BUSINESS LAW SECTION

UNIFORM COMMERCIAL CODE COMMITTEE
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July 9, 2009

Uniform Law Commission and
Article 9 Review Committee
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

Re: Possible Amendments to Uniform Commercial Code Article 9 Individual Debtor Name Provisions

Ladies and Gentlemen:

I. Introduction

The Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (the "Committee") has been considering issues relating to the individual debtor name provisions of Article 9. In the course of this process, which is ongoing, it has reviewed the approaches regarding individual debtor names set forth in the May 27, 2009 draft of Amendments to Uniform Commercial Code Article 9, with Reporter's Prefatory Note and Comment (the "Discussion Draft"), that will be under consideration at the annual meeting of the Uniform Law Commission ("ULC") scheduled for July 14-15, 2009.

The positions set forth herein are those of the Committee only. They have not been adopted by the Business Law Section or its overall membership or by the State Bar's Board of Governors or its overall membership and are not to be construed as representing the position of the State Bar of California. Membership on the Committee and in the Business Law Section is voluntary and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.

The purpose of this letter is to provide the ULC and the Review Committee with the Committee's analysis of individual debtor name issues to date. This letter addresses mainly the three major alternative approaches described in the Discussion Draft, although full consideration of the issues by the ULC and the Review Committee as well as The American Law Institute's Council and membership should take into account the possibilities of (a) leaving the present Official Text of the Uniform Commercial Code (the "UCC") unchanged (sometimes mischaracterized as a "do nothing" approach) while taking non-statutory actions and (b) making statutory changes other than those three alternative approaches but going beyond the single name format change described in the Discussion Draft.[1]

[1] The Committee notes that "doing nothing" with respect to the individual debtor name issues does not accurately reflect the point of view of any Committee member. Some examples of both statutory and non-statutory actions that might well be taken include: (i) improving and making more uniform and more transparent the filing office search logic; (ii) adding provisions concerning non-QWERTY characters (California, for example, already has ASCII-256

While there are varying views within the Committee as to the existence and magnitude of the problem sought to be addressed, the Committee unanimously concluded that the two more drastic approaches described in the Discussion Draft, the Alternative A "only if" approach and the Alternative C "priority" approach, should not be adopted. The Committee strongly urges that they be rejected, believing that adding substantial new and extremely complex text (in the filing provisions, the transition provisions, the priorities provisions and the governing law provisions) would at the very least generate confusion, substantial learning costs for users and a lengthy period of uncertainty pending judicial interpretation (and the risk of errors in interpretation of such new and complex provisions), as well as risking significant non-uniformity in the adoption and interpretation of such provisions, resulting in exacerbated conflict of laws problems. Since many, if not most, sellers, leasing companies and other credit-extenders review multiple sources of information, including credit reports and/or tax returns, in addition to or in lieu of driver's licenses, in conducting due diligence with respect to an individual debtor (and it is the first two sources rather than the third that are most likely to produce the debtor's name for Article 9 purposes, to confirm that the debtor has made full disclosure and to reveal potential competing creditors), the excessive weight given to driver's licenses by the "only if" and "priority" approaches seems particularly inappropriate and unjustifiable.[2] Finally, while the uncertainty concern expressed with respect to the current law relates to the filer's lack of certainty that it has provided the debtor's name sufficiently to assure perfection, the "only if" and "priority" approaches would make changes that go far beyond that concern.

The Committee concluded unanimously that the "safe harbor" approach set forth in the Discussion Draft as Alternative B1 would be acceptable to all; indeed, the majority view was that this was a good solution that should be adopted. It is an approach that removes some uncertainty for filers with respect to perfection (albeit not necessarily with respect to searching), adds little complexity to Article 9, should present minimal transition problems, and, particularly if accompanied by educational efforts, seems the least likely to induce secured parties to abandon their current broader due diligence practices. As the Committee points out later in this Part I, additional investigation should be undertaken to ascertain possible complications from using the driver's license as the source of an individual debtor's name for purposes of a UCC financing statement, but these complications pose a greater threat under the "only if" and "priority" approaches than under the "safe harbor" approach. The Committee further was of the view that the "form of name" approach, identified in the Discussion Draft as Alternative B2, should be enacted in any event, because it provides clear benefits without any foreseeable harm. The Committee hopes that further study will be made with respect to the additional steps described in note 1, *supra*.

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capability, more than ample to accommodate any character likely to arise in a financing transaction) and expanding data field sizes; (iii) resolving issues presented by foreign name-formatting customs; (iv) establishing educational programs to familiarize filers and searchers with ascertaining name variants (including how to do due diligence to discover those actually used) and dealing with them effectively; (v) adjustment of filing fee structures (without costing states any revenue) so that they are not calculated with regard to the number of debtor names presented; and (vi) establishing free (again, without costing states any revenue) on-line searching capabilities, *e.g.*, UCC index browsing (character string search capability) of individual debtor names (many states already offer some form of free searching, albeit providing differing amounts of information). These steps could dramatically alleviate uncertainties without adding significant burdens on filers or searchers and are consistent with current user practices. Indeed, they would enhance the effectiveness of the system also in the context of organization debtor names. All of these possibilities should be taken into account now in making the cost/benefit analysis involved in considering the major approaches described in the Discussion Draft.

[2] This point is elaborated on below. *See* text accompanying notes 33-34, *infra*.

The Committee notes also that the three major approaches described in the Discussion Draft all rely, either entirely or at least initially, on driver's licenses as *the* name source. Although the Committee has been informed by the California Secretary of State's office that the field sizes and character set capabilities of the California UCC filing office exceed those of the California Department of Motor Vehicles, the Committee is in the process of doing further research to ascertain whether any negative consequences would result from choosing the driver's license as the source of an individual debtor's name. There are a number of areas of inquiry that should be explored thoroughly as part of the process for determining whether the driver's license is an appropriate source to use as the basis for the individual debtor's name in a financing statement. The Committee urges that, before adoption of any of these approaches, the ULC ascertain *for all states* both the legal rules and the actual practices with respect to the government entity that issues driver's licenses concerning (i) its technical capabilities and practices (*e.g.*, field sizes, characters sets, name field capture and formatting); (ii) the public accessibility of the issuer's records for verification purposes; and (iii) the actual practices with respect to confiscation or mutilation of invalid licenses upon name change, issuance to newly-arrived residents, etc.

The Committee also urges further investigation—on a state-by-state basis—of the manner in which each state ascertains the name of an individual that applies for a driver's license (*e.g.*, determining what source documents are required to be submitted to the agency responsible for issuing driver's licenses to establish the name of the individual, what processes exist for verifying the authenticity of those source documents and how does the agency confirm the association between those source document and the applicant). Given the primacy of the driver's license in the three major approaches to individual debtor names set forth in the Discussion Draft, understanding the process by which the issuing governmental authority verifies the name under which the individual applies for the license and associates positively that name with the individual are important to making an informed decision on whether to adopt one of these approaches.[3]

Additionally, careful consideration must be given to whether the name format of each state's driver's license can be clearly transcribed onto the UCC financing statement form. For example, if a driver's license issued by a particular state allows for multiple last names, or if a hyphenated last name is replaced with two last names (separated by a space rather than a hyphen), there may be uncertainty regarding how to enter these names into the "last name" field of a UCC financing statement. Similarly, if a driver's license issued by a particular state does not designate which components of the individual's name are the "First Name," "Middle Name" and "Last Name," or if these components are not separated by commas, there may be uncertainty regarding how to input these components into the corresponding fields of a UCC financing statement. This is yet another detail that should be explored on a state-by-state basis to determine the feasibility of using the name on the driver's license as the uniform basis for establishing the individual debtor's name for purposes of Article 9.

[3] It has been reported that several states are especially susceptible to fraudulent and abusive practices from driver's license applicants. *Fraudsters Target Maryland for Driver's Licenses* (NPR broadcast April 6, 2009, transcript *available at* http://www.npr.org/templates/story/story.php?storyId=102798829). In particular, Maryland's lax standards in vetting driver's license applications has made some states skeptical of the validity of Maryland-issued licenses and unwilling to recognize such licenses. *Id*. A lack of confidence in the integrity of the driver's license application and issuance processes makes especially problematic the weight given to driver's licenses for establishing perfection or priority under the "only if" and "priority" approaches.

II. Statement of the Issues

As stated in the Discussion Draft, the UCC Article 9 filing system was designed to balance the interests of filers, who need a level of certainty that they have filed against the debtor's correct name, and the interests of searchers, who need a level of certainty that a search of the public record will reveal any financing statements that have been filed against the debtor.[4] This balance is reflected in several rules, and the Drafting Committee that worked on the last revision of Article 9 was concerned not to adopt an approach that would unduly burden searchers. Section 9-503(a)(4)[5] states that, if the debtor is an individual, a financing statement is sufficient only if it provides the individual name of the debtor. This rule is tempered somewhat by Section 9-506(a), which provides that a financing statement is not rendered ineffective by a minor error that is not seriously misleading. Section 9-506(b) provides that a failure sufficiently to provide the debtor's name in accordance with Section 9-503(a) renders a financing statement seriously misleading. Section 9-506(c) defines what is not "seriously misleading": an error is not seriously misleading if the financing statement would be disclosed in a search of the filing office's records under the debtor's "correct" name using the filing office's standard search logic.

Thus, the debtor's name is key. In the United States, a unique and verifiable official identification card that establishes the individual's name is not issued to each individual; there is not a reliable, objective, publicly-available source for each person's name. This raises a multitude of questions with respect to filing, and searching for, financing statements with respect to individual debtors. What if an individual debtor commonly uses a nickname (that is not the debtor's "real" name)? Must a financing statement include an individual debtor's middle name or middle initial to provide sufficiently the debtor's "correct" name? How should hyphenated names, multiple middle or last names, non-Anglo naming conventions, and non-ASCII characters[6] be treated? Currently, there is no accepted national standard on what a "legal" or "correct" name is or how it can be ascertained. The common law generally recognizes the right of a person lawfully and effectively to change his or her name at will and assume a new name, so long as it is not done for a fraudulent or illegal purpose, without judicial involvement. Indeed, it is not even established that an individual has only one correct name.[7]

At present, Article 9 provides inadequate guidance on these specific questions and, more generally, on how to determine the name of an individual debtor.[8] This uncertainty has prompted some members of the secured financing community to seek legislative guidance, and

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[4] *See* Discussion Draft at 29.

[5] All statutory references, unless otherwise indicated, are to the most recent version of the Official Text of the Uniform Commercial Code prepared under the joint sponsorship of The American Law Institute and the Uniform Law Commission.

[6] Such characters include, for example, the Spanish tilde ("˜") over an "n," which might be reflected as "n," "n*," "*,"or "ny," or the German umlaut ("¨") over an "o," which might be reflected as "o," or "o*," "*," or "oe."

[7] Section 9-506(c)'s reference to a search using the debtor's "correct" name might be read to imply that an individual debtor may have only one "correct" name. This reference, however, is found only in the safe harbor provision and not in the affirmative statement of the requirement to provide the debtor's name, and in any event, is not the only possible reading. *See* Section 1-106 (providing in part that words in the singular number include the plural).

[8] The Committee notes, however, that there are a number of cases holding that using an individual debtor's nickname, rather than the individual debtor's "legal name," is fatal to the effectiveness of a financing statement. *See* cases cited at note 55, *infra*. Accordingly, the case law does inform us that nicknames may not be the individual name of a debtor under Section 9-503(a)(4)(A).

four states have already responded with non-uniform amendments. Whether the level of uncertainty truly merits any change in the law is therefore the first issue to be considered.

III. "Do Something Substantial in the Statute" vs. "Do Little or Nothing in the Statute but Do Something Substantial Outside the Statute": How Significant is this Issue?

The present lack of guidance on how to determine an individual debtor's name for filing under Article 9 is undesirable.[9] Currently, a filer must use its best judgment when providing the debtor's name in a financing statement (although the filer can reduce uncertainty by filing under several variants). If the name is not "correct"—that is, if it is not what a court later determines to have been correct—the filer's security interest may not be perfected.[10] Similarly, searchers may not discover previously filed and effective financing statements naming an individual debtor if they fail to ascertain the "correct" name under which to search (although a search under more than one variant can reduce this risk and has the added benefit of disclosing a potential competitor who has failed sufficiently to provide the debtor's name, but with whom there might nevertheless later be litigation). Lack of certainty as to the correct name of the individual debtor may result in a creditor extending credit where it otherwise would not have or unknowingly taking a junior lien on a debtor's property. It must be kept in mind that (i) the volume of filings against individual debtors is substantial[11] and (ii) many of the users of the filing system are not lawyers, so an ideal system would be structured in a manner that enables non-lawyers to use the system effectively without requiring extensive training. Some in the financial community feel that under current law it is difficult to provide loan officers and other non-lawyers with sufficient guidance regarding the name of an individual debtor and that a system that encourages filers to file against and searchers to search against multiple individual debtor names can be time-consuming and expensive.[12] The question, however, is not whether the present situation is

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[9] Although the entire Committee would like to alleviate the uncertainty inherent in the existing legal structure concerning individual names and the Committee generally favors both adoption of the name formatting modification and the adoption of some or all of the ideas described in note 1, *supra*, a majority of the Committee believes that the additional benefit to be derived from the safe harbor approach outweighs the costs and risks of its adoption. There is a minority view on the Committee that filers and searchers have successfully dealt with this level of uncertainty for almost 50 years, that the few cases in which an individual debtor name issue has resulted in loss to the secured party have been the result of filer error (*e.g.*, name misstatement or typographical error) rather than a failure to guess correctly a name variant acceptable to a court, and that the small added benefit to filers does not outweigh the downsides of pursuing even that approach. The pros and cons of each of the approaches are set forth below.

[10] Pursuant to Section 9-506(c), however, even if the name used in the financing statement is not the debtor's "correct" name, the financing statement would not be "seriously misleading" (and would not, therefore, be rendered ineffective) if the financing statement would be disclosed in a search under the debtor's "correct" name using the filing office's standard search logic.

[11] The Committee was provided a random survey conducted in 2007 of 200 out of the more than 2 million UCC-1 financing statements on file with the California Secretary of State's office. Of these filings, 67, or 33%, name at least one individual debtor. A statistical analysis of the confidence level in the California data indicates a confidence level of approximately 93%. According to the Memorandum of Sue Collins to Joint Review Committee (May 27, 2009), for the period from May 1, 2008 to May 14, 2009, Texas had 147,156 individual names (53%) and 131,508 business names (47%) indexed; however, it is unknown to what extent the individual name total reflects individual name variants.

[12] However, as the Discussion Draft points out, "the advent of on-line searching has significantly reduced the delay and cost of searching under more than one of the likely names and increased the ease of making multiple searches. Likewise, the burden of filing under more than one name has become quite small, inasmuch as filing is done electronically and most states charge a very low fee, or no fee at all, for adding an additional debtor name to a filing." Discussion Draft at 30. Also, as observed in note 1, *supra*, additional improvements can be made to the present situation. And, it is again noted that the non-lawyers currently doing this work for credit-extenders have commonly been instructed to obtain and review credit reports and tax returns, which should in the overwhelming majority of cases provide names—which can be used both for filing and for searching—that will include the

imperfect, but rather whether any of the primary approaches provides significantly greater certainty and does so effectively, at acceptable costs and risks, and with less cost and fewer risks than any other approach. A majority of the Committee supports the adoption of the safe harbor approach (in addition to some or all of the possibilities described in note 1, *supra*) in the belief that there is further gain in certainty and that the "safe harbor" approach has few risks and costs.

That said, a substantial minority of the Committee believes that the present system works sufficiently well and that any potential improvement offered by the major approaches is outweighed by the disadvantages described below and the possible risk of unforeseen and unintended consequences resulting from altering Article 9 in the manner described in the Discussion Draft such that none of the major approaches (other than the "form of name" approach[13] or other "minimalist" approaches referred to in the Discussion Draft)[14] should be adopted. A "minimalist" approach was in fact identified in the Discussion Draft as a fourth alternative to addressing the individual debtor names issue.[15] The reluctance on the part of such minority of the Committee to embrace a more extensive set of changes to address individual debtor names is based in part on the fact that improper individual debtor name filings in reported cases have resulted, almost exclusively, from filer error.[16] None of the major approaches described in the Discussion Draft would change the result of the most likely types of filer error (misspelling, use of a nickname, or misidentification of the debtor), nor can or should Article 9 attempt to legislate against such errors.[17] Moreover, while it does take some modest additional effort, any uncertainty concerning an individual debtor's name can be countered by simply filing (or searching) against all the possibly correct names.[18] Given the relatively low cost of filing a financing statement, prudent creditors have traditionally chosen to "over file" (*i.e.,* file against multiple possible variations of the individual debtor's name) rather than "under file" (*i.e.,* file against less than all possible variations of that name).[19] Similarly, given the relatively low cost

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"correct" name as well as confirm the completeness of the debtor's credit application and books and records and reveal the names of potential competing creditors.

[13] We refer to Alternative B2 in the Discussion Draft's analysis of individual debtor names—which approach is actually a "safe harbor" approach based on the form in which the debtor's name is entered on a financing statement—as the "form of name" approach. *See* discussion in Part VII, *infra*.

[14] *See* Discussion Draft at 31. The minimalist approaches described in the Discussion Draft include minor adjustments to the individual debtor name provisions that would provide clarity as to the significance of the debtor's middle name for purposes of the "seriously misleading" standard.

[15] *Id.*

[16] *See* Exhibit A: "Individual Debtor Name Case and Filing Survey."

[17] As noted by the Reporter in the Discussion Draft:

> The majority of reported cases in which a financing statement was held to be insufficient because of an error in the debtor's name concern entity debtors, not individuals. Although some reported cases have held that filings against individual debtors were insufficient because they did not provide the correct name for the debtor, the financing statements typically were insufficient because they contained a typographical error or provided the debtor's nickname rather than a "real" name, and not because the secured party chose the "wrong" name from among those appearing on documents disclosed through the exercise of due diligence. Indeed, no reported case has found that the name appearing on the debtor's driver's license is insufficient.

Discussion Draft at 30.

[18] With respect to searching, none of the proposals eliminates the burden on diligent searchers to search against multiple individual debtor names. *See* note 21, *infra*.

[19] It is common industry practice for prudent creditors to obtain a credit report of an individual via one of the many consumer credit reporting agencies (such as Experian (formerly TRW), Equifax, or TransUnion) prior to extending

of conducting searches against multiple names, diligent searchers can easily search against variations of individual debtor names.[20] In addition, searchers have to search under multiple name variations in any event because none of the amendments set forth in the Discussion Draft would govern the correct name of an individual for purposes of federal tax liens and in certain other situations.[21] So the more drastic approaches do not actually deliver the claimed simplicity.

As discussed further below, each of the approaches (other than the "form of name" approach) has its own shortcomings. Beyond those, there may be financial costs with implementing any of those approaches. For example, any state that implements a solution based upon driver's licenses or identification cards should deal with any issues presented by a discrepancy in field length, character set, etc., that may exist between its UCC filing office, on one hand, and its Department of Motor Vehicles ("DMV"), on the other hand.[22] Doing so may present significant technical or budgetary problems for filing offices or the other affected government agencies.

Furthermore, the Committee has noted that whatever uncertainty exists as to individual debtor names has existed since the initial adoption of Article 9. The present lack of guidance on how to determine an individual debtor's name for filing under Article 9 did not arise out of the most recent revisions to Article 9. No version of Article 9 has ever provided guidance for determining an individual debtor's correct name. The prior version did provide, however, that a filing against an "incorrect" name could be sufficient if it is "not seriously misleading." The current version was designed to address the manner in which courts decide whether a particular filing is "not seriously misleading" and, therefore, sufficient. Before Article 9 was revised, different courts used different standards, with the result that it was difficult to predict whether a particular filing would be found to be sufficient. Revised Article 9 addressed that problem with

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credit to an individual. The credit reports are typically ordered by the creditor's paying a nominal fee and providing to the credit reporting agency the individual's social security number, the name of the individual set forth on the driver's license and the residential address of the individual (obtained by the creditor, with appropriate statutory authorizations and releases, from the individual's credit application). The credit agency will then provide the creditor with a report that indicates personal credit data of the individual, including every name variation in which the individual has applied for credit during the period covered by the report. This personal credit history provides an indispensable source of name variants for the individual, which the creditor can then use as guide for including additional debtor names on a UCC financing statement (as well as for searching).

[20] State filing offices making available on-line browsing options for UCC records would further enhance the ability of searchers to discover efficiently variations of the name of a debtor. *See* note 1, *supra*.

[21] Although Revised Article 9 attempted to lessen the burden on searchers to search against every possibly correct name, such searches remain necessary because, for federal tax lien purposes, the IRS is not bound by state rules governing debtor names. Prudent creditors searching the database of tax lien notices conduct searches under all reasonable variations of the debtor's name to determine whether there are preexisting tax liens. *See* United States v. Crestmark Bank (*In re* Spearing Tool & Mfg. Co., Inc.), 412 F.3d 653 (6th Cir. 2005). In the course of performing this task, the searcher may well discover financing statements that provide the debtor's name insufficiently, particularly if financing statements and tax lien notices are stored in the same database. In another context, lenders seeking to perfect an interest in agricultural products may need to file against registered trade names to be protected against buyers under the Food Security Act, even though a different filing may be necessary to perfect the security interest. *See* Fin-Ag, Inc. v. Cimpl's, Inc., 754 N.W.2d 1 (S.D. 2008).

[22] *See* discussion at the conclusion of Part I, *supra*. It is noted that a driver's license is a somewhat arbitrary source for determining an individual debtor name. Inconsistencies within a given state, inconsistencies between states, unreliability of some states, and so on, as previously noted, suggest that driver's licenses may well not yet be ready to be used as a nationwide standard for determining individual debtor names. Certainly, the ULC should first investigate and consider the existence and magnitude of issues on a state-by-state basis before adopting a solution that relies on driver's licenses as the sole or primary source of determining individual debtor names for Article 9 purposes.

Section 9-506(c), which states that a filing is not "seriously misleading" if a search under the debtor's correct name, using the filing office's standard search logic, would disclose that filing. However, notwithstanding the clarification of the "seriously misleading" standard in the current version of Article 9, critics continue to attack the lack of guidance on how to determine an individual's name as undesirable even though no widespread instances of hardship to secured parties have emerged in this area of the law (either under the current or former versions of Article 9).

On balance, however, the majority view on the Committee is that the "safe harbor" approach does provide an incremental benefit that can be implemented without drastically altering the current system (which, for the most part, works well today just as it has for decades) or introducing any unintended adverse consequences to filers or searchers. Furthermore, the Committee unanimously supports the "form of name" approach as providing a modest improvement with no adverse consequences The Committee reaches a decidedly different conclusion with respect to the "only if" and "priority" approaches. With respect to both of these approaches, the Committee ***<u>unanimously</u>*** concludes that the cure is substantially worse than the disease and that it would be far better to adopt no change in the law at all than either of these approaches.

IV. Background and Overview of the Alternatives

Notwithstanding that Article 9 has survived for over fifty years under the current regime of filing against individual debtor names, several states have recently enacted legislation amending the individual debtor name provisions of Article 9 in an attempt to provide guidance with respect to filing against the correct name of the individual debtor. Texas was the first state to enact legislation amending the individual debtor name provisions of its version of Article 9.[23] Nebraska recently amended Section 9-506 of its Article 9.[24] Tennessee amended Section 9-503 of its Article 9.[25] Virginia amended Section 8.9A-503 of the Code of Virginia.[26] Each of these states has adopted its own non-uniform solution to the perceived problem of filing against the correct name of the individual debtor. None of these provides a useful model for nationwide adoption; in fact, there are indications that the Texas Bar UCC Committee is dissatisfied with its initial approach and may well modify its non-uniform provision, and the effective date of the Nebraska amendment has been deferred to allow for improvement.

The Discussion Draft describes three major approaches that have been presented by various parties to address the perceived problem and provides possible draft amendments to Article 9; these drafts illustrate at least partially the nature and magnitude of textual changes that would be needed to implement the three approaches. It is, of course, important that if any of the approaches is adopted by the ULC, it will have such strong support that it will be adopted universally and uniformly. These major approaches are:

<u>Alternative A</u>. The "<u>only if</u>" approach would amend Article 9 to require that a financing statement provide the individual debtor's name as it appears on a driver's license or other specified document. As described in the Discussion Draft, the "only if" approach uses a cascade, or waterfall, of documents to determine the name of an individual debtor which is sufficient for a

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[23] TEX. BUS. & COM. CODE ANN. § 9.503(a)(4) (Vernon 2008).

[24] NE L 2007, LB 851, § 28, enacted on March 28, 2008.

[25] State of Tennessee Senate Bill 3732, enacted on March 25, 2008; Tennessee Acts 2007, ch 648.

[26] State of Virginia Senate Bill 1100ER, enacted on April 3, 2009.

financing statement. Although the particular steps in the cascade remain under discussion, the three steps used in the Discussion Draft are the debtor's driver's license, identification card, and U.S. passport, in that order. Because states use different terms for the driver's licenses and identification cards they issue, the words "driver's license" and "identification card" appear in brackets. If a debtor has been issued more than one identity document of the type described in the applicable paragraph of Section 9-503(a)(4) (*i.e.,* driver's license, identification card, or passport), the document of that type that was issued most recently is the one that indicates the debtor's name for purposes of that paragraph. The last step in the cascade provides that if no provision of the identity document cascade applies, the financing statement provides the appropriate name of the debtor only if it sets forth the surname, first given name, and first initial of the second given name, if any, of the individual.[27]

Alternative B. This approach actually consists of two approaches that retain the current "name of the debtor" concept in Section 9-503(a)(4)(A) but amend Article 9 to provide a "safe harbor" for filers. The basic principle is to assist filers by designating a specific name source that, if used, would result in perfection—obviating a need to file against multiple possible debtor name variations. Searchers would have to continue to search against all possibly "correct" variations of an individual's name. The Discussion Draft provides two versions of the "safe harbor" approach. The first, called Alternative B1, provides that a financing statement that sets forth the name contained in the driver's license or identification card is deemed sufficient under new Section 9-503(g). The second, called Alternative B2, is a simple rule that provides that a financing statement that sets forth the debtor's surname, first given name and first initial of the second given name, if any, is sufficient. The Committee refers to Alternative B1 in this memorandum as the "safe harbor" approach and to Alternative B2 as the "form of name" approach.

Alternative C. The "priority" approach would amend Article 9 to create two classes of security interests for individual debtors—one as to which a financing statement provides the name that appears on a driver's license or other specified identification document in a cascade similar to that used in the "only if" approach[28] (or, if no such identification document exists, the debtor's surname, first given name and first initial of the second given name, if any) and another as to which a financing statement provides the name of the debtor but not the name on the specified identification document (or in the specified format of surname, first given name and first initial of second given name). Under the priority approach, a financing statement is a "high-priority filing" if it provides the name of the individual debtor found in the appropriate designated source document or in the specified format. A financing statement that does not qualify as a high-priority filing nevertheless sufficiently sets forth the name of an individual debtor if it provides the "individual name" of the debtor (as under the current text); such a financing statement, however, is defined as a "low-priority filing." Both high-priority filings and low-priority filings are effective to perfect a security interest in collateral of individual debtors (assuming that the other requirements for an effective financing statement are satisfied). However, the priority approach alters the existing first-to-file-or-perfect priority rule of Section 9-322(a)(1) with respect to individual debtors by making a security interest perfected by a

[27] This last option of the cascade's acceptable identification priorities is considered by the Committee independently from the remainder of the "only if" approach. It is the "form of name" approach discussed below in Part VII.

[28] We note, however, that the cascade used in the "priority" approach includes a non-U.S. passport as the last tier of identification documents, while the cascade used in the "only if" approach uses the U.S. passport as the last tier of identification documents.

low-priority filing subordinate to a conflicting security interest perfected by a high-priority filing, even if the low-priority filing is filed first. The priority approach also deprives a purchase-money security interest ("PMSI") perfected by a low-priority filing of the super-priority status given by Section 9-324 to PMSIs generally. Pursuant to changes made by the priority approach to Sections 9-317 and 9-320, the perfected security interests of low-priority filers will be defeated by buyers, lessees and licensees of certain types of collateral even if the low-priority filing is made before delivery to and/or giving of value by such buyers, lessees or licensees, whereas such buyers, lessees or licensees might not take free of a security interest perfected by a high-priority filing if the high-priority filing is made before such buyers, lessees or licensees take delivery and/or give value.

V. Alternative A: The "Only If" Approach

The Committee unanimously opposes the "only if" approach.

The "only if" approach is intended to achieve a high degree of certainty in achieving perfection by providing an exclusive source for the individual debtor name. In our view, however, this approach does not deliver the promised degree of certainty and is fraught with problems.

First, the "only if" approach's reliance on the driver's license to determine the debtor's name—to the exclusion of all other possible sources—is objectionable. As pointed out earlier in this letter,[29] there are a number of possible inconsistencies and complications that can arise from using the driver's license as the basis for determining the individual debtor's name under Article 9, and these inconsistencies and complications expose some of the weaknesses of the "only if" approach. The "only if" approach depends on consistency between data field characteristics in the driver's license and the data inputting capabilities of the filing office. Specifically, if the driver's license that controls the name of the individual debtor contains special characters that the filing office cannot process, sets forth one or more components of a debtor's name that exceed the filing office's field length limitations or is ambiguous as to which components of the debtor's name correspond to the "First Name," "Middle Name" and "Last Name" fields of a financing statement,[30] the filer may not be able to satisfy the requirements of the rule[31] and would therefore find itself in the position of being unable to perfect its security interest against the debtor. These potential obstacles may be forgivable shortcomings in the "safe harbor" approach because, with that approach, one can still perfect a security interest by filing against the debtor's correct name despite what appears on the driver's license. However, the "only-if" approach's dependence on the driver's license for supplying the individual debtor's name makes these issues more troublesome.

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[29] *See* discussion at the conclusion of Part I, *supra*.

[30] We note here the observation of the Reporter in the Discussion Draft that determining whether the names in the source document and in the UCC filings are the same must not be done "mindlessly" in that judgment should be exercised with regard to questions such as name order. *See* Discussion Draft at 37. This inability to make routine the process of extending secured credit to individuals is a significant problem, as one of the chief goals of the proponents of this and other alternatives is to make the process usable by non-lawyers.

[31] For example, a driver's license could have a specific naming convention or input error that drops a middle initial and changes the middle initials "H.W." to simply "W.," so that the filer would be forced to file against "George W. Bush" as opposed to the correct individual debtor, "George H.W. Bush." Even if the filer knows that "George H.W. Bush" is the correct name for the debtor, under the "only if" approach, the filer would have to file against the incorrect individual debtor name, "George W. Bush."

Because of the problems described in the preceding paragraph that could result under the "only if" approach from incompatibility between data processing and formatting capabilities of filing offices and DMV offices, the filing office of a state that adopts the "only if" approach will need to gain assurance that its data inputting and formatting capabilities are flexible enough to accommodate the data inputting and formatting capabilities of such state's DMV office. Otherwise, a state filing office may be unable to index filings according to the name set forth in the driver's license. This effort to verify compatibility with DMV offices' data processing capabilities is likely to require significant coordination and analysis by filing offices, which would increase the costs of implementing the "only if" approach. These additional costs may deter uniform adoption of the "only if" approach. For these reasons, and because there seems to be support for the other approaches on the part of stakeholders who prefer either more or less intrusive solutions, it seems rather unlikely that there would be universal and uniform adoption of the "only if" approach. The goal of any change to clarify the individual debtor name issues should be an approach that will make it more likely to obtain uniform adoption and implementation among the states. The "only if" approach does not lead to this goal.

The "only if" approach also counter-intuitively penalizes a filer that uses an individual debtor's correct name, albeit not the name shown on the individual's driver's license. This promotes the backward result of rewarding a filer that unthinkingly relies on the driver's license name even though that name may not be actually used by the individual debtor for his or her business and legal dealings. For example, in the case of a married individual debtor who has legally changed his or her name yet has failed to obtain a driver's license in the new name, a filer must complete a financing statement by indicating the pre-marriage name of the debtor despite the individual's use of a completely different name for legal and business purposes. Similarly, the "only if" approach would deprive a filer from having a perfected security interest if the filer completes a financing statement with the legal name of the debtor, but not the name on the—now outdated—driver's license.

Furthermore, the "only if" approach may fail in the first instance to assure priority to secured parties who dutifully file using the name of the debtor as set forth in the current driver's license. Take the example of SP-1 that, after obtaining a current driver's license from its individual debtor, searches against the name set forth in the driver's license and discovers no filings made against that particular name. SP-1 then files using the name set forth in the driver's license and extends credit to the debtor in reliance on the apparent priority afforded by the filing. If another creditor (SP-2) had previously filed against a different name of the debtor (for example, if the debtor previously had a driver's license issued under a different name),[32] then SP-2 may have priority with respect to collateral that the debtor owned at the time of (or up to four months after) SP-2 made its filing. While this prior-name risk can be mitigated with respect to a debtor that is a registered organization by the secured party obtaining public records that show the history of name changes for the registered organization, such due diligence may not be a viable option for individual debtors if a state's DMV does not make available records of previously-issued source documents for a given individual. The prudent secured party, of course, will request that an individual debtor represent and warrant as to whether he or she previously held a driver's license under a different name, but the secured party is left with the risk that an unscrupulous or forgetful debtor may fail to disclose the prior driver's license, thereby potentially depriving the secured party of the protection to which it assumed it was

[32] Note that it is possible for an individual to obtain forms of identification with different names. For example, consider a situation in which an individual obtains an identification card, then claims he/she has lost such card and applies for a duplicate with change documents in order to receive a new identification card under a different name. *See also* note 3, *supra*, for an example of gaming the driver's license application process.

entitled by its filing under the "only if" approach. Again, if there is no public accessibility to a state's DMV records, or if those records do not reveal past names under which an individual has obtained a driver's license, the secured party cannot confirm that the debtor's representations are true, and therefore there can be no certainty as to the non-existence of prior competing liens. Unlike the "safe harbor" approach—which still encourages prudent searching against multiple possible individual debtor names—the "only if" approach can mislead a filer into believing that it has attained priority by focusing solely on the name in the driver's license received from the debtor and ignoring possible permutations or prior names that could trump the filer's security interest under certain circumstances.

We contrast dependence of the "only if" approach on the driver's license—which may not be independently verifiable by the lender—with typical lending practice, whereby a lender, depending on the size of the credit to be extended, will require any or all of the following from an individual as part of the credit application process: (1) a copy of the individual's driver's license, (2) a copy of the individual's social security card or social security number, (3) copies of the individual's tax returns and (4) the individual's current home address (if different from address set forth in the driver's license). After collecting this information and obtaining from the individual the appropriate federally mandated authorizations for release of credit information (as may be required by the Fair Credit Reporting Act), the lender can run a credit inquiry and obtain an individual's credit history reports.[33] From those credit history reports, the lender can discover name variations, if any, used by the individual when previously applying for credit.[34] The lender can then conduct a search and complete a financing statement using all reasonable variations of the name as set forth on the driver's license, social security card, tax returns and credit reports under the "additional debtor" fields. Requiring the lender to rely solely on the debtor to provide the dispositive source document for perfecting a security interest—which result is compelled by the "only if" approach—rather than continuing to afford the lender the option under the current regime of determining the "correct" debtor name from a variety of third-party, independently verifiable sources (which option would remain viable under the "safe harbor" approach) is an unacceptable result.

In addition to the weaknesses in the "only if" approach attributable to reliance on the driver's license, the "only if" approach's use of a "cascade" of identification documents creates problems that do not arise under the "safe harbor" approach. Some of these problems are discussed in the Reporter's analysis of the "only if" approach set forth in the Discussion Draft,[35] and we elaborate on them below.

The cascade used in the "only if" approach contains three levels that are based on identification documents: the debtor's driver's license, identification card, and U.S. passport, in that order. If a debtor has been issued multiple documents that appear on the same level of the

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[33] These reports would be obtained from credit reporting agencies such as TransUnion, Equifax and Experian (formerly TRW).

[34] Although negative credit information must be deleted from a personal credit history report after seven years (ten years for bankruptcies), all active accounts are displayed and even closed or inactive accounts are retained for ten years *from the date of last activity*. Therefore, depending on how long credit accounts have remained open, the credit report can show personal credit histories, including names under which credit has been sought, for periods spanning several decades. (In fact, the age of a credit account history has a positive impact on one's credit score). *See* http://www.mycreditcenter.com/FAQ.asp?LS=6050 (last accessed July 1, 2009). *See also* http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre03.shtm (last accessed July 3, 2009).

[35] *See, e.g.,* Reporter's Note 3 on page 37 of the Discussion Draft (discussing name changes as a result of expiring source documents and a debtor's obtaining higher tier source documents).

cascade, the document that was issued most recently prevails for purposes of establishing perfection under the "only if" approach based on that particular level. The last level in the cascade provides that if no provision of the identity document cascade applies, the financing statement provides the appropriate name of the debtor only if it sets forth the surname, first given name, and first initial of the second given name, if any, of the individual.[36] Additionally, an expiration of the source document or the issuance of a new source document under a different name for the debtor at a higher tier of the waterfall can result in loss of perfection (and, therefore, loss of priority) with respect to collateral acquired four months after the event triggering the loss of perfection.[37] For example, if the debtor obtains a new driver's license with a different name from the name set forth in the driver's license provided at the time credit was extended, this would constitute a name change. If, as a result, the filing could not be located in a search under the new name, then perfection will not be achieved as to collateral obtained four months after the name change. Contrast this result with the result under the "safe harbor" approach, where issuance of a new driver's license under a different name does not necessarily result in loss of perfection for after-acquired collateral so long as the name in the previous license against which the secured party filed its financing statement is the individual name of the debtor under Section 9-503(a)(4)(A).

While the fourth and final tier of the cascade in the "only if" approach would appear to be useful in the sense that it avoids the problem of how to handle a debtor who does not have (and is unable to obtain) a driver's license, an identification card or a U.S. passport, as a practical matter it is hard to imagine any lender being willing to lend in reliance on a name determined using this fourth tier. It places the lender in the position of having to take the debtor at his word that he has no such unexpired higher tier document, with no effective way to confirm this representation. In addition if the debtor subsequently obtains a higher tier document, the debtor's name may change (if a search conducted using the name in the new document would not reveal filings made using the lower tier name) and the security interest would become unperfected with respect to collateral acquired more than four months later. This is true, perhaps to a lesser degree, with regard to use of the name in second- and third-tier identification documents. The "only if" approach, therefore, may lead to the result that lenders will require all their individual debtors to have a "first-tier" driver's license, which would reduce the availability of credit to those debtor's that cannot produce a "first-tier" identification document.[38]

For all of these reasons mentioned above, the Committee ***<u>unanimously and strongly</u>*** urges the ULC to reject the "only if" approach.

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[36] The final step in the cascade uses the "form of name" approach set forth as Alternative B2. It is independent from the remainder of the "only if" approach and can be deleted or revised without affecting the remaining provisions. As indicated by Reporter's Note 1 to the Discussion Draft's presentation of the "only if" approach, the inclusion of this form-of-name level as the final level of the cascade is based upon the approach taken by the filing office regulations of some Canadian provinces.

[37] This is the result that would be produced by application of the existing four month rule in Section 9-507(c), as modified by new paragraph (d). *See* Discussion Draft at 39.

[38] Furthermore, even if a lender insists that its debtor must have a first-tier document for the application of credit, the lender is still forced to rely on the debtor for the full disclosure of any name changes or the validity or currency of the identification document, particularly if a state provides no way for a lender to verify this information (*e.g.*, if a state DMV office does not make driver's license information publicly available or if such information can be obtained only with significant time and/or expense). *See* discussion of this point earlier in this Part V. This could lead to less, not more certainty, in determining the correct name for UCC filings against individual debtors.

VI. Alternative C: The "Priority" Approach

The Committee unanimously opposes the "priority" approach. It is clear from the Discussion Draft that significant, widespread changes to Article 9 would be required to implement the "priority" approach. While this factor alone is not dispositive in the Committee's rejection of the "priority" approach, the Committee does believe that subjecting Article 9 to such a drastic increase of complexity to address the individual debtor names issue is not advisable. The "priority" approach would introduce a novel conceptual framework to Article 9 that practitioners, judges, lenders and others who operate within Article 9 will be unfamiliar with and that will require a significant amount of effort by these persons to grasp the complexities and nuances of the "priority" approach and its consequences.

The "priority" approach also introduces difficult choices necessary to avoid circular priority issues. For example, the "priority" approach modifies the basic priority rule in Section 9-322(a)(1) to state that as between competing security interests perfected by filing, a security interest perfected by a low-priority filing is subordinate to a security interest perfected by a high-priority filing, regardless of the order in which they are filed. However, as noted in the Discussion Draft, unless low-priority filings are also made subordinate to security interests perfected by a method other than filing (*e.g.*, possession), the existing "priority" approach can result in circular priority, as illustrated by this example from the Reporter:

> Suppose, for example, that after SP-1 perfects by a low-priority filing, SP-2 perfects by taking possession. Under the first-to-file-or-perfect rule, SP-1's perfected security interest has priority over SP-2's. Thereafter, SP-3 perfects by a high-priority filing. Under the first-to-file-or-perfect rule, SP-2's security interest is senior to SP-3's; however, under the new exception in subsection (a)(1) [relating to low-priority filings], SP-3's security interest would be senior to SP-1's, which is senior to SP-2's, which is senior to SP-3's, etc.[39]

This scenario illustrates two anomalous choices that arise under the "priority" approach: either one must accept the potential for this kind of circularity or one must accept the result whereby a secured party that has perfected its security interest in goods by filing might be defeated in a priority contest by a secured party that later obtains possession of the goods but does not file a financing statement.

A related problem can occur with PMSIs. For example, assume SP-1 files against the debtor's name set forth in the relevant identification document in the cascade (the "ID Name"), SP-2 has a PMSI and files against the debtor's correct name (but not the ID Name), and then SP-3 files against the debtor's ID Name. If SP-2's PMSI loses to SP-1's security interest, then there will be no circularity problem but PMSI priority will not be as strong under the "priority" approach as it is under current law (unless the PMSI lender files under the debtor's ID Name). If SP-2's PMSI has priority over SP-1's security interest (thereby preserving the important priority status Article 9 gives to PMSIs), then an anomaly results. Either SP-3 beats SP-2 and there is a circularity or SP-2 beats SP-3 and the priority that SP-3 expected by filing under the ID Name is not achieved, in which case the goal of giving both filers and searchers one ID Name to use and rely upon is undermined.

Because of its complexity and its departure from the existing Article 9 priority framework, the "priority" approach carries significant risk of non-uniform adoption. While non-

[39] Discussion Draft at 56.

uniformity is possible with each of the potential approaches to the individual debtor names issue, its consequences are particularly problematic with respect to the "priority" approach. Non-uniform priority rules can lead to inconsistent outcomes among creditors with respect to the same collateral, depending on where the collateral happens to be located. Specifically, and as the example in Reporter's Note 9 to the "priority" approach points out,[40] a secured party with a high-priority filing against goods may trump a secured party with a low-priority filing against those goods while they are located in a jurisdiction that has adopted the "priority" approach, but the first secured party may not enjoy the same priority over the second secured party with respect to similar goods located in a jurisdiction that has not adopted the "priority" approach. The inconsistent outcomes on priority can even extend to the same goods if they are moved from a jurisdiction that has adopted the "priority" approach to one that has not. These varying priority rules with respect to the same types of collateral, and the shifting of priority results with respect to the same items of collateral that move across jurisdictions, are significant flaws of the "priority" approach in that they introduce uncertainty to secured creditors with respect to their level of priority.

Furthermore, even if one looks past the unpredictability in priority outcomes that would arise from non-uniform enactment of the "priority" approach, this approach suffers further in that it does not deliver on the promise of priority that it purports to afford secured parties who wish to avail themselves of the advantages of a high-priority filing. The difficulties pointed out by the Committee in its critique of the "only if" approach in Part V raised by inconsistency between governmental agencies' respective treatments of special characters, field length and name fields carry over to the "priority" approach as well, and filers may not be able to achieve the high-priority filing status with certainty as a result of this inconsistency.

As with the other identification-based approaches, and as discussed above in Part V as to the "only if" approach, the certainty provided in perfection and priority depends upon the debtor's providing complete information regarding the debtor's most current identification documents, and whether the debtor has more than one such document in the priority cascade. The difficulty in verifying that the debtor has provided a complete set of all applicable identification documents—a problem that hinders the "only if" approach—likewise handicaps the "priority" approach because it potentially frustrates a secured party's objective of achieving priority.

Continuing priority can be affected not only by a debtor moving to another state and obtaining a new driver's license, but also by the expiration of a driver's license, the re-issuance of a driver's license in a new name, or the issuance of a new source document with a different name at a higher tier in the waterfall. This is yet another weakness that the "priority" approach shares with the "only if" approach. It is also unclear how the "priority" approach would address a situation in which a name change does not result in a filing becoming "seriously misleading" (and therefore does not result in the security interest becoming unperfected) but does result in such filing failing to satisfy the requirements for a high-priority filing. A change in priority status resulting from a shift in the underlying filing from high-priority status to low-priority status would further complicate the "priority" approach's already cumbersome rules.

In summary, because the "priority" approach may fail to fulfill the promise of priority to high-priority filers under a variety of circumstances, because of the complex, significant changes to Article 9 that would accompany adopting this approach, and because of the substantial

[40] *See* Discussion Draft at 60.

problems that would result from non-uniform adoption, the Committee ***unanimously and strongly*** urges the ULC to reject the "priority" approach.

VII. Alternative B2: The "Form of Name" Approach

The "form of name" approach, labeled as Alternative B2 in the Discussion Draft, is a simple rule that provides that a financing statement which sets forth the debtor's surname, first given name and first initial of the second given name, if any, is sufficient. The rule, therefore, implicitly provides that filers need not include a suffix to the debtor's name (*e.g.*, Jr., or III), a full middle name, or more than one middle initial in their filings, and would overrule cases to the contrary.[41] As a result, the approach would provide some guidance to filers and limit somewhat the burden on searchers, and it is unanimously supported by the Committee. The Committee notes that the middle initial rather than full middle name approach is prescribed for individual tax returns on IRS Form 1040.

There are four principal benefits to the "form of name" approach. First, the rule is very easy to draft. In fact, it requires amending only one section of Article 9—Section 9-503—and adds only 54 words. Second, it creates little, if any, problem with respect to transition. This is because existing filings that comply with the rule are very likely to be effective under present law,[42] either because they display enough of the debtor's correct name or because they would be disclosed by a search under the debtor's correct name using the filing office's standard search logic. Indeed, it is likely the case that most of the uncertainty felt by secured parties today arises out of questions about how to present the debtor's name, rather than out of doubt as to the debtor's actual name. This solution would deal directly with the problem actually faced in today's practice.

Third, in contrast to all the other amendments in the Discussion Draft dealing with the name of an individual debtor, the "form of name" approach does not increase the likelihood of a change in the debtor's name. All of the other amendments would alter Section 9-507. These amendments provide that a change in the debtor's identification document, such as a driver's license, may constitute a name change. While the "form of name" approach does not rule out this as a possibility, just as it is a possibility under current law, it does not expressly treat a change in the debtor's identification documents as a change in the debtor's name. This is because the approach does not base the debtor's name (for the purposes of filing a financing statement) on a current identification document.

Fourth, the approach is appropriate as a stand-alone change to the text, and is also compatible with—and could be combined with—any of the other approaches. If, for example, the "safe harbor" approach were adopted, the "form of name" approach could become a component of that approach. Doing so would make it clear that even if the debtor's identification document provides a second given name in full, more than two given names, or a suffix, none of those would be needed in a filed financing statement. And in situations where a lender did not take advantage of the safe harbor (for whatever the reason, such as the debtor's failure to provide the debtor's most current identification documentation), the "form of name" approach would continue to provide guidance as to determining the correct name.

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[41] *See, e.g., In re* Stewart, 2006 WL 3193374 (Bankr. D. Kan. 2006) (filed financing statement identifying the debtor as "Richard Stewart" was ineffective because the debtor's legal name is "Richard Morgan Stewart IV" and a search under the debtor's legal name did not uncover the filing).

[42] This assumes, of course, that the names used are in fact the debtor's names and that they are spelled correctly on the financing statement.

The approach does not, however, identify a source document from which a filer (or searcher) can reliably determine the debtor's current name for the purposes of the filing system. Therefore, the approach does not provide absolute certainty about what the debtor's name is or how to spell it.[43] Further, the approach could be usefully enhanced by adding provisions that deal with the problem of accented letters or special characters and that provide guidance on what to do if the debtor has more than one surname.[44]

Despite these limitations, and reiterating that it is far from clear that there really is a significant problem with current law, the Committee ***unanimously*** recommends the "form of name" approach—whether in conjunction with the "safe harbor" approach or as a stand-alone approach—as an incremental improvement over the current statutory framework.

VIII. Alternative B1: The "Safe Harbor" Approach

It is the opinion of the Committee that the "safe harbor" approach, as set forth in the Discussion Draft as Alternative B1, represents the best approach to individual debtor name issues.

The "safe harbor" approach provides relief to filers by articulating a clear rule that, if followed, would result in perfection—without the need to file against all possible variations of an individual debtor's name. This is the principal benefit of the "safe harbor" approach and is accomplished by adding a new rule (the safe harbor) as Section 9-503(g), which provides that a financing statement that does not set forth the individual name of the debtor (*i.e.*, it does not satisfy the present rule set forth at Section 9-503(a)(4)(A)) is nonetheless sufficient if it provides the name of the individual on the most recently issued driver's license or identification card. No relief is given to searchers, who must continue to search against all possible "correct" permutations of an individual's name.

There are several additional benefits to the "safe harbor" approach. First, it is flexible enough to allow a lender to use the existing rule to the extent that the safe harbor is not available. This may be useful to the extent that there are states where the character set, the number of characters or the name fields used in the driver's license or identification card are not compatible with those used in the filing office.[45]

Second, as a practical matter, the safe harbor rule is likely to reduce the risk of difficult-to-find filings against different but correct individual debtor names to the extent that the use of

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[43] We repeat here the observation that other alternatives exists for identifying the correct debtor name variants, such as the free filing office index searching or credit reports. Furthermore, as indicated in note 19, *supra*, lenders already have a means of establishing individual debtor name variants via the individual debtor credit reports.

[44] In some cultures, for example, children acquire and use both a maternal and paternal surname. A review of a sample of California filings against individual debtors (*see* note 11, *supra*) indicates that filers are addressing this issue by indicating two names in "middle name" or "first name" fields of the UCC-1 forms.

[45] *See* the discussion at Reporter's Note 5 on page 37 of the Discussion Draft. We are hopeful that, to the extent that states adopt the safe harbor or other approach that uses the driver's license or identification card as the source document, steps will be taken to ensure that these kinds of issues are avoided. However, we recognize that this can only be done with some significant cost to the affected state government agencies, and, furthermore, until such time as there is a 100% correlation between the state government agencies, some filers may find themselves without any benefit of the safe harbor rule, and would be forced to file in the same manner as if the rule were not enacted.

the debtor's name as set forth in the driver's license or identification card became the *de facto* standard used by lenders.[46]

Third, the "safe harbor" approach is particularly useful with respect to transactions in which the creditor acquires a PMSI in non-inventory goods and associated software. In such transactions, a secured party with a perfected PMSI can qualify for "super-priority" over the rights of a secured party with a previously filed financing statement.[47] Thus, in these transactions, a lender need only assure itself that it has achieved timely[48] perfection. No search is necessary to assure priority. The availability of the safe harbor to perfect a security interest against an individual debtor, then, will greatly assist lenders' efforts to make these transactions efficient.[49]

Fourth, there may be situations in which secured creditors wish to assure that their lien is perfected but are willing to take the risk of a prior perfected lien. For example, there may be transactions which are simply too small or too routine to justify the cost and time spent on lien searches and the attendant attempt to determine the correct name. In such cases, the secured party may be satisfied with confirmation of perfection only (*e.g.*, in defense of bankruptcy trustee avoidance actions) and may be willing to rely on the debtor's covenants and representations that there are no prior perfected liens against the collateral.[50]

The "safe harbor" approach does have shortcomings, however. First, and most importantly, it does not provide any relief to searchers, who must continue to search under all possible iterations of the "correct" name; this may be mitigated somewhat by the availability of online, low-cost searching options offered by state filing offices.[51]

Furthermore, the "safe harbor" approach does not provide relief to filers to the extent that the approach does not address the potential mismatch between the formatting of an individual debtor's name on the source identification documentation and the filing office's data entry and

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[46] Note, however, the approach relies on the filer receiving the most current version of an individual debtor's identification document. Therefore, the filer will have to rely on the individual debtor to provide the most current version of such document—which reliance would not seem to eliminate the uncertainty of the correct name, as the amendment proposes. This weakness besets the "only if" and "priority" approaches as well, but the impact under those two approaches is more severe because there is little or no protection if the filer uses the "correct" name of the debtor.

[47] *See* Section 9-324.

[48] To be entitled to super-priority status, a PMSI must be perfected within 20 days after the debtor receives possession of the collateral (in the case of a PMSI in goods other than inventory or livestock) or at the time the debtor receives possession of the collateral (in the case of a PMSI in inventory or livestock). Sections 9-324(a)(1), 9-324(b)(1) and 9-324(d)(1). In the case of a PMSI in inventory or livestock, the secured party is also required to given notice to the holders of conflicting security interests within a certain timeframe in order for the PMSI to enjoy super-priority status. Sections 9-324(b)(2)-(4) and 9-324(d)(2)-(4). For these inventory and livestock PMSIs, a search of the individual debtor is necessary to assure the PMSI has super-priority status because the PMSI holder must determine whether there are any holders of conflicting security interests to whom notice must be given.

[49] Note that this is also true under the current regime—a filer that has satisfied itself that it has filed under the "correct" individual debtor name need not search to establish priority in a PMSI filing. This, of course, still begs the question what is the "correct" debtor name, but as mentioned in note 45, *supra*, and the accompanying text, the "safe harbor" approach does not eliminate this uncertainty so long as there is less than 100% correlation between the formatting of an individual debtor's name on the source identification documentation and the filing office name field, and so long as there is any question as to what is the most current form of source identification documentation.

[50] This same argument also supports adhering to the current individual debtor name filing regime.

[51] *See* note 1, *supra*.

indexing capabilities or to the extent that as there is any question as to the most current version of an individual debtor's source identification documentation. For example, a debtor may provide a driver's license or identification card that is not the most current version, and the secured party (depending on the state) may be unable to discover independently that it has not received the most current version. However, in contrast to the "only if" and "priority" approaches, a filer under the "safe harbor" approach that relies on a driver's license or identification card that is not the most current version might still attain perfection if the source document it relies upon contains the individual name of the debtor under Section 9-503(a)(4)(A)'s current rule.

The name change issues that impact the "only if" and "priority" approaches also affect the "safe harbor" approach. Specifically, if the debtor obtains a new license or identification card with a different name, or if the debtor allows the license or identification card to expire, this constitutes a name change that could result in the security interest becoming unperfected with respect to collateral acquired by the debtor more than four months after the name change. The Committee notes, however, that unlike the "only if" and "priority" approaches, if a name change triggered by an expiration or new issuance of a driver's license occurs, the secured party would not necessarily lose perfection or priority under the "safe harbor" approach if the original filing sets forth the individual name of the debtor under Section 9-503(a)(4)(A).

In spite of these shortcomings, the Committee recommends the safe harbor approach as a minor improvement on existing law, without adverse consequences. It is an approach that removes some uncertainty for filers, adds little complexity to the UCC, and should present minimal transition-rule problems.

IX. Conclusion

The Committee has vigorously discussed and debated the individual debtor name issues over an extended period of time. The Committee favors the safe harbor approach, as it removes some uncertainty for filers, adds little complexity to the UCC, and should present minimal transition-rule problems. The Committee arrived at that conclusion recognizing that a number of Committee members maintain that a measured, "minimalist" approach is the better outcome and that adoption of the steps described in note 1, *supra*, would be a better approach. With a nod toward doing less rather than more violence to the current system (a system, the Committee notes, that has functioned without significant pitfalls from individual debtor name issues for decades), the Committee unanimously supports the "form of name" approach as an incremental improvement that could be combined with the "safe harbor" approach or implemented on a stand-alone basis. And, indicative of its strong opposition to both the "only if" and "priority" approaches, the Committee unanimously rejects these two approaches and reiterates the Committee's substantial concerns about the damage to the UCC and the confusion in the secured lending community that would result from these approaches.

The Committee thanks the ULC and the Review Committee for their consideration of the Committee's views.

Sincerely yours,

Patrick M. Costello
UCC Committee Co-chair

Exhibit A

Individual Debtor Name Case and Filing Survey

Since Revised Article 9 became effective, eleven reported cases have dealt with individual debtor name questions. Of these cases, two dealt with a spelling error in the debtor's name,[52] two addressed ambiguities arising out of non-Anglo cultural naming conventions,[53] one involved a filing that was held insufficient for failure to include the debtor's middle name,[54] and six involved filings using nicknames. Of the cases involving filings using nicknames, four held that such filings were "seriously misleading" because a search in the debtor's "legal" name would not reveal the "nickname" filings.[55] The other two cases ignored Article 9's test for determining whether a filing was "seriously misleading" based on whether a search of the filing office records under the debtor's "correct" name would find the "nickname" filing. Instead, these courts emphasized that the secured party had actual knowledge of the "nickname" and should have conducted a search using that name.[56] A review of the reported cases suggests that

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[52] *See* Pankratz Implement Co. v. Citizens Nat'l Bank, 130 P.3d 57 (Kan. 2006) (financing statement that provided debtor's first name as "Roger" instead of "Rodger" held insufficient due to incorrect name); Hopkins v. NMTC Inc. (*In re* Fuell), No. 06-40550, 2007 Bankr. LEXIS 4261 (financing statement filed under name of Andrew Fuel instead of Andrew R. Fuell held insufficient due to incorrect name). The *Fuell* court did not discuss, or even note, the lack of the middle initial.

[53] *See* All Bus. Corp. v. Choi, 634 S.E.2d 400 (Ga. Ct. App. 2006) (filing under name "Gu, Sang Woo" instead of "Sang Woo Gu"); Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc., 48 Cal. Rptr. 3d 868 (Cal. Ct. App. 2006) (filing under name "Armando Munoz" instead of "Armando Munoz Juarez"). In *Corona Fruits*, the court rejected an argument that the "debtor's name" should be determined based on Hispanic cultural naming conventions, stating, "The 'naming convention' is legally irrelevant for UCC-1 purposes and, if accepted, would seriously undermine the concept of lien perfection." 48 Cal. Rptr. 3d at 871.

[54] Morris v. Snap On Credit, L.L.C. (*In re* Stewart), No. 04-16838, 2006 Bankr. LEXIS 3014 (Bankr. D. Kan. 2006) (lender's financing statement reflects debtor used name "Chris Jones" in connection with loan transaction, but debtor filed bankruptcy petition under the name "Christopher Gary Jones").

[55] *See, e.g.*, Parks v. Berry (*In re* Berry), No. 05-14423, 2006 WL 2795507 (Bankr. D. Kan. 2006), *supplemented by* 2006 WL 3499682 (Bankr. D. Kan. 2006) (finding that financing statement referring to "Mike Berry" is seriously misleading because official UCC search conducted by the bankruptcy trustee on the Kansas Secretary of State's online system under "Michael R. Berry" yielded no reference to secured party's financing statement); Genoa Nat'l Bank v. Sw. Implement, Inc. (*In re* Borden), 353 B.R. 886 (Bankr. D. Neb. 2006) (in adversary proceeding to determine priority dispute between an earlier-perfected secured party with blanket lien filed under the name "Michael Ray Borden" and purchase-money lien filed under the name of "Mike Borden," use of the name "Mike Borden" rendered the purchase-money financing statement seriously misleading and therefore ineffective to perfect); Morris v. Snap-On Credit, LLC (*In re* Jones), No. 05-16909, 2006 WL 3590097 (Bankr. D. Kan. 2006) (holding that financing statement filed under name "Chris Jones" was seriously misleading because bankruptcy trustee's official UCC search, using the "standard search logic" of the Kansas Secretary of State's office, for liens against debtor who filed bankruptcy petition in the name of "Christopher Gary Jones" did not reveal creditor's financing statement). Clark v. Deere & Co. (*In re* Kinderknecht), 308 B.R. 71, (B.A.P. 10th Cir. 2004) (financing statements under 'Terry J. Kinderknecht' instead of 'Terrance Joseph Kinderknecht' were insufficient.)

[56] *See* Nazar v. Bucklin Nat'l Bank (*In re* Erwin), No. 02-10227 2003 WL 21513158 (Bankr. D. Kan. 2003); People's Bank v. Bryan Bros. Cattle Co. 504 F.3d 549 (5th Cir. 2007). *In re Erwin* was decided by a bankruptcy court, predicting how a Kansas court would rule on the issue. Subsequently, the Kansas Supreme Court rejected the reasoning and the result in *Pankratz Implement Co. v. Citizens National Bank*, 130 P.3d 57 (Kan. 2006). The court in *Peoples Bank v. Bryan Brothers Cattle Co.* found that the financing statement was not seriously misleading, relying on pre-Revised Article 9 cases. The court explained:

> Peoples was put on inquiry notice that a security interest in the property of "Brooks L. Dickerson" could be listed under the name "Louie Dickerson" Dickerson held himself out to the community as Louie Dickerson, and he used this name in bank accounts, bills of sale, and with others with whom he did business. This is important because evaluating whether a filing is seriously

the predominant cause of individual debtor name problems, at least as disclosed by the reported cases, is filer error, not a defect in the statutory rules or their expression.[57]

It appears that when secured parties erroneously file against incorrect individual debtors' names, such mistakes are not necessarily related to confusion over how to determine the "correct" name. One source (the "Vermont Report") surveyed 53,530 Vermont financing statements containing 40,618 different individual names filed from July 1, 2001 to June 2006.[58] The source found issues with respect to the first names of individual debtors in about 7,000 (13%) of the filings against individual debtors, but concluded that most of these issues arose from the filer filing against what appears from the record to be a nickname, rather than against the debtor's correct first name (4,949 filings or 9% of the total filings, or 70% of the questionable individual debtor name filings). The Vermont Report notes, however, that names that are common nicknames can be the actual name (and not a nickname) of the individual.[59] A much smaller percentage of the questionable individual debtor name filings in Vermont (1,302 or 2.4% of the total) were due to "uncommon" first names (defined in the Vermont Report as names used by less than 10% of the population according to U.S. Census Bureau statistics). The presumption that the uncommon names are in error would appear to point to filer error as well (*i.e.*, filers are misspelling individual debtor names). Other individual debtor name errors cited in the Vermont Report are multiple last names (409 filings in total or less than 1%) and first initial only (177 filings in total). It would appear that only the "multiple last name" group of filings, less than 1% of the filings in Vermont, could be attributed to non-filer error (*i.e.*, errors

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> misleading requires a court to examine the facts in a particular case, although the focus should be 'on whether potential creditors would have been misled as a result of the name the debtor was listed by' in the financing statement" (citations omitted).

504 F.3d at 559. The problem with the court's analysis is that the secured creditor's actual or constructive knowledge of alternate names used by a debtor should be irrelevant when a court determines whether the creditor used "the individual debtor's name" under Article 9. Article 9's rules are not based on the notion of "inquiry notice," or, for that matter, even knowledge of an individual debtor's alternate name or nickname. Moreover, a particular subsequent secured party's knowledge of the use by a debtor of a nickname, without more, should not be relevant to the question whether the nickname made the financing statement seriously misleading (under the definitional approach that a nickname is not the debtor's name) and also should not be determinative of (although possibly might be relevant to) the question whether the debtor's use of the nickname has been of such a consistent and continuous nature and with the requisite abandonment intent as to convert that nickname into the "individual . . . name of the debtor" as referred to in Section 9-503(a)(4).

[57] For example, in *Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc.*, the secured creditor had a photo identification and identification documents showing that the debtor's name as "Armando Munoz Juarez"; nevertheless, the financing statement was filed under the name "Armando Munoz." 48 Cal. Rptr. 3d 868, 869 (Cal. Ct. App. 2006). In describing the facts of the case, the court wrote:

> Elodi Corona, appellants' account manager, prepared the UCC financing statements and testified: "I don't know why I didn't put his [*i.e.*, debtor's] last name [on the UCC-1 financing statement]. I could have made a mistake . . . ." Ms. Corona was asked: "So the last name on all the Agreements is Juarez, but on the U.C.C. 1 Forms, you filed them as Munoz?" Ms. Corona answered, "Yes."

Id. at 871. Note that this testimony, while an unhelpful admission, does not address the argument that Munoz, the patronymic surname was, thus, the correct "last name" rather than the metronymic Juarez.

[58] Ernst Publishing Co., LLC, *Compliance with Rev. UCC §9-503, 506(b) in Vermont: A Technical Report*, UCC REVISED ARTICLE 9 ALERT, Issue 06-2 (August 2006).

[59] "4,949 (9% of total) financing statements contain one of the 225 nicknames listed in Appendix 1. Of course, some of these names, such as Jack or Dan, may also be actual first names, but a secured party must take care to be certain that such a name is not a nickname." *Id.* at 6.

that could not be resolved with the proper exercise of due diligence and care by the filer). The Vermont Report concluded that 10-15% of individual debtor names are seriously misleading and advocated that secured parties exercise greater due diligence when filing. It appears that most of the questionable individual debtor name filings cited in the Vermont Report resulted from filer error.[60]

[60] *Id*.