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Dear Mr. McCorkle,

I want to thank you and members of the Committee for so carefully considering my oral presentation at your October meeting. I also appreciate comments from the Committee that the COTA would be amended to deal with transfers of title, and that there is a distinction between application for a new title and transfer of title.

I am now in receipt of your draft sent out on February 11, 2005. Unfortunately, this draft actually makes matters worse, compared to the draft for the October meeting. It continues to make a muddle of transfer requirements, remains confused about the difference between assignment of title and an application for a new title, requiring states to violate explicit federal mandates as to how states produce and transfer titles, ignores the needs of law enforcement, and nullifies any benefit from the draft's branding provisions.

My experience is that when I have mentioned similar problems in written comments (e.g. in March of 2003, May of 2003 and January of 2004), the comments had no impact on your Committee's deliberations. Only after my October, 2004 oral presentation did your Committee begin to recognize issues that we have been raising for the last two years. Since I will not be able to attend your next meeting in Arizona, I ask that you or someone you designate take it upon themselves to present the thrust of these comments, below, throughout the oral discussion at your meeting. I would be happy to discuss beforehand any questions you or your designee may have about my comments.

I ask this not because I feel our views deserve special treatment. Rather, it is our recognition that your draft is seriously misguided, that those presently at the table are not pointing out these problems, and that the Committee will not produce a credible draft unless these problems are either corrected or the COTA's scope explicitly excludes a number of titling issues, including transfer of title.

Basic Concepts
Transfer of title is of obvious importance to a certificate of title law. An existing title is transferred: whenever a vehicle owner sells a vehicle to an individual or sells or trades it in to a dealer; whenever a dealer transfers ownership to another dealer; and whenever a dealer transfers ownership to a non-dealer.

Federal law and the law in all 50 states require that every transfer of ownership be accompanied by a transfer of the existing title. Unfortunately, the drafting comments to Section 9 continue to get it wrong. Federal law does not place requirements on the application for a new title, but on the transfer of the existing title. A transfer of ownership need not even involve an application for a new title. Instead, state law specifies when a new title must be sought. But every transfer of ownership must involve a transfer of the existing title.

A paper certificate of title is held by the owner or the lienholder. On the other hand, an electronic certificate of title will be held by the state DMV. For the original of an electronic title to be held in private hands would pose extremely serious problems. This obvious fact was recognized in Fred Miller's letter to NCLC stating explicitly that, under COTA, the DMV retains the original of the electronic title. Your Committee, in the October, 2004 meeting, expressed clear agreement with this basic requirement.

From these underpinnings, certain procedures logically flow. Paper titles must be transferred on the paper title itself, using procedures commonly set out in detail by state law, that comply with federal mandates. State law also specifies situations where the new owner turns in this paper title, after assignment, for a new title.

Where an electronic title is to be transferred, this is accomplished by the transferor and transferee supplying certain information in a correct manner to the state DMV. It does not even make sense to apply for a new electronic title, since the existing title is just updated at the DMV. Difficult questions arise as to how this transfer of an electronic title is to comply with federal law and to meet the needs of parties involved. The transfer must be done by secure means and both parties must sign the transfer. The transferee must also have access to information on the title, such as title brands.

The existing COTA draft ignores all these basic procedures or gets them all wrong. These comments focus exclusively on Sections 16 and 17.

Section 16

Section 16 offers the transferor three options, whether the title is electronic or paper. As will be seen, Section 16 is conceptually confused, inconsistent with other COTA sections, ignores fundamental purposes of a certificate of title, is clearly preempted by federal law, and requires states to ignore explicit federal mandates.

The first option uses the word "execute," and as defined by section 3(a)(11), this option thus allows the transferor to sign and deliver to the buyer a record on, attached to, accompanying or logically associated with a certificate of title. This makes no sense at all. If an electronic title is being transferred, Section 16 requires the seller to provide some kind of record to the buyer, but does not provide the same information to the DMV, and thus the electronic title remains in the name of the old owner, not the new owner. (Section 17(b) does not help because it only applies to car dealers, not consumer purchasers, and because it does not specify sufficiently what information is to be provided.) Moreover, the transferor does not have the certificate of title, so cannot deliver a record associated with it to the buyer.

If we are dealing with a paper certificate of title, then the transfer should obviously be made on the certificate itself, as required by federal and state law. Contrast this with the first option that only requires a signed record, not a secure document and not even necessarily on paper, and where it need only be "associated" with the certificate. Of course, this record will not contain the title brands, prior owners, odometer reading, the make and model, or any other useful information

about the existing title, essentially making a mockery of the COTA's branding requirements and federal motor vehicle information requirements.

The second option to deliver to the DMV a signed certificate of title, apparently bypassing the buyer, is similarly flawed. For a paper certificate of title, the buyer never acknowledges the transfer, the buyer never sees the title brands or any other information on title, and the buyer does not have the certificate to send in with an application for title. For electronic titles, the seller does not possess the original of an electronic certificate of title, so cannot deliver it to the DMV.

The third option under the latest COTA draft is for the seller to deliver to the DMV a record evidencing transfer of an electronic certificate of title, indicating transfer of the certificate of title to the buyer. This clearly only applies to electronic titles, and allows the seller to send a record to the DMV saying the certificate has been assigned. This provides no information to the buyer about brands or other information on the existing title, because the certificate remains at the DMV and there is no requirement that the buyer sign anything or be provided any information about the existing certificate. The provision also violates federal law in a number of respects: the transfer is not using a secure process, the transferee does not sign the document, none of the information required by federal law is required to be listed. This third option does not even require proof that the buyer in fact agrees to buy the vehicle or even that the buyer exists.

Under all three options, the transferor is allowed to transfer the certificate "as promptly as practical." This "my dog ate my homework" standard is not found in any other NCCUSL model law, to my knowledge, and should be deleted immediately.

Recommendation: for paper titles, the COTA should refer to existing state law. Every state has enacted numerous provisions about how to transfer a certificate of title, all ignored in the COTA. At this point, in the COTA drafting process, the COTA would either have to start from scratch to consider these provisions, or simply refer to existing law in the area for a particular state.

For electronic titles, the COTA must provide for three procedures. First, the transferor must use a secure process to report to the DMV information required by federal law and existing state law as to any transfer of ownership. Second, there must be disclosure to the transferee of the information on the electronic certificate of title, including any title brands and odometer information. Third, the transferee, as required by federal law and by common sense, must sign a record confirming the transfer and receipt of the disclosures, and providing the buyer's full name. Clearly, we do not want a situation where one party claims to have transferred ownership, but where the other party denies it, or the other party is not properly identified.

In any event, the drafter must distinguish requirements for electronic transfers as different from those for paper titles. Other COTA sections treat the two differently, and the effort to treat two different processes in Section 16 as the same leads to hopeless confusion and bizarre results.

Section 17

Section 17 is confused as to how a certificate of title system operates and how it relates to Section 16. Section 17(a) gives either party the option to deliver a record to the DMV indicating a transfer, without filing an application for a new title. This requirement is clearly wrong:

- For electronic titles, reporting to the DMV is not an option, but must be required. Any transfer of ownership must be accompanied with an assignment of the certificate of title. That is what a transfer is and that is what federal law requires. Where a certificate of title is

electronic, the assignment of title must be accomplished by providing information to the DMV, allowing the DMV to amend the electronic title.

- For paper titles, states will be quite surprised that buyers need not apply for a new title, but can keep the existing title, and instead submit some record indicating the transfer. (A glaring hole in the existing COTA draft is that nowhere does it require a buyer for use to in fact apply for a new title. Instead, apparently a consumer transferee can rely instead on an existing certificate of title assigned to the consumer. Of course, this is contrary to practice in every state.) Instead, the existing certificate must be assigned to the new buyer and the new buyer must immediately file an application for a new title with the DMV. What possible use could section 17a have in such a transfer?

Section 17(b) is equally confusing. It requires a dealer buying a vehicle to deliver information to the DMV if it has not applied for a new title. In itself, this provision is harmless, as long as it is not intended to replace requirements as to transfer of title. Nowhere does section 17(b) indicate that its requirements are meant to replace Section 16 transfer procedures. We are just concerned because we see no other reason for this new subsection.

If Section 17(b) is intended to replace Section 16 transfer requirements, the subsection would be absurd. Apparently an email to the DMV from the buyer that the buyer is the new owner is sufficient to transfer title. This of course would allow transfers without the seller's consent, put states out of compliance with federal mandates, make a mockery of any branding requirement, hinder law enforcement efforts, and would actually encourage fraud. Of course, federal law requires seller and buyer to each comply with certain procedures when there is a transfer of title, no matter who the buyer or seller is and no matter that an application for a new title is subsequently sought. Moreover, Section 17(b) does not place any requirement on a dealer that transfers a vehicle to another dealer, where no new title is sought.

Recommendation: delete the section.

Thank you for the opportunity for us to present these comments.

Jonathan Sheldon
Staff Attorney