DETERMINATION OF INDIVIDUAL NAME UNDER REVISED ARTICLE 9
AMERICAN BANKERS ASSOCIATION WORKING GROUP POSITION PAPER

When enacted, Revised Article 9 provided many bright line tests for the secured lending industry. As such, it helped facilitate commerce as lenders could be assured of the primary rules that affect their secured financing throughout the United States. For example, under the only if rule pertaining to registered entities, secured lenders knew that they must file a financing statement on the name appearing on the public record.

There is a similar "only if" rule for names of individuals, but Revised Article 9 identifies no source of name to determine which name of an individual debtor should be used for filing purposes. Lenders do not know which name or how many variations of the name they need to search upon to find other prior filed financing statements against an individual to whom they are considering providing secured financing. This causes confusion, cost and loss for the secured lending industry. In default or workout situations, some lenders have fully litigated this issue as reported in at least ten cases nationwide. But in many more non-litigated transactions, some lenders may have compromised their loan recovery or incurred actual write-offs because they subsequently determined that (i) their financing statement filed against a named individual did not appear upon a later search using standard state search logic or was not in a priority position; or (ii) they were unwilling to incur litigation costs in cases that involved uncertainty on this point.

The ABA Working Group represents secured bank lenders throughout the nation who are interested in revisions to Revised Article 9 that would (i) provide a definite source of name of an individual debtor; (ii) be simple and straightforward for lenders to follow and (iii) be easily implemented by a lending institution's loan operations center.

The Article 9 Joint Review Committee chaired by Ed Smith provided the ABA Working Group with three alternative revisions to Revised Article 9 pertaining to determination of a debtor's individual name. The alternatives are known as the "safe harbor" rule, the "only if" rule and the "priority" rule. The ABA Working Group considered all of the alternatives and initially found much favor in the "priority" rule. It provides much definition for determination of an individual's name with the added comfort of a back-stop safe harbor. But the rule also adds circular priority concerns that cannot be easily overcome, and the ABA Working Group has withdrawn its support for the "priority" rule.

The "safe harbor" rule (Alternative B1 - Name on official document) provides some comfort to secured lenders in that they can be assured of perfection if they file upon the name appearing on an individual debtor's driver's license or a state ID. The other version of the "safe harbor" rule (Alternative B2 - Form of Name) fails in that regard because there is no designated source to determine the name of an individual.

So the "safe harbor" rule (Alternative B1) provides lenders comfort in the knowledge that they can achieve perfection to withstand a challenge by a trustee in bankruptcy. The "safe harbor" rule does not, however, address priority and does not provide assurance that a lender has obtained a first perfected secured position. Although the "safe harbor" designates one possible means of perfection, it does not by any means eliminate other variations of a name that could suffice as a debtor's individual name. Whereas it might reduce the search burden somewhat, it does not provide as much certainty in searching and is not a simple approach to which inexperienced or even experienced lenders can follow nor their backroom personnel adhere to.

In contrast to the "safe harbor" rule, the "only if" rule as provided to the ABA Working Group by the Official Reporter (and subsequently modified) provides a bright line test as to the name of an individual debtor. It provides more assurance to secured lenders from both a perfection and priority standpoint. It is simple, teachable and easy to implement from an operational standpoint.

The "only if" rule provides the secured lending community with a definite source of name, that being the individual debtor's name as it appears on the debtor's driver's license. This is almost exclusively a commercial lending issue and for commercial lending to individual debtors, the name on a driver's license will suffice.[1] Statistically, nearly 90% of Americans have driver's licenses. Of that population who seek commercial financing secured by filing type collateral, the ABA Working Group estimates that nearly 100% of such individual debtors will have a driver's licenses or state ID. Lacking that, secured lenders will resort in the rarest of instances to the form of name, the third rung in the "waterfall".[2, 3]

The secured lending community is seeking greater certainty in determining the name of an individual for filing purposes. Revised Article 9 provides such definition for registered entities and can do so for individual debtors in a clear and simple approach. By employing the "only if" rule with an appropriate transition period, secured lenders should be able to timely modify any existing filings that are deficient and save time and money on a go-forward basis for all future filings. Accordingly, the ABA Working Group supports a modified version of the "only if" rule.

American Bankers Association Working Group
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[1] Most financing of consumers secured by filing-type collateral is on a purchase money basis. As such, no financing statement need be filed. 9-309(1); 9-310(b)(2)

[2] The ABA Working Group has revised the Official Reporter's "only if" rule to eliminate a passport and instead retained the "form of name" provided by the Official Reporter as the third rung in the "waterfall," for that rarest of instances, the minority of individuals with no driver's license or state ID. The ABA Working Group recommends that accompanying guidelines would be appropriate to make "form of name" useful and contemplates continued discussions regarding this. Also, the ABA Working Group notes that there is no need to ever refer to a passport for domestic commercial individual borrowers and the minority will be further reduced in number where a foreign individual might seek secured financing because such financing would typically be secured by possessory, non-filing type collateral.

[3] The other substantive modification to the Official Reporter's draft of the "only if" rule is the elimination of the provision stating that expiration of a driver's license is a name change. The ABA Working Group believes that expiration causing a name change would put undue burden on the lending community to monitor expiration dates that have no relationship to the secured financing. The ABA Working Group felt that the industry could better support placing the burden upon subsequent searching parties to determine the individual debtor's name on a driver's license, whether expired or not.