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May 27, 2009

Fred H. Miller, Chair
Study Committee on Payments Issues
The University of Oklahoma College of Law
300 Timberdell Road
Norman, OK 73019

Dear Fred:

Thank you for sending the memorandum dated March 16, 2009, relating to issues under UCC Articles 3 and 4. We appreciate your taking time to solicit comments from payment system participants before making recommendations to the NCCUSL Scope and Program Committee concerning the advisability of establishing a drafting project on this subject. For several reasons, the American Bankers Association is opposed to this effort.

By way of background, the American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Our members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$14 trillion in assets and employ over 2 million men and women.

In order to properly evaluate the above-referenced memorandum, ABA sought input from our members in several ways. For example, the ABA Task Force on Payments Law reviewed the memorandum and held a conference meeting May 20, 2009, to discuss the issues in more detail. Composed of bank payments 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 created the Study Committee on the Law of Payment Systems (as it was then designated).

At its 5/20/09 conference meeting, the Task Force noted that several issues contained in the 3/16/09 memorandum had been included in the Reporter's 11/6/08 memorandum, which our group had previously reviewed. As part of that review and in response to your earlier request for comment, ABA had outlined its objections to the drafting project then being considered in a 12/3/08 comment letter. These objections remain.

The ABA Task Force recognized that the 3/16/09 memorandum does raise many interesting questions, as well as highlight ambiguities in the UCC. At the same time, there will likely always be questions and ambiguities no matter what version of the UCC is being considered – this despite the best efforts of all concerned. Simply put, our group does not believe the issues and ambiguities outlined in the memorandum are of a sufficient nature to justify the expense and time of a drafting project, especially when major stakeholders feel there is no compelling need for it.

According to the memorandum, the current code does “not adequately address the issues of responsibility and liability as they relate to modern technologies.” This might or might not be true, but given the rapidity with which technologies are developing, our group’s view is that it would be good to resist rushing too quickly into firmly establishing what those responsibilities and liabilities should be with respect to modern technologies. Indeed, a premature codification might actually impede the further development of new payment systems.

Further, the memorandum notes the “[u]ncertainty of risk allocation [in the payment laws] is undesirable because of its effect on undermining the low cost efficiency that is the model of a well functioning payment system.” Yet the memorandum does not give us any reason to assume that whatever uncertainty does exist today is hindering in any way the development of new and innovative payment systems. In fact, all indications are that innovations in the payment system are continuing at a rapid pace.

As the memorandum correctly notes, the 2002 Amendments to UCC Articles 3 and 4 have been slow to be adopted. One reason for this is because over forty state bankers associations signed a Statement of Opposition to them. In the present case, it is significant that all of the state bankers associations represented on our 5/20/09 call were outspoken in their opposition to the drafting project being contemplated.

Contrast the resistance to the 2002 Amendments with the relative speed with which UCC Article 4A (Funds Transfers) was drafted and adopted by the states. 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. Moreover, the body of law that Article 4A addressed was a relatively mature payment system and not one in a state of rapid evolution.

In order to inform ABA’s broad membership of the Study Committee’s possible agenda, the 3/16/09 memorandum was highlighted and made available in the March issue of *ABA UCC/Uniform Law News*, a periodic e-mail bulletin provided to employees of ABA member institutions. It is significant that we have not received a response from any person supporting initiation of the contemplated drafting project. In the words of one ABA Task Force member, “Now is the time for patience.”

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

Sincerely,

A handwritten signature in black ink, appearing to read "L.H. Wilson". The signature is written in a cursive style with a prominent initial "L" and "H".

L.H. Wilson

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