

FUND FINANCE FRIDAY

Pandemic Perfection: Should You Be Pre-Filing Financing Statements?

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The filing of a UCC-1 financing statement is necessary to perfect the lender's security interest in the collateral supporting a credit facility. In normal times, the lender's counsel will file the appropriate UCC-1s on the closing date of the transaction after confirming the form and content of each UCC-1 with the borrower and checking the information against the certified constituent documents of the filing debtor. As a practical matter, Cadwalader files on behalf of the lender through a service that specializes in such filings in the hours after a deal has closed.

These are not normal times, and Cadwalader has been monitoring our clients' ability to file UCC-1s on a timely basis and without surprises. While most state offices that accept such filings are closed, they remain available to accept electronic filings (subject to a few qualifications noted below). One possible precaution for lenders concerned about their ability to file timely is to pre-file the UCC-1s in advance of the closing date.

While it is not customary to pre-file UCC-1s in fund finance transactions, if the deal team has concerns about the jurisdiction in question, pre-filing may be an appropriate precaution. The only documentary difference is that lenders will need to obtain a pre-filing authorization letter from the debtor. Under Section 9-509 of the Uniform Commercial Code (which is adopted in some form with modifications in every state), the debtor must authorize the filing in an authenticated record (*i.e.*, the authorization letter) or sign a security agreement with respect to the applicable collateral.

However, Cadwalader has not yet seen instances where the lender was unable to file or experienced a delay in filing for the three most common jurisdictions – Delaware, the District of Columbia and New York. In Delaware, it should be no surprise that the Secretary of State is (electronically) open for business as usual and can accommodate all electronic filings. In the District of Columbia, access to filing with the Recorder of Deeds depends on the nature of the filer. Cadwalader has relationships through its service providers that bypass the closed office and can file directly to the Recorder of Deeds. In New York, electronic filing is still accepted, but receiving file-stamped copies has a significant delay – up to six weeks.

In other jurisdictions, some UCC filings services have noted an inability to file multiple pages in an electronic filing (such as Illinois, Indiana and Michigan), which would require a follow-up filing with the appropriate multi-page schedules once such offices reopen. (In fund finance transactions, such filings are nearly always multiple pages, since the collateral is not a simple one-sentence “all assets” pledge but a specific and itemized list of capital commitments and the rights to make capital commitments that must be sufficiently described under the Uniform Commercial Code.)

Given the uncertainty of what state governments may do going forward with respect to their ability to accept electronic filings, it is important for business teams and their counsel to think through the UCC filing locations early in the transaction. Counsel can investigate any potential problems and delays and, if necessary, advise pre-filing a UCC-1. While we have not seen a situation yet that would require pre-filing, each deal team should consider pre-filing as a possible precaution should counsel identify any potential delays in the filing process.