

1 COMMITTEE SUBSTITUTE

2 FOR

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4 FOR

5 **Senate Bill No. 426**

6 (By Senator Snyder)

7 _____
8 [Originating in the Committee on the Judiciary;

9 reported April 1, 2013.]

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12
13 A BILL to amend and reenact §46-9-510, §46-9-516 and §46-9-521 of
14 the Code of West Virginia, 1931, as amended; and to amend said
15 code by adding thereto a new section, designated §46-9-516a,
16 all relating to amending the Uniform Commercial Code as to
17 secured transactions; providing for the effectiveness of filed
18 records; creating additional authority to refuse to accept a
19 record for filing; creating circumstances under which a record
20 filing is false; providing criminal penalties for filing or
21 attempting to file a false record; providing civil penalties
22 for filing or attempting to file a false record; setting forth
23 an administrative procedure initiated by the Secretary of
24 State or a person identified as a debtor on a record;

1 requiring party to an adverse administrative decision by the
2 Secretary of State to file action in Kanawha County Circuit
3 Court if the party wishes to have the Secretary of State's
4 decision reversed; exempting the filing office and its
5 employees from liability; exempting filings by a regulated
6 financial institution or its representatives from certain
7 provisions; and clarifying the applicability of provisions to
8 records filed prior to the effective date of this article.

9 *Be it enacted by the Legislature of West Virginia:*

10 That §46-9-510, §46-9-516 and §46-9-521 of the Code of West
11 Virginia, 1931, as amended, be amended and reenacted; and that said
12 code be amended by adding thereto a new section, designated
13 §46-9-516a, all to read as follows:

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

16 **§46-9-510. Effectiveness of filed record.**

17 (a) *Filed record effective if authorized.* - A filed record is
18 effective only to the extent that it was filed by a person that may
19 file it under ~~section 9-509.~~ section five hundred nine of this
20 article.

21 (b) *Authorization by one secured party of record.* - A record
22 authorized by one secured party of record does not affect the
23 financing statement with respect to another secured party of
24 record.

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

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

8 **§46-9-516. What constitutes filing; effectiveness of filing.**

9 (a) *What constitutes filing.* - Except as otherwise provided in
10 subsection (b) of this section, communication of a record to a
11 filing office and tender of the filing fee or acceptance of the
12 record by the filing office constitutes filing.

13 (b) *Refusal to accept record; filing does not occur.* - Filing
14 does not occur with respect to a record that a filing office
15 refuses to accept because:

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

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

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

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

23 (B) In the case of an amendment or information statement, the
24 record:

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

4 (ii) Identifies an initial financing statement whose
5 effectiveness has lapsed under section ~~9-515~~, five hundred fifteen
6 of this article; or

7 (iii) Identifies an initial financing statement which was
8 terminated pursuant to section five hundred sixteen-a of this
9 article;

10 (C) In the case of an initial financing statement that
11 provides the name of a debtor identified as an individual or an
12 amendment that provides a name of a debtor identified as an
13 individual which was not previously provided in the financing
14 statement to which the record relates, the record does not identify
15 the debtor's surname; ~~or~~

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

21 (E) In the case of a record submitted to the filing office
22 described in subdivision (1), subsection (a), section five hundred
23 one of this article, the filing office has reason to believe, from
24 information contained in the record or from the person that

1 communicated the record to the office, that:

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

6 (ii) If the record indicates that the transaction relating to
7 the record is a manufactured home transaction, the transaction does
8 not meet the definition of a manufactured home transaction as
9 described in subdivision (54), subsection (a), section one hundred
10 two of this article; or

11 (iii) If the record indicates that the transaction relating to
12 the record is a public finance transaction, the transaction does
13 not meet the definition of a public finance transaction as
14 described in subdivision (70), subsection (a), section one hundred
15 two of this article;

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

20 ~~(4)~~ (5) In the case of an initial financing statement or an
21 amendment that adds a secured party of record, the record does not
22 provide a name and mailing address for the secured party of record;

23 ~~(5)~~ (6) In the case of an initial financing statement or an
24 amendment that provides a name of a debtor which was not previously

1 provided in the financing statement to which the amendment relates,
2 the record does not:

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

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

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

12 ~~(7)~~ (8) In the case of a continuation statement, the record is
13 not filed within the six-month period prescribed by ~~section~~
14 ~~9-515(d)~~. subsection (d), section five hundred fifteen of this
15 article.

16 (c) *Rules applicable to subsection (b)*. - For purposes of
17 subsection (b):

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

20 (2) A record that does not indicate that it is an amendment or
21 identify an initial financing statement to which it relates, as
22 required by ~~section 9-512, 9-514 or 9-518~~, sections five hundred
23 twelve, five hundred fourteen or five hundred eighteen of this
24 article, is an initial financing statement.

1 (d) *Refusal to accept record; record effective as filed*
2 *record.* - A record that is communicated to the filing office with
3 tender of the filing fee, but which the filing office refuses to
4 accept for a reason other than one set forth in subsection (b) of
5 this section, is effective as a filed record except as against a
6 purchaser of the collateral which gives value in reasonable
7 reliance upon the absence of the record from the files.

8 ~~(e) *Administrative review.* -- If the Secretary of State~~
9 ~~determines that a financing statement which identifies a public~~
10 ~~official or employee as a debtor is fraudulent or that an~~
11 ~~individual debtor and an individual secured party would appear to~~
12 ~~be the same individual on the financing statement or that the~~
13 ~~individual debtor claims to be a transmitting utility, without~~
14 ~~supporting documents, the Secretary may commence administrative~~
15 ~~proceedings to remove the statement from its records in accordance~~
16 ~~with the provisions of article five, chapter twenty-nine-a of this~~
17 ~~code.~~

18 ~~(1) Upon the commencement of proceedings pursuant to this~~
19 ~~subsection, the Secretary of State shall identify the financing~~
20 ~~statement in its records as subject to administrative review and~~
21 ~~publish a notice in the *West Virginia Register* regarding the~~
22 ~~proceedings.~~

23 ~~(2) A financing statement may be found to be fraudulent only~~
24 ~~if, based upon clear and convincing evidence, no good faith basis~~

1 ~~exists upon which to conclude that the secured party was authorized~~
2 ~~to file the statement and the statement was submitted for the~~
3 ~~purpose of harassment or intimidation or fraudulent intent of the~~
4 ~~alleged debtor.~~

5 ~~(3) If upon the completion of administrative review, it is~~
6 ~~determined that the filing of a financing statement was fraudulent,~~
7 ~~the filing party shall be assessed all costs incurred by the~~
8 ~~Secretary in reaching a final determination, including~~
9 ~~reimbursement for all costs of the hearing. The filing party may~~
10 ~~also be subject to a civil penalty not exceeding \$500 per~~
11 ~~fraudulent filing. If upon completion of administrative review or~~
12 ~~any subsequent appeal of a decision of the Secretary of State, it~~
13 ~~is determined that a filing subject to appeal is not fraudulent,~~
14 ~~the secretary or court may award the prevailing party reasonable~~
15 ~~costs and expenses, including attorney fees.~~

16 ~~(4) The Secretary of State shall annually submit a report to~~
17 ~~the Legislature regarding actions taken against fraudulent filings~~
18 ~~pursuant to this section which identifies the number and~~
19 ~~characteristics of such proceedings, identifies any creditors found~~
20 ~~to have made fraudulent filings, describes proceedings initiated by~~
21 ~~the secretary in which it is ultimately determined that fraudulent~~
22 ~~filings did not occur, describes the number and type of complaints~~
23 ~~received by the secretary in which it is alleged that fraudulent~~
24 ~~filings have occurred, and describes the actions taken by the~~

1 ~~secretary to investigate complaints concerning allegedly fraudulent~~
2 ~~filings and the results of the investigations.~~

3 ~~(5) A decision by the secretary to remove a financing~~
4 ~~statement determined to have been fraudulently filed subject to~~
5 ~~appeal de novo to the circuit court of Kanawha County. Pending the~~
6 ~~outcome of an appeal, the financing statement may not be removed~~
7 ~~from the records of the Secretary, but shall be identified in the~~
8 ~~records as having been adjudicated to be fraudulent, subject to a~~
9 ~~pending appeal by the putative creditor.~~

10 ~~(6) A financing statement filed by a regulated financial~~
11 ~~institution is not subject to the provisions of this section. For~~
12 ~~the purposes of this section, a regulated financial institution is~~
13 ~~a bank, bank and trust company, trust company, savings bank,~~
14 ~~savings association, building and loan association, credit union,~~
15 ~~consumer finance company, insurance company, investment company,~~
16 ~~mortgage lender or broker, securities broker, dealer or~~
17 ~~underwriter, or other institution chartered, licensed, registered~~
18 ~~or otherwise authorized under federal law, the law of this state or~~
19 ~~any other state, to engage in secured lending.~~

20 **§46-9-516a. Filing fraudulent records; civil and criminal**
21 **penalties; administrative proceedings; immunity from**
22 **liability.**

23 (a) No person may cause to be communicated to the filing
24 office for filing a false record the person knows or reasonably

1 should know:

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

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

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

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

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

20 (2) Reasonable attorney fees;

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

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

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

7 (e) Upon receipt of an affidavit filed under this section, or
8 upon administrative action by the Secretary of State, the Secretary
9 of State shall communicate to the secured party of record on the
10 record to which the affidavit or administrative action relates and
11 to the person who communicated the record to the filing office, if
12 different and known to the office, a request for additional
13 documentation supporting the effectiveness of the record. The
14 Secretary of State shall review all such documentation received
15 within thirty days after the first request for additional
16 documentation is sent if the Secretary of State has a reasonable
17 basis for concluding that the record was communicated to the filing
18 office in violation of subsection (a) of this section.

19 The Secretary of State may initiate an administrative action
20 under this subsection with regard to a filed record if the
21 Secretary of State has reason to believe, from information
22 contained in the record or obtained from the person who
23 communicated the record to the filing office, that the record was
24 communicated to the filing office in violation of subsection (a) of

1 this section. The Secretary of State may give heightened scrutiny
2 to a record that indicates the debtor is a transmitting utility or
3 that indicates the transaction to which the record relates is a
4 manufactured home transaction or a public finance transaction.

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

8 (g) The Secretary of State shall promptly communicate to the
9 secured party of record a notice of the termination of a record
10 under subsection (e) of this section. A secured party of record
11 who believes in good faith that the record was not communicated to
12 the filing office in violation of subsection (a) of this section
13 may file an action to require that the record be reinstated by the
14 filing office. A person who communicated a record to the filing
15 office that the filing office rejected in reliance on subdivision
16 (4), subsection (b), section five hundred sixteen of this article,
17 who believes in good faith that the record was not communicated to
18 the filing office in violation of subdivision (4), subsection (b),
19 section five hundred sixteen of this article, may file an action to
20 require that the record be accepted by the filing office. The
21 jurisdiction for the action is the circuit court of Kanawha County.

22 (h) If the court determines that a record terminated under
23 this section or rejected in reliance on subdivision (4), subsection
24 (b), section five hundred sixteen of this article should be

1 reinstated or accepted, the court shall provide a copy of an order
2 to that effect to the Secretary of State. On receipt of an order
3 reinstating a terminated record, the Secretary of State shall
4 refile the record along with a notice indicating that the record
5 was refiled pursuant to this section and its initial filing date.
6 On receipt of an order requiring that a rejected record be
7 accepted, the Secretary of State shall promptly file the record
8 along with a notice indicating that the record was filed pursuant
9 to this section and the date on which it was communicated for
10 filing. A rejected record that is filed pursuant to an order of a
11 court shall have the effect described in subsection (d), section
12 five hundred sixteen of this article for a record the filing office
13 refuses to accept for a reason other than one set forth in
14 subsection (b), section five hundred sixteen of this article.

15 (i) A terminated record that is refiled under subsection (h)
16 of this section is effective as a filed record from the initial
17 filing date. If the period of effectiveness of a refiled record
18 would have lapsed during the period of termination, the secured
19 party may file a continuation statement within thirty days after
20 the record is refiled and the continuation statement has the same
21 effect as if it had been filed during the six-month period
22 described in subsection (d), section five hundred fifteen of this
23 article. A refiled record is considered never to have been
24 ineffective against all persons and for all purposes except that it

1 is not effective as against a purchaser of the collateral that gave
2 value in reasonable reliance on the absence of the record from the
3 files.

4 (j) Neither the filing office nor any of its employees incur
5 liability for the termination or failure to accept a record for
6 filing in the lawful performance of the duties of the office or
7 employee.

8 (k) This section does not apply to a record communicated to
9 the filing office by a regulated financial institution or by a
10 representative of a regulated financial institution, except that
11 the Secretary of State may request from the secured party of record
12 on the record or from the person that communicated the record to
13 the filing office, if different and known to the office, additional
14 documentation supporting that the record was communicated to the
15 filing office by a regulated financial institution or by a
16 representative of a regulated financial institution. For the
17 purposes of this section the term "regulated financial institution"
18 means a financial institution subject to regulatory oversight or
19 examination by a state or federal agency and includes banks,
20 savings banks, savings associations, building and loan
21 associations, credit unions, consumer finance companies, industrial
22 banks, industrial loan companies, investment funds, installment
23 sellers, mortgage servicers, sales finance companies and leasing
24 companies.

1 (1) If a record was communicated to the filing office for
2 filing before the effective date of this section, and its
3 communication would have constituted a violation of subsection (a)
4 of this section if it had occurred on or after the effective date
5 of this section:

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

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

8 **§46-9-521. Written financing statement and amendment thereto.**

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

17 (b) *Amended financing statement.* - A filing office that
18 accepts written records may not refuse to accept an amended written
19 record ~~in the following form and format~~ except for a reason set
20 forth in ~~section 9-516(b):~~ subsection (b), section five hundred
21 sixteen of this article: *Provided, That the written record must be*
22 on the most recent revision of the appropriate form as approved by
23 the International 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.)