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From: Chuck Calvin [REDACTED]
Sent: Monday, May 27, 2013 3:02 PM
To: SoS Rulemaking
Cc: Arthur H. Travers; John McCabe
Subject: Written Comments on Proposed UCC Filing-Office Rules

I have a few comments and suggestions regarding the Proposed Rules. I believe these are all technical in nature, as opposed to being disagreements with any policies implicit in the Proposed Rules.

1. **Rule 1.1.4:** Insert, before the period at the end of the proposed rule, “as that phrase is used in the EFS Act”. **Reason:** The term “effective financing statement” has an entirely different meaning in the context of the UCC.
2. **Rule 1.1.11:** After “FINANCING STATEMENT” insert “OR ANY RECORD COMPRISING PART OF A FINANCING STATEMENT”. **Reason:** Although “financing statement” is defined in the UCC to include both an initial financing statement and all related records, the 2013 statutory changes not only reflect a change in terminology (replacing “correction statement” with “information statement”) but also an extension to secured parties of the right to file an information statement. Readers of the rule may understand it more clearly if they are reminded that amendments, including purported partial releases and termination statements, may also be the subject of an information statement.
3. **Rule 1.1.17:** Replace “effective financing statement” with “EFS”. **Reason:** Make use of the newly-defined term, and avoid confusion with the UCC concept of a financing statement that is still effective.
4. **Rule 1.2:** In the first sentence, modify the phrase “communication for the filing of secured transaction records” to read “communication for the filing with the Secretary of State of secured transactions records”. **Reason:** Secured transactions records are also filed with county clerks and recorders, and paper filings are still permitted. Although the Secretary of State does not maintain those filing systems, the Secretary of State is responsible for promulgating forms to be used by the clerks and recorders.
5. **Rule 1.2.3:** In the second sentence, either delete the words “at the earlier of” or insert whatever alternative thought has been omitted. **Reason:** The comparative term “earlier” implies a choice between two different times, but only one time is identified in the language of the proposed rule.
6. **Rule 1.4.1:** Insert “currently” before the word “promulgated”. Also, consider the variable effect of this language, depending on when the new rules become effective. The forms currently available from IACA do not comply with the requirements of the 2010 (a/k/a/ 2013) amendments to Article 9 in that they still call for extraneous information relating to organizational debtors and do not contain the “separate part” called for with respect to collateral being administered by the PR of a decedent’s estate or held by the trustee of a nonstatutory trust. That will presumably be corrected by IACA on July 1, 2103, but if the revised rules are effective before that date, which IACA forms will have been approved? There may be a question whether the Secretary of State has the power – or should exercise the power if it exists – to delegate to a private organization outside Colorado the authority to determine the content of forms that by statute are supposed to have been prescribed by the Secretary of State.
7. **Rule 1.8.3:** Replace the phrase “secured TRANSACTIONS” with “THE FILING OF secured TRANSACTIONS RECORDS”. **Reason:** Accuracy; the Secretary of State does not typically engage in secured transactions.
8. **Rule 2.3.3:** After the phrase “lapse date or” insert “if it is received”. **Reason:** Clarity; without this insert, the rule could be construed to say that a continuation statement will be refused if it is received more

than six months after the financing statement's lapse date. I don't think that is the intended construction.

9. **Rule 2.4:** Modify the phrase at the end of the proposed rule "filed according to the UCC" so that it reads "filed or rejected in accordance with requirements of the UCC". **Reason:** A purported EFS amendment that cannot be filed as such may not be fillable as a UCC amendment, either.
10. **Rule 2.8:** This suggestion is not specific to this proposed rule, but was prompted by the use of the term "image" in the rule. Since the term is used in a number of rules, and is potentially misleading in most contexts in which it is used, consider adding a definition of "image" to refer to either (i) a tabular display of data submitted to the Secretary of State by one of the two electronic methods, or (ii) a graphical display of information submitted to the Secretary of State (or a predecessor filing office) in paper form or in the form of an attachment to an electronic filing.
11. **Rule 3.2:** In the first sentence of this proposed rule, should "The primary data elements" be modified to read "The primary publicly-viewable data elements"? There are probably a number of additional data elements that are not publicly viewable, presumably including an "EFS flag" and an "attachment flag".
12. **Rule 3.5:** In keeping with the 2012/2013 amendments to C.R.S. 4-9-503, this rule should be revised to read "The electronic filing application will provide a field, separate from any field in which a debtor is identified, in which the filer may indicate that the collateral is being administered by the personal representative of a decedent."
13. **Rule 3.6:** In keeping with the 2012/2013 amendments to C.R.S. 4-9-503, the caption of this rule should be changed to read "Trusts Other than Registered Organizations". In addition, this rule should be revised to read "The electronic filing application will provide a field or fields, separate from any field in which a debtor is identified, in which the filer may indicate that the collateral is held in a trust and may, if applicable, include additional information to distinguish the trust from other trusts having one or more of the same settlors or the same testator."
14. **Rule 3.10:** Consider expanding this rule by adding a second sentence that reads "The extension of the lapse date of the master record will have legal effect only to the extent provided in Section 9-805(c) of the UCC." **Reason:** The Secretary of State should not be in the position of determining whether a financing statement satisfies the substantive requirements of the UCC, so it is appropriate that the lapse date be extended more or less automatically when a purported continuation statement is timely filed. However, under the transition rules applicable to the new amendments, any essential amendments to a filed financing statement must have been made, at or before the time the continuation statement is filed, for the continuation statement to have any legal effect. This rule should not imply otherwise.
15. **Rule 4.1:** At the end of the first sentence, insert, before the period, "or the system-to-system transfer method". **Reason:** The same rule should apply regardless of the system used to communicate the data.
16. **Rule 4.6:** In the second sentence, after "amendment" insert "to correct an error" and delete the words "correct or" before the word "disclose". **Reason:** Clarity; an information statement may disclose an error but cannot correct it. Only an amendment can correct an error.
17. **Rule 4.13:** Consider whether this rule should contain an exception for extraordinary circumstances in which the described backups cannot be made in literal compliance with these provisions.
18. **Rule 4.14.2:** Depending on whether and how "image" has been defined, consider clarifying this rule to indicate that it applies to graphical images originally received in paper form or as attachments to electronic filings.
19. **Rule 5.5.3:** Part C of this rule indicates that search results include the normalized name of the organization if the debtor was identified by the searcher as an organization. If the debtor is identified as an individual, will the normalized name be included in the search results? If so, should this be mentioned?

20. **Rule 5.6:** This rule refers to the provision of an “image”. Depending on whether and how that term is defined, this rule should perhaps be revised.
21. **Other:** Although it is not specific to any of the proposed rules, I note that the Secretary of State’s web site does not provide access to paper or fillable PDF UCC forms, or even a link to a site from which those forms can be obtained. Since the Secretary of State is to promulgate forms used by all filing offices in Colorado, including the county clerks and recorders, I think those forms should be made available by the Secretary of State.

I do not expect to be able to attend the hearing in person, but if you have questions or would like to discuss any of these comments and suggestions, please feel free to call or e-mail me.

Thanks for your attention and consideration.

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