

MEMORANDUM

RE: Proposed UCC Filing Office Rules

FROM: Arthur H. Travers

I have read over the proposed rules, but I have not had time to study them at length. I do have some questions or suggestions based on this reading.

Section 1: General Provisions

"Correction Statement"

At several places the rules refer to a "correction statement." This term appears in the present version of the UCC (Title 4, Article 9). A bill to amend the present text is now in the legislature. Should it pass (and it seems non-controversial) the term "correction statement" will be replaced by the term "information statement." If the bill does pass the effective date will be July 1, 2013. The rules will need amending at that time unless you add language that anticipates this change.

"Document"

I have reservations about the continued use of the term "document." As you recognize, the term now has a very restricted meaning in the UCC. I gather your plan was to use and define the term only when it used as part of the term "UCC document." Yet it appears standing alone in several places throughout the rules. It also appears as part of the term "EFS document," which is not a defined term. I can understand that having defined "secured transaction record" to encompass all records under Articles 9, 9.5, and 9.7 you needed terms that were limited to each of these Articles. But why not use "record" and define that term when used as part of "UCC record," "EFS record," etc.?

Rule 105: I would put in language that makes clear that these approved forms are not the only option for local filing offices. In particular I would make clear that filing real estate mortgages will still be acceptable.

Rule 109: I would change the chapeau to read, "Filing fees and fees for public records may be paid in accordance with the following rules:". Also, more of Rule 109.4 seems to have been deleted than was intended.

Section 2: Acceptance and Refusal of Documents

202: 9-520(a) provides that the filing office may only refuse to accept a record for a reason set forth in 9-516(b). The office may not add reasons. However, the "additional" reasons seem to me to be

essentially the same as reasons given in 9-516(b) or elaborations thereof. I would amend 202 to read: "The reasons set forth in Section 4-9-516(b) are the sole grounds for the Secretary of State to refuse to file a UCC record. These reasons are elaborated below in this rule."

202.1 refers to legibility of paper, but only if the filer proves hardship will there be any issue of paper legibility. You may wish to delete that sentence and replace it by inserting in the next sentence after "legible electronic record": "or a legible paper record submitted under the hardship provisions of these rules".

203: This can't mean what it seems to say. If a record does not meet the requirements of Article 9.5 you won't file it at all.

206: Do you want the word "prevented"? Isn't the notion here that you will, in accordance with 9-520(b), notify the person of the deficiency so that it may be corrected? If you are referring to electronic filing, I assume that the software will simply not accept a deficient record.

Section 3 Secured Transactions Information Management System

304 & 305: I presume that you are following the progress of the 2010 Amendments in the legislature. When these become effective on July 1, 2013 the manner in which the financing statement will indicate that the debtor is an estate or a trust will change. It will then be necessary for there to be a field that can be completed to indicate this.

307.1.7: This seems to say that one cannot delete any secured party of record. Do you mean to say that?

Section 4: Filing and Records Management Procedures

405: Under the present UCC only a debtor (typically not the "filer") may file a correction statement. The correction statement would not have the effect of correcting any error. The "filer" (a secured party) who wished to correct an error would file an amendment. The 2010 Amendments will allow a secured party (as well as a debtor) to file an information statement, but a secured party who wished to correct an error on a financing statement it filed would still file an amendment. I suggest limiting this rule to amendments.

414: Rule 103.1 speaks of hardship "or other good cause" but this rule applies only to hardship cases. Presumably "other good cause" goes beyond hardship. Either the exception should be limited to hardship or the process for gaining an exception should be expanded. I also think that the process to be followed in obtaining such an exception should be outlined.

Section 7: EFS Filings

Article 9.5 was Colorado's response to the Food Security Act of 1985 (7 U.S.C. sec . 1631). The complication to changing the system under Article 9.5 is that any system devised must comply with federal requirements as set out in the Food Security Act and the regulations of the USDA that implement and interpret that statute. If the system does not meet the federal requirements, there is the risk that the whole central filing system can be held invalid. Colorado's central filing system, as well as a number of amendments to Article 9.5 (for example, the unique identifier system mentioned in the proposed rules) was approved by the federal Department of Agriculture.

The regulations promulgated by the Department of Agriculture and located in 9 C.F.R. sec. 205 interpret the Food Security Act as requiring that all recipients of the master list receive a paper copy of the list unless they have requested the list in a different format. (9 C.F.R. sec. 205.105). It may be that this has been amended since the most recent edition of the C.F.R., or that the Department would agree that the ability of a recipient to produce its own paper copy would satisfy the Act. But as things stand, I think that requiring recipients to accept an electronic copy could render the Colorado system non-complying with potentially serious consequences.

At present, a recipient of the master list need not worry about EFS that was filed after the list was compiled and distributed. Under the electronic system, would EFS's be accessible electronically as they are filed? If so, it may well be that recipients could no longer rely upon the master list as authoritative, but would need to check the records before making a purchase. This could complicate the purchase of farm products and is arguably inconsistent with the scheme envisioned by the Food Security Act. I suggest making it clear that EFS's filed after the master list has been compiled for a month not be accessible until the next master list is compiled.