STATEMENT
Of
CARLYLE C. RING, JR.

Council of the District of Columbia
Committee on Public Services and Consumer Affairs

HEARING ON BILL 19-136
Uniform Commercial Code Revision Act of 2011
And
HEARING ON BILL 10-222
Uniform Commercial Code Article 9 Amendments Act of 2011

Monday, June 6, 2011
12:00 pm, 5th Floor Chamber, John A. Wilson Building

Good afternoon, Chairperson Yvette M. Alexander and members of the Committee.

I am Carlyle C. Ring, Jr., and appreciate the opportunity to speak in support of Bill 19-136. I have been a member of the District of Columbia Bar since 1956, associated with the law firm of Ober, Kaler, Grimes and Shriver and its predecessors in its Washington office from 1956 to the present. I am also a Virginia Commissioner to the National Conference of Commissioners on Uniform State Laws ("Uniform Law Conference") since 1970 and am Chair of the Uniform Commercial Code Committee for the Conference.[1]

The Uniform Commercial Code ("UCC") was promulgated after years of consideration in 1954 and enacted by all states and jurisdictions by 1968. However, by the 1980s the Code was becoming outdated by technological developments, particularly electronic transactions, and by the changing practices of stakeholders. Thus, substantial revisions to shift from paper to electronic transactions were most necessary. The first revision was Article 4A for electronic wholesale funds transfers. There was no comprehensive law anywhere in the world governing the obligations and liabilities if an electronic transfer was diverted, forged, or modified. Article 4A, promulgated in 1989, was rapidly adopted by all states, incorporated into Fedwire by regulations issued by the Federal Reserve System, and by incorporation of Article 4A by CHIPS (Clearing House International Payments System) governing almost all international funds transfers. On the average day $3 Trillion is transferred under the 4A rules.

[1] I also served as President of the Uniform Law Conference 1983 to 1985. I have been a member of the Permanent Editorial Board of the Uniform Commercial Code since 1985. I was chair of the Drafting Committees for the revisions of Articles 4A, 3 & 4 (1990) and 5 (1995) and served as a member of the Drafting Committees for Articles 1 (2001) and 3 & 4 (2002).

Following Article 4A, revisions, primarily to provide a legal framework for electronic transactions, were drafted and adopted by the states for Article 5 (Letters of Credit), Article 7 (Certificates of Title), Article 8 (Securities) and Article 9 (Secured Transactions). Changes were then made to Article 1 (General Provisions) in 2001; and further changes to Articles 3 & 4 in 2002.

Attached hereto are maps showing the adoption of these revisions by the various states and jurisdictions: Article 4A – all jurisdictions; Articles 3 & 4 (1990) –all but NY; Article 5 –all but the Virgin Islands; Article 7 – all but ten states and three jurisdictions; Article 8 – all jurisdictions; Article 9 (2002) – all jurisdictions.

Commercial law has been the providence of state and local law since the formation of the United States. However, as our commerce has become more global and international, it has been increasingly essential that commercial law be uniform. That may be achieved through coordinated cooperation of the states and jurisdictions or by federal preemption. The Uniform Law process preserves the federal system and establishes harmony with federal law. In the absence of uniformity in state and local law, federal preemption is inevitable. The division of power and responsibility that our founders felt so necessary to preserve our freedoms is vital less all power becomes concentrated in the overburdened and sometimes deadlocked Congress.

Accordingly, it is important for the District of Columbia to complete the updates of the UCC, maintain and preserve the role of state and local law in commercial transactions:

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With respect to Bill 19-136, the updates and changes include the following:

Article 7 (Documents of Title) revisions of 2003:

The revisions to Article 7 are primarily to provide for electronic certificates. The original Article 7 was based on paper titles. The revisions have been enacted by 40 states including the neighboring states of Maryland and Virginia. There have been no groups that have spoken in opposition to its enactment.

Electronic documents of title require different concepts and terms and the proposed additions include:

Control - The concept of control is set forth in [7-106] providing that an electronic document is the equivalent to possession and endorsement of a tangible document of title. A person has "control" of a document of title "if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred."

Statute of Frauds – Revised Article 7 extends the statute of fraud requirements to include electronic records and signatures by its definitions of "record" and "sign".

Interchangeability - Revised Article 7 permits the conversion of electronic documents to tangible documents and vice versa. An electronic document may be converted when the person in control surrenders control to the issuer, which then issues a tangible document of title containing a statement that it substitutes for the electronic document. A similar process converts a tangible document to an electronic one. Section 28:7-105 lists the minimum requirements that must be filled to give effect to a substitute document.

Article 6 (Bulk Sales) repeal

When the UCC was first promulgated and enacted, there were relatively limited ways a creditor could guard against fraud in a bulk sale by the owner to a third party and then fleeing.

Since 1954, there are a number of ways that a creditor may protect its interests. Article 6 imposed a process and procedures that were costly, with strict liability for noncompliance. Failure to comply rendered the transfer ineffective, even when the buyer had complied in good faith.

Today, creditors are able to protect themselves through the availability of credit reports that are reliable and up to date; state long-arm statutes for obtaining personal jurisdiction over a debtor who flees; and the creditor can under Article 9 secure an interest in the inventory or other collateral and/or obtain remedies under the Uniform Fraudulent Transfer Act.

James White, law professor at the University of Michigan, comments in his Treatise on the Uniform Commercial Code:

> "...the drafters did not propose a repeal of Article 6 just because they were unsympathetic to the unsecured creditors of prospective bulk sellers. The drafters believed that the costs Article 6 imposed upon legitimate transactions exceeded the value conferred in deterring and protecting against illegitimate transactions. For every bulk seller who hoped to take the money and bolt to South America, there are hundreds or thousands who intended to pay and remained capable of doing so after the transfer. Article 6 lumps the rare thief with the ubiquitous merchants who provide for their creditors or at least leave their creditors no worse off as a result of the sale. So Article 6 requires compliance with its expensive procedure in thousands of cases in order to protect the rascals involved in a few.
>
> Second, the protection given by Article 6 – except for the prophylactic qualities – is not necessarily efficacious. A determined thief can give the ten-day notice required by Article 6 and yet abscond with the money. How is a creditor who

gets a bulk sale notice to protect itself against a sale only ten days hence? Not clear.

Finally, the costs of complying with Article 6 may have stymied desirable transactions that would have bettered the lot of the transferor's creditors had the transactions occurred." Page 218 White and Summers, Uniform Commercial Code, Fifth Edition

Article 6 has now been repealed in every jurisdiction except the District of Columbia, California where the revised Article 6 was adopted, and in Maryland and Georgia, where the original Article 6 still is retained. Six states at first did not repeal Article 6 but enacted the revised Article 6. Four of those states, including Virginia, have since repealed Article 6. Only California and DC have not repealed.

Articles 3 & 4 (Checks and Negotiable Instruments) of 2002

In 2002, the Conference undertook to address a limited number of practices and issues that were not covered by Articles 3 & 4. The amendments provide:

Lost Instruments –The amendments establish that a purchaser of a negotiable instrument may enforce an instrument even though the instrument was lost while it was in the possession of the previous holder. This addresses a case that inhibits FDIC purchase and assumption when the actual note cannot be located.

No Double Payment Obligation - Amendments clarify that a maker of a negotiable promissory note that has been sold may continue to make payments to the seller of the note, and obtain a discharge for those payments, until notified to direct payments to the buyer of the note.

Unsigned, Telephonically Authorized Checks – The amendments shift the burden of payment to the bank where such checks are deposited rather than the bank of the drawer when such a check is not authorized, inasmuch as the bank of the telemarketer soliciting such checks is in a better position to police its customer's practices.

FTC Legend – Amendments provide that a holder of a consumer promissory note that is required by the Federal Trade Commission to contain a legend that the note is subject to claims and defenses of the maker, is subject to the same claims and defenses if the required legend is omitted.

Electronic Records and Signatures –Amendments provide that various notices may be given electronically as well as in writing.

Updating Suretyship Rules – The amendment updates the rules for guarantors and other parties secondarily liable as signatories to a negotiable instrument. The rules follow those of the Restatement of Suretyship.

Article 1 (General Provisions) amendments of 2003

The revisions to the other articles of the UCC made appropriate to revise the general provisions (that apply to all of the other articles) conform as well.

Clarification When Non-UCC Rules Apply. Other law supplements, but does not supplant UCC rules. The clarifications reduce interpretation problems that may generate unnecessary litigation.

Good Faith - Reasonable commercial standards are added to the definition providing an objective and fairer standard for courts to enforce the obligations and duties set forth in the various Articles of the UCC.

Course of Performance - Absent express terms, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

Statute of Frauds – General writing and signature requirements are deleted to enable electronic records and signatures.

There are more details in the revisions and I am available for any questions you may have. However, in the interests of maintaining the vitality and vigor of state and local commercial law responsive to the changing technology and business practices, it is most important that the District of Columbia law is current and up to date.

STATEMENT IN SUPPORT OF THE ENACTMENT OF BILL 19-222

REASON FOR THE AMENDMENTS

Since the enactment of the major revisions to UCC Article 9 in 2001, a number of states began to address the sufficiency of the name of a debtor by non-uniform amendments. Further, the International Association of Commercial Administrators ("IACA") wished to make some changes to the filing system for financing statements. Thus the Permanent Editorial Board authorized the study of specific and limited amendments to address these concerns and proposed uniform amendments to the UCC Article 9. The result is these proposed amendments.

CHANGES MADE BY THE AMENDMENTS

The following are the principle changes made:

1. *Name to be provided on a financing statement when the debtor is an individual.*

By amendment to , if the debtor holds a driver's license that has not expired and that has been issued by the state, the name of the debtor that must be

provided on the financing statement is the name of the debtor as it appears on the driver's license. This is the so-called "only if" rule, i.e. the debtor's name on the financing statement will be sufficient "only if" the name provided is the name on the driver's license. I understand that the software and computer interface between the DC Division of Motor Vehicles and the Recorder of Deeds are compatible to achieve the coordination necessary to implement this rule.

If the debtor does not hold a driver's license issued by the state in which the financing statement is filed, then either of the following names for the debtor would be sufficient as the debtor's name on the financing statement: (1) the individual name of the debtor, as under current Article 9, or (2) the debtor's surname and first personal name.

2. *Definition of "Registered Organization"*

The definition is explained to include an organization that is formed or organized under the law of a state or jurisdiction by the filing of a public record with the District of Columbia rather than as under the current definition requires the maintenance of a public record showing that the organization has been organized. This change confirms that a filing with the Recorder of Deeds is a registered organization. The expanded definition thus includes a common law trust formed for a business or commercial purpose.

3. *Name of Registered Organization*

The amendments clarify that a financing statement is sufficient if the name of a registered organization debtor is the name shown on the "public organic record" of the registered organization. If there is more than one organic record stating the debtor's name, the debtor's name is that provided on the most recently filed public organic record as the debtor's name.

4. *Name of Debtor When Collateral is Held in Trust.*

To be sufficient under the amendments, when the collateral is held in a trust that is a registered organization, a financing statement must provide, as the name of the debtor, the name shown as the trust's name on the public organic record of the trust. That may be the name of the trust itself, if there is no such name, the name of the settler; and if it is a testamentary trust, the name of the testator.

5. *Name of Debtor When Collateral is administered by a Personal Representative.*

The name of the deceased debtor is a "safe harbor" if the name is the name of the debtor on the court order appointing the personal representative. If the appointment order contains more than one name for the debtor, the first name of the debtor on the appointment order is sufficient.

6. *Debtor's Change of Location.*

If a debtor changes its location to a new jurisdiction, a secured party whose security interest was perfected by filing in the original jurisdiction has a period of up to four months to continue the perfection of its security interest by filing a financing statement in, or otherwise perfecting, the security interest under the law of the new jurisdiction. The amendments provide for a grace period for after acquired property. The secured party can continue perfection beyond the four-month period by filing a financing statement or otherwise perfecting under the law of the new jurisdiction.

7. *New Debtor.*

Similar protections to those above are provided if a new debtor becomes bound by the original debtor's security agreement and new debtor is located in a different jurisdiction than the jurisdiction in which the original debtor was located. The grace period for a merger is a year but there is no grace period for perfection of any security interest that may attach to post-merger after-acquired property.

8. *Other Filing Related Changes.*

The uniform forms of initial financing statement and amendment have been updated and approved by IACA. Certain other filing changes are made as well.

Certain other changes are made to conform to changes made in Articles 1, and 7 of the UCC.

There are also transition rules for the implementation of these changes.

There are more details in the revisions and I am available for any questions you may have. However, in the interests of maintaining the vitality and vigor of state and local commercial law responsive to the changing technology and business practices, it is most important that the District of Columbia law to current and up to date.

Respectfully submitted,

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