

MARKS & WEINBERG, P.C.

Revised Article 9: What will Cost you \$500

As you know, the enactment of Revised Article Nine of the Uniform Commercial Code (the "Revised Article") requires prudent lessors to learn new rules and to be aware of new risks. This Article focuses on the new obligations and duties that the Revised Article places on lessors for which there is a statutory penalty of \$500 in the event the lessor fails to comply. Section 625 of the Revised Article imposes a statutory penalty of \$500 per offense for each of the following actions: (1) filing a financing statement that the lessor is not authorized to file; (2) failing to file a termination statement within a certain period of time after a proper request from the lessee; (3) failing to terminate a security interest in other collateral or to release control of other collateral within a certain period of time after a proper request from the lessee; and (4) failing to properly respond to a request for an accounting, a list of collateral, or a statement of account within the required time period. Each of these violations is discussed in more detail below. In addition to the \$500 penalty, a lessor is also liable for any actual damages caused by these violations. *See* Revised Article, §9-625(d).

1. **Filing an Unauthorized Record** (§9-509(a))

A lessor may not file a financing statement without the proper authorization of the lessee. As soon as a lessee/debtor executes a security agreement and grants a lessor a security interest in certain collateral, the Revised Article provides the secured party with automatic authorization to file a financing statement covering that collateral.

Equipment lessors should note that "true leases" may not constitute the type of "security agreement" sufficient to provide them with automatic authorization to file a financing statement. *See Revised Article, §9-102(73).* Of course, many lessors will continue to file financing statements for a number of reasons-- for example, (a) the real world benefit of putting other lenders and potential purchasers on notice of the lessor's ownership of the equipment, even if such notice is not legally required; and (b) the benefit of removing some of the incentive a trustee in bankruptcy has to challenge the status of the lease as a true lease.

In order to make sure that a lessor is authorized to file financing statements with respect to true leases, the executed leases should contain an explicit provision authorizing the filings. Also, if a lessor wishes to describe the collateral more broadly on the financing statement, it will need explicit authorization.

2. Failing to File a Termination Statement in accordance with §9-513

Section 9-513 requires a lessor to release its interest in collateral within a certain time frame after receiving an authenticated demand from the lessee. If the lessee has satisfied all of its obligations that are secured by the leased equipment or other collateral, a lessor must file a termination statement within twenty (20) days of the lessee's request that the lessor do so. A lessee's request can be by way of a written or electronically authenticated record. Different rules apply for consumer-goods transactions.



3. Failure to Terminate a Security Interest in other Collateral or to Release Control of Collateral in accordance with §9-513 and §9-208

If the leased equipment is subject to certificate of title laws, the Revised Article imposes a similar rule to the one discussed above with respect to termination statements. However, many states have more restrictive certificate of title laws which require the lessor to release the certificate of title sooner than required by the Revised Article. Lessors must continue to comply with those state laws.

Other types of collateral are perfected by "control" instead of filing. For example, a security interests in a deposit account is generally perfected by entering into a "control agreement." A lessor has similar duties with respect to such collateral as it does with respect to financing statements, except the Revised Article requires lessors to react more quickly. If the lessee has satisfied all of its obligations that are secured by the leased equipment or other collateral, a lessor must release control of a deposit account, electronic chattel paper, investment property, or a letter of credit right within ten (10) days after receiving an authenticated demand by the lessee to do so.



4. **Request For Accounting; Request Regarding List of Collateral or Statement of Account (§9-210)**

Section 9-210 provides a procedure whereby a lessee may obtain information about the amount it owes and the leased assets and other collateral securing that obligation. There are three different request that a lessee may make and all are discussed below.

First, a lessee can "request an accounting" by writing to its lessor and requesting that the lessor provide an accounting of the unpaid obligation secured by the indicated collateral. Within fourteen (14) days of that request, the lessor must respond in one of the following ways: (a) if the lessor still claims an interest in the leased equipment or other collateral, the lessor must provide details regarding the lessee's outstanding obligations; or (b) if the lessor no longer claims such an interest, but had claimed an interest at an earlier time, the lessor must respond by sending a notice to the lessee that disclaims any interest in the leased equipment or other collateral. In addition, if the lessor knows the name and address of any assignee of that interest, it must provide that information to the lessee.

Second, lessee can make a "request regarding a statement of account" by sending a statement to the lessor outlining what the lessee believes to be the aggregate amount of unpaid obligations secured by certain collateral as of a specified date. Within fourteen (14) days of that request, the lessor must send a written response that either approves the lessee's statement or outlines the errors in the statement.



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Third, a lessee can make a "request regarding a list of collateral" by sending a list of what the lessee believes to be all of the collateral securing its obligations to the lessor and by requesting that the lessor approve or correct the list. Within fourteen (14) days of that request, the lessor must either approve the list or reply with a statement outlining the errors in that list. Lessees that have multiple transactions with the lessor *must* identify the relevant transactions in the request. *See* RA §9-210 (Official Comment 5).

During any six-month period, a lessee is entitled to make a total of one free request for accounting, regarding a list of collateral or for a statement of account. A lessee is not entitled to one free response for *each* type of request (i.e. three free responses). For each additional request, the lessor may charge the lessee an amount not to exceed \$25.

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