

# Basics of In Lieu Financing Statements for the 2010 Amendments to UCC Article 9

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## Background

The 2010 Amendments to UCC Article 9 (the “Amendments”) may, in rare situations, change the law governing perfection and priority of a security interest. The law governing perfection and priority determines where a financing statement and subsequent UCC records must be filed on the debtor. If the governing law changes, the filing location also changes. That means records filed in the former jurisdiction will not be effective.

The solution is provided in the transition rules for the Amendment. A secured party can, in essence, move its financing statement from the old jurisdiction to the new state by using a financing statement in lieu of continuation (“In Lieu”). This article explains the circumstances where an In Lieu may be required, the effect of filing an In Lieu, and the In Lieu Content requirements.

## Change in Governing Law

The Amendments clarify the types of entities that fall within the definition of “registered organization” and expand the term to include business trusts. That change could affect the location of the debtor and, therefore, cause a change in the governing law.

Prior to the effective date of the Amendments, a business trust may not fall within the definition of “registered organization. Therefore, it would be located under §9-307(b)(2) at its place of business or, if it has more than one place of business, its chief executive office.

After the amendments take effect, however, a business trust may become registered a organization. The law governing perfection and priority for most collateral when the debtor is a registered organization is the law of the state where the debtor was organized. If the debtor’s single place of business or chief executive office was in a different state than where it was organized, there will be a change in the governing law.

When the governing law changes, any UCC record filed in the former jurisdiction, including a continuation statement, has no effect. The only exception is that the transition rules provide for the filing of an effective termination statement in the former jurisdiction.

The change in governing law will not require the secured party to take action in all cases. If the secured party does not need to amend the record and chooses not to continue the effectiveness for an additional five-year period, then no action

is necessary. Under § 9-805(b)(2), the record remains effective until the earlier of the lapse date or the end of the transition period.

However, if the secured party needs to amend or continue a financing statement filed in the debtor's former jurisdiction, then it will need to "move" the financing statement to the new filing jurisdiction. The transition rules allow the secured party to do this by filing an In Lieu in the new state.

### In Lieu Financing Statement Contents

An In Lieu is, in essence, simply an initial financing statement with added information. The specific requirements are set forth in § 9-806(c). In general, the record must comply with all the requirements for sufficiency set forth in § 9-502(a). These requirements include the name of the debtor, name of the secured party, and an indication of the collateral. The record must also provide all the information necessary to avoid rejection by the filing office under § 9-516(b), such as the debtor and secured party addresses.

An In Lieu, however, must provide some additional information about the original financing statement filed in the former jurisdiction. The In Lieu must identify the office in which the original financing statement was filed, identify the file number and file date of that financing statement and, if applicable, the most recent continuation. Finally, the In Lieu must indicate that the original financing statement remains effective.

If information from the original financing statement needs to be amended, the secured party can simply provide the amended information on the In Lieu. There is no need to first file the In Lieu and then amend it, although that is an option.

Although not required by statute, the best practice is to attach a copy of the original financing statement to the In Lieu. That will preserve evidence of the secured party's perfection and priority even if the former jurisdiction later purges its records.

### Effect of Filing an In Lieu

The In Lieu serves as an initial financing statement in the new jurisdiction. The new jurisdiction will assign the record a file number and file date. The lapse date of an In Lieu is based on its own file date, not the file date of the original financing statement in the former jurisdiction.

Once filed, an In Lieu will have priority for all the listed collateral beginning on the new file date. In addition, the priority of an In Lieu will reach back in time to the original file date for any collateral covered by the referenced financing statement filed in the former jurisdiction.

After filing an In Lieu, the secured party can amend it just like any other financing statement. There is no need for the secured party to file any amendments or continuations to the original financing statement filed in the former jurisdiction.



## Conclusion

Many secured parties will never run into a situation that requires the filing of an In Lieu after the Amendments take effect. Nevertheless, secured parties must know how to recognize a change in the governing law and be prepared to file an In Lieu if necessary to preserve perfection and priority through the transition period for the new law.

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