation document or in the legislation, each of which constitutes a public organic record. The amendments also include as a registered organization a particular kind of common-law business trust formed by contract rather than by the filing of a formation document. After noting that a common-law trust is ordinarily not a registered organization, the comments explain the inclusion as follows:

In some states, however, the trustee of a common-law trust that has a commercial or business purpose is required by statute to file a record in a public office following the trust’s formation. See, e.g., Mass. Gen. Laws Ch. 182, § 2; Fla. Stat. Ann. § 609.02. A business trust that is required to file its organic record in a public office is a “registered organization” . . . if the filed record is available to the public for inspection.

Decedents’ estates and trusts that are not registered organizations

The 2010 amendments have significantly clarified the rules governing decedents’ estates and trusts that are not registered organizations. The clarification was especially important in the case of trusts because the revision as first enacted created a serious problem for practitioners. It suggested that in the case of a

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48 U.C.C. § 9-503(a)(1).
49 Section 1-201(b)(25) defines “organization” as a person other than an individual.
50 U.C.C. § 9-102(a)(71).
51 U.C.C. § 9-102(a)(68).
52 Some states have statutes governing the creation of a type of business trust that is formed by the filing with the state of a formation document and these trusts are (and have always been) within the basic definition of registered organization.
53 U.C.C. § 9-102, Comment 11. The term “organic record” in the statute refers to the document that creates the trust by contract (e.g., the trust indenture). When the organic record is filed as required by statute it becomes the trust’s public organic record and provides the name to be used on a financing statement. U.C.C. §§ 9-102(a)(68) (defining public organic record), 9-503(a)(1) (name to be used on financing statement).
54 U.C.C. § 9-503(a)(2) (name of decedent and indication that debtor is an estate). The 2010 amendments provide a “safe-harbor” rule for the decedent’s name: “the name of the decedent indicated on the order appointing the personal representative of the decedent issued by the court having jurisdiction over the collateral . . . .” U.C.C. § 9-503(f). The individual-name rules in the 2010 amendments rely heavily on the name as it appears on an unexpired driver’s license and that would obviously be inappropriate in the context of a decedent.
55 U.C.C. § 9-503(a)(3).
common-law inter vivos or testamentary trust the debtor might be either the trust itself or the trustee acting with respect to trust property, and the standard financing statement form contained two boxes that could be checked, one for each situation. The clear implication was that the practitioner should consult the governing law to determine which box to check. The problem is that a common-law trust is not a juridical entity capable of owning property and thus is never the debtor, which means the person with an interest in the collateral. The debtor is the trustee acting in that capacity. Because a financing statement must be filed in the jurisdiction of the debtor's location, practitioners who made assumptions about the location of a trust and did not file in the jurisdiction where the trustee was located were unperfected. The fact that the debtor is the trustee leads to a curious situation: the name that must be provided on a financing statement as the name of the debtor is not actually the debtor.

Under the 2010 amendments the financing statement must use the name for the trust provided in the trust's organic record and must indicate in a separate part of the financing statement that the property is held in a trust. Rather than the two boxes provided under prior law, the standard financing statement form provided in the amendments contains a single box to check if the collateral is held in a trust. If the trust's organic record does not provide a name for the trust, the name of the settlor or testator must be used. Furthermore, in the case of an inter vivos trust there must, in a separate part of the financing statement, be sufficient information to distinguish the trust at issue from other trusts having more than one of the same settlors.

Organizations that are not registered organizations

The general rule for organizations that are not registered organizations is that, if the debtor has a name, the financing statement must provide the organizational name of the debtor. Thus if the partnership agreement of a general partnership specifies a name for the partnership, the financing statement must use that name.

56 The 2010 amendments make that point in a comment, and also make the point that the beneficiary of a trust is the debtor with respect to that person's beneficial interest but not with respect to the assets of the trust. U.C.C. § 9-307, Comment 2.
57 U.C.C. §§ 9-307 (location of debtor), 9-301(1) (law of debtor's location governs perfection). Comment 2 of section 9-307 notes that in the case of multiple trustees a secured party should file a financing statement in each trustee's location.
59 U.C.C. § 9-503(a)(3)(B)(i). The reference to a separate part of the financing statement, introduced in the 2010 amendments, may seem obvious, but the pre-amendment text might be read to require the information to be provided as part of the debtor's name.
60 U.C.C. § 9-503(a)(3)(A)(ii). The pre-amendment text referred only to the settlor. U.C.C. § 9-503(a)(3)(A) (2001 Official Text). The amendments provide that the name to be used as the name of the settlor or testator is the name indicated in the trust's organic record. U.C.C. § 9-503(h)(2). If the settlor is a registered organization the name to be used is the name on the settlor's public organic record. U.C.C. § 9-503(h)(1).
61 U.C.C. § 9-503(a)(3)(B)(ii). The indication in a separate field that the collateral is held in a trust is unnecessary if the additional information provided with regard to a settlor so indicates.
If the organization does not have a name, as is true of some informal partnerships and unincorporated associations, the financing statement must provide the names of the partners, members, associates, or other persons comprising the debtor.\textsuperscript{63}

Rejecting an alternative approach previously followed in some jurisdictions, revised Article 9 explicitly states that a financing statement that includes only a trade name does not sufficiently name the debtor.\textsuperscript{64} It also provides that a financing statement is not rendered ineffective merely because it omits either (1) a trade name or (2) except as set out above for organizational debtors without a name, the names of partners, members, associates, or the like.\textsuperscript{65} Thus, a secured party should state the individual name of a debtor who operates a sole proprietorship rather than the trade name under which debtor conducts the business.\textsuperscript{66} If desired, the trade name may be added to the financing statement as an additional name.\textsuperscript{67} The reason for this approach in the case of a sole proprietorship is that the proprietorship is not a juridical entity, meaning that it cannot own property in its trade name. More broadly, trade names are too uncertain and can lack enough common recognition among both secured parties and persons searching the records to form the basis for a filing system.

\textit{Individuals}

Although revised Article 9 requires precision in the name of the debtor, prior to the 2010 amendments its rules regarding the name of a debtor who is an individual were unclear. Section 9-503(a)(4)(A) as originally drafted provides that a financing statement is sufficient only if it contains the individual name of the debtor, but what does this mean if different names are used on an individual's birth certificate, driver's license, social security card, passport, and other documents? The instructions on the safe-harbor financing statement form in Section 9-521(a) call for the debtor's "exact full legal name" and, as applied to individuals, provides blocks for the last name, first name, middle name, and suffix; however, while the instructions offer good advice for prudent filers, they do not constitute a legal standard.

\textsuperscript{63} U.C.C. § 9-503(a)(4)(B). A lender could simplify matters by insisting that the organization adopt a name.


\textsuperscript{65} U.C.C. § 9-503(b). \textit{See In re Wisniewski, 265 B.R. 897, 46 U.C.C. Rep. Serv. 2d 1192} (Bankr. N.D. Ohio 2001) (a reference to an incorrect trade name of the debtor did not make the financing statement seriously misleading because the financing statement correctly listed the debtor’s name). A financing statement is also not ineffective merely because it fails to indicate the representative capacity of the secured party or a representative of the secured party. U.C.C. § 9-503(d).

\textsuperscript{66} \textit{In re Stanton, 234 B.R. 357, 42 U.C.C. Rep. Serv. 2d 1190} (Bankr. E.D. Tex. 2000) (filing in trade name “Elkhart Pharmacy” was ineffective when the debtor Stanton operated it as a sole proprietorship).

\textsuperscript{67} Cross-filing under trade names can be useful because it might enable a searcher who does not know the rules to stumble across the filing, thus preventing a later dispute.
Despite the lack of clarity there have only been a few cases holding that the name provided on a financing statement was insufficient. Nevertheless, the paucity of cases does not mean the lack of clarity is not a problem for lenders. Without certainty as to an individual’s legal name, a prudent lender might search under every possible permutation of a debtor’s name, including common nicknames. Lender concerns were heightened by the ill-considered opinion in Peoples Bank v. Bryan Brothers Cattle Company, a case in which the court held that a financing statement that identified the debtor by his nickname, Louie, rather than his legal first name, Brooks, was sufficient to perfect the bank’s security interest. The court did not even mention that under revised Article 9 any mistake in the name renders a financing statement seriously misleading unless a search of the files in the correct name using the filing office’s standard logic would reveal the mistaken filing.

Lenders wanting the same certainty for individual-debtor filings that revised Article 9 provides for registered-organization filings began to promote nonuniform legislation to accomplish their goal. Texas was first, amending its version of Section 9-503(a)(4) to provide that the name of an individual debtor on a financing statement is sufficient if it is the name shown on the individual’s driver’s license or state-issued identification card. Other jurisdictions followed suit, but the language of the amending legislation varied with each new jurisdiction. Perhaps the single most important impetus for the 2010 amendments was the need to provide uniform rules in this area. The ultimate result was not a single uniform rule but rather two uniform alternatives for the states to choose from.

**Alternative A: the only-if approach**

A financing statement under the first alternative sufficiently shows the name of “an individual to whom this State has issued a [driver’s license] that has not expired, only if it provides the name of the individual which is indicated on the [driver’s license].” Subject to a limited exception for residents of foreign countries, an

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68 See, e.g., In re Borden, 63 U.C.C. Rep. Serv. 2d 801 (D. Neb. 2007) (financing statement using nickname “Mike Borden” insufficient when individual debtor’s name was “Michael Ray Borden” and searches under the names “Michael Borden” and “Michael R. Borden” failed to disclose financing statement); In re Kinderknecht, 308 B.R. 71, 53 U.C.C. Rep. Serv. 2d 167 (Bankr. 10th Cir. 2004) (reversing Kansas bankruptcy court decision holding that financing statement using debtor’s nickname is not seriously misleading when a search under the debtor’s legal name using the filing office’s standard search logic would not produce the filed financing statement); Pankratz Implement Co. v. Citizens Nat’l Bank, 55 U.C.C. Rep. Serv. 2d 245 (Kan. Ct. App. 2004), aff’d, 59 U.C.C. Rep. Serv. 2d 53 (Kan. 2006) (lower court erred in failing to find seriously misleading a financing statement that spelled the debtor’s name as “House, Roger” rather than “House, Rodger” because a search using the standard search logic would not produce the filed financing statement); In re Fuel, 64 U.C.C. Rep. Serv. 2d 722 (Bankr. D. Idaho 2007) (financing statement indicating debtor’s last name as “Fuel” rather than “Fuell” held insufficient). Most of the cases involve the use of a nickname or an obvious misspelling.

69 504 F.3d 549, 64 U.C.C. Rep. Serv. 2d 113 (5th Cir. 2007).

70 U.C.C. § 9-506(b), (c).

71 U.C.C. § 9-504(a)(4) [Alternative A] (2010 amendments). In the unlikely event that an individual holds two unexpired drivers’ licenses from the state of principal residency, the later-issued license controls. U.C.C. § 9-504(g) (2010 amendments) (rule applies under both only-if and safe-harbor approaches). A legislative note appended to amended section 9-504 advises that if “a single agency issues driver’s licenses and non-driver identification cards as an alternative to a driver’s license, such that at any
individual debtor's location is the individual's principal residence, and the law of the jurisdiction where the individual is located generally governs perfection of a security interest in assets of the individual. Thus, if an individual's state of principal residence is Alabama and Alabama adopts the only-if approach, the name of an individual on a financing statement will be sufficient only if coincides precisely with the name as it appears on the individual's unexpired Alabama driver's license. If an individual does not have an unexpired driver's license from the state of principal residence, a filing will be sufficient only if it indicates the individual name of the debtor (the pre-2010-amendment requirement) or the individual's surname and first personal name. The provision relating to the surname and first personal name operates as a safe-harbor — but it is only safe if the individual does not have an unexpired driver's license. It might be helpful to think of the approach as a two-tier system, with the top tier being the name on the driver's license and the bottom tier being the individual's name but with a surname/first-personal-name safe harbor. Lenders generally prefer Alternative A because it provides them with additional certainty not only in filing but in searching. As we shall see, however, it does not provide them with absolute certainty.

Alternative B: the safe-harbor approach

The safe-harbor alternative is much easier to describe and apply, and it avoids the complexities associated with the only-if rule. The safe-harbor approach does not reduce the burden on searchers because the name of the individual (the pre-2010-amendment requirement) continues to suffice to perfect a security interest. This alternative actually has two safe harbors. The first is the same as the safe harbor on the second tier of the only-if approach — the surname and first personal name of the individual. The second safe harbor is the name indicated on an unexpired driver's license issued by the state of the debtor's location.

Had either alternative been in effect, the court's decision in In re Miller would have come out the other way. In that case, the debtor's driver's license and social security cards were issued in the name “Bennie A. Miller” and he used that name on his bank account, tax returns, and even on the security agreement that created the security interest at issue. However, the name on his birth certificate was “Ben” and the court held that this was his correct legal name. Because a search of the files under the name “Ben Miller” did not reveal the financing statement, the court held that the security interest was unperfected.

given time an individual may hold either a driver's license or an identification card but not both, the term “driver's license” should be replaced with appropriate terminology reflecting both types of identification.

Under section 9-307(c), an individual located in a foreign country under the normal debtor-location rule of section 9-307(b) is deemed located in Washington, D.C., if the foreign country location does not have a filing system that meets the statutory test.

For a discussion of some of the problems that may arise in a state that adopts Alternative A, see § 5.03[C], infra.


Former Article 9 required a signature of the debtor on the financing statement. Two related considerations compelled this requirement. First, the mandate of the signature meant that the debtor had to cooperate before an effective filing could occur. This prevented a secured party from overstating, deliberately or inadvertently, the scope of the encumbered assets.\(^77\) Second, the signature requirement served a verification function. Because the debtor had to participate at least to the extent of signing the financing statement, an effective financing statement reflected voluntary dealings between the parties with respect to the described collateral.

Revised Article 9 eliminated the requirement of the debtor’s signature on an initial financing statement to facilitate electronic filing,\(^78\) and alternative methods now satisfy the control and verification objectives. The debtor\(^79\) must authorize the filing of an initial financing statement or of an amendment that adds either collateral or a debtor.\(^80\) Merely by authenticating a security agreement, the debtor authorizes the filing of an initial financing statement that covers collateral described in the security agreement, as well as an amendment that describes proceeds of that collateral.\(^81\) An amendment that indicates collateral not covered in the security agreement or adds a debtor must be authorized by the debtor in an authenticated record.\(^82\) Any person that files an unauthorized record is liable for actual damages plus a statutory penalty of $500.\(^83\) Furthermore, a filing is effective only to the extent that it is authorized.\(^84\) Thus, if the debtor authorizes filing with respect to inventory but the secured party files for inventory and equipment, the filing is effective only as to inventory.\(^85\)

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\(^77\) The potential of a tort action for slander of title also operates to control overreaching.
\(^78\) U.C.C. § 9-502, Comment 2.
\(^79\) The term “debtor” means any person with an interest in collateral other than a person with a security interest or lien, and includes transferees of collateral and new debtors. U.C.C. § 9-102(a)(28). In some instances a secured party will want to file in the name of a transferee or new debtor, and it has statutory authority to do so. U.C.C. § 9-509(c), (b).
\(^80\) U.C.C. § 9-509(a).
\(^82\) U.C.C. § 9-509(a). Only the secured party need authorize the filing of an amendment that releases collateral. U.C.C. § 9-509(c).
\(^83\) U.C.C. § 9-625(e)(3) (penalty); U.C.C. § 9-625(b) (actual damages).
\(^85\) U.C.C. § 9-510, Comment 2. In this situation, the debtor could demand that the secured party file an amendment deleting “equipment.”
§ 5.03 WHAT TO FILE

[3] Addresses

A financing statement must contain the addresses of the parties, although, as discussed above, a filed financing statement can be legally sufficient to perfect a security interest even if it lacks one or both addresses. The inclusion of the mailing address of the debtor can aid in determining the identity of the debtor because a searcher should know the debtor's address as well as its name. This information can help in distinguishing between debtors of the same name and in overcoming the misleading effect of filings that are legally sufficient but contain errors in the debtor's name.

The initial assumption was that searchers would contact the secured party to obtain relevant information concerning any transaction between the secured party and the named debtor. In fact, very few secured parties are willing to reveal confidential information to searchers without permission from the debtor. A secured party's address is thus significant primarily as the place to which others may send notifications. If a person required to send a notification to a secured party sends it to the address provided on a financing statement, the sender satisfies its notification requirement. The secured party will also be deemed to have received a notification delivered to that address. Of course, a searcher will not want to rely exclusively on explanations provided by the debtor, and the Code provides a mechanism by which the debtor can confirm information regarding its transaction with the secured party of record. A prudent searcher will require the debtor to obtain information through the use of this mechanism.

[4] Indication of Collateral

A financing statement is sufficient to perfect a security interest only if it "indicates the collateral covered by the financing statement." Although "indication" is broader than description, a financing statement sufficiently indicates the

86 U.C.C. § 9-516(b)(4) (secured party), (b)(5)(a) (debtor).
87 See 5.03[A] supra.
88 Cf. U.C.C. § 9-502(a) (contents required for sufficient financing statement). See In re Hergert, 275 B.R. 58, 47 U.C.C. Rep. Serv. 2d 1 (Bankr. D. Ida. 2002) (errors in the address of the filed financing statement did not adversely affect the sufficiency of the financing statement as the address serves to indicate where required notifications can be sent to the secured party rather than to identify the secured party). See also In re Bonds Distrib. Co., Inc., 48 U.C.C. Rep. Serv. 2d 1212 (4th Cir. 2002) (unpublished) (substantial compliance was found despite the omission of the address of the secured party based on the policies underlying the new revision of Article 9, even though the revision was not yet in effect); In re Grabowski, 277 B.R. 388, 47 U.C.C. Rep. Serv. 2d 1220 (Bankr. S.D. Ill. 2002) (use of the debtor's separate business address sufficient to perfect a security interest in the debtor's farm equipment).
89 U.C.C. § 9-516, Comment 5. See also U.C.C. § 9-102(a)(75) (defining "send").
90 U.C.C. § 9-516, Comment 5. See also U.C.C. 1-202(d) (defining "notifies").
91 U.C.C. §§ 9-210, 9-102(a)(4). For discussion of this mechanism, see § 5.03[B][2], infra.
92 U.C.C. § 9-502(a)(3). First Nat'l Bank of Lewisville v. Bank of Bradley, 80 Ark. App. 368, 96 S.W.3d 773, 49 U.C.C. Rep. Serv. 2d 959 (2003) (description of “[a]ll equipment and machinery, including power driven machinery and equipment” in the first secured party’s financing statement was sufficient to cover the 113 specific pieces of equipment listed in the second secured party’s filing); In re Systems Eng’g & Energy Mgmt. Assocs., Inc., 284 B.R. 226, 49 U.C.C. Rep. Serv. 2d 608 (Bankr. E.D. Va. 2002) (description of debtor’s accounts, equipment, and other collateral did not include litigation recoveries);
collateral if it provides a description of the collateral effective under section 9-108.\textsuperscript{93} A statement in a security agreement that “all assets” of the debtor are covered is not sufficient as a description under that section,\textsuperscript{94} but it is sufficient as an indication of collateral on a financing statement and thus suffices to perfect a security interest in any asset for which filing is a viable method of perfection.\textsuperscript{95} The primary advantage of an all-assets filing is that it would be sufficient to cover any identifiable proceeds of collateral that are of a type capable of being perfected by filing and outside the automatic perfection rules for proceeds in section 9-315(d). Because the description in the security agreement is unlikely to cover every type of collateral within the scope of Article 9, an all-assets filing will generally not be statutorily authorized and the secured party will need to obtain an authorization authenticated by the debtor.\textsuperscript{96}

The basic test for a description of personal or real property is that, whether or not specific, it must reasonably identify the collateral.\textsuperscript{97} The drafters of original Article 9, where the test originated, clearly intended a more liberal, functional approach to descriptions than the fanatical “serial number” test that often characterized earlier chattel mortgage cases.\textsuperscript{98} The Comments stress this functional approach to description sufficiency: “The test of sufficiency of a description under this section . . . is that the description do the job assigned to it: make possible the identification of the collateral described.”\textsuperscript{99} A greater degree of precision may be necessary in a security agreement than in a financing statement because the security agreement establishes the intent of the parties regarding the assets that will be subject to the security interest.\textsuperscript{100}

\textit{In re Waldick Aero-Space Devices, Inc.,} 49 B.R 192, 42 U.C.C. Rep. Serv. 723 (Bankr. D.N.J. 1985) (security interest was unperfected because financing statement referred to collateral “Per the attached Schedule ‘A’ to be made part hereof,” but no schedule was attached to the financing statement).

\textsuperscript{93} U.C.C. § 9-504(1).

\textsuperscript{94} U.C.C. § 9-108(c).


\textsuperscript{96} Any indication of collateral in a filed financing statement that goes beyond the description in the security agreement and is not otherwise authorized by the debtor in an authenticated record opens the secured party to damages and penalties. \textit{See} § 5.03[A][2], \textit{supra}.

\textsuperscript{97} \textit{See} U.C.C. § 9-108; § 2.02[A][2], \textit{supra}.


\textsuperscript{99} U.C.C. § 9-108, Comment 2. \textit{See Planned Furniture Promotions, Inc. v. Benjamin S. Youngblood,} Inc., 57 U.C.C. Rep. Serv. 2d 678 (M.D. Ga. 2005) (although financing statement described collateral as the assets of “Old Salem Furniture” and did not mention assets held under two other company names subsequently used by debtors, the court pointed to the inclusion of the address where the collateral was located as being sufficient to enable a prudent searcher to identify the described property).

contexts, ambiguities are often resolved against the drafter.\footnote{Shelby Cty. State Bank v. Van Diest Supply Co., 303 F.3d 832, 48 U.C.C. Rep. Serv. 2d 790 (7th Cir. 2002) (court construed security-agreement description of “all inventory, including but not limited to . . . materials sold to Debtor by [Creditor]” against the secured party that drafted it).} A financing statement, in contrast, serves merely to notify interested third parties that the secured party might have a security interest in assets of the debtor that fall within the description, thereby alerting the searcher to investigate further before transacting business with the debtor.\footnote{U.C.C. § 9-504, Comment 2. See § 5.03[B] infra. Kubota Tractor Corp. v. Citizens & Southern Nat’l Bank, 198 Ga. App. 830, 403 S.E.2d 218, 14 U.C.C. Rep. Serv. 2d 1247 (1991).} Descriptions in security agreements and indications in financing statements must be sufficient to fulfill their respective functions.\footnote{In re Lynch, 313 B.R. 798, 54 U.C.C. Rep. Serv. 2d 849 (Bankr. W.D. Wis. 2004) (financing statement describing collateral as “general business security agreement now owned or hereafter acquired” described the financial transaction under which the bank claimed its security interest but it did not indicate any of the collateral described in the referenced security agreement).} For example, if a security agreement describes the collateral as “inventory and accounts,” but the financing statement indicates only “accounts,” perfection does not extend to the security interest in inventory\footnote{In re Katz, 563 F.2d 766, 22 U.C.C. Rep. Serv. 1282 (5th Cir. 1977). See also In re American Home Furnishings Corp., 48 B.R. 905, 4 U.C.C. Rep. Serv. 631 (Bankr. W.D. Wash. 1985) (inclusion in security agreement of intangibles held broad enough to cover tax refund, but omission from financing statement left the interest unperfected).} because a searcher would have notice only of a potential security interest in accounts.\footnote{In re Marta Coop., Inc., 344 N.Y.S.2d 676, 12 U.C.C. Rep. Serv. 955 (N.Y. Cty. Ct. 1973).} Conversely, had the security agreement stated only “accounts” and the financing statement indicated “inventory and accounts,” the security interest would probably be limited to accounts.\footnote{The issue turns on whether the court will admit extrinsic evidence to supplement the description in the security agreement. See discussion in § 2.02[A][2] supra of In re Martin Grinding & Machine Works, Inc., 793 F.2d 592, 1 U.C.C. Rep. Serv. 2d 1329 (7th Cir. 1986) (inclusion of inventory and accounts receivable in the financing statement description does not expand scope of security interest when those categories of property were inadvertently omitted from the security agreement’s description of collateral). See also Landen v. Production Credit Ass’n of the Midlands, 737 P.2d 1325, 4 U.C.C. Rep. Serv. 2d 240 (Wyo. 1987) (narrower description of “cattle” in the security agreement controlled over the description in the financing statement of “livestock” to exclude a security interest in the debtor’s horses).} The security agreement, of course, is the contract that creates the security interest.\footnote{In re Marta Coop., Inc., 344 N.Y.S.2d 676, 12 U.C.C. Rep. Serv. 955 (N.Y. Cty. Ct. 1973). U.C.C. § 9-504(2).} As mentioned above, Article 9 recognizes the use of the broadest-possible indication in a financing statement: “A financing statement sufficiently indicates the collateral that it covers if the financing statement provides . . . an indication that the financing statement covers all assets or all personal property.”\footnote{See, e.g., In re Boogie Enters., Inc., 866 F.2d 1172, 7 U.C.C. Rep. Serv. 2d 1602 (9th Cir. 1989) (description of “personal property” lacks required specificity); In re Grey, 29 B.R. 286, 36 U.C.C. Rep. Serv. 724 (Bankr. D. Kan. 1989) (description “all personal property” held insufficient to perfect an interest in grain).} The notice function that...
financing statements are intended to serve discredits these holdings.\textsuperscript{110} Such a supergeneric indication, however, does not suffice as a description for purposes of a security agreement.\textsuperscript{111}

The financing statement need not indicate that it covers after-acquired property. An after-acquired property clause may be included in a security agreement to eliminate the necessity for the debtor and secured party to enter subsequent security agreements each time the debtor acquires additional property that fits the description of the collateral.\textsuperscript{112} A financing statement, however, functions without regard to the time at which the debtor acquires the collateral. The financing statement may be filed before a security agreement has been entered into,\textsuperscript{113} which means that it may be filed before the debtor has rights or the power to transfer rights in the initial collateral. The searcher must determine through inquiry the property to which a security interest has attached. Despite unequivocally clear drafters’ statements to the contrary\textsuperscript{114} and the vast bulk of conforming case law,\textsuperscript{115} an occasional court decision under former law refused to recognize perfection with respect to after-acquired property because the description in the financing statement did not include an after-acquired property clause.\textsuperscript{116} The clear distinction between indication and description makes such decisions less likely under the revision.

A financing statement must also include a description of the affected real property if the collateral is as-extracted collateral, timber to be cut, or if it is fixtures and the filing is to be a fixture filing.\textsuperscript{117} In these situations, the financing statement must also indicate that it is to be filed in the real property records and, if the debtor does not have an interest of record in the real property, provide the name of at least one record owner, thereby permitting the filing to be incorporated into the real estate recording system.\textsuperscript{118} A security interest in these types of collateral may also be perfected from the date of recording of a real property mortgage if the mortgage indicates the assets covered and satisfies the requirements for a financing statement.\textsuperscript{119}

\begin{footnotes}
\item[110] See § 5.03[B] infra.
\item[111] U.C.C. § 9-108(c).
\item[112] U.C.C. § 9-204(a). “The references to after-acquired property clauses and future advance clauses in this section are limited to security agreements.” U.C.C. § 9-204, Comment 7.
\item[113] U.C.C. § 9-502(d). See § 5.04 infra.
\item[114] “There is no need to refer to after-acquired property or future advances or other obligations secured in a financing statement.” U.C.C. § 9-204, Comment 7.
\item[117] U.C.C. §§ 9-516(b)(3)(D), 9-502(b).
\item[118] U.C.C. § 9-502(b).
\item[119] U.C.C. § 9-502(c).
\end{footnotes}
[B] Notice Filing

[1] The Function of Notice

The filing of an effective financing statement does not indicate as much as an uninitiated searcher is likely to assume. For example, it does not even show that the parties have entered into a security agreement. Article 9 specifically provides that "[a] financing statement may be filed before a security agreement is made or a security interest otherwise attaches." For reasons explained in a later chapter, prudent secured parties in large transactions commonly insist upon "pre-filing;" that is, filing a completed financing statement before making a commitment to give the value necessary for the creation of a security interest. At most, therefore, a filed financing statement indicates only that the indicated secured party might have a security interest affecting the indicated collateral. The function that the filing system serves is strikingly modest; it serves in effect as a bulletin board.

The drafters of the original article adopted a system of "notice filing" that had been used previously in the Uniform Trust Receipts Act. The function of notice filing is described quite ably in the Comments:

What is required to be filed is not, as under pre-UCC chattel mortgage and conditional sales acts, the security agreement itself, but only a simple record providing a limited amount of information (financing statement). The financing statement may be filed before the security interest attaches or thereafter. . . . The notice itself indicates merely that a person may have a security interest in the collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs.

Once placed on notice of the possible existence of a security interest, the searcher can protect itself through further inquiry. A prudent searcher cannot rely on a financing statement to reveal all of the needed information.

[2] Requests for Information — §§ 9-210, 9-625(f), (g)

A searcher should not, of course, rely totally on the debtor's explanation of the secured party's interest. A searcher that contacts the secured party for information directly, however, is likely to be rebuffed. Accordingly, the searcher should ask the debtor to employ a Code mechanism that enables the debtor to verify its

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120 U.C.C. § 9-502(d). For discussion of the desirability of pursuing this option, see §§ 5.04, 10.01, infra.
121 See § 10.01 infra.
122 U.C.C. § 9-502, Comment 2.
123 In re Wak Ltd., Inc., 147 B.R. 607, 19 U.C.C. Rep. Serv. 2d 915 (Bankr. S.D. Fla. 1992) (description directed reader to specific lease). The requirement that the financing statement include at least a statement indicating the types of collateral is designed to spare every prospective creditor from the need to make further inquiry of every party who has filed a financing statement against the debtor. In re Kirk Kabinets, Inc., 15 U.C.C. Rep. Serv. 746 (Bankr. M.D. Ga. 1974).
124 Secured lenders, particularly banks, are often subject to confidentiality requirements. Comment 3 to section 9-210, reflecting this fact, states that "the secured party should not be under a duty to
position vis-a-vis the secured party. The debtor may submit an authenticated record requesting a list of the collateral, a statement of account, or an “accounting.”

A secured party must respond to the request within fourteen days after its receipt. A secured party that fails to comply with its duty to respond is liable to the debtor for $500 and for any actual damages caused by its failure. As against a party misled by its failure to respond to a request for a list of collateral, the secured party may claim an interest only as shown in the debtor’s list. Although the use of these mechanisms appears to protect a searcher by providing information directly from the secured party, an understanding of the Article 9 priority rules will caution the searcher against transacting with the debtor with respect to collateral described in an effective filed financing statement even if the secured party disclaims any current interest in the described collateral.

[C] Effect of Errors and Changes

[1] Errors — §§ 9-506(a), 9-518

[a] Information Required for Sufficiency

Even when parties prepare the simplest of records, errors occur. Article 9 provides a standard for resolving the effect of errors that appear on filed financing statements: “[a] financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.” The objective is clear from the accompanying Comments: “[The provision] is in line with the policy of this Article to simplify formal requisites and filing requirements [and . . . is designed to discourage the fanatical and impossibly refined reading of statutory requirements in which courts occasionally have indulged themselves.” Bear in mind that if the issue is the sufficiency of a filed financing statement to perfect a

disclose any details of the debtor’s financing affairs to any casual inquirer or competitor who may inquire.”

125 U.C.C. § 9-210(a)(3) (request to approve or correct a list stating collateral and reasonably identifying the transaction or relationship that is the subject of the request).

126 U.C.C. § 9-210(a)(4) (request to approve or correct a statement of the aggregate unpaid balance as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request).

127 U.C.C. § 9-210(a)(2) (request must reasonably identify the transaction or relationship that is the subject of the request). An accounting is a record authenticated by the secured party that indicates the aggregate unpaid secured obligations (as of a date not more than 35 days before or after the date of the record) and identifies the components of the obligation in reasonable detail. U.C.C. § 9-102(a)(4).

128 U.C.C. § 9-210(b). A secured party who is a consignor or a buyer of accounts, chattel paper, payment intangibles, or promissory notes need not respond. Id.

129 U.C.C. § 9-625(f).

130 U.C.C. § 9-625(g).

131 See § 10.02 infra.

132 U.C.C. § 9-506(a).

133 U.C.C. § 9-506, Comment 2.
security interest, the court may consider only the items listed in section 9-502.\textsuperscript{134}

The effect of errors essentially is a matter of degree. The purpose of a filed financing statement is to provide notice that informs interested parties that a particular person might have granted a security interest in particular property. If the filing, despite some error, is reasonably sufficient to place such parties on notice, the error should not affect the filing’s effectiveness.\textsuperscript{135} The savings provision that permits effectiveness for financing statements that contain minor errors places a greater degree of responsibility on searchers. While even minor errors might tend to mislead, searchers have grounds to complain only if they have been seriously misled. For example, the Comments suggest that searchers will rarely be seriously misled by an error in the secured party’s name.\textsuperscript{136}

The tolerance for error is less if the information at issue is the debtor’s name. Although the standard remains the same — whether the error is seriously misleading — there is a statutory presumption that any error is seriously misleading.\textsuperscript{137} The presumption is rebutted if a search under the correct name using the standard search logic of the filing office would nevertheless disclose the erroneous financing statement.\textsuperscript{138} This rule properly allocates to the filer the risk of a mistake in the debtor’s name. However, the rule promotes differences among jurisdictions in the near-term, particularly because the search standard still varies considerably among filing offices with computerized systems. Many of the offices employ software that ignores what are sometimes called “noise words,” such as the designations of the type of entity at the end of an organization’s name (e.g., “Inc.” or “LLC”). In those offices a mistaken filing against a limited liability company that indicates the name as ABC, Inc. will be located by a searcher using the correct name — ABC, LLC. In other jurisdictions such an error will be seriously misleading because the search logic used by the filing office can make only an exact match.

The term “financing statement” includes “any filed record relating to the initial financing statement” and the first record filed is referred to as the initial financing statement. Through this mechanism, the seriously-misleading standard is made applicable to initial financing statements and all amendments.

\textsuperscript{134} See § 5.03[A], supra.

\textsuperscript{135} The financing statement in Fifth Third Bank v. Comark, Inc., 794 N.E.2d 433, 51 U.C.C. Rep. Serv. 2d 533 (Ind. Ct. App. 2003), incorrectly described the collateral as inventory rather than equipment. The appellate court nevertheless affirmed the trial court decision that the description was adequate because additional language in the description referring to computer products bearing the name Comark was sufficient to place searchers on notice.

\textsuperscript{136} U.C.C. § 9-506, Comment 2. See In re Hergert, 275 B.R. 58, 47 U.C.C. Rep. Serv. 2d 1 (Bankr. D. Idaho 2002) (name of secured creditor that was incorrect at the time of the effective date of the new revision to Article 9 was not seriously misleading).

\textsuperscript{137} U.C.C. § 9-506(b).

\textsuperscript{138} U.C.C. § 9-506(c). With regard to mistakes as to entity names, see, e.g., In re Tyringham Holdings, Inc., 354 B.R. 363, 61 U.C.C. Rep. Serv. 2d 339 (Bankr. E.D. Va. 2006) (secured party left out “Inc.” and search under the correct name using Virginia Secretary of State’s standard search logic did not disclose the filing); In re C.W. Mining Co., 69 U.C.C. Rep. Serv. 2d 830 (Bankr. D. Utah 2009) (financing statement that identified debtor as “CW Mining Company” instead of correct name “C.W. Mining Company” ineffective). For cases involving individual debtor names, see § 5.03[A][1], supra.
### [b] Other Required Information

If an error in a financing statement relates to information other than that required by section 9-502 (i.e., information not necessary for a filed financing statement to be sufficient to perfect a security interest), the “seriously misleading” standard does not apply. Thus, the issue is not whether the secured party is perfected but whether it can claim that status as against a specific searcher who was misled.\(^{139}\) Section 9-338 contains rules that in effect estop a secured party from taking advantage of even a sufficient financing statement if a subsequent purchaser of the collateral (e.g., a buyer or a secured party) gives value in reasonable reliance on the erroneous information.\(^{140}\) For example, suppose the debtor has a common name such as Jane Smith and the address provided by the financing statement is not her address. The error will not affect the secured party’s perfected status, but the secured party will nonetheless be subordinated to a searcher who gives value and takes a security interest in the same collateral in reasonable reliance on the belief that the financing statement refers to a different Jane Smith. This approach properly balances the equities. As against a lien creditor, including a trustee in bankruptcy, the other required information is irrelevant. Those searchers that give value in reasonable reliance on the appearance created by the erroneous record gain appropriate protection.

### [c] Information Statements

Article 9 provides a nonjudicial method for a debtor to complain on the record about a financing statement that contains errors or was wrongfully filed.\(^{141}\) The debtor may file a record that indicates that it is an “information statement” and that states the basis for the debtor’s belief that there is an error or a wrongful filing. The statement must also indicate any way to amend the financing statement to eliminate the error. A filed information statement is part of the financing statement\(^{142}\) but does not negate its effectiveness.\(^{143}\) In other words, an information statement provides searchers with additional information but has no legal effect.

Until the 2010 amendments the use of information statements was limited to debtors; however, there is sometimes a need for a secured party to file such a statement. For example, it is not as uncommon as one would think for a secured party to transpose digits on a termination statement, leading the filing office to associate the termination statement with another secured party’s financing statement. Of course, such a termination statement would not terminate the financing statement because it is unauthorized, but searchers (who would not be

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\(^{139}\) U.C.C. § 9-520(c) (cross-referencing § 9-338).

\(^{140}\) A purchaser other than a secured party must also, in reasonable reliance on the incorrect information, receive delivery of assets capable of being possessed.

\(^{141}\) U.C.C. § 9-518(a), (b). Prior to the 2010 amendments the statement was called a “correction statement” but this was misleading in that the statement, having no legal effect, does not correct the problem that it addresses.

\(^{142}\) U.C.C. § 9-102(a)(39).

\(^{143}\) U.C.C. § 9-518(e).
aware of this) are likely to be misled. Under the 2010 amendments, a secured party of record may file an information statement indicating that it believes that a record associated with its financing statement is unauthorized. Because only the secured party of record may file an information statement, the secured party that filed the unauthorized record will, if it discovers the mistake, need to advise the secured party of record if it wants to give searchers appropriate notice. It has every incentive to do so to reduce its exposure to a claim for damages.


[a] Changes Related to the Debtor's Name

Even if a financing statement does not contain any errors, changes might occur after filing that can mislead subsequent searchers. The general rule under Article 9 is that such changes do not render a properly completed filed financing statement ineffective. There is an exception, however, for events related to the debtor's name that render a financing statement seriously misleading:

If the name that a filed financing statement provides for the debtor becomes seriously misleading under Section 9-506:

1. the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the financing statement becomes seriously misleading; and

2. the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the filed financing statement becomes seriously misleading, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after that event.

An event that renders the name on a financing statement seriously misleading has a limited impact on the effectiveness of a properly prepared financing statement. The original filing continues to perfect the security interest with

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144 U.C.C. § 9-518(c), (d).
145 U.C.C. § 9-507(b). See In re Hergert, 275 B.R. 58, 47 U.C.C. Rep. Serv. 2d 1 (Bankr. D. Ida. 2002) (change in secured party's name after an effective filed financing statement did not render the original filing ineffective under section 9-504). For the consequences of filing a financing statement that contains incorrect information at the time filed, see U.C.C. § 9-338, § 5.03[C][1], supra.
146 U.C.C. § 9-507(c). Prior to the 2010 amendments the provision referred to “changes” in the debtor's name, but under the new rules regarding the use of drivers' licenses as a source for an individual debtor's name a financing statement might become seriously misleading without a name change. The court in Planned Furniture Promotions, Inc. v. Benjamin S. Youngblood, Inc., 57 U.C.C. Rep. Serv. 2d 678 (M.D. Ga. 2005) addressed the question of whether the name on a financing statement had become seriously misleading. It held that the change from “Benjamin Scott Youngblood and Laura B. Youngblood” to “Benjamin S. Youngblood, Inc.” was not seriously misleading because a search under the changed name would almost assuredly produce the filed financing statement. The result may be correct, but the court should have insisted that the secured party prove that a search under the corporate name, with the “Inc.” designation, would have produced the financing statement in the individual name.
147 A change in the trade name but not the legal name of a debtor will not bring section 9-507(c) into
respect to the collateral to which it attached prior to the event, which means that a secured party not relying on after-acquired collateral need not worry about an event related to the debtor’s name that occurs after it files a sufficient initial financing statement.\textsuperscript{148} Even with an after-acquired property clause, the original filing remains effective as to any collateral acquired by the debtor within four months after an event related to the debtor’s name that renders the financing statement seriously misleading, and that is true even if the secured party never files an amendment indicating the new legally sufficient name.\textsuperscript{149} Thus, the secured party needs to file an amendment to the financing statement only to perfect its security interest in collateral acquired by the debtor more than four months after the event,\textsuperscript{150} and then only if the event rendered the original financing statement seriously misleading.\textsuperscript{151} An amendment will be sufficient if it either provides the debtor’s new legally sufficient name or comes close enough that the financing statement is no longer seriously misleading. The four-month grace period allows the secured party to check on the debtor’s name on a periodic basis without having to monitor the debtor constantly.

Assume, for example, that the debtor, an individual running a sole proprietorship, grants a bank a security interest in all present and after-acquired inventory. Assume also that with regard to individual debtor names the jurisdiction has adopted Alternative A to section 9-503(c)(4) in the 2010 amendments, meaning that as long as the debtor has an unexpired driver’s license issued by the state of the debtor’s residence the only legally sufficient name for a financing statement is the name as it appears on the driver’s license.\textsuperscript{152} The name on the debtor’s driver’s license is Bennie Miller and the secured party properly files in that name, even

\textsuperscript{148} In re Miraglia, 11 B.R. 77, 31 U.C.C. Rep. Serv. 1196 (Bankr. W.D.N.Y. 1991) (debtor’s change of trade name from “Louie’s Deli” to “Pizza Pit” held irrelevant because financing statement was in name of individual proprietor).

\textsuperscript{149} In re Custom Coals Laurel, 258 B.R. 597, 44 U.C.C. Rep. Serv. 2d 1 (Bankr. W.D. Pa. 2001) (amendment to the financing statement is not required with respect to collateral acquired prior to the name change).


\textsuperscript{151} In re Motrobility Optical Sys., Inc., 279 B.R. 37, 48 U.C.C. Rep. Serv. 2d 727 (Bankr. D.N.H. 2002) (filing made six months after name change from “Lancast, Inc.” to “Aura Networks, Inc.” held ineffective with respect to collateral acquired more than four months after the name change); In re Cohuta Mills, Inc., 108 B.R. 815, 11 U.C.C. Rep. Serv. 2d 338 (N.D. Ga. 1989) (failure to file in name of new corporation within four months of its creation left secured party unperfected with respect to all collateral acquired after the grace period).

\textsuperscript{152} U.C.C. § 9-507(c). This standard is identical to the standard for determination of the effect of errors in the initial preparation of financing statements. See, e.g., Union Nat’l Bank of Chandler v. Bancfirst (Seminole), 22 U.C.C. Rep. Serv. 2d 347 (Okla. 1993) (change from “Webb Metals, Inc.” to “Webb Expanded, Inc.” in corporate restructuring held not seriously misleading because names are linguistically similar); First Agri Servs., Inc. v. Kahl, 385 N.W.2d 191, 42 U.C.C. Rep. Serv. 1583 (Wis. Ct. App. 1986) (financing statement listing debtor as “Gary and Dale Kahl” held seriously misleading when debtors began operating their farm as a partnership under the name “Kahl Farms” and filing officer had separate indexes for individual and organizational debtors).

\textsuperscript{153} For discussion of the alternatives provided for individual debtor names, see § 5.03[A][1], supra.
though the name on the debtor's birth certificate is Ben J. Miller. On May 1, the debtor's driver's license expires and he fails to renew it. The names sufficient to perfect a security interest under Alternative A now are the individual's name, with all the ambiguity this formulation created prior to the 2010 amendments, and the debtor's surname and first personal name. Even though the debtor's name has not legally changed, the expiration of the driver's license is an event that will render the financing statement seriously misleading if a search of the files using the filing office's standard search logic under either of the now-sufficient names does not produce the financing statement.

Assume further for purposes of this hypothetical that the financing statement has become seriously misleading and that the bank does not file an amendment using one of the legally sufficient names. On December 1, a finance company takes a competing security interest in the debtor's inventory and perfects by filing under a legally sufficient name. Despite its failure to file an appropriate amendment within the statutory four-month grace period, the bank will be perfected and thus have priority over the finance company as to all inventory on hand at the time the driver's license expired and all inventory acquired through the end of August (the end of the four-month period). The bank will be unperfected and thus subordinate to the finance company for all inventory acquired thereafter. If the bank files an appropriate amendment after the expiration of the grace period but before December 1, it will have priority over the finance company as to all inventory, including the inventory acquired more than four months after the name change. There will have been a gap in perfection that could have been avoided if the amendment had been filed during the grace period, but if no third party acquired an interest in the collateral during the gap period the bank will have suffered no harm. Although the prior example does not involve a change in the debtor's legal name, the same analysis would apply to such a change.

The practical implications behoove searchers to know any prior names the debtor may have used or that may have been legally sufficient for perfection purposes. Otherwise, a search under the currently sufficient name may not reveal an effective financing statement. As indicated above, because many secured parties do not look to after-acquired property for security, post-filing events related to the debtor's name will not affect their interests. The secured parties that most commonly look to after-acquired property, and thus have the most at stake with regard to the refiling requirement, are financers against inventory or accounts.

[b] Transferees and New Debtors

Rather than simply an event related to the debtor's name, a change might relate to the debtor's business structure. For example, an individual debtor that operates a sole proprietorship and had granted a bank a security interest in its existing and after-acquired inventory might incorporate, or a corporate debtor that granted a

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153 The facts of In re Miller, 2012 Bankr. LEXIS 70 (C.D. Ill., Jan. 6, 2012), loosely provide the basis for this hypothetical.

154 For discussion of priority contests between secured parties, see Chapter 10, infra.

bank a similar security interest might dissolve after merging into another corporation. If existing collateral transfers from the debtor that granted the security interest to the new entity, does the bank’s security interest in that collateral remain perfected by its filing in the name of the transferor?

The general rule on continuation of perfection with respect to transferred collateral is that a filed financing statement remains effective with respect to any collateral that is disposed of and in which a security interest continues “even if the secured party knows of or consents to the disposition.” This must be read in connection with section 9-315(a)(1), which provides that a security interest continues in collateral notwithstanding its disposition “unless the secured party authorized the disposition free of the security interest.” Thus, as to transferred collateral, the secured party continues to have an enforceable, perfected security interest unless the secured party authorized the transfer clear of its security interest. An exception applies if the transferee is located in a different jurisdiction from that of the transferor, but inter-jurisdictional issues are discussed elsewhere and for current purposes we will assume that everything occurs within a single jurisdiction. Because the transferee succeeded to the debtor’s rights with respect to the existing collateral, it becomes the debtor with respect to that collateral. Recall that the term “debtor” refers not to a person that owes payment or performance of the secured obligation but rather to a person with an interest in the collateral.

Suppose the new entity subsequently acquires new inventory. Will the bank’s security interest attach to the new inventory even though the new entity did not authenticate the security agreement containing the after-acquired property clause? The answer is that it attaches only if the new entity qualifies as a “new debtor.” Because the transferee becomes the debtor with regard to the transferred collateral there is a temptation to think of it as a new debtor, but this might be inaccurate. A new debtor is usually but not necessarily a transferee. The term means a person bound by the terms of the security agreement entered into by the original debtor and the mere fact that the new entity is a transferee does not mean that it is bound by the terms — in this case the after-acquired property clause — of its transferrer’s security agreement. Section 9-203(d) determines whether a person is a “new debtor,” providing as follows:

A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

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156 U.C.C. § 9-508, Comment 2.
157 U.C.C. § 9-507(a).
158 The secured party will become unperfected if it fails to file in the transferee’s name and in its jurisdiction within a year after the transfer (or earlier if the financing statement lapses in the transferor’s jurisdiction) or otherwise perfect its security interest, as by possession. See U.C.C. § 9-316(a); § 9.04 infra. The secured party has statutory authority to make such a filing. U.C.C. § 9-509(c).
160 U.C.C. § 9-102(a)(56). The “original debtor” is a person that, as the debtor, entered into the security agreement to which the “new debtor” becomes bound. U.C.C. § 9-102(a)(60).
(1) the security agreement becomes effective to create a security interest in the person’s property; or

(2) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

Law other than Article 9 thus determines whether a person becomes bound as a new debtor. The applicable sources are the law of contracts and the law of business organizations.

Using the sole proprietor example described above, suppose the individual debtor running the proprietorship not only transfers all her business-related assets to the newly formed corporation but also arranges for the corporation to assume all her business-related contractual obligations. With regard to the transferred assets, the corporation becomes the debtor and a filing in the name of the corporation is unnecessary to continue the bank’s perfected status. Because the corporation assumed the contractual obligations of the debtor and succeeded to all or substantially all her assets, it is a new debtor as well as a transferee. The bank’s after-acquired property clause is thus effective against the corporation even though the corporation did not authenticate the security agreement containing the clause. The question then arises whether the bank’s filing in the name of the individual perfected its security interest in inventory acquired by the corporation after it became bound.

As an initial proposition, a filed financing statement is effective against a new debtor to the same extent it would be effective against the original debtor, but there is an exception if, as will virtually always be the case, the difference between the name of the original debtor and the name of the new debtor is sufficient to render the filing seriously misleading to someone searching in the correct name of the new debtor. In that case, the filing is effective only as to (1) collateral of the new debtor, other than collateral transferred to it, in existence at the time the person becomes bound as new debtor (none in this example), and (2) collateral acquired by the new debtor during the four months after it becomes bound. The filing in the name of the individual will not perfect the bank as to inventory acquired by the new debtor more than four months after it becomes bound unless the secured party

161 The security interest continues perfected by a filing naming the transferor as debtor and the rules governing perfection as to new debtors are not applicable. U.C.C. §§ 9-507(a) (filed financing statement continues effective notwithstanding disposition by the debtor), 9-508(c) (rules governing perfection as to new debtor inapplicable to financing statement that remains effective under U.C.C. § 9-507(a)).

162 As with transferees, the discussion in the text assumes that the original debtor and the new debtor are located in the same jurisdiction. For discussion of inter-jurisdictional issues, see § 9.04, infra.

163 The hypothetical assumes that the corporation was created to receive the transfer of inventory and to carry on the business, and thus it did not have, at the time it became bound by the security agreement, any assets that qualified as inventory other than the transferred assets. The new-debtor perfection rules thus apply only to the corporation’s after-acquired inventory. Contrast this situation with the hypothetical involving merging corporations discussed next in the text.

164 U.C.C. § 9-508(b)(1).
files an initial financing statement in the name of the new debtor before the expiration of the four-month period.\textsuperscript{165}

Now suppose the person that granted the bank a security interest in existing and after-acquired inventory is Corporation A. Suppose also that Corporation A merges into Corporation B, which acquires all of Corporation A's existing inventory and alone survives the merger. If the law governing the merger makes Corporation B liable for Corporation A's debts, it will qualify as a new debtor. As to the assets of Corporation A acquired by corporation B, the transfer rules rather than the new-debtor rules apply. Unlike the corporation that succeeded the sole proprietorship in the prior example, however, assume that Corporation B had its own stockpile of existing inventory at the time it became bound as new debtor. Because a new debtor is bound by all the terms of the original debtor's security agreement, the bank has a security interest in Corporation B's existing and after-acquired inventory.\textsuperscript{166} The financing statement filed in the name of Corporation A is effective as to Corporation B's existing inventory and as to inventory acquired by it within four months after it becomes bound. For inventory acquired more than four months after Corporation B becomes bound, the bank needs to file an initial financing statement in Corporation B's name.\textsuperscript{167}

\textbf{[D] May a Financing Statement Function as a Security Agreement?}

With perfection by filing, a typical secured transaction involves at least two separate records: (1) a security agreement that meets the requirements of section 9-203 for attachment, and (2) an initial financing statement that complies with sections 9-502 and 9-516(b). A security agreement is often lengthy because it includes provisions that go far beyond the minimum requirements for attachment. An initial financing statement, in contrast, is generally a simple form that follows the model provided in section 9-521(a). The use of the simple form is efficient. The limited basic information required facilitates the practice of filing even before creation of the security interest. Filing fees based on the number of pages and whether the financing statement is in a standard form also create an incentive to keep filings simple.

\textsuperscript{165} U.C.C. § 9-508(b)(2). The secured party has statutory authority to make such a filing. U.C.C. § 9-509(b). As with name changes, a secured party that files its initial financing statement in the name of the new debtor after the four-month period expires will have a gap in its perfection but will still be perfected as to a third party whose interest arises after the secured party belatedly files.

\textsuperscript{166} U.C.C. § 9-203(e)(1). Section 9-326 governs priority contests between the original debtor's secured party and a secured party that has dealt directly with the new debtor. Even if it files an initial financing statement within four months after the new debtor becomes bound, the secured party of the original debtor will not obtain priority over a perfected security interest of the secured party of the new debtor in collateral of the new debtor in existence at the time it became bound or after-acquired collateral. It will have priority, however, with regard to transferred collateral even if the secured party of the new debtor now has a perfected security interest in that collateral as a result of an after-acquired property clause. U.C.C. § 9-326(a), (b).

\textsuperscript{167} The hypothetical assumes the filing in the name of Corporation A would seriously mislead a searcher using the correct name of Corporation B.
The question sometimes arises whether a financing statement can serve both functions. The court’s decision in Evans v. Everett is instructive in this regard. It stated that “[a] financing statement which does no more than meet the [statutory] requirements . . . will not create a security interest in the debtor’s property.” The court considered a basic financing statement to be insufficient because it does not create or provide for a security interest; that is, it does not contain language indicating an intent that there be a security interest. The financing statement before the court, however, contained more than the basic statutory requirements; it stated that it “covers the following type of collateral: (all crops now growing or to be planted on 5 specified farms) same securing note for advanced money to produce crops for the year 1969.” The court held that this additional language was sufficient to show that the debtor had granted a security interest to the plaintiff. Thus, a financing statement, provided it satisfies the formal requirements for an enforceable security agreement, can serve both functions. Because revised Article 9 does not require that a financing statement be authenticated, the requirement in section 9-203(b)(3)(A) that the debtor authenticate the security agreement would have to be satisfied by another record.

168 A copy of the security agreement was sufficient under prior law to constitute a valid financing statement if it was filed and included all of the information required for a valid financing statement. U.C.C. § 9-402(1) (1972 Official Text). This provision created problems for filing officers because a typical security agreement is much more detailed than a financing statement and is formatted quite differently. As a result, if a secured party filed a security agreement as its financing statement, it created more work for the filing officer in indexing the filing correctly (and, correspondingly, increased the likelihood of a filing or indexing error). Revised Article 9 no longer expressly authorizes the use of a security agreement as a financing statement, and many filing offices have adopted rules that discourage or prohibit secured parties from filing copies of security agreements.


170 Evans, 183 S.E.2d at 113, 9 U.C.C. Rep. Serv. at 774 (emphasis supplied).

171 Id., 183 S.E.2d at 114, 9 U.C.C. Rep. Serv. at 775 (emphasis supplied). The debtor had also signed a promissory note that contained a statement that it “is secured by Uniform Commercial Code financing statement of North Carolina.” Id. (emphasis provided). See In re Outboard Marine Corp., 300 B.R. 308, 52 U.C.C. Rep. Serv. 2d 488 (Bankr. N.D. Ill. 2003) (additional documents were invoices that included a reservation of a security interest by the seller as part of the terms and conditions of the sales of pieces of machinery; court declined to grant summary judgment because, although the writings clearly showed the seller’s intent to create security interest, a genuine issue remained as to whether the buyer had the same intention).

172 The courts have been virtually unanimous in holding that a financing statement that does not create or provide for a security interest cannot qualify as a security agreement. See, e.g., In re Arctic Air, Inc., 202 B.R. 533, 31 U.C.C. Rep. Serv. 2d 233 (Bankr. D.R.I. 1996). Professor Grant Gilmore, a principal drafter of the original version of Article 9, disagreed, arguing that “nothing in § 9-203 requires that the ‘security agreement’ contain a granting clause.” 1 G. Gilmore, Security Interests in Personal Property § 11.4, at 347 (1965). For a case that relies on Prof. Gilmore’s analysis to conclude that a financing statement qualifies as a security agreement if extrinsic evidence shows that the parties so intended, see Gibson Cty. Farm Bureau Co-op Ass’n v. Greer, 648 N.E.2d 333, 25 U.C.C. Rep. Serv. 2d 954 (Ind. 1994). See also § 2.02[A], supra.

173 The use of multiple sources to satisfy the formal requirements for an enforceable security agreement is discussed in § 2.02[A][3] supra.
§ 5.04 WHEN TO FILE — § 9-502(d)

One caveat on the timing of filing is readily apparent: a secured party perfects to enhance its position vis-a-vis potential competing claimants. It is, therefore, in the secured party’s interest to file sooner rather than later because, as a general proposition, the secured party will defeat most claimants whose interests arise after perfection but will be subordinate to most pre-filing claimants. This ranking of competing claimants is the concept of priorities, which subsequent chapters cover in detail. Nevertheless, the basic importance of perfecting promptly is easy to grasp. Delay in perfection leaves the secured party vulnerable to competing claimants.

Because a person cannot perfect a security interest that has not yet attached and therefore does not exist,\(^1\) it is logical to assume that parties will first create a security interest and that the secured party will then perfect that interest by filing. The logic is not reliable in this case because Article 9 specifically authorizes pre-attachment filing: “A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.”\(^2\) This provision allows a secured party to “pre-file,” thereby “staking out” priority in the indicated collateral against possible competing claimants while making a decision whether to make a secured loan to the debtor.\(^3\) Knowing about the priority advantage and the risks that it can help eliminate, lenders often require a prospective debtor to authenticate a record authorizing the filing of a financing statement\(^4\) as a condition to continuing the negotiations that might lead to a secured transaction. If the transaction proceeds as anticipated, the secured party’s priority date vis-à-vis other secured parties will be the date of its filing, not the date of attachment and perfection, which will occur simultaneously.\(^5\) If the debtor does not authorize the filing in an authenticated record but later, as part of the now-approved transaction, authenticates a security agreement that describes the same collateral as that covered by the unauthorized filing, the authentication of the security agreement gives the secured party statutory authority to file an initial financing statement covering the collateral described in the agreement\(^6\) and thus serves to ratify the unauthorized filing.\(^7\) If the transaction is not consummated, the debtor is entitled to a termination statement that will end the effectiveness of the financing statement and its potential to perfect a subsequent transaction involving the same collateral.\(^8\)

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\(^1\) U.C.C. § 9-308(a). See § 4.03 supra.
\(^2\) U.C.C. § 9-502(d).
\(^3\) U.C.C. § 9-322(a). For a more detailed discussion of Article 9’s “first-to-file-or-perfect” rule for governing priority between conflicting security interests in the same collateral, see § 10.01, infra.
\(^4\) U.C.C. § 9-509(a)(1).
\(^5\) U.C.C. § 9-322(a)(1) (as between competing perfected security interests first to either file or perfect has priority).
\(^6\) U.C.C. § 9-509(a)(1).
\(^7\) U.C.C. § 9-509(a)(1).
\(^8\) U.C.C. § 9-509, Comment 3. The 2010 amendments added a comment indicating that a secured party’s priority date in the case of a ratification is the date of filing rather than the date of ratification.
U.C.C. § 9-322, Comment 4. The rationale for the position taken in the comment is that the notice value of the filing is independent of the time of ratification.
\(^9\) U.C.C. § 9-513(c), (d).
The pre-filing option illustrates another consequence to the disassociation of perfection and filing. After the full satisfaction of a secured obligation, a financing statement that perfected the security interest will remain filed. Unless it is terminated or lapses, the financing statement will still be effective to perfect a security interest created later and not originally anticipated as long as the description in the financing statement covers the collateral in the later transaction.\textsuperscript{182} A third party contemplating a secured transaction with the debtor using the same collateral should insist on a termination statement\textsuperscript{183} or require a subordination agreement\textsuperscript{184} with the person that filed the financing statement.

\section*{§ 5.05 WHERE TO FILE — § 9-501}

A financing statement must be filed in the appropriate office to be effective. Interested parties are likely to search the files only in the office designated in Article 9 as the proper place for filing and thus a filing in another office cannot meet the notice function that the filing system advances.\textsuperscript{185}

Because Article 9 is state law, its provisions designating the office in which to file refer to offices within the borders of the enacting state.\textsuperscript{186} Many secured transactions involve contacts with more than one state, however, as when a debtor moves from one state to another or has a physical presence in more than one state. Multiple-state contacts raise choice-of-law issues that are addressed by provisions that determine the state in which to file initially and the effect of subsequent moves to another state.\textsuperscript{187} A subsequent chapter explains the choice-of-law provisions.\textsuperscript{188} The focus now is on the choices that confront a secured party that wants to file an initial financing statement in the appropriate state.

The vast bulk of filings under Article 9 are made centrally, at the state level.\textsuperscript{189} The exceptions are for (1) timber to be cut, (2) as-extracted collateral,\textsuperscript{190} and (3)

\begin{footnotesize}
\begin{enumerate}
\item In re Payless Cashways, Inc., 273 B.R. 789, 47 U.C.C. Rep. Serv. 2d 366 (Bankr. W.D. Mo. 2002) (filing of a financing statement three years prior to the debtor granting a security interest led to a perfected security interest).
\item For discussion of termination statements, see § 5.06[C], infra.
\item U.C.C. § 9-339. Article 9’s priority rules are default rules and the parties are free to alter them by agreement.
\item See § 5.06[B] supra.
\item The Code makes the point clear: “if the local law of this State governs perfection of a security interest or agricultural lien.” U.C.C. § 9-501(a).
\item See U.C.C. Part 3, Subpart 1.
\item See §§ 9.01, 9.02 infra.
\item U.C.C. § 9-501(a)(1). Historically, the states required that certain designated categories of Article 9 filings be made at the local level. The assumption was that the local availability of the files facilitated searches. With the advent of computerized systems capable of handling massive quantities of information, it was inevitable that there would be movement toward centralized filing. A separate filing system for personal property is no longer maintained locally. The trend ultimately may culminate with a single national (or international) system in which searchers can search a single data bank from their desks and filers can make effective filings with the push of a button.
\item The term “as-extracted collateral” has two basic applications. First, the term applies to “oil, gas, or other minerals that are subject to a security interest that (i) is created by a debtor having an interest
\end{enumerate}
\end{footnotesize}
fixture filings for goods that are or are to become fixtures. Filings for transactions involving these situations are made locally in “the office designated for the filing or recording of a record of a mortgage on the related real property,” i.e., the office for recording interests in real estate. That office is most likely to be in the county in which the affected real property is located. Because of concerns about competing real-estate-based claimants with respect to a secured transaction using real-estate-related collateral, Article 9 consolidates the filing with respect to such collateral in the real estate recording system to provide effective notice to parties interested in the real estate.

§ 5.06 LAPSE AND TERMINATION OF FILING

[A] Lapse of Initial Financing Statement — § 9-515(a)

The general rule under Article 9 is that a financing statement is effective for five years after filing. Unless continued through the mechanisms discussed below, the effectiveness of the financing statement lapses at the end of this five-year period. Lapse provides a means to keep the filing system from being cluttered with financing statements unlikely to have further commercial relevance. The five-year period runs from the date of filing of the financing statement, not the date of attachment of the security interest. Because the filing is effective for five years after filing, it lapses at the end of the anniversary date, not the day before. The filing office may destroy any written record immediately upon lapse but must maintain a record of the information destroyed for at least one year thereafter.
Continuation Statements — § 9-515(c)–(e)

Some secured transactions will extend beyond five years and the secured parties in these transactions will want their interests to remain continuously perfected beyond the initial five-year period. The solution is to file a continuation statement. A timely continuation statement prevents a filed financing statement from lapsing.197

A continuation statement is a type of amendment that provides notice of extension of the lapse date. It must identify the initial financing statement to which it relates by its file number and indicate that it is filed as a continuation statement or to continue the effectiveness of the identified financing statement.198 A filing fee also must be paid.199 The filing office must index all filed records that relate to an initial financing statement, including continuation statements, in a way that associates the related records to the initial financing statement.200

A continuation statement may be filed at any time during the six months that precede lapse of the financing statement.201 A timely filing with the correct information extends the effectiveness of the financing statement for an additional five years.202 The additional five years begin not from the date of filing of the continuation statement but rather from the date the five-year period under the original filing ends.203 A secured party that desires to extend the effectiveness of a

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197 U.C.C. § 9-515(c). The courts have disagreed on the necessity of filing a continuation statement after a secured party commences litigation. Compare Hassell v. First Pa. Bank, N.A., 41 N.C. App. 296, 254 S.E.2d 768, 26 U.C.C. Rep. Serv. 1380 (1979) (secured party held to be unperfected despite having obtained judgment against debtor prior to expiration of five-year period), with Chrysler Credit Corp. v. United States, 24 U.C.C. Rep. Serv. 794 (E.D. Va. 1978) (filing of litigation tolled any obligation of plaintiff to file continuation statement because defendant was clearly aware of plaintiff’s security interest). However, a prudent secured party should simply file a continuation statement in a timely manner rather than rely upon questionable case authority that a continuation statement is unnecessary.

198 U.C.C. § 9-102(a)(27). Nat’l Bank of Fulton City v. Haupricht Bros., Inc., 55 Ohio App. 3d 249, 564 N.E.2d 101, 14 U.C.C. Rep. Serv. 2d 215 (1988) (nonconforming filings not effective as continuation statement). If a security interest is assigned, it makes sense to file a record of the assignment. Otherwise, the assignee will continue as the secured party of record, and a continuation statement signed by the assignee will have to be accompanied by a separate statement of assignment authenticated by the secured party of record. The assignment of a security interest of record can be made in two ways: naming the assignee in the initial financing statement or making a subsequent amendatory filing. U.C.C. § 9-514.

199 U.C.C. § 9-525.

200 U.C.C. § 9-519(c).

201 U.C.C. § 9-515(d). A filing office is required to reject a continuation statement not filed within this six-month period. U.C.C. §§ 9-520(a), 9-516(b)(7). A continuation statement accepted for filing outside this time frame is ineffective. U.C.C. § 9-510(c); In re Quality Seafoods, Inc., 104 B.R. 560, 9 U.C.C. Rep. Serv. 2d 1156 (Bankr. D. Mass. 1989) (filing continuation statement five years and one day after filing of financing statement caused security interest to be unperfected because financing statement had lapsed before filing of continuation statement).


financing statement even further may file additional continuation statements during the six-month periods that precede lapse ad infinitum.\textsuperscript{204} A continuation statement requires authorization by the secured party of record but not by the debtor.\textsuperscript{205}

Unless perfected through some means other than filing,\textsuperscript{206} a security interest becomes unperfected prospectively upon lapse.\textsuperscript{207} The security interest is also "deemed never to have been perfected as against a purchaser of the collateral for value."\textsuperscript{208} Even though the filing is effective and the security interest is thus perfected when the interest of a purchaser for value arises, this "retroactive invalidation" provision will cause the unperfected status that the secured party acquires upon lapse to relate back \textit{ab initio} in the case of a later priority dispute with the purchaser.\textsuperscript{209} In other words, a secured party that allows its filing to lapse will be treated, as against a purchaser for value, as if it had never filed at all.\textsuperscript{210} Retroactive invalidation does not apply against nonpurchasers, notably lien creditors, including a trustee in bankruptcy. The trustee will lose to a secured party perfected on the date of the debtor's bankruptcy filing (and whose interest is not otherwise avoidable under bankruptcy law)\textsuperscript{211} even if lapse later occurs.

The array of competing claimants that fall within the scope of the retroactive-invalidation rule is broader than initially appears. The term "purchaser" includes a buyer, secured party, and any other party that acquires an interest in property through a voluntary transfer.\textsuperscript{212} For example, suppose SP-1 takes and perfects by filing a security interest in Debtor's equipment. A year later, SP-2 does likewise. If a priority dispute comes to trial before SP-1's financing statement lapses, SP-1 will have priority. If SP-1 permits its filing to lapse, however, SP-2 will gain priority

\begin{itemize}
\item \textsuperscript{204} U.C.C. § 9-515(e). \textit{See also} United States v. Branch Banking & Trust Co., 11 U.C.C. Rep. Serv. 2d 351 (E.D.N.C. 1990).
\item \textsuperscript{205} U.C.C. § 9-509(d) provides that "[a] person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if" it is authorized by the secured party of record. For discussion of an exception for debtor-filed termination statements, see § 5.06[C], infra.
\item \textsuperscript{206} \textit{See Chapter 4 supra.}
\item \textsuperscript{208} U.C.C. § 9-515(c).
\item \textsuperscript{209} \textit{In re} Hilyard Drilling Co., Inc., 60 B.R. 500, 2 U.C.C. Rep. Serv. 2d 370 (Bankr. W.D. Ark. 1986) (upon lapse, prior-perfected secured party became junior to competing security interest that had been perfected during five-year period of effective filing of prior-perfected secured party).
\item \textsuperscript{211} For discussion of applicable bankruptcy law, see Chapter 16, infra.
\item \textsuperscript{212} "Purchaser" means "a person who takes by purchase." U.C.C. § 1-201(b)(30). The term "purchase" is, in turn, defined to include "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." U.C.C. § 1-201(b)(29).
\end{itemize}
over SP-1. Even if SP-1 files a new financing statement after lapse, it cannot repair
the gap in perfection caused by lapse. The new filing will only operate to perfect
SP-1 prospectively for five years.\textsuperscript{213}

\begin{center}
\textbf{[C] Termination Statements and Releases of Collateral —}
\textit{§§ 9-513, 9-509}
\end{center}

A debtor will encounter significant difficulty obtaining secured financing against
any property indicated as collateral on a filed financing statement that has not
lapsed. A subsequent chapter develops the reasons for this reluctance on the part
of prudent lenders.\textsuperscript{214} The mere existence of this potential difficulty is sufficient for
present purposes, however, to suggest that a debtor that pays off the debt and does
not have an ongoing financing relationship with its secured party will want to
terminate the effectiveness of the secured party’s filed financing statement without
waiting for lapse.

The solution for such a debtor is a termination statement.\textsuperscript{215} A termination
statement is an amendment to a financing statement that identifies the initial
financing statement to which it refers by its file number and either indicates that it
is a termination statement or that the identified financing statement is no longer
effective.\textsuperscript{216} As with continuation statements and all other records that relate to an
initial financing statement, the filing office must index a termination statement in a
way that associates it with the initial financing statement.\textsuperscript{217}

A debtor may make an authenticated demand on the secured party to provide
the debtor with a termination statement if “there is no obligation secured by the
collateral covered by the financing statement and no commitment to make an
advance, incur an obligation or otherwise give value.”\textsuperscript{218} A debtor may also demand

\textsuperscript{213} The rationale for the retroactive invalidation rule is that it reduces the circumstances in which
priorities will be resolved in a circular fashion. If the rule was otherwise — that is, if a secured party
retained priority against all parties whose interests arose before lapse — the following scenario might
occur. Bank lends money to Debtor and takes a security interest in Debtor’s equipment, which it perfects
by filing. Before Bank’s financing statement lapses, Finance Company takes and by filing perfects a
security interest in the same collateral. Bank then allows its financing statement to lapse and Debtor,
while Finance Company is still perfected, files a petition in bankruptcy. As between Bank and Finance
Company, Bank would have priority; as between Finance Company and the bankruptcy trustee
exercising the rights of a lien creditor, Finance Company would have priority; as between Bank and the
trustee, the trustee would have priority. Around we go! Under the retroactive invalidation rule, Finance
Company has priority over both Bank and the trustee and the trustee has priority over Bank. A full
analysis of priority issues must await later chapters. See §§ 10.01 (secured party versus secured party),
14.02 (secured party versus lien creditor), infra.

\textsuperscript{214} See § 10.02 infra. For a case in which a subsequent creditor did not concern itself with a prior-filed
financing statement on a debt that had been paid in full but found itself ultimately in a subordinate
Serv. 1332 (1978).

\textsuperscript{215} “[U]pon the filing of a termination statement with the filing office, the financing statement to
which the termination statement relates ceases to be effective.” U.C.C. § 9-513(d).

\textsuperscript{216} U.C.C. § 9-102(a)(80).

\textsuperscript{217} U.C.C. § 9-519(c).

\textsuperscript{218} U.C.C. § 9-513(c)(1).
a termination statement with respect to the filing of an initial financing statement that the debtor did not authorize. Subject to an exception for consumer goods discussed below, the secured party must then cause the secured party of record either to communicate a termination statement to the filing office and pay the statutory fee or to deliver a termination statement to the debtor, which may then communicate it to the office and pay the fee. A filed termination statement ends the effectiveness of a financing statement earlier than would occur through lapse. If a termination statement is not communicated for filing or delivered within twenty days after a proper demand, the secured party incurs the same liability as that imposed for filing an unauthorized initial financing statement or amendment: a civil penalty of $500 and liability for any losses incurred by the debtor as a result of the secured party’s failure to comply.

Although a secured party does not ordinarily have a duty to provide a termination statement absent a demand from the debtor, an exception applies if the financing statement covers consumer goods. The secured party then must cause the secured party of record to file a termination statement within one month after the outstanding secured obligation is extinguished, even without a demand from the debtor. The secured party of record does not have the option of delivering the termination statement to the debtor. If the secured party receives

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219 U.C.C. § 9-513(c)(4). Article 9 also includes other grounds for which a debtor may make an authenticated demand on a secured party for a termination statement: the financing statement covers accounts or chattel paper on which the person obligated has been discharged [U.C.C. § 9-513(c)(2)], and the financing statement covers goods that were on consignment but are not in the debtor’s possession [U.C.C. § 9-513(c)(3)].

220 A termination statement (and any amendment other than an amendment that adds a debtor or adds collateral) must be authorized by the secured party of record. U.C.C. § 9-509(d)(1). If the secured party assigns its rights to a third party, the third party will be the secured party but, unless an amendment providing the name of the assignee is communicated to the filing office, the assignor will remain the secured party of record. Amendments to the comments in 2010 make the obvious but helpful point that authorization by the secured party of record need not be evidenced by an authenticated record. U.C.C. § 9-500, Comment 6.

221 U.C.C. § 9-525.

222 J.I. Case Credit Corp. v. Foos, 11 Kan. App. 2d 185, 717 P.2d 1064, 1 U.C.C. Rep. 2d 250 (1986) (filing of termination statement under erroneous belief that debtor had paid in full was nevertheless effective to terminate perfection).

223 U.C.C. § 9-513(c).


225 U.C.C. § 625(b). For example, the secured party’s failure to file a timely termination statement could cause the debtor to be unable to borrow money from another secured party on favorable terms. The debtor’s foreseeable consequential damages in such a case could include the additional cost of obtaining substitute financing on less favorable terms (such as a higher interest rate).


227 U.C.C. § 9-513(a).

228 Id.
an authenticated demand from the debtor, it must cause the secured party of record to file a termination statement within twenty days thereafter. If the secured party of record fails to file (in the case of consumer goods) or communicate for filing or deliver (in other cases) a required termination statement, a termination statement may be filed without the secured party's authorization. The filed termination statement is effective, however, “only if the debtor authorizes the filing and the termination statement indicates that the debtor authorized it to be filed.”

In certain circumstances a secured party may choose to release some or all of the collateral described in its financing statement. A release is a type of amendment to the financing statement. As with other amendments, including termination and continuation statements, a release must identify the initial financing statement by file number and must be filed in a manner that relates it to the initial financing statement. An amendment that adds collateral or adds a debtor must be authorized by the debtor in an authenticated record, but an amendment that operates as a release of collateral or a debtor need only be authorized by the secured party of record.

The case law demonstrates that secured parties intending to make a partial release of collateral should be careful not to inadvertently create a termination statement instead. For example, in one case a bank erroneously checked a box on the form which indicated that its filing was a “termination statement” rather than a “partial release of collateral.” The description portion of the form showed that the bank intended to release only two specific items of collateral, whereas its security interest was in nearly all of the debtor’s assets. The court held that, by checking the box, the bank had created an effective termination statement. To hold otherwise would potentially mislead subsequent searchers.

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229 U.C.C. § 9-513(b).
230 U.C.C. § 9-509(d)(2).
231 Id.
232 U.C.C. § 9-512(a)(1).
233 U.C.C. § 9-519(c).
234 U.C.C. § 9-509(a)(1).
235 U.C.C. § 9-509(d)(1).