

COMMITTEE SUBSTITUTE

FOR

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Senate Bill No. 426

(By Senator Snyder)

[Originating in the Committee on the Judiciary;
reported April 1, 2013.]

A BILL to amend and reenact §46-9-510, §46-9-516 and §46-9-521 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §46-9-516a, all relating to amending the Uniform Commercial Code as to secured transactions; providing for the effectiveness of filed records; creating additional authority to refuse to accept a record for filing; creating circumstances under which a record filing is false; providing criminal penalties for filing or attempting to file a false record; providing civil penalties for

filing or attempting to file a false record; setting forth an administrative procedure initiated by the Secretary of State or a person identified as a debtor on a record; requiring party to an adverse administrative decision by the Secretary of State to file action in Kanawha County Circuit Court if the party wishes to have the Secretary of State's decision reversed; exempting the filing office and its employees from liability; exempting filings by a regulated financial institution or its representatives from certain provisions; and clarifying the applicability of provisions to records filed prior to the effective date of this article.

Be it enacted by the Legislature of West Virginia:

That §46-9-510, §46-9-516 and §46-9-521 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §46-9-516a, all to read as follows:

**ARTICLE 9. SECURED TRANSACTIONS; SALES OF
ACCOUNTS AND CHATTEL PAPER.**

§46-9-510. Effectiveness of filed record.

1 (a) *Filed record effective if authorized.* – A filed record
2 is effective only to the extent that it was filed by a person that
3 may file it under ~~section 9-509~~; section five hundred nine of
4 this article.

5 (b) *Authorization by one secured party of record.* – A
6 record authorized by one secured party of record does not
7 affect the financing statement with respect to another secured
8 party of record.

9 (c) *Continuation statement not timely filed.* – A
10 continuation statement that is not filed within the six-month
11 period prescribed by ~~section 9-515(d)~~ subsection (d), section
12 five hundred fifteen of this article is ineffective.

13 (d) A filed record ceases to be effective if the filing office
14 terminates the record pursuant to section five hundred
15 sixteen-a of this article.

§46-9-516. What constitutes filing; effectiveness of filing.

1 (a) *What constitutes filing.* – Except as otherwise
2 provided in subsection (b) of this section, communication of
3 a record to a filing office and tender of the filing fee or
4 acceptance of the record by the filing office constitutes filing.

5 (b) *Refusal to accept record; filing does not occur.* –

6 Filing does not occur with respect to a record that a filing
7 office refuses to accept because:

8 (1) The record is not communicated by a method or
9 medium of communication authorized by the filing office;

10 (2) An amount equal to or greater than the applicable
11 filing fee is not tendered;

12 (3) The filing office is unable to index the record
13 because:

14 (A) In the case of an initial financing statement, the
15 record does not provide a name for the debtor;

16 (B) In the case of an amendment or information
17 statement, the record:

18 (i) Does not identify the initial financing statement as
19 required by ~~9-512 or 9-518~~, section five hundred twelve or
20 section five hundred eighteen of this article, as applicable; ~~or~~

21 (ii) Identifies an initial financing statement whose
22 effectiveness has lapsed under section ~~9-515~~; five hundred
23 fifteen of this article; or

24 (iii) Identifies an initial financing statement which was
25 terminated pursuant to section five hundred sixteen-a of this
26 article;

27 (C) In the case of an initial financing statement that
28 provides the name of a debtor identified as an individual or
29 an amendment that provides a name of a debtor identified as
30 an individual which was not previously provided in the
31 financing statement to which the record relates, the record
32 does not identify the debtor's surname; ~~or~~

33 (D) In the case of a record filed or recorded in the filing
34 office described in ~~section 9-501(a)(1);~~ subdivision (1),
35 subsection (a), section five hundred one of this article, the
36 record does not provide a sufficient description of the real
37 property to which it relates; or

38 (E) In the case of a record submitted to the filing office
39 described in subdivision (1), subsection (a), section five
40 hundred one of this article, the filing office has reason to
41 believe, from information contained in the record or from the
42 person that communicated the record to the office, that:

43 (i) If the record indicates that the debtor is a transmitting
44 utility, the debtor does not meet the definition of a
45 transmitting utility as described in subdivision (81),
46 subsection (a), section one hundred two of this article;

47 (ii) If the record indicates that the transaction relating to
48 the record is a manufactured home transaction, the
49 transaction does not meet the definition of a manufactured
50 home transaction as described in subdivision (54), subsection
51 (a), section one hundred two of this article; or

52 (iii) If the record indicates that the transaction relating to
53 the record is a public finance transaction, the transaction does
54 not meet the definition of a public finance transaction as
55 described in subdivision (70), subsection (a), section one
56 hundred two of this article;

57 (4) In the case of an initial financing statement or an
58 amendment, if the filing office believes in good faith that the
59 record was communicated to the filing office in violation of
60 section five hundred sixteen-a of this article;

61 ~~(4)~~ (5) In the case of an initial financing statement or an
62 amendment that adds a secured party of record, the record
63 does not provide a name and mailing address for the secured
64 party of record;

65 ~~(5)~~ (6) In the case of an initial financing statement or an
66 amendment that provides a name of a debtor which was not
67 previously provided in the financing statement to which the
68 amendment relates, the record does not:

69 (A) Provide a mailing address for the debtor;

70 (B) Indicate whether the name provided as the name of
71 the debtor is the name of an individual or an organization;

72 ~~(6)~~ (7) In the case of an assignment reflected in an initial
73 financing statement under ~~section 9-514(a)~~ subsection (a),
74 section five hundred fourteen of this article or an amendment
75 filed under ~~section 9-514(b)~~; subsection (b), section five
76 hundred fourteen of this article, the record does not provide
77 a name and mailing address for the assignee; or

78 ~~(7)~~ (8) In the case of a continuation statement, the record
79 is not filed within the six-month period prescribed by ~~section~~

80 ~~9-515(d)~~; subsection (d), section five hundred fifteen of this
81 article.

82 (c) *Rules applicable to subsection (b).* – For purposes of
83 subsection (b):

84 (1) A record does not provide information if the filing
85 office is unable to read or decipher the information; and

86 (2) A record that does not indicate that it is an
87 amendment or identify an initial financing statement to which
88 it relates, as required by ~~section 9-512, 9-514 or 9-518;~~
89 sections five hundred twelve, five hundred fourteen or five
90 hundred eighteen of this article, is an initial financing
91 statement.

92 (d) *Refusal to accept record; record effective as filed*
93 *record.* – A record that is communicated to the filing office
94 with tender of the filing fee, but which the filing office
95 refuses to accept for a reason other than one set forth in
96 subsection (b) of this section, is effective as a filed record
97 except as against a purchaser of the collateral which gives
98 value in reasonable reliance upon the absence of the record
99 from the files.

100 ~~(e) *Administrative review.* — If the Secretary of State~~
101 ~~determines that a financing statement which identifies a~~
102 ~~public official or employee as a debtor is fraudulent or that an~~
103 ~~individual debtor and an individual secured party would~~
104 ~~appear to be the same individual on the financing statement~~
105 ~~or that the individual debtor claims to be a transmitting~~
106 ~~utility, without supporting documents, the Secretary may~~
107 ~~commence administrative proceedings to remove the~~
108 ~~statement from its records in accordance with the provisions~~
109 ~~of article five, chapter twenty-nine-a of this code.~~

110 ~~(1) Upon the commencement of proceedings pursuant to~~
111 ~~this subsection, the Secretary of State shall identify the~~
112 ~~financing statement in its records as subject to administrative~~
113 ~~review and publish a notice in the *West Virginia Register*~~
114 ~~regarding the proceedings.~~

115 ~~(2) A financing statement may be found to be fraudulent~~
116 ~~only if, based upon clear and convincing evidence, no good~~
117 ~~faith basis exists upon which to conclude that the secured~~
118 ~~party was authorized to file the statement and the statement~~

119 was submitted for the purpose of harassment or intimidation
120 or fraudulent intent of the alleged debtor.

121 (3) If upon the completion of administrative review, it is
122 determined that the filing of a financing statement was
123 fraudulent, the filing party shall be assessed all costs incurred
124 by the Secretary in reaching a final determination, including
125 reimbursement for all costs of the hearing. The filing party
126 may also be subject to a civil penalty not exceeding \$500 per
127 fraudulent filing. If upon completion of administrative
128 review or any subsequent appeal of a decision of the
129 Secretary of State, it is determined that a filing subject to
130 appeal is not fraudulent, the secretary or court may award the
131 prevailing party reasonable costs and expenses, including
132 attorney fees.

133 (4) The Secretary of State shall annually submit a report
134 to the Legislature regarding actions taken against fraudulent
135 filings pursuant to this section which identifies the number
136 and characteristics of such proceedings, identifies any
137 creditors found to have made fraudulent filings, describes

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138 ~~proceedings initiated by the secretary in which it is ultimately~~
139 ~~determined that fraudulent filings did not occur, describes the~~
140 ~~number and type of complaints received by the secretary in~~
141 ~~which it is alleged that fraudulent filings have occurred, and~~
142 ~~describes the actions taken by the secretary to investigate~~
143 ~~complaints concerning allegedly fraudulent filings and the~~
144 ~~results of the investigations.~~

145 ~~(5) A decision by the secretary to remove a financing~~
146 ~~statement determined to have been fraudulently filed subject~~
147 ~~to appeal *de novo* to the circuit court of Kanawha County.~~
148 ~~Pending the outcome of an appeal, the financing statement~~
149 ~~may not be removed from the records of the Secretary, but~~
150 ~~shall be identified in the records as having been adjudicated~~
151 ~~to be fraudulent, subject to a pending appeal by the putative~~
152 ~~creditor.~~

153 ~~(6) A financing statement filed by a regulated financial~~
154 ~~institution is not subject to the provisions of this section. For~~
155 ~~the purposes of this section, a regulated financial institution~~
156 ~~is a bank, bank and trust company, trust company, savings~~

157 ~~bank, savings association, building and loan association,~~
158 ~~credit union, consumer finance company, insurance~~
159 ~~company, investment company, mortgage lender or broker,~~
160 ~~securities broker, dealer or underwriter, or other institution~~
161 ~~chartered, licensed, registered or otherwise authorized under~~
162 ~~federal law, the law of this state or any other state, to engage~~
163 ~~in secured lending.~~

**§46-9-516a. Filing fraudulent records; civil and criminal
penalties; administrative proceedings; immunity
from liability.**

1 (a) No person may cause to be communicated to the filing
2 office for filing a false record the person knows or reasonably
3 should know:

4 (1) Is not authorized or permitted under sections five
5 hundred nine, seven hundred eight or eight hundred eight of
6 this article; and

7 (2) Is filed with the intent to harass or defraud the person
8 identified as debtor in the record or any other person.

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9 (b) Any person who violates subsection (a) of this section
10 shall, for a first offense, be guilty of a misdemeanor and,
11 upon conviction thereof, shall be fined not less than \$100 nor
12 more than \$1000 or, in the discretion of the court, be
13 confined in jail not more than twelve months, or both fined
14 and confined. Any person who violates subsection (a) of this
15 section shall, for a second or subsequent offense, be guilty of
16 a felony and, upon conviction thereof, shall be imprisoned in
17 a state correctional facility not less than one nor more than
18 five years.

19 (c) Any person who violates subsection (a) of this section
20 is liable in a civil action to each injured person for:

21 (1) The greater of the actual damages caused by the
22 violation or up to \$10,000 in lieu of actual damages;

23 (2) Reasonable attorney fees;

24 (3) Court costs and other related expenses of bringing an
25 action including reasonable investigative expenses; and

26 (4) In the discretion of the court, punitive damages in an
27 amount determined by the court or jury.

28 (d) A person identified as a debtor in a filed record the
29 person believes was caused to be communicated to the filing
30 office in violation of subsection (a) of this section may, under
31 penalty of perjury, file with the Secretary of State an affidavit
32 to that effect. The Secretary of State shall adopt and make
33 available a form affidavit for use under this section.

34 (e) Upon receipt of an affidavit filed under this section,
35 or upon administrative action by the Secretary of State, the
36 Secretary of State shall communicate to the secured party of
37 record on the record to which the affidavit or administrative
38 action relates and to the person who communicated the
39 record to the filing office, if different and known to the
40 office, a request for additional documentation supporting the
41 effectiveness of the record. The Secretary of State shall
42 review all such documentation received within thirty days
43 after the first request for additional documentation is sent if
44 the Secretary of State has a reasonable basis for concluding
45 that the record was communicated to the filing office in
46 violation of subsection (a) of this section.

47 The Secretary of State may initiate an administrative
48 action under this subsection with regard to a filed record if
49 the Secretary of State has reason to believe, from information
50 contained in the record or obtained from the person who
51 communicated the record to the filing office, that the record
52 was communicated to the filing office in violation of
53 subsection (a) of this section. The Secretary of State may
54 give heightened scrutiny to a record that indicates the debtor
55 is a transmitting utility or that indicates the transaction to
56 which the record relates is a manufactured home transaction
57 or a public finance transaction.

58 (f) The Secretary of State may not charge a fee to file an
59 affidavit under this section and may not return a fee paid for
60 filing a record terminated under this section.

61 (g) The Secretary of State shall promptly communicate to
62 the secured party of record a notice of the termination of a
63 record under subsection (e) of this section. A secured party
64 of record who believes in good faith that the record was not
65 communicated to the filing office in violation of subsection

66 (a) of this section may file an action to require that the record
67 be reinstated by the filing office. A person who
68 communicated a record to the filing office that the filing
69 office rejected in reliance on subdivision (4), subsection (b),
70 section five hundred sixteen of this article, who believes in
71 good faith that the record was not communicated to the filing
72 office in violation of subdivision (4), subsection (b), section
73 five hundred sixteen of this article, may file an action to
74 require that the record be accepted by the filing office. The
75 jurisdiction for the action is the circuit court of Kanawha
76 County.

77 (h) If the court determines that a record terminated under
78 this section or rejected in reliance on subdivision (4),
79 subsection (b), section five hundred sixteen of this article
80 should be reinstated or accepted, the court shall provide a
81 copy of an order to that effect to the Secretary of State. On
82 receipt of an order reinstating a terminated record, the
83 Secretary of State shall refile the record along with a notice
84 indicating that the record was refiled pursuant to this section

85 and its initial filing date. On receipt of an order requiring
86 that a rejected record be accepted, the Secretary of State shall
87 promptly file the record along with a notice indicating that
88 the record was filed pursuant to this section and the date on
89 which it was communicated for filing. A rejected record that
90 is filed pursuant to an order of a court shall have the effect
91 described in subsection (d), section five hundred sixteen of
92 this article for a record the filing office refuses to accept for
93 a reason other than one set forth in subsection (b), section
94 five hundred sixteen of this article.

95 (i) A terminated record that is refiled under subsection (h)
96 of this section is effective as a filed record from the initial
97 filing date. If the period of effectiveness of a refiled record
98 would have lapsed during the period of termination, the
99 secured party may file a continuation statement within thirty
100 days after the record is refiled and the continuation statement
101 has the same effect as if it had been filed during the six-
102 month period described in subsection (d), section five
103 hundred fifteen of this article. A refiled record is considered

104 never to have been ineffective against all persons and for all
105 purposes except that it is not effective as against a purchaser
106 of the collateral that gave value in reasonable reliance on the
107 absence of the record from the files.

108 (j) Neither the filing office nor any of its employees incur
109 liability for the termination or failure to accept a record for
110 filing in the lawful performance of the duties of the office or
111 employee.

112 (k) This section does not apply to a record communicated
113 to the filing office by a regulated financial institution or by a
114 representative of a regulated financial institution, except that
115 the Secretary of State may request from the secured party of
116 record on the record or from the person that communicated
117 the record to the filing office, if different and known to the
118 office, additional documentation supporting that the record
119 was communicated to the filing office by a regulated
120 financial institution or by a representative of a regulated
121 financial institution. For the purposes of this section the term
122 “regulated financial institution” means a financial institution

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123 subject to regulatory oversight or examination by a state or
124 federal agency and includes banks, savings banks, savings
125 associations, building and loan associations, credit unions,
126 consumer finance companies, industrial banks, industrial loan
127 companies, investment funds, installment sellers, mortgage
128 servicers, sales finance companies and leasing companies.

129 (l) If a record was communicated to the filing office for
130 filing before the effective date of this section, and its
131 communication would have constituted a violation of
132 subsection (a) of this section if it had occurred on or after the
133 effective date of this section:

134 (i) Subsections (b) and (c) are not applicable; and

135 (ii) The remaining subsections of this section are
136 applicable.

**§46-9-521. Written financing statement and amendment
thereto.**

1 (a) *Initial financing statement.* – A filing office that
2 accepts written records may not refuse to accept a written
3 initial financing statement ~~in the following form and format~~

4 except for a reason set forth in ~~section 9-516(b)~~: subsection
5 (b), section five hundred sixteen of this article: *Provided,*
6 That the written record must be on the most recent revision
7 of the appropriate form as approved by the International
8 Association of Commercial Administrators.

9 (b) *Amended financing statement.* – A filing office that
10 accepts written records may not refuse to accept an amended
11 written record ~~in the following form and format~~ except for a
12 reason set forth in ~~section 9-516(b)~~: subsection (b), section
13 five hundred sixteen of this article: *Provided, That the*
14 written record must be on the most recent revision of the
15 appropriate form as approved by the International
16 Association of Commercial Administrators.

(NOTE: The purpose of this bill relates to filings under the Uniform Commercial Code as to secured transactions. The bill clarifies false or fraudulent filings, provides civil and criminal penalties for such filings and provides administrative and legal recourse for such filings.

§46-9-516a is new; therefore, strike-throughs and underscoring have been omitted.

Strike-throughs indicate language that would be stricken from the present law and underscoring indicates new language that would be added.)