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Dear Commissioners:

The following are comments of the American Bankers Association on the 1/4/11 Miller/Rusch memorandum addressed to the NCCUSL Scope and Program Committee. In a nutshell the memorandum recommends appointment of a drafting committee with a charge that is staggering in its scope. The memorandum was provided to us for review only yesterday afternoon. We understand that the NCCUSL Scope and Program Committee will meet on January 7 to consider the broad request.

By way of background, the American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13.4 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than \$165 million in assets. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities.

In order to properly evaluate recent materials provided by the Study Committee, ABA sought input from our members in several ways.

First, the ABA Task Force on Payments Law reviewed a 12/14/10 Miller/Rusch memorandum (as well as the 1/4/11 one) and held a conference meeting on January 5, 2011, to discuss issues in more detail. Composed of bank lawyers, financial institution operations officers, and state bankers association professionals who lobby

state legislatures on behalf of their members, the ABA Task Force was established some time ago when NCCUSL first created a Study Committee on the Law of Payment Systems (as it was then designated). Our group has twenty-seven members, and some were able to participate in the 12/21/10 conference call of your Study Committee on Payment Issues. ABA is grateful for the countless hours that members of our Task Force have devoted to analyzing the multiple papers produced by the Study Committee.

Second, in order to inform ABA's broad membership of the Study Committee's possible agenda, the various papers and memoranda were publicized in *ABA UCC/Uniform Law News*, a monthly e-mail bulletin provided to more than 3,000 employees of ABA member institutions.

Third, the plans of the ALI/NCCUSL Study Committee and its materials were discussed in various industry forums, such as the recent State Bankers Association Counsels Meeting and the 2010 ABA State Issues Summit. Those attending this year's Summit included state bankers association (SBA) executives, SBA counsel, SBA government relations managers, and a substantial number of government relations professionals from large, multi-state banks. The topic will continue to be discussed on weekly state legislative conference calls hosted by ABA and attended by representatives of member banks and state bankers associations.

More Groundwork and Input Needed

The recent Study Committee request for appointment of a drafting committee and an expanded charge represents a dramatic shift from the Study Committee's original focus, which was aimed at issues relating to checks and drafts. Significantly, the Committee now envisions initiating a broad drafting project to include issues concerning promissory notes and the foreclosure of mortgages securing those notes.

These new plans were announced during the hectic holiday season, leaving little time for industry review and input. In recent years NCCUSL has made greater use of study committees. The idea is to obtain input from all interested parties and define the issues so that participants will be on the same page as much as possible. Such preliminary steps are necessary to determine if there is indeed a need for a drafting project. These basic steps also avoid needless waste of resources and better insure the success of a drafting committee if one is appointed.

ABA feels strongly that there has not been sufficient groundwork to justify a drafting project of this magnitude. In all candor, it must be pointed out that New York Federal Reserve Bank support for a drafting project cannot fairly be represented as banking industry support or be used to suggest the existence of some sort of groundswell of support for such a drafting project among commercial banks. Indeed, it is the consensus of those banking industry representatives who faithfully participate in the activities of our Task Force that the drafting project has been insufficiently considered and is not a pressing necessity for our industry. This point has been made repeatedly during our Task Force conference calls.

Before appointing a drafting committee, it makes sense for NCCUSL to obtain the views of a broad spectrum of bankers, bank attorneys, and others who will be directly affected by the contemplated changes. In addition, the reaction of those working in the securitization and mortgage registration areas should be obtained. It does not appear from the 1/4/11 memorandum that these basic steps have been taken or that productive attempts at consensus-building have been pursued.

To be sure, the above memorandum does state that representatives of the Federal Reserve Bank of New York indicated a desire for NCCUSL to deal with issues concerning notes and mortgage foreclosure. Is this the view of the Federal Reserve Bank of New York or that of one or two employees? It is not clear. In any event, the history of NCCUSL projects shows that Federal Reserve attorneys do not necessarily reflect the views of commercial banks generally. The role and mission of the Fed district banks are distinct from those of commercial banks, and launching a project on the basis of those New York Fed bank employees' views would seem ill-considered and far removed from consensus-building.

Bottom line: The Committee seeks to move to a drafting project before completing its study. The project is a moving target with an uncertain destination.

Well-Defined Scope Essential

The 1/4/11 memorandum makes clear the ambitious drafting project envisioned by proponents – “to make changes to the legal infrastructure that governs promissory notes, drafts, funds transfers, and bank collections to facilitate desired commercial practices within appropriate public policy, and to provide legal infrastructure to support the electronic nature of the operational systems currently in use.” There are no realistic limits to such a broad-based charge. The 12/14/10 Miller/Rusch memorandum contemplates a wide range of “conforming and preemptive or supplementary amendments to other state law necessary to effectuate appropriate legal structure.” The drafting committee should have “authority to say, upon reflection, . . . that a newly discovered issue does warrant being addressed.”

In particular, ABA is very disappointed with the Study Committee recommendation that the drafting project include numerous amendments to UCC Articles 3, 4, and 4A relating to checks, drafts, and funds transfers. In several comment letters ABA has stressed the lack of industry support for these proposed changes. We are not alone in our opposition. Both ECCHO and NACHA have repeatedly voiced their lack of support for these amendments. Their 12/15/09 letters outline their objections. ABA shares their concerns. Additionally, state bankers associations and individual financial institutions have made their views known.

Our Task Force members believe that the technological changes that are taking place will outpace the attempts of a drafting committee to fix in place specific rules that have been proposed. It is not clear that the rules now in place are truly inadequate.

We urge the NCCUSL Executive Committee and Scope and Program Committee to consider the history of multiple NCCUSL projects where industry voiced repeated opposition – the 2003 Amendments to UCC Articles 2 and 2A, the inclusion of

controversial choice-of-law provisions in the 2001 Revision of UCC Article 1, and the unsuccessful attempt to incorporate portions of federal Regulation CC into the UCC as part of the last drafting project to amend Articles 3 and 4. There are others.

On the other hand, NCCUSL has enjoyed success when it has had industry support, and we are proud to support the work of the Commissioners when it coincides with the needs of the banking industry. For example, UCC Article 4A (Funds Transfers) was drafted and adopted by the states with relative speed. Article 4A was far from a modest drafting exercise and dealt with a number of important policy issues, but it was highly successful because there was a clear consensus around the need for the law governing funds transfers both from a policy perspective and a certainty perspective.

To summarize, ABA strongly favors retaining the status of the project as a study committee, as opposed to expanding it to a drafting committee. Furthermore, ABA strongly believes that should the Study Committee make a compelling case for a drafting project, its scope should be carefully and explicitly limited. It should not include the above-referenced amendments previously opposed by our industry.

Thank you for the opportunity to comment. We would appreciate your consideration of our views. Please share this letter with members of the Scope and Program Committee, the Executive Committee, and Study Committee. Feel free to contact me if you would like to discuss this matter further.

Sincerely,



L.H. Wilson

cc: Fred H. Miller, Study Committee Chair
Linda J. Rusch, Study Committee Reporter
John A. Sebert, NCCUSL Executive Director