

# **PROPOSED GUIDING PRINCIPLES FOR CONSIDERING UCC AMENDMENTS**

*Submitted by  
Edith Warkentine,  
Vasco H. Morais, and  
Harry C. Sigman,  
on behalf of the  
Uniform Commercial Code Committee of the  
Business Law Section of the State Bar of California<sup>1</sup>*

Recently, the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California (the “Cal UCC Committee”) conducted an analysis of proposed amendments and non-uniform state variations to Article 9 of the Uniform Commercial Code (“UCC” or the “Code”).<sup>2</sup> In the course of analyzing and considering these proposed amendments and non-uniform state variations to Article 9, the Cal UCC Committee believed it constructive to develop suitable and consistent criteria to be used when evaluating the appropriateness of any proposed amendments or non-uniform state variations to the UCC.<sup>3</sup>

As a result of this effort, the Cal UCC Committee has developed the following Guiding Principles which it believes may prove helpful as a guideline for the review and analysis of any past or future proposed amendments or non-uniform state variations to the UCC.<sup>4</sup> The Cal UCC Committee proposes that the Guiding Principles outlined below be utilized in conjunction with the well-established public participatory process carried out by the co-sponsors of the UCC: the National Conference of Commissioners on Uniform State Laws and the American Law Institute—supported by the American Bar Association, the various state bar UCC committees around the country, and other interested organizations. Only through a full vetting by the UCC sponsor organizations, is the process of review of a perceived problem and/or proposed amendment to the UCC most likely to reach carefully crafted and well-articulated solutions to actual real-world (as opposed to merely academic) problems with the existing UCC. Such vetted solutions are correspondingly more likely to be consistent with UCC policies, and are more likely to enjoy widespread support, which will, in turn, best ensure the likelihood of a uniform and simultaneous nationwide adoption.

## **A. Guiding Principles and Criteria Generally Applicable to Analysis of Proposed Amendments to the UCC**

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<sup>1</sup> This article was prepared by the Cal UCC Committee in the spring of 2008, at a time when several states were considering enactment of non-uniform amendments to Article 9. The co-sponsors of the UCC have now established a Drafting Committee to consider amendments to Article 9, making even stronger the case made herein for deferring consideration by individual states of non-uniform amendments.

<sup>2</sup> Unless the context indicates otherwise, all references to “Article 9” are to the Official Text of Article 9 of the Uniform Commercial Code promulgated by The American Law Institute (“ALI”) and The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1999.

<sup>3</sup> See the Cal UCC Committee website at: [http://www.calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=11387](http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11387).

<sup>4</sup> Please note that the positions set forth in this article are those of the Cal UCC Committee only. The positions stated herein have not been adopted by the California State Bar Business Law Section or its overall membership, or by the California State Bar’s Board of Governors or its overall membership and are not to be construed as the position of the State Bar of California. Membership on the Cal UCC Committee and in the California State Bar Business Law Section is voluntary and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources. Reprinted with permission of the State Bar of California.

The analysis of any proposed amendments to the UCC should be guided by the overarching principles (the "Guiding Principles") of:

- (A) preserving the uniformity of the UCC, and
- (B) maintaining the coherence of the UCC and consistency with the underlying purposes and policies of the UCC.

Consequently, proposed amendments to the UCC should be analyzed based on the following specific criteria to determine whether the proposed amendments are (1) necessary, (2) appropriate, (3) comprehensive, and (4) uniform.

### **1. Necessary**

The first of these criteria, *necessity*, requires that there be a defect in the current text of the UCC that causes a problem in practice that can be solved by a change in the text. For example, where text has been subject to conflicting interpretations that have generated significant legal disputes or legitimate uncertainty causing significant cost or distortion of transactions, or have led to a result that is contrary to the underlying policies or purposes of the UCC, a change may be necessary. Well-meaning attempts to "improve" on or "tinker" with the language of the UCC ("we can say it better"), where no serious need for a change has been demonstrated, or where there is no clear evidence that a real, rather than an imagined, problem exists under the current UCC text, should be resisted; attempts to make such changes raise the risk of unintended consequences and needlessly imperil uniformity due to the possibility that they will not be universally adopted. Even when it is arguable that the UCC might be improved by a particular amendment, an amendment is generally not advisable if the UCC, in its current form, will achieve the correct result. Changes should not be made to address problems that are the result not of a defect in the current text but of a mistake on the part of a person that failed to comply with the current text, unless the evidence suggests that a significant number of similar mistakes are being made, or are likely to be made, that can be attributed to ambiguous or confusing text.

### **2. Appropriate**

The second criterion, *appropriateness*, requires that the proposed UCC amendment be directly targeted at correcting the problematic provisions in the UCC text. This requires precise identification of the problem and extensive and careful analysis of all of the options available to address the defect in the UCC text, and selection of the best solution among these options. The proposed amendment should be complete and not incremental, and the costs, benefits, and burdens of the proposed amendment to all parties affected should be identified and taken into account. Furthermore, the language of the proposed amendment should be carefully tailored to address the identified defect and avoid unintended collateral effects. Finally, the proposed amendment should be in harmony with and fully integrated within the current UCC text.

### **3. Comprehensive**

The third criterion is *comprehensiveness*. As it is not feasible to engage in frequent legislative efforts on a nationwide level and frequent change may well result in instability, proposed amendments to the UCC should, absent emergency, be gathered into a single comprehensive legislative package rather than being introduced individually or in small bundles to each of the individual state legislative bodies. Thus,

it must always be considered whether a particular UCC amendment, even if meritorious, can be combined with other proposed amendments in a comprehensive legislative package to be presented simultaneously to all states. A comprehensive approach to UCC amendments makes it more likely that such amendments will be fully integrated with each other and with the remainder of the UCC text and will be consistent with the purposes and policies underlying the UCC. ***Only in exceptional cases, when evidence of serious and imminent actual or potential harm creates an urgent need for immediate action, should the need for a particular amendment outweigh the importance of acting with due deliberation to propose a comprehensive package of amendments.***

#### **4. Uniform**

A comprehensive package of proposed UCC amendments is more likely to draw the attention, study and input of a far wider constituency, enhancing both the likelihood of quality and the greater likelihood of acceptance, i.e., simultaneous and uniform enactment, producing satisfaction of the fourth criterion, *uniformity*. A lack of uniformity among the versions of the UCC adopted by the various states leads to increased transaction costs, the potential for costly errors and unintended consequences, defeating the purpose of a uniform body of law. Although uniformity can never be guaranteed, a proposed UCC amendment not aimed at solving a unique local problem should not be enacted by a state unless there is evidence that it enjoys sufficient widespread support to make likely nationwide enactment. An endeavor to seek approval of a particular amendment on an ad-hoc state-by-state basis, without a substantial organizational effort on a national level, would be ill-advised and would likely jeopardize the essential uniformity of the UCC.

#### **B. Summary**

The best possible text of proposed amendments to the UCC, meeting the foregoing criteria of *necessity, appropriateness, comprehensiveness, and uniformity*, will have the best chance of nationwide uniform enactment. Satisfaction of these four criteria is most likely to be achieved through a vetting of the proposed amendments by the UCC co-sponsors, with input from the ABA, state and local bar groups and any other interested groups and persons. Consequently, the Cal UCC Committee strongly believes that any amendments to the UCC should in almost all cases be fully analyzed first by the Code's co-sponsors, and that ***individual state non-uniform amendments or variations to the UCC are generally undesirable as being inconsistent with one of the principal objectives of the UCC, i.e., uniformity.***

The Cal UCC Committee notes that the UCC co-sponsors, ALI and NCCUSL, have recently created a Review Committee to consider and make a recommendation concerning whether there are problems under existing Article 9 that can and should now be dealt with by legislative amendment and, if so, to identify them. The Cal UCC Committee understands that a summary of the initial findings of the Review Committee will be made available shortly, and, if deemed appropriate, a Drafting Committee will be established.

The Cal UCC Committee intends to employ the Guiding Principles in its consideration of any proposed amendments or variations to the UCC. The Cal UCC Committee would welcome comments on the foregoing Guiding Principles. Please direct any such comments to the Co-Chairs of the Cal UCC Committee subcommittee on Article 9 Amendments, Vasco H. Morais at [vmorais@atel.com](mailto:vmorais@atel.com) and Edith Warkentine at [ewarkentine@wsulaw.edu](mailto:ewarkentine@wsulaw.edu).