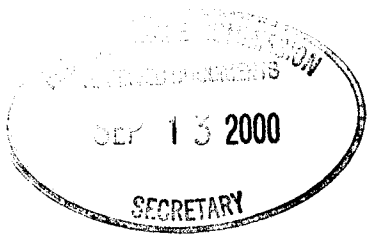

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

September 11, 2000

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington D.C. 20580

Re: High Tech Warranty Project-Comment P994413

Dear Mr. Clark:

Enclosed are copies of two letters written in July, 1999, to Gene Lebrun, President of the National Conference of Commissioners on Uniform State Laws, on behalf of 24 state attorneys general and the Administrator of the Georgia Fair Business Practices Act. These letters are specifically about the proposed Uniform Computer Information Transactions Act. However, the comments relate to question 7(a) of the questions in the Invitation to Comment.

Thank you for giving us the opportunity to comment.

Sincerely,

Jane Wheeler

Jane F. Wheeler
Assistant Attorney General
Director, Consumer Protection Unit

JFW:clb
Enclosure

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W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

July 23, 1999

Gene Lebrun
President,
National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Dear Mr. Lebrun:

The Attorneys General of Connecticut, Idaho, Indiana, Iowa, Kansas, Maryland, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Vermont, Washington and the Administrator of the Georgia Fair Business Practices Act are disappointed with the provisions of the proposed Uniform Computer Information Transactions Act (UCITA). For the reasons explained below, we urge NCCUSL to table this project. If NCCUSL decides to continue the project, we hope that by going on record with our concerns, NCCUSL will be persuaded to defer any attempt to introduce the statute in our state legislatures until such time as it has considered and addressed the problems that we identify.

We believe the current draft puts forward legal rules that thwart the common sense expectations of buyers and sellers in the real world. We are concerned that the policy choices embodied in these new rules seem to almost invariably favor a relatively small number of vendors to the detriment of millions of businesses and consumers who purchase computer software and subscribe to internet services.

We are aware of the many criticisms that others have made of the proposed statute, particularly in the areas of scope, impacts of use restrictions on competition and freedom of speech, warranty rights of purchasers, and choice of law and forum rules. We share many of these concerns and they weigh heavily in our decision to recommend that NCCUSL table the UCITA project. However, we believe that such concerns have been well aired, and have chosen to focus our comments on areas that we believe have not been so well aired, at least in the public record, and that are of grave concern to us as the chief law enforcement officials of our respective states.

Preemption of Existing State Consumer Law Disclosure Standards

One of the most serious of our concerns is Section 105(d). This provision preempts any existing state law requirement applicable to a UCITA transaction that a term be conspicuously disclosed and replaces the preempted provision with UCITA's own definition of conspicuous in Section 102(15). We are concerned that section 105(d) preempts long-standing consumer protection laws

relating to the time, place and manner in which important disclosures are made and replaces those laws with a standard which is inconsistent with the fundamental principles underlying the laws it preempts. Morever, we are concerned that the safe harbors in the new standard will be easily circumvented by those who wish to hide material facts from purchasers.

Section 105(d) Preempts a Wide Range of Consumer Law Disclosure Requirements

Section 105(d) does not merely set the standard for the manner in which contractual provisions governed by UCITA are presented. Because it preempts any state law that "applies to a transaction governed by [UCITA]", it covers a broad range of requirements, from advertising disclosures to safety warning labels required to avoid product liability law exposure. The required time, place, and manner of disclosure under these requirements varies as the matter being disclosed varies. For example, under the law of almost every state, a clear and conspicuous disclosure of the fact that a minimum purchase is required in order to obtain an offered free gift must be made in any communication, including advertising, in which the free gift offer is made. Another example involves products that may be harmful in some way. Typically in such cases, the product itself must be labeled with a warning of the potential harm, such as the warning label that now appears on certain handheld computer toys. With the enactment of section 105(d) of UCITA, the disclosures in these two examples would still be required but not in the time, place or manner in which they are currently required. These disclosures would only have to be made in sales contracts in accordance with the UCITA definition of conspicuous.

The Definition of Conspicuous is Inconsistent with the Requirements of the Laws it Preempts

Even if the scope of Section 105 were narrowed, the provision to which it refers, the definition of conspicuous in section 102(15), is fundamentally flawed because it ignores the principles underlying the laws it replaces. In most states, the basic consumer disclosure law is to modeled after the Federal Trade Commission Act, which generally requires disclosures of material facts concerning consumer transactions. There are two key principles underlying these laws. First, disclosures are evaluated according to how likely they are to actually be communicated, based upon the totality of the context in which they are presented, rather than the specific characteristics of the disclosures alone.[1] Second, such disclosures should be made in a timely manner to avoid deception. While the exact timing of required disclosures varies with the situation, it is uniformly the case that post-purchase disclosures do not meet the requirements of consumer protection laws.[2] The definition of conspicuous in section 102(15) fails to follow either of these principles.

Section 102(15) defines a term as conspicuous if it is so presented that a reasonable person ought to have noticed it. By focusing solely on whether a term is noticeable, the definition ignores most

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[1] *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), *American Home Products v. FTC*, 691 F.2d 681 (3d Cir. 1982).

[2] It is well settled that dishonest advertising is not cured or excused by honest labeling. *American Home Products*, 98 F.T.C. 136 (1981).

of the basic principles of communication and is unlikely to result in disclosures actually being communicated. Noticeability is certainly a factor to consider in determining whether a term is likely to be communicated. However, there are several other factors, which if ignored, may lead to a disclosure that is not in fact likely to be communicated. These factors include: 1) readability, whether a term uses words in accordance with their generally recognized meaning and whether it is readily understandable; 2) proximity, whether a term clarifying or explaining another term is in such proximity to the term it clarifies or explains that it is as likely to be read as the term it clarifies or explains; 3) language, whether the term is expressed in the language spoken by those to whom it is presented; 4) prominence, whether the term is hidden or obscured by other terms or whether it readily stands out from other matter with which it is presented; and 5) intended audience, whether the term meets these criteria with respect to the audience for which it is intended. If disclosures are evaluated solely by their noticeability and not these other factors, sellers will be able to easily craft disclosures that meet the requirements of UCITA, but which are highly unlikely ever to be read or understood by their intended audience. Rather than serving as useful disclosures of material information, these terms will merely form the basis of a legal defense after a purchase has failed of its essential purpose.

Even more importantly, by allowing all affected disclosures to be made as contractual terms, the definition of conspicuous ignores the timeliness requirements of consumer protection laws. This is particularly problematic in light of the contract formation rules of UCITA which allow contract terms to be presented for the first time after a purchase has been made. Most consumer protection disclosure requirements are intended to prevent deception by providing information prior to purchase. For example, the fact that a word processing software program requires 64Mb of RAM to function would be a material fact under most states' consumer laws and would have to be disclosed prior to the purchase of the program. Under UCITA, that fact could be disclosed as a post-sale contract term.

The Safe Harbors in the Definition of Conspicuous Will Help Unscrupulous Sellers Hide Information.

These deficiencies in the definition of conspicuous are compounded by the inclusion of a series of safe harbors. The concept of a safe harbor as part of a definition of conspicuous is misguided. In the considerable experience of the Attorneys General, it is impossible to anticipate the creativity of those who seek to obscure, divert and deceive. We have yet to see a method of disclosure defined with the specificity of the safe harbors proposed in section 102(15) that could not easily be circumvented to aid deception.

The safe harbors proposed in section 102(15) are especially problematic because they are so very easy to circumvent. Pursuant to section 102(15) a term may be made conspicuous merely by presenting it in a contrasting type face. It may be, but need not be in a heading. It may well be in the middle of a larger paragraph of text. A statement in contrasting type in the middle of a paragraph may be conspicuous on the front of a 2 by 3 inch sales receipt. The same statement in the same contrasting type in the second column on the back side of the second page of a three

page single-spaced contract will probably not be conspicuous.

Ironically, it is in UCITA's special subject matter that the inadequacies of the proposed safe harbors most reveal themselves. Even within the realm of currently available technologies, the variety of possible modes of presentation is overwhelming. A UCITA record may be displayed in an email message, on a web page, or in a banner ad. It may be viewed on a standard computer screen or on the screen of a pocket-sized portable device. Under the proposed safe harbors, a term presented in a contrasting type face on the 346th line of scrolling text box displayed on a 3 inch by 4 inch screen would be conspicuous. The inadequacy of this result is obvious.

Unlike these present technologies, future technologies may not even be text based. It is conceivable that in the very near future, users of information technologies will navigate through an information space that is configured more like a video game than a web page, where vectors of movement are translated on the fly to reveal sought after information. It may well be that displaying a term in a contrasting typeface in such an environment will be utterly meaningless.

Were the effect of these safe harbors merely to govern the presentation of terms required by UCITA, it is conceivable that they might not be so objectionable, as applicable consumer law would require better disclosures of material terms. However, because section 105(d) preempts applicable consumer law disclosure requirements, UCITA transactions are effectively exempted from any requirement that consumers be presented with material information about the transaction in a time, place or manner that will actually assist them in making basic purchase decisions. Section 105(d) opens the door to fraud for dishonorable vendors who will exploit its terms to craft legal conspicuous disclosures so difficult to find and understand that buyers will likely never be aware of them. It is essentially a repeal of some of the most basic protections of state consumer laws.

If NCCUSL decides to go forward with UCITA, it is imperative that the scope of section 105(d) be narrowed to apply only to terms required by UCITA to be conspicuous. Moreover, the definition of conspicuous in section 102(15) should be revised to require that a term be presented in such a manner that it is likely to be read and understood by the person to whom it is presented, given the totality of the circumstances in which it is presented. Finally, the safe harbors in section 105(d) should be removed, as any safe harbor will inevitably be defeated by a seller intent on deception.

Contract Formation Issues

The contract formation provisions of UCITA permit practices that are contrary to purchaser expectations. Sections 112 and 211 permit a party offering a mass-market license to withhold almost any contract terms it wishes until after a sale has occurred and provides that such terms become part of the contract if the purchaser reviews and accepts the terms after the sale. Purchasers do not expect to be confronted with surprise terms after a purchase has been made. At a minimum, UCITA should require that prior to the formation of any enforceable contract from

which terms have been withheld, notice should be given to the purchaser that additional terms will be provided in the future, and the substance of any such terms that may be material to the purchasing decision should be disclosed. For example, a term limiting the number of copies that a purchaser can make of a software product would be a material term that should be disclosed prior to the purchase.

A second danger in the contract formation provisions of UCITA lies in section 112(f), which allows the parties to a contract to modify the rules of contract formation in future transactions. This is entirely inappropriate in most consumer transactions. For example, the terms of a simple purchase agreement under section 112(f) could contain a provision providing that future transactions could take place on a negative option basis, allowing the seller to propose new contracts and enforce them unless the buyer objects within a fixed period of time. The Attorneys General certainly understand the need for commercial buyers and sellers to be able to determine for themselves how they will conduct business over a course of dealing. However, extending the ability to change the basic rules of contract formation to merchants doing business with consumers via mass market contracts will open the door to consumer confusion and deception.

Contract Modification Issues

In the area of contract modification, section 304 of UCITA allows vendors to unilaterally make enforceable modifications to contracts involving continuing performances, requiring only minimal notice as a condition for doing so. The sole remedy available to persons against whom such modifications would operate is cancellation, and even that remedy is limited to parties to mass market contracts. The value of that limited remedy is further diminished by the fact that is unavailable to parties to access contracts, such as contracts with as internet service providers and online information services, that will probably comprise the largest class of contracts subject to section 304.

There is great peril in section 304 for persons to whom modifications are proposed. Section 304(b) allows a contract to specify a modification procedure if the procedure reasonably notifies the other party of the change. The modest safeguard in section 304(c) that permits a court to reject standards of notice that are manifestly unreasonable would, if interpreted in accordance with the reporter's notes, permit procedures that are highly unlikely to result in any notice at all. The reporter's notes seem to approve a procedure whereby terms of service can be modified simply by posting the changes to a particular location or file. Such a procedure places the entire burden of discovering whether a modification has been proposed upon the offeree, rather than the offeror. It requires parties to whom such a modification may be proposed to continuously monitor the designated location to determine whether a modification has in fact been proposed.

From a practical point of view, it has been the experience of the Attorneys General that offerees simply do not monitor online locations for contract modifications. Indeed, attempting modification in such a manner is so unlikely to actually inform offerees of a proposed modification that the Attorneys General have taken the position that any such modification

procedure is illegal under current law. In a highly publicized recent case, America Online agreed to make just over $2.5 million dollars in refunds to consumers who may not have received a price change notification that was posted in the manner suggested in the reporter's note.

From a simple economic point of view, it makes much more sense to place the cost of discovering a modification upon the offeror rather than the offeree. This is particularly true for UCITA, because in almost every instance that will be subject to section 304, the parties will have the means to communicate electronically at very little cost to the sender of the transmission. The deficiencies of the recommended procedure become quite clear when projected into likely practices of the near future, in which a person, much as a person now may have multiple magazine subscriptions, may subscribe to numerous different sources of information and entertainment via contracts governed by UCITA. There really is no possible common sense justification for requiring such a person to monitor numerous services on a daily basis to learn of possible changes in terms.

The cancellation provision in section 304(b)(2) is hollow. The largest category of contracts to which section 304 applies are contracts with internet service providers and online information service providers who are not bound by section 304(b)(2) because contracts with such entities are access contracts excluded from the definition of mass market contract. Purchasers of such services may well be faced with a modification, proposed in good faith but which deprives them of the benefit of their bargain, that they have no choice but to accept.

There is additional danger here because of the nature of the billing relationships between the parties for the kinds of contracts to which section 304 applies. In many instances, particularly in agreements with internet service and information providers, the user of the service authorizes the service provider to automatically charge amounts due under the agreement to the user's credit card or checking account. In the case of a price increase implemented by posting online, it will likely be the case that the user will only discover the increase after it has been paid. The fact that payment has already been made substantially reduces the user's bargaining power in seeking a refund of the amount of a surprise price increase.

The Attorneys General believe that reasonable notice should be defined to mean a method of notice that is calculated to give actual notice. If the reporter's notes are to give any example of a type of notice that meets this standard they should use as an example of such notice an electronic mail notification to an address designated by the recipient of the notice. In addition, the Attorneys General believe that there is no instance in which it is acceptable to enforce a modification of terms if the offeree is unwilling to accept them. In such instances, unless the ability to cancel is otherwise provided for, the party offering the modification should be required to perform as originally agreed. In the event that an offeree does not discover a proposed modification until after he or she has suffered financial loss as a result of the modification, as may be the case when a party with preauthorized bank account or credit card access proposes a price increase, the offeree should not only be able to cancel the contract, he or she should be able to recover any loss suffered on account of the unaccepted offer of modification.

Mass Market Transactions vs. Access Contracts

The Attorneys General are concerned about the exclusion of access contracts from the definition of mass market transaction. As is the case with section 304 discussed above, many of the UCITA provisions that purport to offer protections from various forms of overreaching by sellers are available only in the context of a mass market transaction, and therefore are unavailable to consumers of services offered by means of access contracts. The access contracts offered by most consumer internet access and information services offer the same potential for overreaching as contracts in mass market transactions. Like the contracts offered in mass market transactions, these access contracts are form contracts, offered in the ordinary course of retail business, and offering the same terms to all takers. Buyers typically have no ability to negotiate or modify their terms. Transactions involving access contracts otherwise meeting the definition of mass market transaction should be subject to the same restrictions as mass market transactions.

Notes and Commentary

In our view, the prefatory note and reporter's comments incorrectly present the proposed statute as balanced and as leaving "in place basic consumer protection laws" and "adding new consumer and licensee protections that extend current law." It may be that the drafters of this statute believe the policy choices it embodies are necessary or desirable for the development of e-commerce. However, in instances in which provisions are described as new consumer protections, such as the contract formation and modification provisions discussed below, consumers actually have fewer rights than they do under present law. If NCCUSL promulgates UCITA, it should revise the explanatory materials accompanying the statute to scrupulously identify the instances in which the policy choices embodied in the statute either extend or resolve controversies in current law and to clearly explain whether such extension or resolution favors sellers/licensors or buyers/licensees.

A Cautionary Tale

We are concerned that should UCITA become law in its present form in even one state[3], the following scenario will become legally sanctioned:

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[3] We note with concern that section 109 of UCITA abandons the limited party autonomy rule which is the prevailing choice of law rule in the United States and which is embodied in UCC 1-105. Under the limited party autonomy rule, parties may choose the law by which their contract is interpreted, but only so long as the jurisdiction chosen has some relation to them or their contract and the choice does not thwart or offend the public policy of the state whose law would otherwise apply. *Desantis v. Wackenhut Corporation*, 793 S.W.2d 670, 677 (Tex. 1990), RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). By allowing the parties to a contract, and in the case of mass market contracts and most access contracts, the drafter of the contract, to choose the law of any jurisdiction, UCITA invites law shopping. If only one state adopts UCITA, any seller/licensors, no matter where located, would be able to select the law of that state to govern their transactions with purchaser/licensees, no matter where they are located, with minimal regard for the policy choices made by the legislatures of the states with actual relationships to the parties or the transaction.

Jane Consumer purchases a piece of software that promises analysis and advice concerning various investment options. When she installs the software, she learns from a message displayed during the installation process that she must subscribe to a proprietary information service to use it, rather than the competing service she already uses to obtain such information. Even though other similar software packages are available which do not impose such requirements, Jane is loathe to begin the shopping process over again in order to decide which of those packages to purchase, so she accepts the new terms. Jane subscribes to the new information service, selecting a discounted 1 year agreement rather than a full price month to month agreement, and logs onto the system for the first time. When she does, she is presented a screen which contains a hyperlink in the upper left hand corner labeled "important information." She is also presented with a flashing icon calling her attention to a hot stock tip. She decides to check out the tip before reviewing the information. After deciding the tip was not something she wants to pursue, she returns to the main screen, but the "important information" hyperlink is gone.

She continues to use the service for a period of months. About 6 months later, a package arrives in the mail. It is an upgrade to her investment analysis software. Because she did not order the upgrade and there is nothing contained in the package advising her otherwise, she assumes it is a free bug fix upgrade. After a couple of weeks, she installs it and logs onto the service to try it out. When she does she sees the "important information" hyperlink. Because this hyperlink eluded her before, she decides to immediately review the information and discovers that the software upgrade was not free, but was sent to her on a negative option basis. She learns that she will be billed $49.95 for the software because she failed to return it within 7 days of receipt as required by the upgrade service provisions of her original contract.

Confused because she was never aware of any such provision, she calls the software company's customer service line for an explanation. She is told that the term was conspicuously displayed behind the "important information" hyperlink when she first logged onto the service and that the company has a no refund policy. She is somewhat condescendingly told that she should read her contracts before she agrees to them. She asks where on the service a copy of the contract is available for her review, but is told that it is only available during the initial session of use. She angrily asks to cancel the service, but is told that she cannot do so until her 12 month term expires.

The next month, she reviews her credit card statement and discovers not only the $49.95 charge for the software, but also that the monthly fee for the service has increased by $5. She logs onto the service and goes to the customer service area to see if she can find any information about the fee increase. In the customer service area, she finds a lengthy letter from the president of the company explaining that

its former business model was flawed and that the company had to choose between raising its prices or going out of business. The letter closes with a reminder that customers should periodically check the customer service area for notice of such fee changes, as required by the company's standard contract. She again calls customer service and asks to cancel the service because of the price increase, but is again told she cannot do so until her 12 month term expires.

Jane writes to her credit card company asking for charge-backs in the amounts of the unexpected fees, but when provided a copy of the agreement by the software company, her credit card company declines the charge-backs, saying that the charges were appropriate under the agreement. Jane angrily uninstalls the software and decides that she will return to the expensive but relatively trustworthy stockbroker that she had used before.

Certainly, the Attorneys General hope that even if UCITA were enacted, Jane Consumer's experience would be atypical, if only because merchants would realize that consumer goodwill would be damaged by such practices. However, in our experience as law enforcement officials, we have found that there is a substantial element in our society unconcerned with matters such as consumer goodwill, who will exploit any method to gain advantage in their dealings with others. As it currently stands, UCITA is an open invitation to those persons to exploit our citizens.

Conclusion

The overriding purpose of any commercial code is to facilitate commerce by reducing uncertainty and increasing confidence in commercial transactions. We believe that UCITA fails in this purpose. Its rules deviate substantially from long established norms of consumer expectations. We are concerned that these deviations will invite overreaching that will ultimately interfere with the full realization of the potential of e-commerce in our states. Certainly it would be counter to the goals of UCITA to promote an environment in which people like Jane decide that the legal pitfalls of doing business online outweigh the benefits.

For these reasons, the Attorneys General respectfully request that NCCUSL table its UCITA project.

Sincerely,

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Attorney General of Oklahoma
JANE WHEELER
Assistant Attorney General

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Attorney General of Connecticut
GARY HAWES
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W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

July 28, 1999

Gene Lebrun
President,
National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Re: Proposed Uniform Computer Information Transactions Act;
July 23, 1999 Letter on behalf of the Attorneys General of 14 States.

Dear Mr. Lebrun:

On behalf of the Attorneys General of California, Arizona, Arkansas, Florida, Minnesota, Mississippi, Missouri, New Jersey, Tennessee, West Virginia, and Wisconsin I am writing to express support for the comments submitted to you in my July 23, 1999 letter on behalf of the Attorneys General of Connecticut, Idaho, Indiana, Iowa, Kansas, Maryland, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Vermont, and Washington and by the Administrator of the Georgia Fair Business Practices Act, a copy of which is attached hereto.

These Attorneys General agree with the concerns and recommendations expressed in the July 23, 1999 letter and urge that NCCUSL act in accordance with those concerns and recommendations.

Sincerely,

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JANE WHEELER
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