

community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

DISCLAIMER

COMMUNITY BANKER is designed to share ideas and developments related to the field of banking. It is not intended as legal advice and nothing in the COMMUNITY BANKER should be relied upon as legal advice in any particular matter. If legal advice or other expert assistance is needed, the services of competent, professional counsel should be sought.



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Your UCC Filing Options

Do you think “YUCC” when you have to sit down to make a filing with North Dakota’s Central Indexing System? There’s the UCC-1, the UCC-3, the UCC-5, and our old friend, the UCC-11. Happily, it’s not difficult to determine which filing is appropriate.

A **UCC-1** is the *initial* or original financing statement that’s filed to provide public notice to the world, letting other creditors know of your bank’s security interest in a debtor’s particular collateral. Usually, when we talk about “perfecting” your security interest or filing a UCC, we are referring to the filing of a UCC-1 - your initial financing statement. The most basic description of a “perfected” security interest is one that is filed correctly, giving you a valid and enforceable lien on the collateral.

A **UCC-5** is an information statement filed as a means of providing notice when you think an existing financing statement is inaccurate or was wrongfully filed. Put another way, a UCC-5 allows a debtor or secured party to dispute a financing statement. N.D.C.C. § 41-09-89 (UCC § 9-518) Be aware that filing a UCC-5 has no legal effect - it doesn’t amend or correct any information, it’s only a means of providing additional information to searchers. You’ll have to file a UCC-3 to amend your information. More on that later!

A **UCC-11** is a search request. Upon request, the Office of the North Dakota Secretary of State will provide a report identifying other secured parties, whether specific collateral is already secured by the UCC filing of another creditor, and will help determine a particular creditor’s priority.

A **UCC-3** is the multitasker or the Jack-of-all-Trades form. Unlike the other forms, a UCC-3 can be used for a number of different purposes - amendment, assignment, continuation, and termination. *See* N.D.C.C. § 41-09-83 (UCC § 9-512).

1. The UCC-3 as an amendment. An amendment makes changes to errors or standard adjustments on the UCC-1, which might involve the secured party, the debtor, or an error in the description of the collateral. The most common reason to amend a filing are a change in the secured party’s name (or address), a change in your debtor’s name (or address), or a change in the collateral. The most *crucial* reason to amend a filing is if your debtor’s name changes. Under N.D.C.C. § 41-09-78(3) (UCC § 9-507(c)), a creditor has a 4-month window to amend its filing for a debtor name change to maintain priority. If a creditor fails to timely amend the filing, it’ll be considered “seriously misleading,” and the security interest will be unperfected. Though the statute doesn’t require it, we also recommend an amendment to a filing if either your address or the debtor’s address changes in order to avoid missed notices or notifications. Certainly, a change in the collateral requires an amendment. If your financing statement fails to correctly identify or describe the collateral, other creditors will believe that there’s collateral available for them to use as security. That means an expensive priority dispute.
2. The UCC-3 as an assignment. To assign or transfer all or some of the bank’s rights to the collateral described in a UCC-1 financing statement, file a UCC-3. *See* N.D.C.C. § 41-09-85 (UCC § 9-514).

3. The UCC-3 as a continuation. As you know, a UCC financing statement is effective for 5 years. If your bank has to extend the filing past five years, and most do, you must file a UCC-3 continuation statement within 6 months before the expiration date of the existing filing. If the continuation has been timely filed, the financing statement is valid for another 5 years. If you *fail* to timely file the continuation statement, your security interest will lapse and someone may step ahead of you in the priority line. *See* N.D.C.C. § 41-09-86 (UCC § 9-515) *Suspense your files!*
4. The UCC-3 as a termination. When a debtor has satisfied all debts owed and/or collateral has been returned to the lender, the lender typically files a termination statement to the initial financing statement that established the lender's priority over the collateral. *See* N.D.C.C. § 41-09-84 (UCC § 9-513) The filing of a termination ceases the effectiveness of the original UCC – be sure that the lending relationship is over, because a terminated financing statement can't be reinstated.

Penalty provision. Be aware that when there remains no outstanding secured debt and no written commitment between the bank and the debtor to make advances, unless the debtor requests in writing to continue the filing, the secured party must file a termination statement to the effect that the secured party no longer claims a security interest. If the bank fails to file a termination statement within 60 days of when the debt is fully satisfied, and the debtor has not requested in writing that the filing be continued, the secured party is liable to the debtor for \$100 and for any loss caused to the debtor by such failure. If a secured party fails to file a termination statement within 10 days after proper written *demand* by the debtor, then the secured party is liable to the debtor for \$100 and for any loss caused to the debtor by such failure. *See* N.D.C.C. § 41-09-84(1). Be watchful! The \$100 is minor, but the “any loss” provision might amount to some real money, depending on the circumstances.

UCC-3 Practice tip. When filing a UCC-3, make only one change at a time – don't file a UCC-3 that purports to be both an amendment *and* a continuation (it may be rejected, but it certainly will be confusing). Instead, file separate UCC-3 form for each change, whether it be an amendment, an assignment, a continuation, or a termination, in a logical sequence.

YOU ARE ASKING

Q: We are considering doing away with NOW accounts at our bank. In your opinion, is this a poor business choice?

A: It is not, in our humble opinion. A Negotiable Order of Withdrawal (NOW) account is a Reg. D odd duck that earns interest on a checking account, but the withdrawals are “negotiable” and the bank can require at least 7 days' notice for any withdrawals. The Reg Q prohibition on banks' paying interest on demand deposit checking accounts was repealed by the Dodd-Frank Act. In other words, the reason NOW accounts were created no longer exists, and they are often considered burdensome. NOW accounts are still in use, but does your bank want to exercise its right to negotiate customer withdrawals for up to 7 days?

SAVE THE DATE!

- When:** Friday, July 12, 2024
Registration: 8:15 a.m.
- What:** Olson & Burns P.C. - *Legal Update and Golf Outing*
- Where:** Vardon Golf Course, formerly the Minot County Club

Join us for a morning discussing current legal issues affecting community bankers presented by Olson & Burns attorneys and outside environmental counsel.

Not only will you obtain useful insight into the use of receiverships, complex foreclosures, current environmental laws, and North Dakota's only Chapter 15 bankruptcy filing (undertaken by our firm), the session will be followed by lunch on us and 18 holes of golf on us!

This informative and practical session will be sure to engage and entertain you, so much so that it will continue in the club refreshment center after golfing. Don't just take our word for it - reserve your spot today!