

# “WHO (OR WHAT) IS YOUR CUSTOMER?”

## BANK GUIDE TO ORGANIZATIONS FOR LOANS AND DEPOSIT ACCOUNTS Presentation to Missouri Bankers Association

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# I. Introduction

- A. Some of the non-individual “persons” that the banker may encounter.
- B. How to recognize the structure of a non-individual person.
- C. How to identify the individual or individuals that have the power and authority and are authorized to act for and legally obligate the non-individual person.
- D. Sources for obtaining information concerning non-individual organizations.
- E. Suggestions for making the process of identification easier regarding non-traditional organizations such as limited liability companies and trusts.



## II. Identifying “Persons”

- 1) an individual,
- 2) a corporation,
- 3) a general partnership (which also might be registered with the State as a “limited liability partnership”),
- 4) a limited partnership (which also might be registered with the State as a “limited liability limited partnership”),
- 5) a joint venture (which could be any number of legal entities),
- 6) a limited liability company,
- 7) an unincorporated association,
- 8) a trust,
- 9) a government or government agency.

# Creatures of Statute

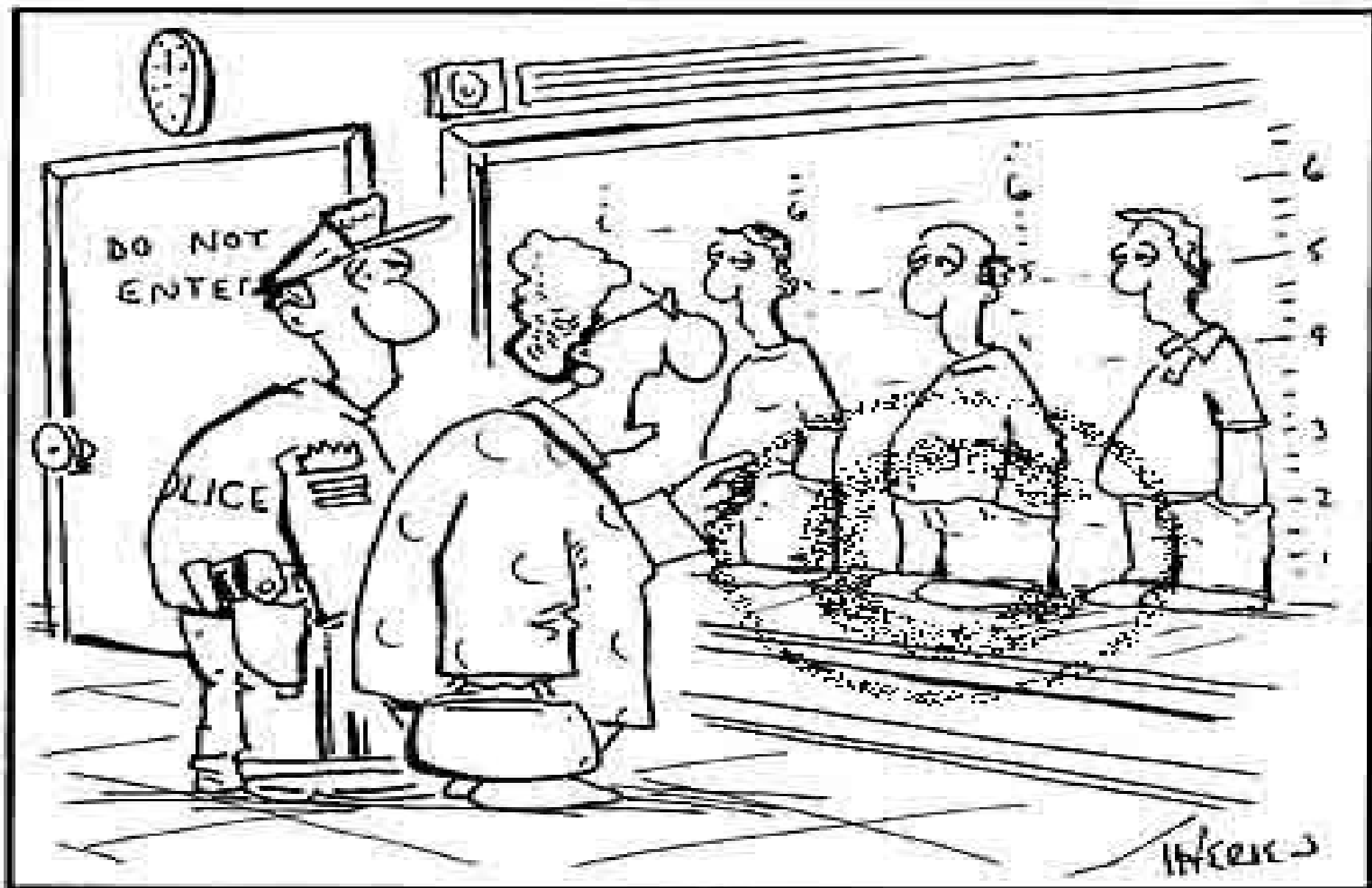
- 1) Corporations;
  - a) General business corporations (Ch. 351)
  - b) Professional corporations (Ch. 356)
  - c) Not-for-profit corporations (Ch. 355);
- 2) Limited liability companies (Ch. 347);
- 3) Limited partnerships (which can also be limited liability limited partnerships) (Ch. 359);
- 4) Limited liability (general) partnerships (Ch. 358).

# “Registered Organizations”

- 1) Corporations – Certificate (and Articles) of Incorporation and Bylaws;
- 2) Limited liability companies – Certificate (and Articles) of Organization and Operating Agreement;
- 3) Limited partnerships – Certificate (and Articles) of Limited Partnerships and Limited Partnership Agreement.

### III. Persons Created By Agreement

- 1) General partnerships,
  - 2) Most trusts, such as revocable living trusts and irrevocable testamentary trusts.
- These persons are governed by agreement and recognized by statute.



"That's him, all right... only taller,  
younger and thinner!"

## IV. Persons That Can Change Their Status By Filing Documents With The State

- A. General partnerships (all partners personally liable) can register with the Missouri Secretary of State as a “limited liability partnership” (or “LLP”)(no partners personally liable).
- B. Limited partnerships (general partners personally liable) can register with the Missouri Secretary of State as a ‘limited liability limited partnership’ (or “LLLP”)(general partners not personally liable).
- C. Missouri law shields partners in LLP’s and LLLP’s from personal liability for the organization’s actions:

## IV. Persons That Can Change Their Status By Filing Documents With The State, cont.

“ . . . no partner in a registered limited liability partnership [same for limited liability limited partnerships] shall be liable or accountable, directly or indirectly, including by way of indemnification, contribution, assessment or otherwise, for any debts, obligations and liabilities of, or chargeable to, the partnership or each other, whether in tort, contract or otherwise, which are incurred, created or assumed by such partnership while the partnership is a registered limited liability partnership.” Section 358.150-2.

## V. Non-Individual Persons Can Be Owned By A Single Individual Or Another Single Non-Individual Person

- A. Corporations can be owned by and operated by a single individual. Limited liability companies may also be owned and operated by a single individual.
- B. An individual signing in his/her representative's capacity on behalf of his/her one-owner entity, is not personally liable for that entity's obligations unless he/she also signs individually.

## VI. Purposes For Establishing Non-Individual Persons

- A. The Missouri statutes recognize and generally honor the non-personal-liability of individuals who are owners of non-individual persons.
- B. The Missouri statutes indicate an acceptance of non-liability for many non-individual persons as a valid public policy that promotes business activity.

## VII. Working Assumption

Assume no owner, member, partner, director, officer or agent of a non-individual organization is liable personally for the contracts he/she signs (including promissory notes) on behalf of an organization. Obtain personal guaranties if personal liability is required.

## VIII. Assumed Names

Any individual or organization may legally do business in Missouri by filing a “fictitious name” registration with the Missouri Secretary of State. Section 417.210.

## IX. Corporations

- A. Corporations are recognized by the words “corporation”, “company”, “incorporated”, or abbreviations of those words.
- B. The structure of ownership and power is familiar:
  - 1) shareholders as owners
  - 2) a board of directors
  - 3) officers
  - 4) President
  - 5) Vice Presidents
  - 6) Secretary
  - 7) Treasurer

## IX. Corporations, cont.

- C. Opening of accounts or applying for loans requires a Board resolution.
- D. Any or all of the above “traditional” roles and levels of authority can be altered by specific provisions in the Articles of Incorporation, the bylaws or authorizing resolutions of the Board of Directors.
- E. See Appendix I for example of certification and corporate borrowing resolution.

## X. Limited Liability Companies - Characteristics

- A. A relatively new hybrid form of business organization that has now become the organization of choice.
- B. Combines limited liability and single taxation (if desired).
- C. LLC members can fashion the power structure of an LLC in almost any form desired.

## X. Limited Liability Companies - Characteristics, cont.

D. Bankers face a new vocabulary in dealing with LLC's:

- 1) "Articles of Organization"
- 2) "Operating Agreement"
- 3) "Members"
- 4) "Managers"
- 5) "Member's Interest"
- 6) "Member Managed" or "Manager Managed" LLC's

## X. Limited Liability Companies - Characteristics, cont.

- E. In a member-managed LLC, every member is an agent of the LLC and the act of any member binds the limited liability company.
- F. Exception: If the member so acting has in fact no authority to act for the limited liability company in the particular matter, and the person with whom he is dealing has “knowledge” of the fact that the member has no such authority. §347.065-1

## X. Limited Liability Companies - Characteristics, cont.

- G. If the LLC is “manager-managed,” the manager is an agent of the LLC and the act of any manager binds the limited liability company.
- H. Exception: If the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom he is dealing has “knowledge” of the fact that the manager has no such authority. §347.065-2

## X. Limited Liability Companies - Characteristics, cont.

- I. A danger: if the LLC has delivered to the bank the articles of organization and the operating agreement of the LLC.
- J. Operating agreements often have limitations on managers or even a single member obligating the LLC.
- K. The operating agreements of some limited liability companies authorize the members or managers to appoint “officers” with corporation-sounding names (e.g. president, chief executive officer).

## X. Limited Liability Companies - Characteristics, cont.

### L. What to do?

- A. Read the Articles of Organization and operating agreement.
- B. If the transaction is large and/or complex, consider consulting counsel.
- C. One solution that some banks are using is requiring the delivery of a set of “comprehensive resolutions” to be signed by ALL MEMBERS and, if the LLC has managers, ALL MANAGERS. (See Appendix II)

## Some Important Information in Comprehensive Resolutions:

1. Names of all members (Item 1).
2. Whether the LLC is member-managed or manager-managed and names of all managers (Item 3).
3. Confirmation that the LLC's operating agreement is not contrary to the information and resolutions in the certificate (and it is deemed to be amended to conform, if contrary).
4. It is signed by all members and all managers to insure that it "works."

# XI. Comparison of Characteristics (See Appendix III)

## XII. A Trust As Borrower, Guarantor, Pledgor

- A. Most trusts are established by individuals for estate planning purposes.
- B. Often real property or an individual owner's stock or LLC interests of his/her own corporation or LLC are transferred to a trust.

## XII. A Trust As Borrower, Guarantor, Pledgor, cont.

- A typical scenario is as follows:
  - 1) John Smith, as President and sole owner of Corporation A, applies for a loan for the corporation.

## XII. A Trust As Borrower, Guarantor, Pledgor, cont.

- 2) The bank requires Mr. Smith personally guarantee the loan to his corporation and requires that the guaranty be collateralized by either his residence or the stock he owns in the proposed borrowing company or publicly traded stock, title to all of which Smith has transferred to his revocable trust of which he is the trustee during his life.

## XII. A Trust As Borrower, Guarantor, Pledgor, cont.

- 3) Many, if not most, trusts do not specifically give the trustee the power to guarantee the obligations of a third party or authorize the trustee to pledge assets of the trust to secure such guaranty.
- 4) If not, the trustee does not have the power to guarantee the loan or pledge trust assets.
- 5) A solution: consider requiring the borrower to amend its trust agreement to expressly authorize the transaction that is being proposed (See Appendix IV).

## XIII. Finding Information

- A. A lot of information is available electronically from the Missouri Secretary of State website at [www.sos.mo.gov](http://www.sos.mo.gov) under the “Business” heading is a section called “Corporations”.
- B. Under the “Business” section there is also a “UCC” section, which breaks down into various subsections, the most important of which initially is “Research UCC Filing.”

## XIV. Formal Name of a Registered Organization

- A. Trade Name: “General Machine”
- B. Name used on letterhead and stated in Articles of Incorporation: “General Machinery Corporation”
- C. Formal, legal name: “General Machinery Corporation, a Missouri corporation”
- D. The proper signature block:

GENERAL MACHINERY CORPORATION,  
a Missouri corporation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

## XV. Real-Life Example

(See Appendix V)

1. On day 1, Corporation 1 obtained a secured loan from lender secured by (among other things) the pledge of its brokerage account.
2. On day 2, Corporation 2 obtained a secured loan from the same lender secured by the assets of Corporation 2.
3. Corporation 1 did not sign any document pledging its brokerage account to secure Corporation 2's loan.
4. The owners and officers of both corporations were identical.

## XV. Real-Life Example, cont.

5. Later, the lender and Corporation 2 signed an amendment to its loan documents stating that all lending agreements of Corporation 1 also extend to Corporation 2.
6. No one signed the amendment as an authorized person of Corporation 1; individuals who were officers of both corporations signed, but only in their capacities as officers of Corporation 2.
7. Default by Corporation 2 occurred; lender obtained judgment in the trial court against Corporation 2 and an order attaching the brokerage account of Corporation 1.

## XV. Real-Life Example, cont.

8. Corporation 1 sued lender for “converting” the brokerage account.
9. Since Corporation 1 never signed the amendment (even though the individuals who owned Corporation 1 and who were officers of Corporation 1 did so), lender could not reach the pledged brokerage account of Corporation 1 because such obligations by law must be in writing and **SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE “PERSON” TO BE OBLIGATED.**

## XVI. Conclusion

Dealing with non-individual “persons” requires:

1. Digging into the documents
2. Independent inquiry
3. Cover-all certifications/resolutions