Recommendation of the Permanent Editorial Board for the Uniform Commercial Code to Withdraw the 2003 Amendments to UCC Articles 2 and 2A from the Official Text of the Uniform Commercial Code

Amendments to Articles 2 and 2A of the Uniform Commercial Code were approved by the Uniform Law Conference at its 2002 annual meeting and by the Council and Membership of the American Law Institute in 2003. To date, no state has enacted these amendments and the prospects for enactment in the near future are bleak. At its fall 2010 meeting, the Permanent Editorial Board for the Uniform Commercial Code (PEB) unanimously recommended that these amendments be withdrawn from the Official Text of the Uniform Commercial Code. Under this recommendation, the Official Text would revert to the text of Articles 2 and 2A as they were prior to 2003, as amended by the conforming amendments to those Articles that were prepared in conjunction with the 2003 revision of Article 7 of the Uniform Commercial Code.

Since 2007, the PEB, at its annual meeting, has considered the status of these amendments and whether to make any recommendations with respect to them. The agenda for the 2007 meeting called for discussion not only of the status of the amendments to Articles 2 and 2A but also the status of Section 1-301 of the 2001 Official Text of the Uniform Commercial Code (which no state had enacted, even though many states had otherwise enacted revised Article 1 in substantial conformity to the Official Text). While the PEB decided at that meeting to recommend amending the Official Text of revised Article 1 to replace the 2001 text of Section 1-301 with language essentially identical to that in former UCC Section 1-105, the decision with respect to Articles 2 and 2A was different. As stated in the minutes of the 2007 meeting, “[the PEB was asked] whether the PEB and the sponsoring organizations might consider withdrawing these amendments so as to avoid a situation in which the official text of the UCC is no longer in alignment with the UCC as enacted in the states. The consensus was to table this discussion while NCCUSL makes further efforts to obtain enactment of the amendments.”

When the matter was addressed again at the fall 2008 meeting of the PEB, the result was similar. As stated in the meeting minutes: “Mr. Sebert [Chair of the PEB] reported that the UCC Committee of the Uniform Law Conference recommends that no action be taken as to withdrawing these amendments at this time. Differing views were expressed as to the prospects of enactment of the amendments and as to the effect of continuing to maintain an Official Text that has not achieved enactment after several years. After discussion, it was determined not to recommend action at this time.”

The matter was discussed briefly at the PEB’s fall 2009 meeting in conjunction with a report on enactment status of the various Articles. No action was taken.

Prior to the fall 2010 PEB meeting, a small informal working group comprised of two Commissioners (Bill Henning and Henry Gabriel) and two ALI members (Neil Cohen and Steven Weise) was asked to consider whether an effort to “fix” the 2003 amendments to Articles
2 and 2A so that they are both enactable and, in the view of the sponsoring organizations, worthy of being enacted would have a reasonable possibility of success. The interim report of the informal working group served as the basis of extensive discussion at the fall 2010 PEB meeting.

While there was general agreement at that meeting that the 2003 amendments to Articles 2 and 2A represent improvement of the law and it is regrettable that they have not been enacted, it was also agreed that, for a variety of reasons, an effort to salvage a portion of that improvement by “fixing” the package of amendments should not be pursued.

Recognizing that the prospects for enactment of the 2003 amendments are bleak, the PEB concluded that no purpose was served by retaining those amendments in the Official Text of the Uniform Commercial Code, which would represent the law of no state either now or in the foreseeable future. Accordingly, as noted in the first paragraph of this memorandum, the PEB unanimously decided to recommend amending the Official Text of the Uniform Commercial Code to revert to the prior text of Articles 2 and 2A, as amended in conjunction with the 2003 revision of Article 7.

The PEB has asked that the ULC and ALI approve this recommendation. The recommendation was approved by the ULC Executive Committee on January 8, 2011, and no further ULC action is required. Under ALI procedure, approval of both the Council and Membership is required. The ALI Council approved the recommendation on January 21, 2011; thus, approval by the ALI Membership is the last approval necessary for effectuation of the PEB recommendation.