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Amendments to UCC on the Horizon Affecting Purchase and Sale of Digital Assets

In 2019, the Uniform Law Commission (“ULC”) and the American Law Institute (“ALI”) appointed a joint committee to review the Uniform Commercial Code (“UCC”) in light of emerging technologies and the purchase and sale of digital assets. The committee has nearly finished approving draft amendments to the UCC to address these emerging technologies, including virtual currency, non-fungible tokens (“NFTs”) and electronic fiat money. These amendments will impact industry players, including blockchain and cryptocurrency startups, financial institutions, and investment banks.

Background

As the popularity and prominence of cryptocurrencies, NFTs, and other emerging assets has grown, questions have emerged among regulators and stakeholders in the industry, particularly regarding the purchase and sale of intangible digital assets. For example, under the UCC, it is uncertain whether cryptocurrencies constitute “money,” how to perfect a security interest in virtual currency, how to insulate purchasers of digital assets from adverse claims, and how to streamline the monetization and transfer of digital assets.

The ULC and the ALI hope to ensure the continued uniformity of state commercial laws by updating UCC provisions to address digital assets. With this in mind, the ULC and ALI formed the Emerging Technologies Committee (“ETC”) in 2019 to resolve unsettled questions.

Since 2019, the ETC has been working with lawyers whose practice and experience focuses on the UCC and lawyers whose practice involves digital technologies more broadly. The ETC presented its initial draft of the amendments in July 2021, which the ALI Members Consultative Group (“MCG”) discussed in October 2021. At its meeting on January 20 and 21, 2022, the ALI Council approved Council Draft No. 1. The MCG will meet and discuss the latest draft in April, and hopes to obtain approval from ALI on the changes in May 2022. If the ULC approves the changes at its annual meeting in July 2022, the amendments will be offered for uniform enactment by the states.

Proposed Changes Include New and Existing Articles

There are two approaches to the proposed amendments. First, the amendments revise existing UCC Articles to address the emergence of digital assets. Second, the amendments introduce Article 12, which defines and governs digital assets specifically.

Several existing Articles are amended to address emerging technology assets, including Article 3 (governing negotiable instruments) and Article 9 (governing secured transactions). Regulators and stakeholders have suggested that these Articles as currently in effect fail to properly account for digital assets. For example, UCC Article 9 fails to provide adequate guidance on how to create or perfect a security interest in digital currencies, since a security interest in money can be perfected only by *possession*—and electronic money is not susceptible to possession. Under the proposed amendments, a person has control of “electronic money” (e.g., cryptocurrency) when the electronic money confers an exclusive benefit or transfer control to its owner, and the electronic money is readily identifiable (i.e., with a number, key, account number, etc.).¹

¹ U.C.C. § 9-105A (Unif. L. Comm’n & Emerging Technologies Draft, Mar. 21, 2022) (control of electronic money).

In addition to changes to existing UCC Articles, the draft amendments propose a new UCC Article 12, which would govern the transfer of property rights in intangible digital assets. The proposed Article 12 creates a class of digital assets defined as “controllable electronic records” (“CERs”), a subset of what are often referred to as digital assets.² The drafters chose this intentionally broad definition—rather than couching Article 12 in familiar technologies, like distributed ledgers, blockchain, and bitcoin—to account for technology not yet developed.³ The proposed Article 12 also clarifies property rights associated with CERs by outlining the meaning and scope of “control” of a CER.⁴

Under Article 12, enhanced property rights apply to “qualifying purchasers” who benefit from the “take-free” rule, i.e., the purchaser acquires the CER free from competing property claims to the CER.⁵ Article 12 defines “qualifying purchaser” as a purchaser who obtains control of a CER for value, in good faith, and without notice of a property claim to the CER. These definitions, among others, extend UCC concepts of a “protected purchaser” to acquirers of CERs.⁶

Notably, some assets are excluded from Article 12—for example, electronic chattel paper, electronic documents, investment property, transferable records under the federal E-SIGN law or the Uniform Electronic Transactions Act (“UETA”), and deposit accounts, to name a few—because commercial rules already exist and generally work well for these assets.

Practical Guidance and Further Resources

UCC amendments address state commercial laws only. The UCC does not affect federal laws, such as securities laws or anti-money laundering laws, the taxation of digital assets, or the regulation of money transmitters.

Despite the desire for uniformity under the UCC, some states have already taken steps to implement non-uniform amendments to their respective UCC to address digital assets.⁷ Further, the UCC is not the only area where digital assets regulators and stakeholders should take note. As previously reported by Ropes & Gray, [President Biden](#) and federal regulatory bodies, like the [Securities and Exchange Commission](#) and the [Department of Labor](#), have focused on digital assets. Digital asset holders will need to keep current with evolving laws and regulations.

If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney contacts.

² *Id.* at § 12-102(a) (defining “controllable electronic record”).

³ *See* Reporter’s Prefatory Note preceding U.C.C. § 12 (“Article 12 creates a legal regime that is meant to apply more broadly than to electronic (intangible) assets” like “distributed ledger technology (DLT), including blockchain technology, which powers transactions in bitcoin and other digital assets” because “[i]t aspires to apply to electronic assets that may be created using technologies that have yet to be developed, or even imagined.”).

⁴ *Id.* at § 12-102(a).

⁵ *Id.* at § 12-104(e).

⁶ *Id.* at 12-102(a)(2).

⁷ Matthew Kohen, *State Regulations on Virtual Currency and Blockchain Technologies*, JD Supra (Apr. 19, 2021) (reporting that Idaho, Kentucky, Tennessee, and Wyoming have passed legislation updating state Uniform Commercial Codes); *see, e.g.*, Robert T. Isham III, *Wyoming’s Digital Assets Amendments: Marked Out or Missed Out? A Review of Recent Amendments to Article 9 of the Wyoming UCC*, American Bar Association (Oct. 1, 2019),

https://www.americanbar.org/groups/business_law/publications/blt/2019/10/digital-assets/.