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VIRGINIA CONSUMER COUNCIL
WALGREEN CORPORATION
WORKSTATION

February 2, 2004

RE: Resolution 111C

American Bar Association
House of Delegates

Dear Delegate:

We urge the House of Delegates to seek withdrawal or indefinite referral of Resolution 111C, the proposed change to Article 2 of the Uniform Commercial Code (UCC) at the American Bar Association Midyear Meeting this week. If withdrawal is not possible, we ask that you either abstain from approving it or vote it down. AFFECT joins with the U.S. Chamber of Commerce, the National Electrical Manufacturers Association, the American Electronics Association and the National Association of Manufacturers in registering concerns about the proposed change.

AFFECT, Americans for Fair Electronic Commerce Transactions, is a broad-based national coalition of retail and manufacturing businesses, consumers, financial services institutions, technology professionals and libraries opposed to the enactment of the Uniform Computer Information Transactions Act (UCITA). Our interest in the proposed changes to Article 2 grows out of our beliefs that current law is satisfactory in meeting our members' needs and that the proposed change could lead to a revival of interest in UCITA, an Act that the ABA and many others have refused to endorse.

We have two key concerns. The first is that the new exclusion of "information" from the definition of goods will destabilize the law of transactions in software and digital content. The second is that the Article 2 amendments fail to take a clear stand against delayed disclosure of contract terms, even in Internet transactions, despite strong support for this position within the American Law Institute and the American Bar Association.

By now, there is a large body of case law dealing with disputes over digital products, most of it applying Article 2. Although we do not agree with every case, we find the current state of the law preferable to a situation in which all the case law would be subject to reconsideration because Article 2 would no longer apply to "information" (which, though excluded from the definition of "goods," is not itself defined).

Many of our constituencies, especially small businesses and rural libraries, lack resources for extensive litigation and all of us would prefer to put our resources to more productive uses than litigating what "information" means. Putting all existing case law in doubt would impose new planning and drafting costs, with no compensating gains in legal predictability.

Information is defined in UCITA. Because of our strong opposition to UCITA, we are particularly concerned that removing the term from coverage by Article 2 could too easily be misrepresented as an indirect or implicit endorsement of UCITA. The proposed change in Article 2 could create a sense that there now is a void in the law and therefore new urgency for the enactment of UCITA or, at the very least, the courts' looking to UCITA in disputes involving computer information.

Second, we are also concerned that Article 2 fails to take any steps to clarify the unacceptability of delayed disclosure of standard form terms. This substandard practice is currently a huge problem in transactions in goods, including software. We note that in 2002, the ABA UCITA Working Group was critical of UCITA on this issue and specifically recommended that licensors be required to disclose all the terms of the license prior to purchase.

AFFECT has previously expressed its concerns to both the American Law Institute and the National Conference of Commissioners on Uniform State Laws (NCCUSL) during the amendment drafting process. We join with others in requesting that the HOD seek withdrawal of the motions; abstain from either approving or opposing them, or if forced to vote, to oppose them.

Sincerely,



Miriam Nisbet
President