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IMPROVING THE UCC REVISION PROCESS: TWO SPECIFIC PROPOSALS

*Harry C. Sigman**

I. INTRODUCTION

The Uniform Commercial Code (UCC) is most assuredly alive. Indeed, it is in such a constant state of flux these days[1] that an observer might legitimately wonder whether all this "improvement" is not overwhelming the need for stability and predictability and generating an excessive burden of perpetual re-education. As I am one of those participating in the "improvement" process,[2] however, discretion suggests that, at least for the moment,[3] I leave it to others to consider such matters.

The subject of the process of Code revision has been receiving particular attention recently.[4] The perspectives, attitudes, and ap-

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1. Since 1987, new Articles 2A and 4A have been added to the UCC, Articles 3 and 4 have been revised, Article 6 became the subject of a repeal recommendation (and an alternative revision recommendation), revised Articles 5 and 8 received final readings at the National Conference of Commissioners on Uniform State Laws annual meeting in summer 1994, Articles 2 and 9 are being revised by drafting committees, and Articles 1 and 7 have been or are being scrutinized by American Bar Association (ABA) Task Forces. *See* Fred H. Miller, *Et Sic Ulterius*, UCC BULL., Sept. 1993, at 1-5.

2. The Author is an American Law Institute-designated member of the Article 9 Drafting Committee, co-chair of the ABA Task Force reviewing Article 1, a member and past co-chair of the Article 9 Subcommittee of the ABA's UCC Committee, and a member and past chair of the UCC Committee of the State Bar of California, which seeks to participate actively in both the national revision process and the enactment process in California.

3. At the end of the Article 9 revision drafting process, it will be necessary and appropriate to step back and challenge the end product with the question whether the proposed changes as a whole justify the costs inherent in making them. I hope that the time and energy invested in the effort will not distort judgment on this question.

4. *See, e.g.*, Fred H. Miller, *Is Karl's Kode Kaput?* 26 LOY. L.A. L. REV. 703 (1993); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Steven L. Schwarcz, Revising Article Nine: A Bickelian Approach to Statutory Obsolescence, (Aug. 10, 1994) (unpublished manuscript, on file with the *Loyola of Los Angeles Law Review*); Donald J. Rapson, *Who Is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (And Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 251 (1994); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. (forthcoming 1994).

proaches of the writers have varied. For example, Professor Miller has stressed the need to be "politically realistic";[5] Professor Patchel has questioned whether the process does not, by its nature, cause underrepresentation of particular constituencies;[6] and Donald Rapson has focused on the "public interest."[7] I have previously addressed the subject of the revision process,[8] and I have long felt that bar committees[9] and academics[10] ought to involve themselves in the process far more than they have in the past. In this piece, I wish simply to present two specific proposals. I believe that these proposals are consistent with and facilitate achieving the goals of all of these writers.

II. First Proposal: A "Public Comment" Period

My first proposal calls for the institution of an official six-month "public comment" period following the American Law Institute's (ALI) and the National Conference of Commissioners on Uniform State Laws' (NCCUSL) "final" reading and approval of a new or revised article. This period would precede the article's formal promulgation as the new official text and the commencement of the effort to achieve enactment by the states. The second proposal is that the sponsors specify a common effective date for the states enacting the new version in the initial wave.

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5. *See* Miller, *supra* note 4, at 711-12 n.26.

6. *See* Patchel, *supra* note 4, at 124-25.

7. Rapson, *supra* note 4.

8. *See* Harry C. Sigman & Jeffrey S. Turner, *Preface to the California Report on Article 2A (With Some Thoughts About Participation in the Legislative Process)*, 39 Ala. L. Rev. 975 (1988).

9. I note with pride that the California Bar UCC Committee, following the lead of Donald Rapson's provocative article, Donald J. Rapson, *U.C.C. Article 6: Should It Be Revised or "Deep-Sixed"?*, 38 Bus. Law. 1753 (1983), delivered to an NCCUSL annual meeting a paper advocating repeal of Article 6. See Bryan D. Hull, *Recommendation of the UCC Committee of the State Bar of California: Article 6 Should Be Repealed*, 41 Ala. L. Rev. 701 (1990), for a subsequently published version of that paper. I believe that paper was highly influential in persuading the Conference the following year to adopt that proposal. Despite the generally accepted "political wisdom" that repeal was impossible, within five years half of the states had in fact repealed Article 6—a task not yet accomplished in California. Miller, *supra* note 1, at 2.

10. Not enough has been said about the failure of academia to give "points" to professors for devoting energy to the legislative process. A postenactment critique published in a prestigious law review seems to get far greater academic respect than does a pre-enactment contribution to the actual improvement of the legislative work product, despite the fact that the latter is far more likely to have an impact on the real world. Is it possible for the American Association of Law Schools to have an institutional involvement in the UCC revision process, or to facilitate the establishment and support of a framework for individual professorial involvement? What can be done to enhance communication among commercial law teachers and increase their involvement in law reform and bar group activities?

The purpose of the first proposal is to allow, in a way not otherwise likely to occur, for the outside participation that is so crucial to the quality and the legitimacy of the process. Professor Miller closed his piece in the first portion of this Symposium with the notion that we are obligated to support "reasonable results arrived at through a participatory and open process,"[11] a sentiment I share. It is certainly true that the NCCUSL has diligently sought to make the drafting process an open one. Drafting committee meetings are open to anyone wishing to attend, and many people do attend. At the recent Article 9 Drafting Committee meetings, approximately seventy-five to one hundred people attended, and they showed no reluctance to make their views known. Attendees included representatives of individual and groups of lenders and credit-extending sellers, bar groups, the New York Federal Reserve Bank, and consumer organizations. The Chair of the Article 9 Drafting Committee has engaged in significant efforts to identify individuals and groups who might be interested in Article 9 revision and to inform them of the Committee's existence, its meeting dates, and its activities. The ABA Business Law Section and its UCC Committee regularly send advisers to the drafting committee meetings who represent and report back to their memberships. And, of course, the ALI's membership—through both consultative group meetings and debate at the ALI annual meetings—can participate actively and with significant impact.

Nevertheless, this is insufficient to ensure the kind of truly widespread participation, prior to state-by-state legislative consideration, that is really required, particularly if that legislative consideration—and the local bar group activity that frequently accompanies it—is to be of the restrained nature so skillfully advocated by Professor Miller.[12] "Open" means more than the absence of direct exclusion. For obvious reasons, it is not possible for all who might contribute usefully to the end product to attend drafting committee meetings. This reality should not, however, deprive the process of the benefit of their input.

It is true that the NCCUSL makes drafts available to all who seek them throughout the drafting process. This, however, does not do the job. In the typical drafting process, the reporter generates a draft approximately four to eight weeks before a drafting committee meeting. By the time an interested outsider—a state or local bar UCC committee, for example—obtains a draft from the NCCUSL, the drafting

11. Miller, *supra* note 4, at 714.
12. *See id.* at 709-12.

committee has likely met, or there remains too little time before that meeting for study, discussion at the group's own meeting, and communication of the group's views. Thus, the bar group is generally put in the position of studying and communicating views about a draft that may have been scrapped entirely or significantly modified by the time those views are presented. Almost certainly the draft will have already been discussed by the drafting committee without the benefit of those views. Obviously, this fact is discouraging to bar groups and other "outsiders." Can one reasonably expect volunteers to expend a great deal of effort on what is likely to be a superseded draft by the time the results of that effort are communicated?

Review under such circumstances is particularly likely to be discouraging if the draft is lengthy, as was the case with new Article 2A, for example.[13] Re-revised Article 8 is not only lengthy but also complex and full of new concepts and new terminology. Moreover, drafts are sometimes accompanied by dauntingly lengthy, albeit useful, explanatory notes from the reporter. Even the last preapproval draft of Article 5,[14] which consists of only fifteen substantive sections, is (together with the reporter's comments, transition provisions, and complementary amendments to Article 9) a forty-eight-page document. Furthermore, the drafting sometimes proceeds in a piecemeal fashion, and it is possible to give mature reflective study to the proposed new or revised article only when considering the finished product.[15] Often it is only then that the full significance of policy and drafting decisions can be appreciated.[16] Also, the official comments sometimes have not yet been prepared at the time the sponsors approve the black letter. Absence of reporter's notes and official comments may well make review of text, both drafts and the final version, by those not intimately

13. Article 2A has 80 sections. *See* U.C.C. § 2A (1990).

14. U.C.C. Article 5 (Tent. Draft May 23, 1994).

15. Consider the current Article 9 revision process. Although the drafting committee has been functioning for over a year and has already met twice, only Part 5 (and a few discrete other areas) has been the subject of circulated drafts to date. Thus, while the drafting process may well be three years in duration, more than half of that time will have passed before even a preliminary version of the revised article as a whole will have been exposed. I hasten to make clear that this is not a criticism of the process or the reporters; the project is proceeding in a completely sensible way. These facts are noted here only to illustrate the limited time that will be available to those not intimately involved in the process to study the finished product and participate meaningfully at the drafting, prepromulgation stage.

16. The problems analyzed in the excellent symposium on Article 2A in the Alabama Law Review came to light only when the official text of Article 2A was in substantially final form. Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988).

involved with the drafting process more difficult and less meaningful. This is a particularly important concern because the official comments are relied upon to play an increasingly important role in revision efforts.[17] It is all too tempting to deal with suggestions made late in the drafting process by "putting something in the comments." Finally, review of the finished product by readers not theretofore involved invariably brings to light unintended glitches, ambiguities, "typos," et cetera, that could be fixed by the sponsors before enactment, by means of truly "technical" amendments that do not upset policy choices.

Only the essentially finished product, close to imminent enactment in both text and time, will engage the attention and justify meaningful study effort on the part of "volunteer" outsiders. Busy practitioners are notoriously loathe to devote time to legislation until shortly before its effective date. Although early rather than late participation is clearly more likely to be effective, early participation is nevertheless probably too much to expect from most outsiders.[18]

Our hypothetical bar group, however, is highly unlikely to receive the finished product much before presentation to the ALI for its final consideration, typically in May and only about ten weeks prior to the NCCUSL final reading. At that point, the bar group is essentially presented with a *fait accompli*. Though the product has not yet been enacted anywhere, indeed, has not even been proposed in any state legislature, the NCCUSL (and an often exhausted reporter) takes the position that its work is essentially done, subject only, perhaps, to the uncovering of a monumental error.[19]

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17. The official comments can be an ideal place for articulating and justifying policy choices underlying statutory provisions, see, for example, the comments to revised § 3-311, and for lengthy elaborations and illustrations, see the comments to § 2A-303. I believe it is inappropriate, however, to use the official comments to intentionally fill gaps or clarify things left muddy in the statute. *See* Donald J. Rapson, *Efficiencies and Ambiguities in Lessors' Remedies under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 Ala. L. Rev. 875 (1988).

18. Although there is a risk that some who might have participated earlier will defer their participation until the public comment period, I believe this risk is slight. Those highly motivated because of the nature of their interest in the project will participate early anyway; those less motivated are unlikely to participate extensively, if at all, much before the end of the project, even if there were no public comment period.

19. "Timing" problems were among the frustrations confronted by the California Bar UCC Committee in its effort to participate constructively in the Article 2A drafting process. *See* Sigman & Turner, *supra* note 8, at 976. Indeed, it was the extraordinary difficulty of the struggle to synchronize the California Bar UCC Committee's review of drafts with the drafting schedules of reporters and the meeting schedules of drafting committees that originally prompted me to make this proposal to Professor Miller years ago.

My proposal would come into play precisely at this point. The sponsors should give mass circulation to their work (including proposed official comments) in early to mid-August—immediately after the NCCUSL final reading—as a proposed finished product. This should be followed by an official public comment period lasting until the end of February. Promptly at the end of this period, the drafting committee should meet and consider, on the merits, with an open mind (i.e., an "it's not too late" attitude), all comments of any nature received during that period. It should make any changes to the black letter or the official comments that seem advisable. Such changes should result not only in a better product, but one likely to receive a more congenial reception from legislatures and practitioners who have had time to become educated about the revision and a more uniform judicial treatment down the road. If the nature or extent of the drafting committee's changes so requires, the annual meetings in May and July would be the appropriate occasion for final reconsideration by the sponsoring bodies.

This proposal would enable the revision process to get, or at least represent a sincere and diligent attempt to get, the benefit of analysis and consideration by the many who could not meaningfully participate at an earlier stage. Academics, bar groups, and interested individuals would be far more likely to invest their energies in reviewing a completed work, proposed as ready for enactment, and they would do so with the knowledge that there is sufficient time to do so and that an institutional mechanism exists for meaningful consideration of their views. This would broaden the base of public participation in the process and likely would improve both the quality of the product and its political legitimacy. Moreover, during the public comment period, the general education process could commence and a wider base of political support[20] could be built to assist in speedy enactment. Instead of the present system's five months between the NCCUSL final reading (typically late July) and presentation for legislative enactment as a proposed bill (presumably the following January 2), there would be seventeen months in which to create support in each state. My proposed procedure would make more likely a larger first wave of adoptions and more rapid overall enactment.

20. This might also lessen the power of the narrow but highly motivated groups who, according to Professor Patchel, might otherwise exert inordinate weight in the give and take of the drafting process candidly described by Professor Miller. *See* Patchel, *supra* note 4, at 120-25; Miller, *supra* note 4, at 711-12 n.26.

I readily acknowledge that this proposal would also result in giving groups unhappy with a proposed revision additional time to mount an opposition. If such opposition exists, however, the merits of the issue should be seriously and publicly considered. It is far better to withdraw a proposed revision in serious danger of defeat in the legislatures than to promulgate it only to discover that many states will refuse to pass it (outright or as promulgated by the sponsors). Public debate and open policy choice should enhance both the quality and legitimacy of the product and thereby earn more widespread acceptance for the product.

I also acknowledge that, under some circumstances, there may be other costs of delay, although I believe this risk to be, in most instances, theoretical at best. The additional time for mounting the legislative campaign might be perceived as involving a loss of momentum. Also, if the revision is seen as a statutory solution for a serious problem requiring urgent attention, there is a risk that some states may proceed to act on their own without waiting for the public comment period to expire. I do not believe, however, that any of the revisions to date has dealt with a problem of such perceived urgency that precomment period enactment would have occurred. Besides, the drafting process itself takes several years.[21]

To summarize, if this proposal is adopted, the sponsors will gain the likelihood of both improved quality and improved political legitimacy, as well as more lead time, allowing for a better-prepared and better-mounted legislative enactment effort. This gain will be accompanied by the increased likelihood of a greater number of adoptions in the initial wave, lessening the problems of nonuniformity arising from nonsimultaneous adoption. Further, if it should turn out that there is significant opposition, an opportunity for political compromise or withdrawal of the proposal will have been gained.

This is far preferable to what occurred in the enactment process for Article 2A. Prior to the Code sponsors' offering of Article 2A for adoption in any state, the California Bar UCC Committee determined that there were flaws in the proposed 1987 Official Text of sufficient importance that it would oppose enactment in California as promulgated, although it would support enactment of a modified version.[22]

21. Despite a perceived need to act expeditiously to head off federal action in the area, the revision of Article 8 has proceeded according to the sponsors' usual timetable.

22. The competition between the competing versions is described in Steven L. Harris, *The Interface Between Articles 2A and 9 Under the Official Text and the California Amendments*, 22 UCC L.J. 99, 100 (1989).

Other Bar groups around the country reached similar conclusions.[23] These views were made known to the drafting committee—indeed, prior drafts of the California Bar Committee's Report had been circulated even earlier. The NCCUSL nevertheless declined to deal with those views at that time and proceeded with its legislative program.[24] With the support of the California Bar Committee, a modified version of Article 2A was adopted in California,[25] no doubt giving momentum to the adoption of Article 2A elsewhere. With the support of local bar groups, several states enacted a version of Article 2A modelled after California's version of Article 2A. Several states enacted Article 2A as promulgated by the sponsors. Ultimately, the NCCUSL decided to take note of the criticisms, and in 1990 it promulgated revisions to Article 2A.[26] This required an additional legislative effort to amend the version previously enacted in several states—a process not yet completed.[27] This imbroglio could have been avoided if the California Bar Committee had created its report earlier in the drafting process—something not achievable for the reasons described above—or if the NCCUSL had not been insistent on adhering to its schedule in the face of considered substantive opposition. Surely the country could have waited an additional year for the enactment of Article 2A.[28] Had my proposal been in effect in 1987, the modification to the official text of Article 2A that ultimately occurred in 1990 could have taken place in early 1988 under more auspicious circumstances, wholly within the framework of the sponsors' process, and without creating a need later to go back to several legislatures to seek postadoption amendment.

Finally, for those who derive comfort from precedent, the initial UCC promulgation process was delayed to allow for further opportunity for study by interested groups.[29]

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23. *See id.*

24. *Id.*

25. CAL. COM. CODE §§ 10101-10600 (West 1990 & Supp. 1994) (added by Act of Sept. 26, 1988, ch. 1359, § 5, 1988 Cal. Stat. 4495, 4502-35, effective Jan. 1, 1990).

26. *See* Miller, *supra* note 4, at 703.

27. As of December 31, 1993, Florida and South Dakota had not yet adopted the 1990 revisions to the previously enacted 1987 version of Article 2A. *See* Miller, *supra* note 1, at 1.

28. Indeed, as of December 31, 1993, Article 2A (in any version) had been adopted in only 39 states.

29. One researcher has reported:

> The sponsors of the Code planned to present the Spring 1950 draft for final approval by the [sponsoring organizations] in May 1950. Just before the meeting, the Section on Corporation, Banking and Business Law of the American Bar Association adopted a resolution urging the sponsoring bodies not to approve the

III. Second Proposal: A Common Effective Date

I turn now to my second proposal. It too relates to timing, but is, I believe, more modest.

I propose that the NCCUSL, before commencing its legislative enactment program with respect to a particular revision, consider the prospects for that revision and the legislative calendars confronting it, and designate a proposed common effective date. Unless the prospects for the particular revision suggested something else, the designated common effective date typically would be the first day of January following the first calendar year by the end of which all—or virtually all—of the state legislatures would have met at least once with an opportunity to consider the bill. The current practice is simply to push for adoption and leave the effective date up to the usual practice of each state.

One of the stated purposes and policies of the UCC is "to make uniform the law among the various jurisdictions."[30] Unfortunately, one of the problems inherent in the uniform law technique, as contrasted with federal enactment, is the inability to achieve simultaneously effective enactment throughout the country. While there rarely is an urgent need to enact a particular UCC revision immediately,[31] a prolonged period of time in which there has been enactment in some but not all states presents conflict of laws problems, with the attendant uncertainty and increased probability of litigation.

The second proposal, entailing the designation of a common effective date, is intended to address this issue by lessening the number of nonsimultaneously effective adoptions. Additionally, since not every legislature meets annually, this device might make possible a number of simultaneously effective adoptions that presently cannot be

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> Spring 1950 draft. This resolution also urged that interested groups have more opportunity to study the proposed Code. The sponsors postponed their approval, and the drafters prepared another draft, the September 1950 revision of Article 9.

Thomas E. Plank, *Sacred Cows and Workhorses: The Sale of Accounts and Chattel Paper Under the U.C.C. and the Effects of Violating a Fundamental Drafting Principle*, 26 Conn. L. Rev. 397, 419 n.84 (1994) (citations omitted).

30. U.C.C. § 1-102(1)(c) (1990).

31. Indeed, the several years' delay in enactment caused by the New York Law Revision Commission's lengthy study of the UCC in the 1950s resulted in both a better end product (the Code sponsors modified the official text in response to the suggestions made in the report of that study) and a more rapid enactment by the remaining states once New York adopted it. Moreover, since we are now dealing with the change from the existing Code to a revised version—that is to say, from a satisfactory environment to a still better one—the urgency for change should be far less than was the case at the time of the initial adoption of the Code.

achieved. Moreover, designation of a common effective date would serve to stress that the legislation is part of a multistate effort to achieve "uniform" legislation, perhaps thereby helping to ward off nonuniform amendments.

It is true that the consequence of this proposal would be to defer the effectiveness of a particular enactment in jurisdictions where it might otherwise have become effective sooner. This seems, however, a small price to pay given the conflict problems the proposal would lessen or avoid.[32] Moreover, there is nothing in this proposal that entails delay in the enactment effort.

These proposals, then, would substantially improve the UCC revision process. The first proposal would go a long way toward producing a better quality product and a more politically legitimate and better received product. The second proposal would lessen conflict of laws problems and might well result in more rapid and more uniform enactment. These advantages would be achieved at the small cost of a short delay in the effective date of a new or revised Article.

32. Occasionally, other methods are possible. For example, Article 4A has been the NCCUSL's most successful legislative program to date in terms of speed of enactment. Promulgated in 1989, it had become effective in 47 states by December 31, 1993. In any event, because of the powerful choice of law rules of § 4A-507, authorizing both party autonomy and selection of governing law by a funds-transfer system rule, nationwide effectiveness was, for all practical purposes, achieved virtually immediately. The Federal Reserve Board promptly promulgated the provisions of Article 4A as the operating rules of Fedwire, thereby making those provisions the effective law for all transactions on Fedwire. Miller, *supra* note 4, at 713. See UCC § 8-110, as approved by the NCCUSL on August 4, 1994, for a powerful choice of law rule that might offer a somewhat similar possibility in connection with the new rerevised Article 8.