

FUND FINANCE FRIDAY

To Be Continued: Staying Ahead of Financing Statement Expirations

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In the subscription finance space, the secured party's security interest in the right to make, issue, and enforce capital calls on the borrower's investors and to receive the resulting capital contributions is governed by Article 9 of the Uniform Commercial Code (the "UCC") and is perfected by the filing of a UCC-1 financing statement in the applicable jurisdiction(s).

Pursuant to UCC §9-515, a UCC-1 financing statement is effective for five years after the date of filing, and its effectiveness lapses on the expiration of that five-year period. If a deal is still active and the security interest is still needed at the end of five years, the secured party can file a UCC-3 continuation statement within six months before the expiration date. So, for example, if a UCC-1 financing statement was filed on January 1, 2015, then a continuation statement would need to be filed at some point between July 1, 2019 and December 31, 2019.

Though a lender, as secured party, will typically have its outside counsel prepare and file the original UCC-1 financing statements, it is incumbent on the lender itself to track its outstanding financing statements and be aware of upcoming expiration dates. If an attorney at the outside firm becomes aware that a UCC-1 financing statement is about to expire, it certainly is helpful to alert the lender, but the expectation is that lenders are tracking their own financing statements.

2014 and 2015 were active years in the subscription finance market. Lenders might be well served to take a look through their portfolios at deals that closed in those years to get an idea of what UCC-3 continuations need to be filed. Outside counsel will be happy to prepare and file the UCC-3 continuation statements. The vast majority of credit agreements will contain a negative pledge covenant – which prohibits the borrowers from creating any outside lien on the collateral – so in the event a UCC-1 financing statement does lapse, there should not be another creditor that can take first priority. However, obviously it's best to avoid this scenario entirely by timely filing the UCC-3 continuations.