

# Delaware Goes Paperless (Sort of) Direct Submission of Paper or Imaged UCC Filings Is No Longer Permitted as of December 1, 2015

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## Abstract

*This article discusses the end of paper UCC filing with the Delaware Secretary of State, and provides an overview of the three remaining filing methods. It concludes that one such method—electronic submission of images of completed financing statement forms—is likely to be preferred by those providing and those accepting legal opinions relating to perfection of security interests by way of filing.*

## Introduction

On November 2, 2015, the Delaware Secretary of State, Division of Corporations announced an end to the submission of paper UCC filings, and an end to the “direct” submission of imaged UCC filings. Briefly, from and after December 1, 2015, UCC filings will be accepted by the Division of Corporations (the “Division”) only if submitted (1) by the entry of information into the State’s e-UCC web application

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(an option available to anyone), (2) in XML<sup>1</sup> (an option available only to Authorized UCC Filers), or (3) by electronic submission of images of completed financing statement forms, accompanied by basic keyed-in data (an option available only to Authorized UCC Filers).<sup>2</sup>

### **Paper-Based Filings and the Role of Counsel**

Historically, the Division permitted direct paper filing by anyone. In addition, the Division has for some years permitted indirect “paper-based” filings whereby an electronic image of a completed UCC form (e.g., one of the safe-harbor forms codified at UCC § 9-521) is communicated by an Authorized UCC Filer together with information manually keyed in by an employee of the Authorized UCC Filer regarding debtor and secured party names and addresses and the like. With the advent of yet more filing means, Delaware has used differential pricing to encourage filers to move away from hard-copy and imaged filings. For example, Rule 104.1 of the Administrative Rules of the Delaware Secretary of State, Division of Corporations, Uniform Commercial Code Revised Article 9 (revised May 14, 2014) specified a base fee of \$100 for paper or paper-based filings, as contrasted with a base fee of \$30 for non-paper-based filings.

Many secured transactions in which counsel play a meaningful role include delivery of a legal opinion speaking to, among other things, perfection of a specified security interest by way of the filing of a financing statement on Form UCC1. Many such opinions, in one fashion or another, reference a specified financing statement, whether or not attached to the opinion letter, which financing statement is intended to be filed and whose filing is assumed by the opinion giver. Perhaps not coincidentally, during the period leading up to December 1, 2015, more than forty percent of Delaware fil-

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<sup>1</sup>XML (i.e., Extensible Markup Language) is designed to facilitate the storage and transport of data in a format readable by both humans and machines.

<sup>2</sup>An Authorized UCC Filer is a service provider that has an account with the Division and has qualified for expanded filing capabilities. For example, commercial registered agents in Delaware are typically Authorized UCC Filers.

ings were paper or paper-based, though other options had long been available.<sup>3</sup>

As the secured transactions world has been painfully reminded in recent years, mistakes can happen, and can have consequences. Perhaps this explains why so many Delaware filers have continued to tender paper-based filings. Indeed, it seems unlikely that anyone has given, or that anyone has accepted, a perfection opinion in which the giver opined on a yet-to-be-made purely electronic filing, while trying to limit risk with something along the lines of “In rendering this opinion, we have reviewed the UCC1 financing statement painstakingly reviewed by extensive teams on both sides, as ultimately purged of all typographical and other errors, which UCC1 financing statement we understand will be under the steady gaze of a data entry clerk who will endeavor to flawlessly reproduce its content in the electronic filing interface of the Filing Office.”

### **Addressing Different Possibilities of Error**

The Division’s new policy has an effect on the point when the risk of errors, however likely or unlikely, is at its greatest, and who will bear the risk of those errors. Further explanation is in order.

Under the Division’s now-discontinued direct paper (or paper-based) filing protocol, a Division employee keyed into the database all information from the tendered hard-copy or imaged form, and created and uploaded an image of the tendered form. In a two-step quality-assurance process, a second employee checked the keyed-in data against the image and by doing so (or by other means) could identify irregularities. A call to the filer may have resulted. For example, if I had made a filing against “duPunt,” I might well have received a courtesy call inviting me to consider resubmitting in the name “duPont.” Such human intervention was a courtesy, and of course had its limits. I would hardly have expected to be alerted that the actual name of my (presumed to be) intended debtor is “E. I. du Pont de Nemours and Company.” In any event, the tendered hard-copy or imaged form would have been, technically, what I

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<sup>3</sup>Data from Delaware Secretary of State, on file with the author.

filed, not the (possibly divergent) data entered by the Division. Thus, as a filer I would have been protected against data-entry or other indexing errors by the filing office (*see* UCC § 9-517).

As noted above, effective December 1, 2015, the Division requires electronic submission of all UCC filings. Anyone can submit an electronic filing online via the e-UCC filing interface on the Division's website. Authorized UCC Filers can also submit electronic filings in XML. Because e-UCC and XML filings require in all cases the "direct" entry of certain data into the Division's database, Division personnel have no opportunity to conduct quality assurance by making a comparison between the data keyed in by the Authorized UCC Filer (or its financial institution customer, in the case of XML filings) and another source of information. Therefore, recognizing potential concerns among some in the secured lending community, the Division continues to allow Authorized UCC Filers to submit images consisting of filings on any of the financing statement forms permitted by UCC § 9-521 and the Division's Administrative Rules, provided such images are accompanied by a keyed-in iteration of the debtor's name and certain other basic information to assist in indexing.

When a filing is made through e-UCC, the typist's keystrokes—not the paper form or other source from which the typist is working—determine what data are "communicated" to the filing office. Thus, the ultimate filer bears the risk of data-entry error. Similarly, in XML filings, Authorized UCC Filers relay data exported directly from the secured-loan databases of certain secured parties (e.g., commercial banks) in XML format. In that scenario, the risk of data-entry errors generally peaks still earlier in the process, when an employee of the secured party enters the data in the secured party's system. Most errors in XML filings are presumably already in the data provided to the Authorized UCC Filer, just as if the client had provided the Authorized UCC Filer with an erroneously completed paper form. Some errors may nonetheless be caught by the Division's systems, which are programmed to decline attempted submissions that are incomplete (e.g., for want of information required under UCC § 9-516(b)(3)). But those automatic checks will not catch misspellings, partial omission of text, and the like. They are

designed to catch the absence of any data in required data fields, not the provision of erroneous or incomplete data in such fields.

Different considerations come into play when an Authorized UCC Filer, making a paper-based filing, submits an image of a financing statement form together with a keyed-in iteration of the debtor's name and other basic information. The possibility for discrepancy arises inasmuch as it can be said that certain information appears both in the keyboarded data and in the image submitted to the Division. To take the obvious and most pernicious type of error, return to the example above and assume the debtor's name has been keyed in as "duPunt" but appears as "duPont" on the accompanying image of the completed UCC1 form approved by the deal team. Under long-standing protocols, it is anticipated that Division personnel will note the discrepancy in their quality check and conform the keyed data to the imaged data. But what should happen if the discrepancy is not caught and corrected? Under the UCC, what's filed consists of what's communicated to and accepted by the filing office (§ 9-516). Article 9 does not expressly resolve the question of discrepant renderings of data *within* a record.

### **Rule Revised to Provide Clarity.**

The Division has addressed this question by enacting revisions to its filing office administrative rules, initially on December 1, 2015 and again on February 12, 2016. These revisions provide that in the case of paper-based filings made by Authorized UCC Filers, consisting of both an image of a UCC financing statement and the basic data required to be keyed in by the Authorized UCC Filer, the Division will "accept" (within the contemplation of UCC § 9-516) only the image. The accompanying keyed-in data represent a mere outsourcing of the initial data-entry function formerly performed by Division personnel as described above. Thus, to the extent any of the keyed-in data are incorrect, the data as featured on the communicated image are controlling, since the keyed-in data are deemed a function of indexing on behalf of the Division. By administrative rule, there is no discrepancy within the record when a debtor's name is rendered differently on an image and in the accompanying

keyed-in data, because only the image constitutes the record. Accordingly, the risk of data-entry errors by the Authorized UCC Filer is not borne by the client when a paper-based electronic filing is made. In addition, the Division anticipates continuing its quality-assurance process for such filings, with a Division employee checking the keyed-in data against the image and possibly identifying inconsistencies between the image and the keyed-in data provided by the Authorized UCC Filer.

Of course, where economic, timing, and other considerations permit, it may be advisable to consider obtaining an official UCC search report confirming the filing and proper indexing of the financing statement (and indicating the priority afforded by it, at least vis-à-vis other secured parties perfected by filing in such office) before relying upon the perfection and priority it is intended to achieve.