National Conference of Commissioners on Uniform State Laws

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January 22, 2007

Mr. Keith Kiser
Vice President
American Association of Motor Vehicle Administrators
2113 N. 9th Street
Bismarck, ND 58501-1846

Re: Uniform Certificate of Title Act

Dear Keith,

This letter contains NCCUSL's initial response to the concerns about the Uniform Certificate of Title Act expressed in the draft document that you so graciously shared with us last September. The letter sets forth your concerns in normal font, followed by our responses in italics. The responses are largely explanatory in nature and are not intended to suggest a negotiating position or bottom line. We want to work with AAMVA to reform and modernize the states' laws governing certificates of title, and we would like to continue our dialogue after you have had a chance to read and consider this letter.

Extensive retraining of DMV staff, other service providers, and dealers

UCOTA, with commentary, is approximately sixty (60) pages in length and contains some significant departures from current DMV practices and procedures. Implementation of UCOTA would necessitate the retraining of all those persons, both in government and in the private sector, who are involved in motor vehicle transactions. Aside from DMV staff, privatized service delivery personnel, dealers, lenders, and the general public would need to be educated regarding the changes. As an example, the provisions of Sections 13, 14, 25, and 26 of UCOTA, regarding security interest statements, envision tasks and responsibilities not generally associated with current DMV procedures and requirements.

Although the official version of UCOTA is some sixty pages in length, when it is reduced to statutory type size and spacing and the comments are excluded, it probably does not exceed the length of the statutory text it will replace. Although any commercial law statute will of necessity be complex, UCOTA is far clearer and more precise than the law it replaces, and it is drafted to interrelate smoothly with relevant provisions of the Uniform Commercial Code.

Those sections of UCOTA with a direct impact on the office generally do not create new burdens. For example, Sections 13-14 and 25-26 are relatively simple in terms of the duties they impose on the office and, with only a few exceptions, are consistent with current title office practices. The exceptions were created by the drafting committee pursuant to a broad consensus among the committee members

and its advisors and observers, and they likely will become necessary in the future one way or another, even if UCOTA is not enacted. The movement to electronic certificates also will continue with or without UCOTA (which facilitates but does not mandate the use of such certificates), and thus the training costs associated with this movement should not be attributed to UCOTA.

NCCUSL recognizes that any change in an established legal regime involves retraining but believes that the advantages of UCOTA make the burdens associated with retraining worthwhile. Assuming the availability of resources, NCCUSL is prepared to assist as AAMVA deems appropriate in the development of training materials.

Some education of dealers and lenders may also be needed, but not much. The primary changes will relate to electronic certificates of title. It should be noted that dealers and lenders generally favor UCOTA because it solves many problems for them even though they recognize that the transition will impose some burdens. The fact that UCOTA is seen by such entities as an important step forward in the law should provide an incentive for AAMVA to support it as these are key constituencies of state title offices.

The general public will not need training, as UCOTA is consistent with existing practices and indeed reinforces them by clarification. UCOTA also includes some new consumer protections which will automatically protect consumers without the need for additional diligence on their part.

Requirements that states create a title and record a lien without the signature or consent of a buyer or transferee

After further review, there is not a specific requirement that states create or record a lien without the signature of the buyer or transferee. However, Section 21 of UCOTA provides for the transfer of ownership of a vehicle by a "secured parties transfer statement". Section 21(a-6) provides this can be done without the possession of the previously issued written certificate of title. Additionally, Section 25 of UCOTA relates to the filing of a security interest statement, and Section 26 provides that a security interest statement is perfected when a security interest statement is received by the DMV. The signature of the owner, buyer, or transferee is not required on a security interest statement.

As noted in the AAMVA draft, UCOTA does not specifically require that states create or record a lien without the signature of the buyer or transferee. Regarding Section 21, which deals with secured party transfer statements, see the later discussion under the topic heading "Opportunity for more than one title to exist for the same vehicle at the same time," which focuses on transfer-by-law statements under Section 22 but also discusses secured party transfer statements.

Regarding the concern that no signature is required on a security interest statement, it should be noted that this is already the law for financing statements in all states pursuant to Article 9 of the Uniform Commercial Code and that we understand that it is also a common practice in many DMV offices. The rationale for not requiring a signature is to facilitate electronic filings, where the imposition of an electronic signature requirement might be costly and inefficient.

Requirements that a state record a lien without a title

Sections 25 and 26 provide that, regardless of who holds a certificate of title, or even if a vehicle

is not covered by a title, a security interest (lien) may be perfected (See comment number 5 on page 36). Section 14(c) requires the files maintained by the DMV contain information on any security interest statement filed with the DMV.

Please see the later discussion under the topic heading "Provisions making liens effective even if title application is rejected."

Imposition of specific time limits for a DMV to process a title application

Section 15(b) provides that a written certificate of title should be provided in a "reasonable" period of time and suggests, but does not specifically require, that reasonable could be fifteen (15) business days. UCOTA is written in such a way that state legislatures would have the discretion to insert an appropriate number of days when they enact UCOTA. The net effect is that enactment of UCOTA would include some determination of the maximum time allowed to process an application for a certificate of title. Based on past experiences, it is reasonable to assume that not all states will always be able to meet a legislatively imposed deadline.

The Section 15(b) requirement applies only to a request for a written certificate. If there is a loan on the vehicle, this request can only come from the secured party, who by all accounts has every reason not to make such a request. Therefore, it should be very rare for a section 15(b) request to be made. In addition, the section does not determine the maximum time for processing an application; rather, it only comes into play after the written certificate is created. Therefore, the additional burdens on the office should be less than perhaps are understood by AAMVA.

Moreover, the number of days is in brackets because the drafting committee understood that the time limit might be different for different states. It is assumed that the office in each state will work with the legislature to determine an appropriate time period.

Necessity to record vehicle model on vehicle titles

A further review of Section 9(b-3) indicates the need to record vehicle model, as well as other data fields, will be determined by the states but does not make it a requirement.

No response since this concern has been satisfied.

Limitations on state's authority to cancel certificates of title

Section 10(d) provides that a state may cancel a certificate of title only for reasons that would have allowed it to reject the original application for the title or for another provision in UCOTA. However, many states have laws that require them to cancel a certificate of title subsequent to its creation. As an example, there are laws that require the cancellation of a title for failure to maintain child support payments, pay library fines, failure to pay outstanding parking tickets, and failure to maintain a vehicle in a mechanically fit manner. If the applicant or vehicle were not in violation of these requirements at the time the vehicle was originally titled, or if these statutory reasons for subsequent cancellation of a title are not part of this act, it appears UCOTA limits the authority of states to cancel a certificate of title.

We might be able to amend UCOTA to permit cancellation for a reason set forth in another statute of the state.

Added responsibility to record when a vehicle is sold before the new owner applies for a certificate of title

Section 13 specifies that a DMV may accept a submission of information related to a vehicle even if an application for a certificate of title has not been made. Although it appears states could also not accept a submission of information, office procedures would have to be established on how such submissions are handled, and a record of any rejection would undoubtedly need to be maintained.

Section 14 requires the maintenance of and access to files that relate to any record received that relates to a vehicle. It appears the submission of information contemplated in Section 13 meets the definition of "record" as defined in Section 2.

Section 17 provides that either the transferor or the transferee may deliver a signed record to the DMV related to the transfer of ownership of a vehicle without filing an application for a certificate of title. It appears the requirements of Section 14 would apply to any notice received under Section 17.

Section 25(d) specifies that DMVs must maintain records of any security interest statement that is filed under the provisions of Section 25.

Each of the above requirements exceeds current procedures and requirements in some or all states.

The reading of UCOTA is correct although, with respect to Section 17, the transferee as the new owner should still be submitting an application for a certificate of title for the vehicle.

UCOTA does provide for the office to keep and maintain in accessible form, subject to the enacting state's public records requirements, records relating to the creation and transfer of the certificate of title for a motor vehicle. The reasons for the record-keeping requirements relate to facilitating vehicle taxation, law enforcement and the intent of the transferor and transferee when the transferor sells the vehicle but the transferee does not timely apply for a new certificate of title. The transferor will want the public record to show, for liability purposes, that the transferor no longer claims an interest in the vehicle.

The question raised is whether the record-keeping requirements of UCOTA are unduly burdensome on the office. The drafting committee did not believe this to be the case given that, as pointed out, there is no requirement in Section 13 for the office to accept submission of information under that section and since other records - such as those relating to security interests (notations of liens on certificates of title) - would appear to be routinely kept by the office. If the drafting committee was mistaken and there are areas in which the record-keeping requirements are unduly burdensome on the office, it would be helpful for NCCUSL leadership to know so that it could address areas in which that may be the case.

Added responsibility to record all previous title brands from other states for a vehicle, even when brands stated are not authorized under the laws of the titling state

Section 11(a-3) requires that a certificate of title for a vehicle include all brands covering a vehicle, including all previously records brands in other states. In addition, Section 14(c) requires the files maintained by the DMV contain all title brands.

These requirements would be additional responsibilities for most states as they currently do not record all brands from all states. Most states record only those brands from a previous state if it is also a required brand within their own state. As an example, some states record brands such as "former taxi", "former police car", and "salt-water damaged". If the next titling state does not use the same brands, or have similar brands, the non-conforming brands are generally not records on subsequent certificates of title. Many states have statutory limits on what brands can be placed on their certificates of title, and from a practical standpoint, there may not be physical space on a certificate of title to record the multitude of brands that may apply to a vehicle.

UCOTA should not be onerous given that current practice is to record brands from the state of the administrative office and from previous states if the brand from the previous state is also a recognized brand within the administrator's state. In the case of a brand from another state that is not a recognized brand, Section 11(c) permits the use of the phrase "Previously branded in [name of jurisdiction]."

Requirement that stolen vehicle reports become part of the DMV database

Section 14(c) requires that stolen property reports be included in the files maintained by the DMV.

Please see the prior discussion under the topic heading "Added responsibility to record when a vehicle is sold before the new owner applies for a certificate of title," especially the last paragraph of that discussion.

Provisions making liens effective even if title application is rejected

Although there is no specific provision in UCOTA related to this concern, Sections 25 and 26 provide that, regardless of who holds a certificate of title, or even if a vehicle is not covered by a title, a security interest (lien) may be perfected (See comment number 5 on page 35).

Under the Uniform Commercial Code, a security interest must generally be perfected by the filing of a financing statement. U.C.C. Section 9-310(a). However, if the goods are subject to a state certificate-of-title act, the filing of a financing statement is neither necessary nor effective [*U.C.C. Sections 9-310(b)(3), 9-311(a)(2)*] *unless the goods are inventory held for sale or lease, or actually leased, by a person in the business of selling goods of the kind. U.C.C. Section 9-311(d). The provisions in UCOTA that govern the filing of a security-interest statement are designed to parallel, to the extent practicable, the Article 9 rules that govern the filing of a financing statement.*

In most instances, a security interest will be perfected when the owner files an application for a certificate of title that indicates a security interest. See UCOTA Sections 2(a)(27)(B) (application that indicates security interest functions as security-interest statement), 9(b)(4) (application must indicate all security interests known to owner). There are instances, however, in which a secured party will need to perfect a security interest even though there is not a pending application for a certificate. For example, suppose a debtor acquires a certificate of title in State A, then moves to State B and applies for a certificate in that state, fraudulently claiming that the original certificate has been lost and that there are no liens on the vehicle. Under U.C.C. Section 9-303 and UCOTA Section 4, the law governing the secured party's perfection ceases to be State A and becomes State B when the application is made in that state, and the secured party has four months to perfect in State B or it will become unperfected as to

certain purchasers for value. U.C.C. Section 9-316(e). If the secured party learns of the move late in the four-month period, or if the debtor will not cooperate, the secured party may not have time to go through a process of having the title surrendered so that it can be reissued showing its lien. It makes sense to have a simplified process for the secured party to register its interest with the state and thereby obtain perfection. This example is illustrative and is by no means the only circumstance in which it is important to be able to perfect a security interest apart from an application for title.

However, there is no need to be concerned that "stray" security interest statements may float into the office. Under UCOTA Section 25(b)(4) the office may reject a security-interest statement if it "cannot identify a file of the office, certificate of title, or application for a certificate of title to which the security-interest statement relates."

Opportunity for more than one title to exist for the same vehicle at the same time

Section 22 provides for the use of a "transfer-by-law statement" in lieu of the written certificate of title for a vehicle (Section 22(a) C(ii), and requires the DMV to issue a new certificate of title (Section 22(b-5). Although Section 22 also provides the DMV shall cancel the old certificate of title, the opportunity for two certificates of title to exist at the same time still exists.

The rule set forth in Section 22 is similar to the rule in Section 21 covering a secured party's transfer statement, which is already the law in every state. U.C.C. Section 9-619(a) provides that a secured party may sign a record stating that the debtor is in default on an obligation secured by titled goods and that the secured party has, through foreclosure, transferred the vehicle to a transferee. The office is then required to cancel the old certificate and issue a new one. Section 21 of UCOTA provides for what is essentially the same process, and Section 22 expands the concept beyond the foreclosure context.

It is true that there is a risk that there may be two certificates outstanding at the same time, although that risk is reduced somewhat by the requirement that the old certificate be canceled. The situations described in Sections 21 and 22 are not the only contexts in which there can be two certificates in existence at the same time, and UCOTA and the Uniform Commercial Code contain rules that protect parties who buy in reliance on a clean certificate of title that does not indicate that there may be unstated liens against the vehicle. In fact, UCOTA ameliorates the problems of buyers who rely on clean certificates in that it extends the rule of U.C.C. Section 9-337 protecting innocent buyers in the interstate context to innocent buyers where the context is purely intrastate. UCOTA Section 19(b).

Subordination of rights of record owner to rights of "good faith purchaser"

While the provisions of UCOTA related to purchasers and buyers "in ordinary course of business" may be consistent with provisions of UCC, they may not be consistent with policies, procedures, and laws currently administered by DMVs. As an example, a vehicle owner who consigns a vehicle for sale to a dealer but does not get paid by the dealer, would seem to have his rights to the vehicle suborned by the rights of the good faith purchaser.

This concern appears to be in reference to UCOTA Section 19(c), which provides protection for a buyer in ordinary course of business to whom a certificate of title is not executed. This occurs sometimes in the sale of used vehicles, where the dealer fails to obtain the certificate from its

seller and then sells the vehicle to a buyer and promises that the title will be forthcoming later. In such cases, the general rule of the Uniform Commercial Code is that the buyer takes free of any security interest, and quite a few courts have so held in the context of titled goods. There have, however, been some cases that have read state certificate-of-title laws to reach an opposite result.

The Code rule properly balances the interests of secured parties and innocent buyers. Note first that to qualify for protection the buyer must be a buyer in ordinary course of business, a term that is defined in UCOTA Section 2(a)(2). To qualify, the buyer must be in good faith, must not know that the sale violates the secured party's rights, must buy from someone in the business of selling goods of the kind (i.e., a dealer), must take possession of the vehicle, and must give present value. The rule does not protect other secured parties or any person other than a buyer who meets this exacting definition. Protecting the innocent buyer from the secured party in this context promotes commerce and is a rule secured lenders have lived with since the inception of the U.C.C.

The concern expressed about the consignor is misplaced, at least if the vehicle was a consumer good in the hands of the consignor immediately before delivery to the consignee. That is because UCOTA Section 19(c) only applies if the consignor has a security interest as defined in Article 9 of the U.C.C. Article 9 gives security interest status to only to a "consignment" within the definition of that term in Article 9. The definition of consignment in Article 9 excludes consignments of goods which were consumer goods in the hands of the consignor immediately before delivery to the consignee. U.C.C. Section 9-102(a)(20(C). Absent Article 9 applying to the consignment, a consignor would likely be protected from even a buyer in ordinary course of business by the common law of bailments.

Additional identified concerns

While conducting this follow-up review, some additional concerns were identified. They are:

1. Section 9(b-7) requires a transferee's application for certificate of title include the physical and mailing address of the transferor, the sales price, if any, and the date of sale. The requirement for the transferor's addresses is generally not a DMV requirement at this time, and the purchaser may also have difficulty obtaining this information, particularly if the purchaser is not aware of the requirement at the time of purchase. The requirement for the sale price, while needed by some states for taxation purposes, is not needed by all states and would require the applicant provide information that may not needed by the DMV.

   These requirements are not central to the act. We could bracket sale price for those states that want it. With regard to the transferor's address, we could eliminate the requirement, bracket it, or possibly make it optional.

2. Section 27 requires a secured party to deliver to the DMV a termination statement indicating they no longer have a security interest in a vehicle. The DMV is then required to record the date of delivery to the office and change its records to indicate the secured party no longer has a security interest in the vehicle. These requirements are contrary to existing practice in many states where it is generally the obligation of the vehicle owner to submit a certificate of title to record or discharge a lien from the DMV files.

Section 27 is modeled on a similar provision in Article 9 that permits a secured party, or anyone authorized by the secured party in a signed record, to file a termination statement relating to the financing statement. Under Article 9, the obligation is on the secured party to file the termination statement once the secured obligations are paid. The involvement of the debtor is not contemplated except in a case in which the secured party is obligated to file the termination statement but fails to do so, in which case the debtor is permitted to file the termination statement.

The procedure envisaged by Section 27 should not appear disruptive to existing practices for motor vehicle certificates of title. Even under those existing practices, presumably when the owner submits a certificate of title to the office to record a discharge of lien noted on the certificate of title, the consent or agreement of the secured party for the discharge must accompany the submission. UCOTA Section 27 merely permits that consent or agreement from the secured party to be given directly to the office.

This procedure may be especially useful in cases where the certificate of title is electronic. Even if the certificate of title is written, however, the submission by the secured party will enable the office to terminate the security interest statement in the records of the office, thereby facilitating a concurrent or later submission by the owner of an application for a "clean" certificate of title.

3. Section 28 requires the maintenance of records related to the filing of security-interest statements and termination statements. These are records not currently filed with most DMVs and create additional recordkeeping requirements.

   It is true that Section 28 imposes record-keeping requirements, but security-interest statements and termination statements are critical to UCOTA and some additional record keeping is inevitable.

Thank you for taking the time to consider the information provided by this letter. Please let me know when it would be convenient for us to talk about the path forward.

Respectfully,

William H. Henning

cc: Howard J. Swibel
Leon M. McCorkle, Jr.
John A. Sebert