Improvements (?) to the UCC Article 9 Filing System

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Of the recently approved changes to the Official Text of UCC Article 9 (the "Amendments"), probably the ones that will have the most impact on daily practice are those made to Part 5, the filing provisions. Indeed, it was the (misplaced?) focus on the name of a debtor who is an individual that both forced the amendment process into being and occupied the bulk of the time and energy that went into that process. After less than ten years since the major re-write of Article 9 in the Revision[1] process, and given the great success of Revised Article 9's nationwide adoption in a virtually uniform text, within an extraordinarily short time frame and with an almost unanimous single effective

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1. References to the Revisions and to Revised Article 9 refer to the Official Text approved by the UCC's sponsors in 1998, which, by and large, went into effect in all states during 2001.

date, the Code's sponsors, The American Law Institute and the Uniform Law Commission, were not at all eager to tamper with the text. They understood both the magnitude of the effort that would be required to generate nationwide adoption and the strong likelihood that uniformity would be lost in the amendment process (because of failure of some state legislatures to act, failure of some to adopt the recommended text with perfect fidelity and the risk that other local changes would be made in the legislative process). It was the pressure from a particular group and the adoption of poorly drafted 'driver's license' provisions by a handful of states[2] that pushed the sponsors into embarking on this amendment process.[3] The sponsors attempted to limit the potential for damage by limiting the scope of the charge given to the Review Committee[4] and by requiring the project to be completed in a very short time frame.[5] Also significant in driving the determination to engage in the amendment process was the wish of the UCC filing officers to have the statute expressly require that transmitting utility status (carrying with it indefinite effectiveness of the financing statement) be declared in the initial financing statement.[6] That said, the Reporter and the Review Committee did a superb job with respect to the issues that were addressed, providing successful, carefully crafted resolutions in the recommendations for changes in the Official Text and the Official Comments.

2. Effective June 16, 2007, Texas adopted a driver's license provision, seemingly intended to provide a safe harbor. *See* TEX. BUS. & COM. CODE ANN. § 9.503(a)(4) (West 2008). That text is far from ideal, and it is likely that there will be some further modification in Texas, possibly adoption of the Amendments. Had this provision simply remained a Texas aberration, notwithstanding the fact that Texas is an important state with a high volume of UCC filings, it would have done little harm nationally. However, enthusiastic proselytizing efforts soon began to cause the spread of the disease. *See* discussion of the Tennessee and Nebraska debacles *infra* notes 31-32 and accompanying text. These ill thought through and poorly drafted provisions illustrate only too well the value of the official UCC drafting process, which brings to bear nationwide public exposure and discussion, substantial deliberation and great substantive and drafting expertise.

3. *See* U.C.C. Article 9 Reporter's Prefatory Note (Proposed Revisions 2010); *see also* Edwin E. Smith, *A Summary of the 2010 Amendments to Article 9 of the Uniform Commercial Code*, 42 UCC L.J. 345 (2010).

4. The initial mandate to the Review Committee was limited to matters listed on the U.C.C. Article 9 Review Comm., *Statutory Modification Issues List* (June 24, 2008), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucc9/2008june24_issues.pdf.

5. *See* U.C.C. Article 9 Reporter's Prefatory Note (Proposed Revisions 2010); *see also* Smith, *supra* note 3.

6. *See* discussion *infra* Part III.A.

This paper will deal only with the filing-related changes. It will do so in three segments: (1) individual debtor names—the only controversial issue; (2) other debtor names; and (3) other filing-related issues.

This paper supports the adoption of the Amendments, exactly as proposed by the UCC's sponsors, in all respects except for the changes proposed with respect to individual debtor names. As to those changes, this paper opposes strongly the adoption of a mandatory driver's license rule (Alternative A); this paper proposes the adoption of a solution that is far simpler than the safe harbor driver's license rule (Alternative B), is completely compatible with current practice, and is the least likely to do any harm or even generate litigation—a solution that is based on the drafting done by the sponsors for Alternative B but with fewer changes to the Official Text; this proposed solution is here called the 'light touch.' The author believes that the existing Official Text is manageable and has been quite successful for over five decades, and, thus, that no change at all is absolutely required. To coin a phrase, if it ain't broke, don't fix it. If there is a problem that needs fixing, the 'light touch' goes most of the way to solving it, without the undesirable introduction of driver's licenses into the Article 9 legal structure.[7]

I. INDIVIDUAL DEBTOR NAMES—A SOLUTION IN SEARCH OF A PROBLEM?

One of Article 9's major innovations was the adoption of a notice filing system. The key to the notice filing system is the debtor's name, as that is the element under which financing statements are indexed and, hence, discoverable.

Based on forty years of experience and taking into account realized and anticipated technological developments, the provisions relating to the filing regime were substantially refined and elaborated in Part 5 of Revised Article 9.[8]

7. The question for the Legislator is not whether current law provides perfect certainty in all situations but rather whether introduction of the driver's license name, especially on a mandatory basis under Alternative A, adds so much certainty that it justifies accepting the risks of unexpected consequences, changes in practice, the likelihood of litigation to clarify the new regime, and instability due to absence of coordination between the UCC filing offices and motor vehicle license issuing offices (which are not concerned with UCC policies, which are currently in a state of flux and which differ from state to state).

8. *See* Harry C. Sigman, *Twenty Questions about Filing under Revised Article 9: The Rules of the Game under New Part 5*, 74 CHI.-KENT L. REV. 861 (1999); Harry C. Sigman, *The Filing System under Revised Article 9*, 73 AM. BANKR. L.J. 61 (1999). Unless otherwise indicated, in this paper, (i) citations to Article 9 of the UCC are to the Official Text of Revised Article 9, Uniform Commercial Code 2008 (without regard to the

With respect to the debtor's name, former Article 9 required for sufficiency of the financing statement simply that it provide the debtor's "name."[9] This rule was reiterated by use of the phrase the "individual . . . name of the debtor."[10] The rule's seemingly absolute nature was alleviated somewhat by the provision that: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."[11] The Revisions introduced greater specificity with respect to the names to be provided in the case of debtors other than individuals,[12] continued to use the phrase "individual . . . name of the debtor,"[13] and elaborated on the error provision.[14] The effect of these changes was, at least in the context of registered organizations, to make the statute more precise, and clearly to shift[15] onto filers the burden of 'getting it right', away from the direction taken by some of the case decisions that had placed an almost open-ended burden on searchers (at least by positing the existence of a

Amendments), (ii) changes effected by the 2010 Amendments are referred to as "amended section 9-___" and cited as U.C.C. § 9-__" (Proposed Revisions 2010), and (iii) Article 9 as in effect prior to the adoption of the Revisions are referred to as "former § 9-__" and cited as U.C.C. § 9-__ (1999).

9. U.C.C. § 9-402(1) (1999).

10. U.C.C. § 9-402(7) (1999).

11. U.C.C. § 9-402(8) (1999).

12. U.C.C. § 9-503(a)(1)-(3) (2008) (providing rules for debtors that are registered organizations, decedent's estates and trusts or trustees acting with respect to property held in trust).

13. U.C.C. § 9-503(a)(4)(A) (2008).

14. U.C.C. § 9-506 (2008). providing in relevant part:

> (a) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.
>
> (b) Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) is seriously misleading.
>
> (c) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.

Id.

15. For an example of judicial recognition of this shift, see *In re Summit Staffing Polk County, Inc*., 305 B.R. 347, 354 (Bankr. M.D. Fla. 2003) ("Revised Article 9 requires more accuracy in filings, and places less burden on the searcher to seek out erroneous filings.").

'duty' to be a 'reasonable searcher'[16]). Section 9-506(c) introduced a narrow safe harbor for erroneous names that are discoverable by a search under the debtor's "correct" name.[17] This is the extent of the statutory guidance provided with respect to individual debtor names.

Some courts sought to deal with debtor's name cases by developing a "reasonably diligent searcher" test,[18] although, regrettably, many of the decisions did not reflect an understanding that particular outcomes would affect the statutory balance between filers and searchers. For the most part, however, this situation did not present unmanageable difficulties, as a searcher could easily search under several name variations and the filer could easily file against several name variations. There is no evidence that this limited degree of uncertainty either reduced the amount of available credit or significantly

16. This analysis represented a carryover from a conceptual approach based on notions of 'constructive notice' and whether a party had a 'duty' to observe particular conduct. The Article 9 filing system does not rely on constructive notice and nobody has a duty to file or to search; instead, the statute lays out the consequences of filing or failing to file a sufficient financing statement, and a competitor's priority or lack thereof does not turn on whether the competitor did or should have searched (although there might well be instances where, as a result of a search, the review of a financing statement might in fact result in a searcher gaining knowledge of some fact). *See also* U.C.C. § 9-331 cmt. 5 (2008) (noting that a search might be required of someone claiming holder in due course status in particular circumstances in order to satisfy the standard of "reasonable commercial standards of fair dealing" under the requirements of "good faith" as defined in section 9-102(a)(43)).

17. U.C.C. § 9-506(c) (2008). This limited safe harbor was introduced in the Revisions, applicable to organizations as well as individual debtors. The term "correct" was not found in any earlier version of Article 9, was not intended to cause a fundamental change in the debtor name requirement and was not placed in the statutory rules concerning sufficiency. *See also infra* note 22. The limited nature of this safe harbor is sometimes not fully recognized. For example, the court, in Wardin v. Hunter (*In re* Wardin), No. 08-21951-dob (Bankr. E.D. Mich. June 29, 2010), seems to believe that a search under the debtor's last name alone (an otherwise prudent methodology, though not available in all states, for a risk-averse prospective secured party, at least when not dealing with an ultra-common name such as "Smith") triggers the subsection (c) safe harbor and results in the blessing of any filing revealed by such a search. The statutory reference to "standard search logic" is applicable only to a search against the debtor's "correct name"—not to a search against any name provided by the searcher that is an acceptable search criterion in the particular state. Thus, a search under the last name only, while often acceptable, would trigger the safe harbor rule only if that name alone is the debtor's "correct name"—a rare instance of a debtor having a name composed of only a single element.

18. For a recent application of this test, see Wardin v. Hunter (*In re* Wardin), No. 08-21951-dob (Bankr. E.D. Mich. June 29, 2010), where the name provided was "Jon Wardin" rather than "Jonathan P. Wardin" and nevertheless held sufficient. The court refused to follow Kinderknecht v. Deere & Co. (*In re Kinderknecht*), 308 B. R. 71 (B.A.P. 10th Cir. 2004). *See also infra* note 27.

affected its cost. The worst this situation did was to occasion a slight increase in cost, as it obliged, at least in doubtful cases, both filers and searchers to make filings and run searches under more than one name variant. Given the low cost of searching and of adding some additional debtor names to a financing statement, these added costs are nominal in the context of a transaction in which taking and perfecting a security interest is otherwise justified.[19] Further, the legal problem was alleviated in many states by the pre-Revision practice of filing offices to accompany a response to a search under a specific name with a 'similar names in which you might be interested' list, a practice that was helpful to risk-averse searchers.[20] In addition, many (if not most) private search-service providers used very broad search logics and produced results for many 'similar' names. Also, improvements made to the standard paper financing statement forms in the 1990's and particularly in connection with the Revision process,[21] e.g., by making the name field more capacious, so as to not force filers to abbreviate, and by breaking up the name field for individual debtors into separate segments for "last" name/"first" name/"middle" names, as well as by providing more complete and detailed instructions, all served to diminish the scope of the problem. Many of these steps became more widespread as a result of the unanimous and virtually uniform adoption of Revised Part 5 of Article 9. One of the purposes of the Revisions was to decrease room for judicial maneuver by adoption of a clearer allocation of the burden onto the filer to get the name right rather than to burden the searcher with an obligation to creatively imagine all potential name variations and search under them, and, in the context of registered organizations, to provide still more certainty by requiring the exact name of the entity as provided on the public record of the state of organization.[22]

19. Discovering other name variants used by a debtor would not require extraordinary efforts; they would most likely be revealed by ordinary secured creditor due diligence—examining various identification documents, past tax returns and credit reports.

20. Not all states provided this service and the logic used to develop such lists varied from state to state. It is also the case that the author has been told by numerous filing officers over the years that many of their 'customers' have expressed the view that they would prefer to receive fewer rather than a broader range of possible hits.

21. This was one of the significant benefits of the development of the paper forms made nationally acceptable under U.C.C. § 9-521 (2008).

22. *See* discussion *infra* Part II.A regarding the further refinement of these registered organization provisions by the Amendments. The seeming strictness of this 'exact match' rule is alleviated by the adoption in many states of standard search logics that ignore so-called 'noise words', such as entity-designating endings (e.g., "corp.", "inc."), ignore "The" at the beginning of an entity name, ignore punctuation marks, are not case sensitive, etc. *See* MODEL ADMIN. RULES § 302.1 (2010) (promulgated by the International Association of

It was recognized during the Revision process that the same degree of certainty established for registered organizations could not be achieved with respect to names of individual debtors. It is definitely the case that one cannot say with absolute legal certainty that every individual has only one name.[23] To take the simplest example, is only one of the following "the" name of the current President of the United States: Barack Obama, Barack H. Obama, and Barack Hussein Obama?[24] In general, in the United States, the law does not

Corporate Administrators ("IACA"), generated in response to the adoption of Revised Article 9). Although some version of the Model Rules was adopted in the majority of the states, the practices are, regrettably, far from uniform throughout the nation; indeed, there are even variations among states that have adopted the same textual version of the Model Rules, arising from differing interpretations of the rules and the application of the rules in different sequences. In some states, no rules are published, and in many states the search logic is less transparent than it ought to be.

23. While the use of the term "correct" in section 9-506(c) arguably might be read to suggest that only one version of a name is sufficient, the term is consistent with a reading that there may be more than one correct name. Section 1-106 provides that "unless the context otherwise requires: (1) words in the singular include the plural, . . ." Moreover, as noted earlier, the term "correct" is not placed in section 9-503 statutory debtor name rule. Further, some courts have referred to a debtor's "legal" name. That term, however, does not have a definitive and nationally accepted meaning (the court, in Wardin v. Hunter (*In re* Wardin), No. 08-21951-dob (Bankr. E.D. Mich. June 29, 2010), stated "The Michigan Legislature, however, has not given any direction as to the meaning of 'the' legal name of the debtor."), and is not found in the statutory text. The term is found in the guidance given to filers on the national paper forms found in section 9-521, which suggests to filers to provide the debtor's "exact full legal name." These forms, however, are not mandatory, nor are the model forms provided by filing offices, and, in any event, the filing officers are not authorized to add to the statutory requirements for sufficiency. Those terms, "exact full legal", were intended not to create additional legal requirements but rather to urge filers to focus on an effort to provide the name that, in the context of a financing transaction having legal and economic significance, most filers would be reasonably likely to provide and against which most searchers would be reasonably likely to search. Had the draftsmen of the Revisions wished to impose a requirement of providing a "legal" name, they would have done so directly in the statute (ideally, with a definition, since a uniform definition for that term, at least in this context, does not otherwise exist), in the provision setting forth the name sufficiency requirement, not in an instruction on an optional form. The statute as written reflects a careful balance, seeking to provide a functional searchable system while not generating traps for the unwary filer, and the draftsmen were fully aware that the system was intended to be used not only by lawyers but by sellers and other businessmen acting without counsel. It is not the intention of the author to introduce, by the foregoing purposive language, a new 'test', but rather to suggest that an analysis, in the few cases that present a difficulty, should be policy-based and consistent with and furthering the goals of Article 9.

24. Moreover, responding to this question should take into account the fact that the search logic used by the different filing offices is far from uniform, so it is possible that a search under any of these names might in any given state produce filings against any of these

oblige people (or, at least, U.S. citizens) to carry an identification document, and no particular identification document is defined by law as being definitive as to the person's name.[25] Further, a passport, a driver's license, a social security card and a birth certificate issued to an individual might all have different variants of the person's name.[26] The name provided by a person when applying for these and other potential identifying documents depends on the instructions pertaining to the particular application, the person's understanding of those instructions, the degree of proof required in connection with the applications and the stringency of its enforcement by the particular issuer, the purpose of the particular document, etc. Some bankruptcy cases have alluded to the name as indicated by the debtor on his/her petition as being the debtor's "legal" name, but this is surely not a sound test, as it provides no guidance in circumstances where no case has been commenced and it might produce

three variants. Indeed, it is likely that in the great majority of states, a search under "Barack Obama" would turn up filings against both of the other two variants, but there certainly are some states that have taken "exact match" to its literal extreme. So far, no case has held that only one of these three variants is the only sufficient one. It might be noted that in *Genoa National Bank v. Southwest Implement, Inc. (In re Borden)*, 353 B.R. 886, 891 (Bankr. D. Neb. 2006) (holding that the nickname "Mike" was insufficient, the opinion refers to the debtor's "legal" name variously as "Michael Borden", "Michael R. Borden" and "Michael Ray Borden" (in light of the filer's use of the nickname, it was not necessary to the decision to determine whether anything less than all three variants would have been sufficient)).

25. Although a large part of the United States population has a Social Security number (the subject of much recent concern in the context of identity theft and privacy issues), unlike many other countries, there is not an official identification number prescribed for each individual, making it impossible to use, for UCC filing purposes, a number to avoid name uncertainty. In India, there is a project underway to assign Universal Identity Numbers (tied to biometric markers) to the entire population of over a billion people. *See Identifying a Billion Indians*, ECONOMIST, Jan. 27, 2011, at 82, *available at* http://www.economist.com/node/18010459/print. It is unlikely that the United States will embark on such a program in the near future.

26. For a discussion of the Canadian response to this issue, see RONALD C. C. CUMING, CATHERINE WALSH & RODERICK J. WOOD, PERSONAL PROPERTY SECURITY LAW 249-251 (2005) (in some jurisdictions, regulations stipulate authoritative sources, in others it has been left to the courts "with somewhat mixed results"). Establishing an authoritative hierarchy (waterfall) was discussed by the Review Committee and a limited hierarchy was included in some discussion drafts but was objected to by the key proponents of the driver's license rule as introducing too much complexity into the statute. The initial Tennessee nonuniform modification, discussed *infra* note 32, did include a list of multiple sources, presented, however, as alternatives, not as a hierarchy. *See also* Personal Property Securities Regulations 2001, SR 2001/79, reg. 2-5 (N.Z.), *available at* http://www.legislation.govt.nz/regulation/public/2001/0079/latest/DLM24891.html (referring to a "name as stated on official documentation", giving as examples of official documentation "a birth certificate, marriage certificate, certificate of New Zealand citizenship, passport [and] driver's licence").

different results depending on whether the issue was presented before or after a bankruptcy case had been commenced by or against a debtor.[27]

While the Drafting Committee that developed Revised Article 9 recognized that the number of filings against individual debtors exceeds the number of filings against entities (still true today), they also took into account that the greater amount of secured debt was likely to involve entities, and that creditors could without difficulty file and search against several name variations and could, in many instances, oblige prospective debtors to form an entity to serve as the debtor if they were concerned about this issue. Moreover, the changes to the paper forms and their instructions, the mimicking of the paper forms by electronic filing intake formatting, the great increase in the ease and availability of online searching by prospective creditors (in many states free or at negligible cost), and the great expansion of continuing legal education programs about Article 9, all greatly lessened the significance of the issue, even with respect to names of individual debtors.[28]

Furthermore, although there were a dozen cases dealing with debtor name issues in the decade following adoption of Revised Article 9 (most of which

27. *See, e.g.*, Clark v. Deere & Co. (*In re* Kinderknecht), 308 B.R. 71, 72 (B.A.P. 10th Cir. 2004). It is interesting to note that the Court's opinion begins with the statement (as "undisputed") that the debtor's "legal" name is Terrance Joseph Kinderknecht (with no definition or citation for that term), and then states that the Chapter 7 petition was signed by "Terry Kinderknecht" and was "filed under his legal name, 'Terrance J. Kinderknecht.'" *Id.* *See generally* FED. R. BANKR. P. 1005, (requiring in the caption of the petition the "name . . . and all other names used [by the debtor] within eight years before filing the petition"). The Official Form for a voluntary petition provides a field entitled "Name of Debtor (if individual, enter Last, First, Middle)" and a field entitled "All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names)." U.S. COURTS, OFFICIAL FORMS: B1 VOLUNTARY PETITION, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Official_2010/B_001_0410.pdf. Thus, the Bankruptcy Rules provide expressly for the possibility that a debtor might have been known by his/her creditors by more than one name, and do not single out a particular name as being a, or the, 'legal' name. Moreover, debtor identification in the bankruptcy context is itself problematic. *See* Martha Davis & Jane Limprecht, *Beyond Identifying the Problem: Debtor ID Initiatives Move Ahead*, 17 AM. BANKR. INST. J. 12, *available at* http://www.justice.gov/ust/eo/public_affairs/articles/docs/debtoride0303.html (discussing identity theft and other bankruptcy fraud problems, the authors note, *inter alia*, that the Sacramento office of the U.S. Trustee obtained an injunction against further bankruptcy filings by a debtor without prior court approval because the debtor had over a twenty five-year period filed at least fifteen cases in the Eastern and Northern Districts of California using four names and two social security numbers).

28. Nevertheless, the debtor name issue generally has drawn some academic attention. *See, e.g.*, Margit Livingston, *A Rose by Any Other Name Would Smell as Sweet (or Would It?): Filing and Searching in Article 9's Public Records*, 2007 BYU L. REV. 111, 114.

dealt with entity debtors rather than individuals[29]), this does not, in the author's view, demonstrate an urgent need to amend the statute. Most of the cases involved nicknames,[30] or secured party spelling or typographical errors or

29. *See, e.g.*, Estate of Wing Foods, Inc. v. CCF Leasing Co. & BS&R Equip. (*In re* Wing Foods, Inc.), No. 09-08062, 2010 WL 148637, *5 (Bankr. D. Idaho Jan. 14, 2010) (provided name as "Wing Fine Food" rather than Wing Foods., Inc); Owens Trust v. Schwalbe (*In re* Lohrey Enters., Inc.), No. 09-1001, 2010 WL 147916, *1 (Bankr. N.D. Cal. Jan. 12, 2010) (name provided as "Lohrey Investments LLC", the name of a different company owned by the same individual (to which the loan funds were transferred and used to buy the collateral)); Rushton v. Standard Indus., Inc. (*In re* C. W. Mining Co.), No. 2:09CV417DAK, 2009 WL 4906702 (Bankr. D. Utah Dec. 11, 2009) (periods and spaces omitted; name presented as "CW Mining Company"); Host Am. Corp. v. Coastline Financial, Inc., No. 2:06CV5, 2006 WL 1579614 (D. Utah May 30, 2006) (periods omitted from corporate name K. W. M. Electronics Corporation); Tyringham Holdings, Inc. v. Suna Bros., Inc. (*In re* Tyringham Holdings, Inc.), 354 B.R. 363, 364 (Bankr. E.D. Va. 2006) ("Inc." omitted from corporate name); Miller v. Van Dorn Demag Corp. v. Asheboro Precision Plastics, Inc. (*In re* Asheboro Precision Plastics, Inc.), No. 03-11319C-7G, 2005 WL 1287743, *1(Bankr. M.D. N.C. Mar. 1, 2005) (provided trade name rather than corporate name); *In re* Nittolo Land Dev. Ass'n, 333 B.R. 237, 239 (Bankr. S.D. N.Y. 2005) (name provided as "Nittolo Land Development Associates, Inc." rather than "Nittolo Land Development Association, Inc."); *In re* FV Steel & Wire Co., 310 B.R. 390, 391 (Bankr. E.D. Wis. 2004) (provided trade name "Keystone Steel & Wire Co." rather than corporate name "Keystone Consolidated Industries, Inc."); Receivables Purchasing Co. v. R&R Directional Drilling, L.L.C., 588 S.E.2d 831, 832 (Ga. Ct. App. 2003) (name provided as "Net Work Solutions, Inc." rather than "Network Solutions, Inc.").

30. *See, e.g.*, Clarke v. Deere & Co. (*In re* Kinderknecht), 308 B.R. 71, 72 (B.A.P. 10th Cir. 2004) (name provided as "Terry J. Kinderknecht" rather than "Terrance Joseph Kinderknecht"); Morris v. Snap-On Credit, LLC (*In re* Jones), No. 05-16909, 2006 WL 3590097, *1 (Bankr. D. Kan. Dec. 7, 2006) (name provided as "Chris Jones" rather than "Christopher Gary Jones"); Farmers & Merch. State Bank v. Larson (*In re* Larsen), 2010 WL 909138 (Bankr. N.D. Iowa Mar. 10, 2010) (name provided as "Mike D. Larsen" rather than "Michael D. Larsen"); Parks v. Berry (*In re* Berry), No. 05-14423, 2006 WL 2795507, *1 (Bankr. D. Kan. Sept. 26, 2006), *supplemented by* No. 05-14423, 2006 WL 3499682, *1 (Bankr. D. Kan. Dec. 1, 2006) (name provided as "Mike Berry" rather than Michael R. Berry"); Genoa Nat'l Bank v. Sw. Implement, Inc. (*In re* Borden), 353 B.R. 886, 887 (Bankr. D. Neb. 2006) (name provided as "Mike Borden" rather than "Michael Ray Borden"). Furthermore, many nicknames are far more remote, both alphabetically and otherwise, from the actual name than "Mike" is from "Michael." For example, the (at least locally very well-known) nickname of the former mayor of Providence, Rhode Island, was "Buddy" but his actual name was "Vincent Albert Cianci, Jr."; consider also "Bill" and "William Jefferson Clinton." A few additional words about nicknames. Webster's New International Dictionary offers the following definition: "1. a . . . name (as Shorty, Tex) given instead of in addition to the one belonging to a person, . . . 2. a familiar form of a proper name (as Bill, Tommy)." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1526 (3d ed. 1993). Thus, a nickname, by definition, co-exists with a person's 'real' name, i.e., despite extensive use, it has not been adopted by the person with an intent to abandon and replace

secured party carelessness,[31] and were not the result of uncertainty about which version of a debtor's name to provide. Indeed, not a single case involved a situation where the filer was uncertain about which of several possible names to provide and then was found to be unperfected because it had guessed wrong. While the absence of a large number of cases of a particular type may not be strong evidence of rarity, the complete absence of such cases does at least suggest rarity. Is it the law or the poor practice of some secured parties that needs changing when the case that initially put the spotlight in this issue involved a secured party who filed against (and only against) "Terry" when the debtor's birth certificate, driver's license and social security card all presented his name as "Terrance"?

Nevertheless, certain interests generated an unwarranted (in the author's view) hysteria about individual debtor names, and, under pressure to act immediately, a few states adopted poorly thought-through and poorly drafted provisions.[32] It was the prospect that nonuniform and perhaps downright

the person's given name. (In this sense, a nickname is analogous to an organization's trade name, long insufficient under Article 9 by statutory fiat—a rule emphatically restated in Revised section 9-503(b) and (c), unchanged by the Amendments.) An initial question, in case of dispute, will be, what was the name given to the person at birth? For example, this author's given name is Harry—that was never merely a nickname for Harold or Henry. If a debtor's given name was Harold, but Harry has been used so extensively that it could be said to have become a name by which the debtor is generally known, there would remain the question whether Harold has changed his name to Harry, a change that can, generally speaking, be accomplished without the necessity of the debtor's obtaining a court order to that effect and that depends on the debtor's intent to change his name. A decision that Harry is the debtor's nickname, therefore, is a decision that a name change from Harold has not occurred.

31. *See, e.g.*, Pankratz Implement Co. v. Citizens Nat'l Bank, 130 P.3d 57, 59 (Kan. 2006) (debtor's first name provided as "Roger" rather than "Rodger"); Hopkins v. NMTC Inc. (*In re* Fuell), No. 06-40550, 2007 WL 4404643, *1 (name provided as "Fuel" rather than "Fuell"); *In re* Jim Ross Tires, Inc., 379 B. R. 670, 677 (Bankr. S. D. Tex., 2007) (name provided as "Jim Ross Tire Inc). Why will filers who cannot replicate a name from the corporate charter do better at replicating a name from a driver's license?

32. TENN. CODE ANN. § 47-9-503(a)(4) (Supp. 2010) provides that a name shown on "one (1) of the following: (A) A state-issued driver license . . . (B) A birth certificate; (C) A passport; (D) A social security card; or (E) A government-issued military identification card" would be sufficient. *Id.* § 47-9-503 amend. notes. This had the effect of obliging prospective secured parties to examine all of these items, as a financing statement providing the name shown on any of them would be sufficient. On June 13, 2008, Tennessee enacted changes eliminating the list and substituting for it a rule that a financing statement is sufficient if it provides the name shown on the driver's license "issued by the individual's state of residence . . . .or is otherwise sufficient as determined in accordance with any other method permitted by law, excluding § 47-9-503(a)(4) as it existed pursuant to Acts 2008, ch. 648,

foolish[33] provisions would spread around the country that forced the UCC's sponsors to deal with the issue and institute this amendment process. At the same time, it should be noted that, during the drafting process, the proponents of the mandatory driver's license rule (Alternative A) declined to do the state-by-state field work necessary to assure that the proposed change could be made safely.[34] Consequently, the Amended Official Text is accompanied by a Legislative Note, pointing out to each state contemplating a change (particularly if it contemplates adopting Alternative A) that it should examine the name element field sizes, character limitations, etc. of the existing UCC and DMV (this acronym is used to refer to the Department of Motor Vehicles or other state agency responsible for the issuance of driver's licenses) systems to

§ 1." *Id.* §§ 47-9-503(4), 47-9-710(b)(1). The corrective legislation also provided a sixty-day grace period for filers to amend filings made under the earlier amendment on or after May 1, 2008; that additional provision stated that a financing statement that complied with the earlier legislation and was made between May 1 and June 13, 2008 and was properly amended during the sixty-day period ending August 13, 2008, "shall be deemed to have sufficiently provided the name of the debtor from and after its original filing date." *Id.* § 47-9-710(b)(3). In the spring of 2009, VA. CODE ANN. § 8.9A-503(a) was amended, effective July 1, 2009, to make sufficient the name shown on a driver's license or identification card "issued by the individual's state of residence." Comparison with the relevant provisions of the Amendments, particularly Alternative B, the safe harbor these states apparently were trying to achieve, highlights the deficiencies of the nonuniform enactments, and it is to be hoped that they will amend their texts by adopting Alternative B.

33. Nebraska attempted to deal with individual debtor names not by modifying section 9-503, and without introducing driver's licenses into the picture, but instead by modifying section 9-506. By L.B. 851, 100th Leg., 2d Reg. Sess. (Neb. 2008), enacted March 28, 2008, Nebraska extended the pre-existing safe harbor rule to a financing statement that would be disclosed by a search under the "debtor's correct last name"—creating the potential that all a filer had to get right was the debtor's surname. Imagine the prospect of searching for filings against a prospective debtor named Smith! Fortunately, that law was twice delayed (on April 21, 2008 by L.B. 308A, 100th Leg. 2d Reg. Sess. (Neb. 2008) and on February 26, 2009 by L.B. 87, 101st Leg., 1st Reg. Sess. (Neb. 2009)) and ultimately repealed (by L.B. 751, 101st Leg., 2d Reg. Sess. (Neb. 2010)) before it went into effect.

34. A report presented to the Uniform Law Conference at its annual meeting in July, 2009 (a year before the Conference took final action), by the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (which, *inter alia*, unanimously opposed the mandatory driver's license rule embodied in Alternative A) explicitly pointed out the need for such a study, and the need for such a study was repeatedly mentioned at meetings of the Joint Review Committee. *See* BUS. LAW SECTION, UNIF. COMMERCIAL CODE COMM., POSSIBLE AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9 INDIVIDUAL DEBTOR NAME PROVISIONS (2009) [hereinafter DEBTOR NAME REPORT].

assure that any incompatibility would not preclude the potential use on a financing statement of the name shown on a driver's license.[35]

Although beneficial (but not necessarily urgently needed) changes are provided by other elements of the Amendments package, the vast bulk of the time and energy of the Review Committee was devoted to shaping the potential solution for the individual debtor name 'problem' and seeking a solution less likely to cause more harm than good.[36]

Views ranged from

(i) making no changes to the current individual debtor name provisions, to

(ii) using a very light touch—providing a simple, extremely useful safe harbor based on the debtor's surname and first personal name only, to

(iii) providing a driver's license safe harbor, to

(iv) providing a mandatory driver's license name rule (the so-called "only if" approach), to

(v) providing not only an "only if" rule but also an absolute priority rule, giving the provider of the driver's license name priority even over those that would otherwise enjoy a purchase money super-priority.[37]

The 'Light Touch' Approach

The 'light touch' approach is the author's preference. This approach involves adding only a few words to the current Official Text (introducing far less complexity than either of the two Alternatives), requires no original drafting by an enacting state (as its content is already present in the work of the Code sponsors), is simple to understand and to apply and is unlikely to present interpretation issues, is based on current secured party practice (many filers currently omit middle names and middle initials), and would not involve driver's licenses beyond their use in current practice as a routine due diligence source.

Following the elegant principle that 'less is more', under the 'light touch' approach, there is no need to amend current sections 9-502 and 9-507 at all and no need to add new subsection 9-503(4)(g). The only change from the current Official Text would be in section 9-503. In that section, an enacting state

35. *See* U.C.C. § 9-503 Legislative Notes (Proposed Revisions 2010).

36. I leave it to the legal historians to parse each of the numerous drafts and accompanying memoranda that were the subject of in-person meetings and frequent telephone conferences of the Joint Review Committee, which included the participation, among others, of the proponents of the driver's license approaches.

37. This demand met with virtually no support on the Review Committee, although substantial time and energy was devoted to it.

would use Alternative B as drafted by the Reporter except omitting the change to subsection (4)(C) and omitting new subsection (4)(g). Thus, no new drafting effort is required in order to adopt the 'light touch,' and all states enacting that approach would do so compatibly with whatever version of section 9-503 were adopted by other states (i.e., adoption of the 'light touch' approach would introduce no conflict of laws issue).[38]

While retaining the current rule of providing the debtor's name, the 'light touch' approach adds a safe harbor for those providing correctly the debtor's surname and first personal name only, i.e., doing away with any need to include additional personal names or initials. In the author's view, this change alone would eliminate the most significant source of uncertainty about individual debtors' names under present law, making both the mandatory and optional use of the driver's license name largely superfluous from the standpoint of a filer seeking certainty.[39] Risk-averse searchers could continue their current practices (which likely includes a search under surname and first personal name or initial), and for searchers willing to take some risks, they would be able to limit their searches to surname and first personal name, since in many states (likely a majority), the standard search logic would discover all filings against debtors where the names matched that search but also included additional personal names or initials (i.e., a search under "S. Jackson" would also produce filings against all debtors surnamed "Jackson" whose first personal names begin with "S", as well as all those which also included any additional personal names or initials). True, this broad search is likely to result in a longer list of 'hits' that might well include debtors other than the target debtor, but many searchers currently accept this slight[40] increase in burden, and such a search

38. Of the several options for change, only Alternative A produces a prescribed name the absence of which results in an ineffective filing; Alternative B and the 'light touch' approach add sufficient names.

39. It should be noted that many individual debtor situations involve the purchase-money financing of equipment. In these cases, the financier will enjoy a super-priority, priming earlier filers, merely by making an effective filing of its own; thus, the primary concern of such financiers is achieving certainty that they have sufficiently provided the debtor's name, and they are not concerned about the names provided on filings by earlier creditors. The 'light touch' approach is essentially all that is needed to satisfy the needs of such financiers.

40. Of course, this increase in burden might be significant in the situation of a very common surname in a high volume filing state, even though debtor's addresses, type of collateral familiarity with the prospective debtor and other sources of credit information might assist in assessing the probability of a particular filing being a real 'hit'. The extent of the credit allows a searcher to make a cost-benefit analysis to guide in dealing with search results. The court, in Wardin v. Hunter (*In re* Wardin), No. 08-21951-dob (Bankr. E.D.

provides the benefit that it is more likely to pick up filings against the target debtor of potential, even if subordinate, competing secured parties and of notices of tax liens. It should be noted that the 'light touch' safe harbor found its way into the Amended statute, as an element of a small category under Alternative A and as one of the two new safe harbors under Alternative B (quite possibly the one that would prove most significant).[41]

The end result of the Review Committee process was a compromise. The Amendments set out two driver's license[42] alternatives, "only if" and safe harbor, labeled Alternatives A and B, respectively.[43]

Of course, as with every element of the Official Text, each state is free to adopt neither of the proffered Alternatives and instead, (i) make no change at all, (ii) adopt only the simple safe harbor involving the debtor's surname and first personal name (the 'light touch' approach), (iii) adopt one of the proffered Alternatives but with nonuniform variations or (iv) adopt any other rule it prefers. Also, states considering adoption of Alternative A are warned by the Legislative Note referred to above that they should perform a study to determine the precise parameters of the driver's license regime in the particular state, lest they enact Alternative A and later discover that it requires the filer to provide a name which for some reason cannot be accepted by the UCC filing office (e.g., if the system used by the DMV includes characters that cannot be inputted into the UCC system, or if the field size of any of the name elements in the UCC system is smaller than its counterpart in the DMV system and the name on the license exceeds the capacity of the UCC system).[44] These or similar issues are all solvable, but might require changes to one of the systems.

It should also be noted that the DMV rules are not uniform nationally, and may vary, *inter alia*, as to the instructions for providing the name on the

Mich. June 29, 2010), expressed the view that the expansion of the number of disclosed possible 'hits' from 1 to 17 was not burdensome.

41. U.C.C. § 9-503(a) Alternatives A & B (Proposed Revisions 2010).

42. The Review Committee was aware that there are individuals residing in the United States who do not hold driver's licenses, and it was considered important that such persons not be excluded from available credit by virtue of that fact in a state that adopts a driver's license provision. Consequently, the legislative note to amended section 9-503 specifies that if the state agency that issues driver's licenses also issues identification cards as an alternative to driver's licenses (so long as an individual may not hold both simultaneously), the state should include in its adoption of the Amendments reference to both driver's licenses and such identification cards. U.C.C. § 9-503 Legislative Note 2 (Proposed Revisions 2010). Thus, references in this paper to driver's licenses should be understood to encompass such identification cards.

43. U.C.C. § 9-503(a) Alternatives A & B (Proposed Revisions 2010).

44. U.C.C. § 9-503 Legislative Note 2 (Proposed Revisions 2010).

application, the nature of evidence required to be presented by the applicant, the rigor with which such requirements are applied,[45] and the format in which the name is presented on the driver's license. The DMV systems also vary as to technological limitations imposed by field sizes, character recognition, etc.[46] And, it should be kept in mind that this is not a one-moment-in-time matter; changes made to the DMV system in the future (e.g., possibly in connection with Homeland Security/Real ID issues) must be continuously monitored lest they give rise to a problem that doesn't exist currently.[47]

Inclusion of the driver's license name in the Article 9 individual debtor name regime, especially under Alternative A, may well not produce the certainty imagined by its proponents. Illustrative of some of the issues that might arise are the following: A sample Nebraska driver's license presents the driver's name, all on one line, as: "FRANCESCA A SAMPLE, MD".[48] What will the courts do with financing statements that fail to include "MD"? Will filers include this as part of surname? California recently changed its driver's license name presentation format. Until recently, the California driver's license format was to present the name, horizontally, on a single line. The license of the author's neighbor (in Los Angeles), presents his name as "JERRY FRANKLIN DDS ZIMRING". The questions presented by the inclusion of the licensee's professional title are obvious. Not readily apparent is the fact that he signs all documents, including the license, as "J. F. Zimring." The neighbor's wife just received a newly issued California license. The new format presents her name in two lines, demarcated "LN" and "FN". Her license presents her

45. *See, e.g.*, Lisa Rein & N.C. Aizenman, *Maryland Considers Change to Driver's License Policy Amid Fraud by Illegal Immigrants*, WASH. POST, Mar. 28, 2009, at A01 (noting that Maryland became a magnet for illegal immigrants from Georgia to Delaware seeking driving privileges (who used, *inter alia*, the address of a Maryland mailbox rental location), resulting in a situation where several other states no longer were willing to accept a Maryland license as proof of identity for relocating drivers. While this does not bear directly on formatting, etc., of names, it does illustrate the difficulty of achieving uniformity or even a satisfactory minimum level of cooperative action among the state DMVs).

46. U.C.C. § 9-503 Legislative Note 2 (Proposed Revisions 2010).

47. On October 6, 2010, California announced major changes with respect to new driver's licenses. *See, e.g.*, Ching-Ching Ni, *New California Driver's Licenses Designed to Thwart Counterfeiters*, L.A. TIMES, Oct. 6, 2010, http://latimesblogs.latimes.com/lanow/2010/10/new-california-drivers-license-designed-to-thwart-counterfeiters.html. In a photo image of the new license, the name format appears to have changed from a single line presentation of IMA VALID CARDHOLDER to a two-line format of "ln CARDHOLDER" and "fn IMA" (with no indication concerning the presentation of middle name(s)). *See id.*

48. *See* http://www.dmv.ne.gov/dvr/images/sample_dl.jpg (last visited Apr. 11, 2011) (this particular sample is now depicted as a prior driver's license).

name as "ZIMRING" in the LN line and Mildred Virginia" in the FN line. Virginia, however, is her middle name, not part of her first name, despite both names being presented on the FN line (and is a name she never uses). Problems might also arise in the situation where an American Indian tribe issues driver's licenses in an alphabet that is not the Roman alphabet.[49] The author has been told, but has not personally verified, that a tribe in Oklahoma does this.

UCC filing officers have begun to think about the issues presented by the possibility of the insertion into Article 9's text of any alternative including the driver's license, and, in some cases, to communicate with their respective DMVs. It seems likely that there will be little coordination between the systems, and there is no expectation that the DMVs will undertake to inform the UCC filing officers of changes that might hereafter be made to the software or the format decisions made by the DMVs. In instances where intake systems of the two offices are such that a particular name presentation can be accepted by the DMV but cannot be accepted by the UCC filing office, the latter will have to devise (and, one would hope, inform filers and searchers about) solutions adopted to deal with that difference. For example, the author was recently informed (but has not personally verified) that the Texas DMV does accept a tilde over the "ñ" (common in Hispanic names), but the current Texas UCC system does not. This does not present an insoluble problem, but does require the UCC filing office to adopt a method of dealing with this issue, and to inform users of the solution adopted.

In light of the increasingly heterogeneous nature of the population in the United States (it has been recently reported in the media that the 2010 census indicates that over fifty million Hispanics now reside in the United States), increased cross-border financing and the increased creativity of those who give names to organizations (enabled by technological advances), many of the debtor name issues presently encountered or that can reasonably be anticipated could be solved by having a nationwide statutory minimum field size for each name element that is large enough to prove capable of dealing with all but a minuscule number (not percentage) of filings, and a minimum character set (i.e., character-encoding scheme) well beyond the "qwerty" keyboard (i.e., one that embraces accents, other signs, other alphabets[50], etc.). Such larger sets,

49. *See, e.g.*, *Cherokee Syllabary*, WIKIPEDIA, http://en.wikipedia.org/wiki/Cherokee_syllabary (last visited Apr. 11, 2011).

50. In bilingual provinces of Canada, the registries handle French and English names with equal ease. It is also noteworthy that, in a different context, in October, 2009, the Internet Corporation for Assigned Names, the body that oversees the Domain Name System, allowed domain names entirely in scripts other than the Latin alphabet. *See* ICANN,

e.g., ASCII-256 (American Standard Code for Information Interchange) and Unicode (a much wider array of characters, rapidly displacing ASCII in many environments), are readily available and in use not only elsewhere in the world but also are used in the United States in other governmental and private sector applications. A few states' UCC filing offices already go beyond the characters shown on the "qwerty" keyboard.[51] It is regrettable that this amendment process did not include some progress in this area. While I recognize the political issue raised by attempting to include minimum standards in the statute, I believe the net gain to be derived from raising filer and legislative awareness of the lack of uniformity and the fact that some states are quite deficient compared to the rest offers potential benefits even without universal adoption of such a provision.[52]

Finally, it must be noted that there does not appear to be a single case that held that the name on a driver's license was not sufficient. It may safely be concluded that a secured party whose routine practice already was to provide in the financing statement the name shown on the driver's license (a claim asserted by some of the proponents of the driver's license rule) could safely have continued that practice without the Amendments and would, as a filer, gain little from legislative adoption of either alternative. As a searcher, Alternative A would appear to eliminate the need to search under any name other than that shown on the driver's license. However, there are other reasons, discussed below, why a secured party might well prefer to search under one or more plausible variants. In this author's view, Alternative A offers less certainty and less significant cost savings than its proponents claim. Moreover, driver's licenses are imperfect as a source and the Amendments introduce more verbiage into Article 9 and expose parties, the courts and lawyers to the risk of unforeseen consequences.

Bringing the Languages of the World to the Global Internet, (Oct. 30, 2009) http://www.icann.org/en/announcements/announcement-30oct09.htm.

51. *See, e.g.*, DEBTOR NAME REPORT, *supra* note 34, at n.1 (noting that California has the ability "to accommodate any character likely to arise in a financing transaction").

52. Similarly, revenue-neutral provisions could have been included in the Amendments package eliminating fees (currently imposed in some states) for including multiple debtors on a single filing, and eliminating fees for on-line searching, particularly for on-line browsing of the index (many states already offer some free searching), a measure that would facilitate, indeed, encourage, more, and more effective, searching. Such provisions, despite being revenue-neutral, however, might have made enactment of the package more difficult.

Alternatives A and B

Alternative A divides the universe of individual debtors into two categories: those to whom "this State" (the enacting state, where the financing statement is filed) has issued a driver's license that has not expired, and all other individuals.[53]

For the first category, the financing statement is sufficient *only if* it provides that name of the individual which is provided on the driver's license.[54] This seemingly foolproof rule, however, still requires some human analysis. For example, since the formatting of names on driver's licenses is far from uniform nationwide,[55] a filer must still determine which element on the license is the debtor's surname and which is the debtor's first personal name. Suppose a license presents the name on a single line as Elton John. From the face of this license alone, one could not determine which is the surname. Suppose a license presents the name on a single line as Mary Beth Jones. Is the first personal name Mary or Mary Beth, i.e., is Beth part of the first personal name or is it an additional personal name? Suppose the name presented on a single line is Juan Hernandez Rodriguez. Is the surname Hernandez Rodriguez (even if not hyphenated) or Hernandez (which might be a patronymic) or Rodriguez (even if it is a matronymic)?[56] Regardless of the formatting convention followed on a

53. U.C.C. § 9-503(a) Alternative A (Proposed Revisions 2010).

54. U.C.C. § 9-503(a) Alternative A (Proposed Revisions 2010).

55. *See* Memorandum from the Joint Task Force on Filing Office Operations & Search Logic, to Lynn Soukup & Stephen Sepinuck, exhibit A (Mar. 26, 2009), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucc9/2009march26_report.pdf (indicating a wide variety of name presentation formats). Even this may not be exhaustive, as some states appear to give the applicant some discretion as to content and presentation of the name. Moreover, at least two of the examples indicate numbers (birthdate or driver's license number) presented on the first line together with the letters that presumably are the surname.

56. *See* Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc., 143 Cal. App. 4th 319, 321 (2006) (name provided on financing statement as "Armando Munoz" rather than "Armando Munoz Juarez", the latter being shown on debtor's photo identification card and green card and on other documents provided to the first-filed secured party, who argued that it should be entitled to rely on the Latin American naming convention of listing the patronymic before the matronymic). Although the Texas version of Article 9 is silent on this point, 37 TEX. ADMIN. CODE § 15.23(2) (2007), provides in relevant part: "Latin American males and single females will list surname (of father), given first name, and middle name." *See also* All Bus. Corp. v. Choy, 634 S.E.2d 400, 401 (Ga. Ct. App. 2006) (name provided as "Gu, Sang Woo" rather than "Sang Woo Gu"; i.e., the debtor's "last" name was not his surname). Should non-Anglo cultural naming conventions be taken into account, and, if so, how? The Official Comments recognize the issue, but the Amendments do not directly address the specific problem.

particular state's driver's licenses, the filer must (whether filing on a paper form or in an electronic medium) provide the debtor's surname in the field on the financing statement designated for surnames, the debtor's first personal name in the field designated for that element and all the additional personal names and/or initials indicated on the license in the single field designated for those elements.

Note that Alternative A is satisfied only if the name provided on the financing statement is the name indicated on the debtor's unexpired driver's license, even if the name indicated on the license is erroneous and the debtor's correct name is provided on the financing statement. This would not be the case under Alternative B, where the correct name would satisfy one or both of the other two safe harbors.[57] Likewise, adoption of Alternative A might well result in the exclusive sufficiency of a name that the debtor has never in fact used; for example, the debtor may have provided a middle name or initial in response to the request for that item on the driver's license application, even though the debtor is not known by that name and has never used it on any document. In effect, any greater certainty resulting from Alternative A might be achieved by shifting away from the debtor's 'actual' name as used in all other contexts (including the secured transaction documents themselves.

The driver's license rule must be read together with new subsection 9-503(g), which deals with the circumstance where the relevant state has issued more than one driver's license to an individual.[58] In that case, it is the name that is indicated on the most recently issued license that is sufficient.[59]

Under Alternative A, for a prospective secured party to achieve certainty as a filer, it must (to determine the only name that is sufficient under the "only if" regime) satisfy itself that no license was issued by the relevant state subsequent to the one presented by the prospective debtor, and, as a searcher, it must satisfy itself that no earlier license with a different name was issued to this person by that state which might have provided a sufficient name to an earlier filer.[60] These are not insurmountable issues. With respect to subsequent

57. U.C.C. § 9-503 Reporters Note to Alternative B (Proposed Revisions 2010).

58. U.C.C. § 9-503(g) Alternatives A & B (Proposed Revisions 2010).

59. U.C.C. § 9-503(g) Alternative B (Proposed Revisions 2010).

60. U.C.C. § 9-507(c) (2008) provides post-change ongoing effectiveness with respect to collateral acquired by the debtor before or within four months after the issuance of the license with a different name. It should be noted that, unlike the publicly accessible records maintained with respect to registered organizations which indicate earlier names and dates of name changes, few (if any) DMVs maintain equivalent publicly accessible records and it may be more difficult for a prospective secured party to satisfy itself about the existence or nonexistence of a prior or subsequent driver's license indicating a different

licenses, less risk-averse filers might be willing to rely on the practice of some states' DMVs to refuse to issue a new license to a person until the old license is surrendered or defaced;[61] this very practice, however, might make it difficult to ascertain whether the earlier license indicated an identical name. Actual DMV practices with respect to confiscation or mutilation of earlier-issued licenses upon name change, issuance to newly-arrived residents, etc., vary from state to state. Further, it is not only a dishonest debtor who would have a license that does not reflect the debtor's current name. For example, not everyone who changes his/her name upon marriage or divorce immediately goes to the DMV and obtains a new license or an amended license showing the new name. Indeed, many married women quite honestly simultaneously use two names, using their maiden names professionally and their married names in personal contexts. While these examples are not deal-breakers, they certainly weaken the claim of certainty attributed to and asserted to justify adoption of Alternative A. For the searcher, it is unlikely that prudent secured parties (at least in cases of credit in a significant amount) will, under Alternative A, restrict their searches to what they believe to be the driver's license name. Such prospective creditors will usually be aware, from the credit application and the various other sources included in their due diligence process (e.g., credit reports, past tax returns, credit card records, etc.) of name variants used by the debtor. Even if they are confident that a court will apply the law literally, so that they will prevail over an earlier filer who used the debtor's name rather than the name shown on his/her driver's license (suppose, for example, that the debtor's name was misspelled on the license), they will want to avoid litigation and will want the added assurance that the debtor has fully disclosed his/her situation which can be derived from searching under those other names, and they will want to discover federal tax lien notices filed against the debtor. So, the purported cost savings attributed to Alternative A (which the proponents never quantified) may well not be realized.

For the second (and presumably much smaller) category under Alternative A (no unexpired driver's license issued to the debtor), the operational rule is provided in amended subsection (a)(5): the name is sufficient only if it provides the "individual name of the debtor or the surname and first personal name of the debtor."[62] The first of these two subrules is current law and the second is the 'light touch' approach.

name.

61. *See, e.g.*, H.B. 256, 1996 Leg., Reg. Sess. (Ga. 1996).

62. U.C.C. § 9-503(a)(5) Alternative A (Proposed Revisions 2010).

It should be noted, however, that under Alternative A, this latter subrule, the 'surname and first personal name' rule, works as a safety net only as to the debtor's correct name, not as to the driver's license name. This is true under both Alternatives A and B, but is obviously of greater significance under the Alternative A "only if" rule. The important point to note is that this safety net comes into play under Alternative A only in the case of a debtor with no unexpired driver's license, making it substantially unavailable in states that adopt Alternative A, while it is always available under Alternative B (and, of course, under the 'light touch' approach).

While Alternative A provides no greater certainty of perfection than Alternative B to the filer who provides the name indicated on the debtor's driver's license, it does come at a cost to the filer who provides the debtor's correct name rather than the name indicated on his/her driver's license (unless it is 'close enough' to be discovered by the filing office's standard search logic), and it does not reduce the number of searches to one, particularly since an effective federal tax lien might well be filed under a different version of the debtor's name.[63]

Alternative B, like Alternative A, adds a degree of complexity to Article 9, but Alternative B is not otherwise likely to do harm. It provides filers with three name alternatives, any of which will be sufficient: current law, surname and first given name, and driver's license name.[64] This adds a slight bit of certainty for filers, as it provides whatever is gained from the driver's license rule, which might in particular, but certainly very rare, cases provide more certainty than the determination of the debtor's correct name. In fact, in Alternative B, it is the addition of the surname and first name safe harbor, rather than the driver's license safe harbor, which provides significant additional certainty for filers and searchers, while the inclusion of the driver's license safe harbor adds little certainty for filers but burdens all searchers. This is because the search logic in virtually every state will disclose filings against "B. Obama", "B. H. Obama", "B. Hussein Obama" and "Barack Hussein Obama" in response to a single search under "Barack Obama."[65] Inclusion of the driver's license safe harbor, however, might make effective a filing against

63. *See* United States v. Crestmark Bank (*In re* Spearing Tool & Mfg. Co.), 412 F.3d 653, 655 (6th Cir. 2005) (federal law, not Article 9, governs sufficiency of the name provided on a notice of federal tax lien).

64. U.C.C. § 9-503 Reporters Note to Alternative B (Proposed Revisions 2010).

65. Indeed, mandating a search logic that achieved these results, with or without the 'light touch' approach, would be a solution far preferable to Alternative A. Of course, nothing prevents the filing offices from achieving these results even absent a statutory mandate obliging them to do so.

"Barry Obama" if that is the name indicated on the license—a name not likely to be disclosed in a search against "Barack Obama."

Of course, things may happen even after an effective filing has been made, e.g., the debtor's principal residence may change to another state (which may or may not have the same section 9-503 or the same amended section 9-503 as the state in which the filing was made) or, without any such move, there may be a change in the debtor's name or the name indicated on the debtor's driver's license or the debtor may obtain a license for the first time or suffer the expiration of his/her license. Except for the latter events relating to a license, this is true under the Revised Article 9 regime as well, and the only point to be made here is that there is less likely to be uniformity as the states deal with the Amendments and the significance or effect of an event may vary depending on the respective regimes. Adoption of a driver's license rule gives rise to the risk that 'license name' changes may be more likely to occur than name changes under current law, and monitoring subsequent events with respect to driver's licenses may be more difficult than the monitoring currently required with respect to 'actual' names.

As noted above, amended section 9-503, under both Alternatives A and B, refers to a driver's license issued by "this State."[66] Generally, the law governing perfection of a security interest by filing is the law of the jurisdiction in which the debtor is located.[67] For individuals, that generally is the place of an individual's principal residence.[68] So, it will be that state's version of section 9-503 or amended section 9-503 that will be relevant; it will govern during the period when it is the state where the debtor's principal residence is located, and its version of amended section 9-503 will refer to a driver's license issued by it. Whether the debtor holds a driver's license issued by any other state during that time, a not uncommon circumstance, is irrelevant. If a debtor's principal residence changes to another state, it will be the new state's version of section 9-316 (which might be either current or amended section 9-316) that will determine the effect of the debtor's move and the new state's then current section 9-503 that will provide the applicable rule for the debtor's name on the financing statement filed there. In the case of a name change, with no change in the debtor's principal residence, the familiar rules will apply except that if the state has adopted any version of the Amendments, it may be the issuance or the expiration of a license or a change (whether or not obvious

66. The Texas, Tennessee and Virginia enactments all refer, less precisely, to a license issued by the debtor's "state of residence." *See supra* notes 2 & 32.

67. U.C.C. § 9-301(1) (2008).

68. U.C.C. § 9-307(b)(1) (2008).

from the face of the license) of the name indicated on the driver's license, rather than a change of the debtor's 'real' name, that will trigger applicability of a different rule.

Finally, one more point must be dealt with if a state adopts Alternative A. Amended section 9-502(c) was changed conditionally, that is, the amendment to that section is to be enacted only if amended section 9-503(a)(4)-(6) are enacted pursuant to the enactment of Alternative A.[69] This section prescribes the conditions under which a record of a mortgage that is recorded in the real estate records is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut.[70] The effect of the change is to override the requirement that such a financing statement provide the name shown on the debtor's driver's license by establishing that the name is sufficiently provided if it is the individual name of the debtor or the debtor's surname and first personal name, even if the debtor is an individual to whom amended section 9-503(a)(4) applies (i.e., an individual to whom this State has issued a driver's license that has not expired). The reason for this amendment is that it is not unlikely that such filings will be made by real estate lawyers who might well be unaware of Alternative A's special driver's license requirement enacted in Amended Article 9.[71]

Summary of arguments against Alternative A:

- Requires changes to several sections and increases complexity, thus raising risks of lawyer and judicial error.
- Introduces issues relating to driver's licenses, including potential for incompatibility between DMV system and UCC filing systems, now and/or in the future.
- Forces on secured parties a practice (examining driver's license) that, to the extent it exists now, is voluntary; forces on secured parties the need to monitor changes in the DMV system characteristics and license name format; forces secured parties to determine existence of prior licenses issued to same individual under a different name and to monitor against subsequent issuance of a license to same individual under a different name, in a context where public record verification may be difficult.

69. U.C.C. § 9-502 Legislative Note (Proposed Revisions 2010).
70. U.C.C. §9-502 (c) (2008).
71. *See* U.C.C. § 9-503(a) Alternative A (Proposed Revisions 2010).

- Introduces potential for different name being provided on the financing statement from that used on all other documentation relating to the credit extension, leading to increased potential for error.

- Of all the options available to the Legislature, it is the one that is the most likely to generate difficulties if less than all states adopt it and if it does not become effective everywhere on the same date.

The simplicity and other advantages of the 'light touch' approach are set forth at length above.

None of the other amendments discussed in this article was controversial and all should enhance certainty under Article 9.

II. NAMES FOR OTHER TYPES OF DEBTORS

A. *Name to be Provided when Debtor Is a Registered Organization*

There are two categories of Amendments relating to this subject: (i) changes to the definition of "registered organization" and introduction of the new term "public organic record", and (ii) changes to the specification of the name that is sufficient for filing purposes. Both are aimed at being more precise as to the scope and the application of the name rule for this type of debtor. These Amendments further the purpose of providing greater certainty to filers and searchers. The changes have the effect, *inter alia*, of expanding the category of debtors within these rules. This will require secured parties not only prospectively to change their filing practice for those entities newly placed into the defined category, but also to review their existing filings against entities newly included in this class, because the re-categorization might affect the continued effectiveness of a financing statement.

Two definitions are relevant: the modified term "registered organization", in amended section 9-102(a)(71), and new term "public organic record", in amended section 9-102(a)(68).[72]

The modified definition specifies that an organization is a "registered organization" if it is "formed or organized" under the law of a single state or the United States "by" (i) "the filing of a public organic record with," (ii) "the

72. The term "public record" was used, undefined, in the pre-Amendment definition of "registered organization, U.C.C. § 9-102(a)(70) (2008), and the term "organic documents" was used, undefined, in connection with the name rule for trusts in section 9-503(a)(3)(A); the latter term has been replaced by the term "organic record." *See* U.C.C. § 9-503(a) (Proposed Revisions 2010).

issuance of a public organic record by or" (iii) "enactment of legislation by the State or the United States."[73] The focus is put on a single record based on the role it played in the formation or organization of the entity.[74] The prior definition made inclusion turn on whether the government was obliged to maintain a public record showing the organization to have been organized.[75] Some uncertainty was expressed as to the nature of the public record that satisfied the prior definition (and, under section 9-503(a), was the source of the organization's name). Not only do states maintain filed corporate charters as a public record, but states also maintain a corporate index, issue certificates of good standing, etc.[76] While filing a financing statement against the name stated in the charter to be the corporation's name surely satisfies current law, concerns were expressed whether the name "indicated" on one of those other forms of public record might also satisfy Article 9. The Amendments answer these questions definitively. It is clear that none of those other forms of public record is a public organic record.

The new second sentence of the definition of registered organization specifies that the term includes not only the familiar corporation, limited partnership, limited liability company and statutory trust which are embraced within the first sentence, but also entities such as a Massachusetts business trust.[77] The term now expressly includes "a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust's organic record be filed with the State."[78] The ordinary common law trust, even if formed for a business purpose, is not required to file its organic record with the state, and, therefore, it does not fall within the definition of registered organization; its status, for Article 9 purposes, continues unchanged. However, in states, like Massachusetts, where the trustee of a common law trust that has a business purpose is required in certain circumstances to file its organic record in a public office following the trust's formation, the expanded definition encompasses such a trust.[79] As a result of the re-categorization, the name to be provided on

73. *See* U.C.C. § 9-102(a)(71) (Proposed Revisions 2010).

74. *See* U.C.C. § 9-102(a)(71) (Proposed Revisions 2010).

75. *See* U.C.C. § 9-102(a)(70) (2008).

76. It was routine practice for state corporation departments, often as the result of system limitations, to key in (for indexing and other purposes) a name different from the name shown on the charter, e.g., by abbreviating and converting everything to upper case, and the practice often varied depending on the particular key operator.

77. *See* U.C.C. § 9-102(a)(71) (Proposed Revisions 2010).

78. U.C.C. § 9-102(a)(71) (Proposed Revisions 2010).

79. *See* U.C.C. § 9-102(a)(71) (Proposed Revisions 2010).

the financing statement might be changed.[80] The Amendments do not purport to answer the question of who is the debtor—the trustee or the trust—and no change in this regard is made to section 9-307.[81] Consequently, unless all states adopt the relevant Amendments effective on the same date, there might be not only differing laws governing priority and the proper place to file the financing statement, but also different rules with respect to the name to be provided. For example, in the case of a security interest in property held through a Massachusetts business trust (in this author's view not a registered organization under current law) the trustee of which is an individual whose principal residence is in New Hampshire, it would be necessary to determine which law governs the issue of who is the debtor (likely the law of Massachusetts based on the law governing the trust agreement) and then, assuming one intended to perfect by filing, in which state to file and under which name rule (likely, as to both, the law of New Hampshire, based on the residence of the individual trustee).

The substantive rule concerning the name to be provided as that of a debtor that is a registered organization is found in amended section 9-503(a). The current version of the rule refers to the name indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized.[82] The amended rule focuses not only on the public record by which the organization was formed or organized, but, taking into account the possibility of a subsequent name change, it also now specifies that the name to be provided is that which is "stated to be the [debtor's] name on the public organic record most recently filed that "purports to state, amend, or restate the [debtor's] name."[83] This new text responds to issues raised by some who observed that it is not uncommon to find a corporate charter (or an amendment to a charter) that itself sets forth multiple versions of the name (e.g., in a heading, in a provision expressly purporting to state the name, in a signature block, etc.). Likewise, the amended text would disregard a different version of the name set forth on a charter amendment that didn't purport to be changing the name but was instead filed to change a provision other than the name.

80. *See infra* Part III.B.

81. Where the trust is the debtor, the connecting factor (debtor's location) for a registered organization is the jurisdiction of organization and for another organization (which would generally include common law trusts, other than a Massachusetts-type business trust) it is generally the chief executive office. *See* U.C.C. § 9-307(b), (e) (2008).

82. *See* U.C.C. § 9-503(a) (2008).

83. U.C.C. § 9-503(a)(1) (Proposed Revisions 2010).

B. Name to be Provided as the Debtor's Name when the Collateral Is Held in a Trust

The current rules governing the name in trust situations turn on the characterization of the debtor as "a trust or a trustee acting with respect to property held in trust,"[84] while amended section 9-503 provides rules based on whether the collateral is held in a trust, bifurcating the rule depending on whether the trust is a registered organization.[85]

The basic effect of the amended rules governing the name to be provided on the financing statement as the name of the debtor when the collateral is held in a trust is to eliminate the need, for this purpose only[86], to make a determination whether, under the relevant State's law, the debtor is the trust or the trustee.[87] The general result under the amended rules is that the name to be provided on the financing statement will be the name of the trust or the name of the settlor, even if, under the applicable law, it is the trustee that is the "debtor" as defined in section 9-102. This should make life easier for filers in determining the name to be provided on the financing statement and for searchers who would otherwise have difficulties when the debtor trustee is a large financial institution. The category of "collateral held in a trust" embraces both situations where the trust is the debtor and those where the trustee is the debtor.

The name rule for registered organization debtors set forth in amended section 9-503(a)(1) is expressly made applicable to the circumstance where the collateral is held in a trust that is a registered organization but is not applicable when, even though the trustee is a registered organization and it is, as a matter of state law, the debtor, the trust is not a registered organization.[88] In the case of collateral held in a trust that is not a registered organization, if the organic record of the trust does not specify a name for the trust and the settlor is a registered organization, then the name to be provided on the financing statement is that of the registered organization.

Whether the applicable name rule is amended subsection (a)(1) or (a)(3) depends on whether the trust in which the collateral is held is or is not a registered organization. As explained above, a statutory trust and a

84. U.C.C. § 9-503(a)(3) (2008).

85. U.C.C. § 9-503(a)(1) (Proposed Revisions 2010).

86. This Amendment does not eliminate the need to determine the identity of the debtor for other purposes, e.g., creation and attachment of the security interest, which law governs perfection, and where to file the financing statement.

87. *See* U.C.C. § 9-503 cmt. 2(b) (Proposed Revisions 2010).

88. *See* U.C.C. § 9-503(a)(1) (Proposed Revisions 2010).

Massachusetts-type business trust would be a registered organization and, as a general rule, a common law trust that is not a Massachusetts-type business trust would not be. If the trust is a registered organization, then amended subsection (a)(1) applies and the ordinary registered organization rules (discussed in the preceding section of this article) govern. If the trust is not a registered organization, then amended subsection (a)(3) applies (even if the trustee is the debtor and it is a registered organization).[89] Amended subsection (a)(3) requires that the name to be provided on the financing statement, as the name of the debtor, depends not on the identity of the debtor but rather on whether the organic record of the trust specifies a name for the trust.[90] If it does specify a name for the trust, amended subsection (a)(3)A)(i) requires that the name to be provided as the name of the debtor is the name specified in the organic record.[91] If it does not, amended subsection (a)(3)(A)(ii) requires that the name to be provided as the name of the debtor is the name of the settlor or testator.[92]

In either of the latter circumstances, under amended subsection (a)(3), additional information must be provided in a separate part of the financing statement (i.e., not in the debtor name field).[93] This additional information is, under amended (a)(3)(A)(i), an indication that the collateral is held in a trust, or, under amended (a)(3)(A)(ii), information sufficient to distinguish the trust from other trusts having one or more of the same settlors (e.g., in many cases, the date on which the trust was settled might satisfy this requirement) or the same testator and, also, an indication that the collateral is held in a trust, unless the additional information so indicates. This latter information element would be required if neither the name nor the other additional information provided

89. This result is reached by means of the exception at the beginning of amended subsection (a)(1), which subordinates the general rule of amended subsection (a)(1), applicable to debtors that are registered organizations, in favor of the rule in amended subsection (a)(3), specifying use of the name of the trust or the settlor, and not that of the debtor, even in the case where the debtor is a trustee that is a registered organization; were it not for the subordination clause, both subsections would have been applicable in the case of a common law trust that is not a registered organization but has a trustee that is a registered organization. *See* U.C.C. § 9-503(a)(1), (3) (Proposed Revisions 2010).

90. *See* U.C.C. § 9-503(a)(3) (Proposed Revisions 2010).

91. U.C.C. § 9-503(a)(3) (Proposed Revisions 2010).

92. This requirement is elaborated in new subsection (h), which defines the name of the settlor or the testator. If the settlor is a registered organization, the name to be provided is that of the registered organization in accordance with the general rule of subsection (a)(1). In other cases, the name of the settlor or testator is that indicated in the trust's organic record. *See* U.C.C. § 9-503(a)(3)(A)(ii), (h)(1)-(2) (Proposed Revisions 2010).

93. *See* U.C.C. § 9-503(a)(3)(A)(i)-(ii) (Proposed Revisions 2010).

indicates that the collateral is held in a trust.[94] These requirements are intended to make the financing statement easily discoverable and informative in order to lessen the burden on searchers. Although neither the required indication nor the required additional information is part of the debtor's name, failure to provide them in a separate part of the financing statement (i.e., not in the debtor name field)[95] would result in a financing statement that is ineffective—because it fails sufficiently to provide the debtor's name under section 9-503(a) and, thus, is insufficient under section 9-502(a) and fails to "substantially satisfy" Part 5 within the meaning of section 9-506(a).[96]

C. *Name to be Provided as the Debtor's Name when the Collateral Is Being Administered by the Personal Representative of a Decedent*

This more accurate formulation—collateral being administered by the personal representative of a decedent,[97] found in amended section 9-503(a)(2)—replaced the prior reference to the debtor being a decedent's estate. The new reference would include an executor, an administrator or any other personal representative of a decedent under the applicable state law.[98] The new rule requires, as the name of the debtor to be provided on the financing statement, the *name of the decedent*, even if under section 9-102 the debtor is the representative.[99] It requires, in addition, that there be an indication, in a separate part of the financing statement, that the collateral is being administered by a personal representative (the same concept, having the same purpose and the same consequences in case of failure to satisfy the requirement, as discussed above in the trust context).[100]

With respect to the name of the decedent, amended subsection (f) has been added to provide a special safe harbor: the name of the decedent indicated on the order appointing the personal representative issued by the court having

94. *See* U.C.C. § 9-503(a)(3)(A)(ii) (Proposed Revisions 2010).

95. Providing the additional material in the debtor name field would likely make the financing statement undiscoverable (because the financing statement probably would not show up in a search against the correct debtor name) and would not constitute the providing of the debtor's name in accordance with the statutory text. *Cf.* Hastings State Bank v. Stalnaker (*In re* EDM Corp.), 431 B.R. 459, 467 (B.A.P. 8th Cir. 2010); *In re* Jim Ross Tires, Inc., 379 B.R. 670 (Bankr. S.D. Tex. 2007) (debtor name field in financing statement provided debtor's corporate name followed by trade name).

96. U.C.C. §§ 9-502(a), 9-503(a), 9-506 (2008).

97. *See* U.C.C. § 9-503(a)(2) (Proposed Revisions 2010).

98. U.C.C. § 9-503(a)(2) (Proposed Revisions 2010).

99. U.C.C. § 9-503(a)(2) (Proposed Revisions 2010).

100. U.C.C. § 9-503(a)(2) (Proposed Revisions 2010).

jurisdiction over the collateral is stated to be sufficient.[101] This provides a publicly accessible single source for a sufficient name. Note that this is a safe harbor, not a definition of the term, so another name might also be sufficient. For example, it is not uncommon for the court order in probate proceedings to indicate more than one name by which the decedent was known. In such a case, presumably the first name on the list would qualify for the safe harbor, but another name (whether or not on the list) might also be sufficient.

III. OTHER FILING-RELATED CHANGES

A. *Filings Against Transmitting Utilities*

The effectiveness of a financing statement filed against a transmitting utility does not lapse; the filing is effective until it is terminated. Typically, filing offices assign a lapse date upon receipt of the initial financing statement, assigning a five-year life to all financing statements that do not indicate entitlement to a longer life. The question has occasionally arisen whether a secured party is entitled to correct its failure to indicate transmitting utility status of the debtor in the initial financing statement by a subsequent amendment. The statute did not specifically forbid this; on the contrary, section 9-512(a)'s broad reference is to "otherwise amend."[102] However, because some filing offices designed their systems in such a manner that such a later amendment would create operational difficulties to modify the previously set lapse date, IACA sought an amendment to expressly require that transmitting utility status, and the resulting perpetual effectiveness, be established exclusively by the content of the initial filing. Amended section 9-515(f), by the addition of the word "initial", accommodates this request.[103] It should be noted that this amendment brings the rule into line with the analogous rule, in section 9-515(b), for the thirty-year life in public-finance and manufactured-home transactions.[104]

101. *See* U.C.C. § 9-503(f) (Proposed Revisions 2010).

102. U.C.C. § 9-512(a) (2008).

103. *See* U.C.C. § 9-503(f) (Proposed Revisions 2010).

104. *Compare* U.C.C. § 9-503(f) (Proposed Revisions 2010), *with* U.C.C. § 9-515(b) (2008).

B. *Elimination of Additional Information Requirements re Organization Debtors*

Section 9-516(b) provides a list of the sole grounds on the basis of which a filing office may refuse to accept a tendered filing.[105] The Amendments eliminate one of those grounds, by deleting subsection (b)(5)(C).[106] That provision requires that an initial financing statement (and an amendment providing the name of a new debtor) provide, in the case of a debtor that is an organization, the type of organization, the jurisdiction of organization and an organizational identification number for the debtor (or indicate that the debtor has none).[107] This requirement had already been deleted or modified in many states, and the deletion will simplify financing statements. The requirement had been inserted in the course of the Revisions in 1998 because those revisions had changed conflicts of laws rules, but the UCC's sponsors could not be certain that the new conflicts rules would be enacted uniformly and universally. Had they not been, a searcher might have been confronted with filings listing XYZ Corp. as debtor, in circumstances where some of them related to XYZ Corp., a California corporation, while others related to XYZ Corp, a Delaware corporation. The requirement in question was intended to aid the searcher in distinguishing from the public record which of two or more corporations with the same name was the entity in which the searcher was interested. In light of the universal adoption of the Revision's uniform conflict of laws rule (and the fact that several states had already deleted the requirement), its current utility is, to say the least, questionable.

C. *Information Statements*

Because of a concern with so-called "bogus filings",[108] the Revisions introduced a provision, section 9-518, that authorized the filing by an aggrieved

105. U.C.C. § 9-515(b)(1)-(7) (2008).

106. *See* U.C.C. § 9-516(b)(5)(C) (Proposed Revisions 2010).

107. U.C.C. § 9-516(b)(5)(C) (Proposed Revisions 2010)

108. The term "bogus filings" is used in connection with two very different types of filings (neither of which is made in connection with or in contemplation of a legitimate extension of credit): (i) filings made by a person identified as both secured party and debtor, and (ii) what might be called "malicious" or "harassment" filings—filings made for the purpose of injuring the purported debtor by giving the impression that a security interest does or may exist with respect to assets of the purported debtor in circumstances where there is no obligation to be secured, no security interest has been created by the purported debtor and the purported debtor has not authorized the filing of the financing statement. While the first category does not reflect a legitimate transaction, it also does no harm to anyone as the

debtor of a notification of the debtor's objection to a filing.[109] This provision was modeled after an analogous remedy provided under the Fair Credit Reporting Act (15 U.S.C. § 1681i). An important element of this remedy is that while it provides a debtor with a technique that can be implemented immediately, it protects secured parties from the risk of a wrongful termination by a mischievous debtor, by providing expressly that such a filing by a debtor is merely a notification of the debtor's position, but with no substantive impact on the legal effectiveness of the objected-to filing.[110] While clearly not a perfect solution from the standpoint of the debtor, it was believed to be a reasonable balanced solution. All public records are vulnerable to abuse, and existing criminal and tort laws deal with the issue, alongside, of course, the available remedy of seeking judicial relief against a wrongful filing. It should be kept in mind that a major goal of Article 9 is to provide a filing system that is simple, speedy, inexpensive and entailing a minimum of bureaucratic involvement—any new remedy should not undermine this goal. The issue of providing a stronger Article 9 remedy arose again during this amendment process. This was revisited in light of the fact that some states had proposed and some had even enacted nonuniform provisions, or enactments outside of the UCC, seeking to address this matter.

Giving the filing office the power to reject a filing or remove a record that the office believes to be "bogus",[111] usually lacking provision for notice to and due process rights to protect the filer, fails to recognize that this opens the door to mischief on the part of dishonest debtors, causing uncertainty to legitimate secured parties, and burdens the filing office with a responsibility for which it

purported debtor is the person who has made the filing (this is often done in the mistaken belief that it somehow shields the filer's assets from availability to creditors; many of these filings are made by members of "Freemen" or "Sovereign" anti-government groups). While inclusion of such filings in the public record may be intellectually distressing to some, it harms no third party and simply provides additional revenue to the filing office. In contrast, the second category does harm third parties. Even though the filing of a financing statement does not create a security interest and, since it was not authorized by the purported debtor, has no legal effect on the purported debtor's assets, the existence of the filed financing statement on the public record may harm the purported debtor by injuring his credit—it might well delay that person's access to credit.

109. *See* U.C.C. § 9-518(a) (Proposed Revisions 2010).

110. *See* U.C.C. § 9-515(e) (Proposed Revisions 2010).

111. Because of their usually bizarre content, Freemen filings are for the most part easily recognizable, and of course, a filing identifying the same person as both debtor and secured party is obviously bogus on its face--such filings are apparent to filing officers. This, however, is not the case with respect to the real problem of harassment filings; there is generally no way to identify a harassment filing from the face of the financing statement.

lacks both the expertise and the resources. Filing offices do not have the financial or staff resources, or the competence, to adjudicate disputes between debtors and secured parties, and such an activity would be a diversion from the primary task of operating an efficient filing system. Moreover, proposed solutions usually were not limited to the one category that have been in fact the victims of malicious filings—government employees, most typically, the wardens, prosecutors and judges involved in convicting criminals. The burden on the system and the risks to bona fide creditors of having their legitimate filings removed would be reduced to manageable size were the privileged class of those getting a more expeditious remedy limited to government employees. However, this ran afoul of sentiment that all purported debtors should be treated alike.

Ultimately, the Review Committee again rejected the idea of empowering the filing office to reject or remove filings. The Committee concluded that it could not propose a solution that would satisfy enough of the relevant considerations, so no proposal was made. This leaves it to the Uniform Law Commission office to work with individual states that are determined to 'do something more' to ensure that those efforts do not do too much damage to the Article 9 system. The Amendments, however, did improve subsections (a) and (b) of section 9-518 by substituting the term "information statement" for the potentially misleading term "correction statement."[112]

A different issue, however, was dealt with, although this change was not unanimously supported. In the Revision process, it was anticipated that the section 9-518 debtor notification technique would be used only rarely and the Code sponsors did not include a uniform national form. The filing officers, however, chose to generate such a form (which they entitled "Correction Statement") and when that form was announced by IACA and individual filing officers, it came to the attention of the filing community generally.[113] This produced the unintended consequence that some secured parties used the form to correct errors they had made in a particular record (e.g., accidentally filing a termination with respect to a financing statement that they had not intended to terminate) or to announce to the world that they disclaimed having filed a particular record (e.g., that an amendment or termination had been filed by someone other than the secured party of record without authority to do so). They did this either in ignorance of, or despite knowledge of, the express

112. *See* U.C.C. § 9-518(a)-(b) (Proposed Revisions 2010).

113. ROBERT LINDSEY, SECURED TRANSACTION SECTION REPORT: 2006 IACA CONFERENCE (2006), *available at* http://www.iaca.org/downloads/2006Conference/STS/STS_Report_2006.pdf.

provisions in section 9-518 that such notifications were to be filed by debtors and that they had no effect on the effectiveness of the record referred to.[114] Indeed, sometimes such filings were made in situations where an effective amendment might have been filed.

Consequently, section 9-518 was modified to add subsections (c) and (d), which permit a secured party of record to file an information statement indicating its belief that a person that filed a particular record relating to that secured party's financing statement was not entitled to do so.[115] Several important points should be noted. The new 'remedy' provided by this Amendment does not provide a mechanism by which the secured party can, via an information statement, correct an error it made in an earlier filing.[116] Second, the new remedy is, like the current debtor's remedy, subject to the rule (found in amended subsection (e)) that an information statement has no effect on the effectiveness of a filed record.[117] And, third, nothing in the Amendments creates an obligation on a secured party that learns of an unauthorized filing to file an information statement.[118]

D. *Modified National Paper Forms*

During the first fifty years under Article 9, each state individually (or in some regional groups) developed its own form of paper financing statement. They varied in size, shape, format, etc., requiring filers to maintain a large stock of forms, and, more importantly, often provoked errors by failing to provide sufficient space (forcing abbreviations) and by failing to guide filers to identify clearly name components. As a result, Revised Article 9 introduced, in section 9-521, a single national paper form. This form was developed by the Drafting Committee, after extensive consultation with users and with the helpful cooperation of many of the filing officers. It should be emphasized that the form was, and is, neither mandatory nor exclusive—filers were not obliged

114. *See* U.C.C. § 9-518 (Proposed Revisions 2010).

115. U.C.C. § 9-518(c)-(d) (Proposed Revisions 2010).

116. *See* U.C.C. § 9-518(e) (Proposed Revisions 2010).

117. *See* U.C.C. § 9-518(e) (Proposed Revisions 2010). There was neither time nor inclination to consider alternative solutions such as the issuance to a secured party of a confidential code relating to each financing statement filed, which would have the effect of preventing any third party from filing an amendment or a termination with respect to that financing statement. Such codes already are in use in some foreign registries. It is to be hoped that IACA will consider making available that (and other possible) solutions; such a solution could be instituted by a filing office without the need for statutory amendment.

118. This last point is helpfully made explicitly in modified Official Comment 2 to section 9-518. U.C.C. § 9-518 cmt. 2 (Proposed Revisions 2010).

to use that form. Instead, its function was to provide a single form that filers everywhere could use, confident that it would be accepted by every filing office in the country—i.e., section 9-521 prohibits rejection by a filing office of that form on grounds of form. This in no way precludes a particular filing office from developing its own preferred form and posting that on its website or otherwise encouraging filers to use that preferred form Indeed, during the past decade, IACA has worked on development of a preferred form, but has not succeeded in achieving unanimous adoption of that form.

In connection with the Amendments, the Review Committee sought to develop a new national form—under the same rule—i.e., neither mandatory (for filers) nor exclusive and in no way restrictive of the development of preferred forms by individual state filing offices. Regrettably, as of this writing, a new form has not yet been developed, although efforts continue to secure the agreement of IACA to a new form, even though nothing in section 9-521 would prevent filing officers, individually or as a group, from developing their own preferred form and encouraging its use. As the Code sponsors were pressed to issue an Amended Official Text that might be considered by the states, the text now up for consideration does not (yet) present a formatted image (unlike the provision in the Revised Article 9) but instead has merely a verbal text. Enactment of a verbal text would not achieve the goal of the provision. Should this situation continue and there not be a formatted image presented in the statute, including in the statute a section 9-521 that merely indicates an unformatted verbal content would be of limited value.[119] This would restore the original Article 9 situation, leaving each state free to promulgate exclusive form(s), with no guarantee that all states would adopt the same form at the same time; this would deprive filers of the benefit intended to be provided under current section 9-521. It is to be hoped that the filing officers will, during the enactment process, assist the Code sponsors in securing the adoption of a useful section 9-521 with a single national form developed by the Code sponsors, making that the basis for a single nationwide form acceptable everywhere, from the effective date of the adoption of the Amendments in the particular state. Fortunately, as the use of electronic filing

119. It is the case that, during the enactment of Revised Article 9, some states enacted a verbal text in section 9-521 rather than the image presented by the Code sponsors. The filing offices in those states, however, administratively accepted the national form, and the existence of the national form in most statutes enabled the provision to serve its intended purpose. This is, thus, different from the current situation, which would, absent some change, result in no state having adopted a revised national form developed by the Review Committee, significantly lessening the likelihood of there being a single nationally accepted form.

grows, the significance of absence of a national statutory paper form will diminish.

IV. CONCLUSION

For the reasons explained above, the author recommends enactment of the Amendments exactly as approved by the UCC's sponsors, with the sole exception of the changes relating to the provisions relating to the name to be provided on financing statements for individual debtors. On that point, the author recommends the 'light touch' approach—the simple addition of a new safe harbor, based on the debtor's surname and first personal name. The author's second choice would be enactment of Alternative B—which consists of current law, plus the 'light touch' safe harbor plus a driver's license safe harbor. The author notes that the four states that acted prematurely all enacted (or intended to enact) safe harbor solutions. Further, the author recommends that the Amendments be adopted with the agreed effective date of July 1, 2013.[120] This deferred effective date should (i) allow time for careful thought to be given to the options available with respect to individual debtor names, including full analysis of the current DMV and UCC filing office systems with respect to field sizes, character recognition, etc.; (ii) minimize the risk of conflict of laws issues by allowing as many states as possible to enact the changes and bring them into effect on a single date; and (iii) allow ample time for parties and their counsel, and filing offices, to prepare for the new rules, including assessing what changes, if any, need to be made to current practices and considering whether amendments or new filings need to be made with respect to existing portfolios.

120. U.C.C. § 9-801 (Proposed Revisions 2010).