

DRAFT
FOR APPROVAL

**UNIFORM SUPPLEMENTAL COMMERCIAL LAW
FOR THE UNIFORM REGULATION OF VIRTUAL-
CURRENCY BUSINESSES ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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May 18, 2018

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1 **UNIFORM SUPPLEMENTAL COMMERCIAL LAW FOR THE UNIFORM**
2 **REGULATION OF VIRTUAL-CURRENCY BUSINESSES ACT**

3
4 **Prefatory Note and Comments Not Reviewed by the Drafting Committee**

5 *To assist Commissioners, Observers, and other Stakeholders in evaluating this draft act, some of*
6 *the information in this draft Prefatory Note repeats explanations offered in the draft Comments*
7 *to this act. Once the text of this act is confirmed, the redundancies will be remedied and this Note*
8 *will conform to the final text of this act.*
9

10 The Uniform Regulation of Virtual-Currency Businesses Act (URVCBA) establishes a
11 regulatory structure for businesses engaging in or offering to residents of enacting states certain
12 virtual-currency transfer, exchange, or custodial services. The act provides certainty and
13 protections that will enable such businesses to operate to everyone’s benefit including provisions
14 designed to enable start-up companies offering virtual-currency services room to test products and
15 operate prior to full licensure without risks of running afoul of state “money transmitter” or
16 “money services” laws or of federal prosecution for being unlicensed under 18 U.S.C. § 1960.
17 However, the URVCBA does not provide commercial law rules for covered transactions, thus
18 leaving agreements for those services to the perhaps uncertain application of general contract,
19 bailment, and other personal property laws of the enacting state. It has been asserted that the lack
20 of commercial law rules, to a degree, has shut out virtual-currency businesses and users from
21 access to important banking services, such as secured loans.
22

23 Without more guidance on the commercial law rules, the Uniform Regulation of Virtual-
24 Currency Businesses Act may fail to achieve for covered virtual-currency transactions the
25 certainty and protections that enactment of the Uniform Commercial Code brought to other types
26 of commercial transactions, including those with consumers. This act is intended to address the
27 commercial law rights of virtual-currency businesses that have control over their customers’
28 virtual currency and their customers, in particular, providing to those businesses and customers
29 duties and rights comparable to those enjoyed by customers of securities intermediaries under
30 Article 8, Part 5 of the Uniform Commercial Code. Enactment of a new uniform act in this subject
31 area in connection with the enactment of the Uniform Regulation of Virtual-Currency Businesses
32 Act is strongly recommended to give users of virtual-currency businesses and the businesses
33 themselves comparable certainty about their dealings with each other and with certain third
34 parties.
35

36 This act has specific goals in addition to providing certainty to participants in virtual-
37 currency asset transactions that this act will govern. One of these is to enable owners of virtual-
38 currency assets to use their virtual currency as collateral under Article 9 of the Uniform
39 Commercial Code. This act allows secured parties taking virtual currency as collateral to proceed
40 under the “control” model for attachment and perfection of their security interests that Article 9
41 allows in this case for secured parties to take security interests in virtual currencies held by
42 intermediaries in a manner comparable to traditional securities held in “securities accounts”
43 subject to UCC Article 8.
44

1 A second goal is to enhance the “negotiability” of virtual currency when transferred or
2 exchanged. A third goal is to make clear that generally recognized commercial law rules are
3 available to supplement the provisions of this act. Because of these goals, provisions of this act do
4 not track the UCC Article 8’s provisions. Rather, in some cases, this act provides more or less
5 than UCC Article 8’s provisions would allow.
6

7 In addition, this act is designed to replace the substance of Section 502 of the Uniform
8 Regulation of Virtual-Currency Businesses Act, in jurisdictions that enact both the Uniform
9 Regulation of Virtual-Currency Businesses Act and this companion act. Section 502 as approved
10 by the Uniform Law Commissioners in July 2017 provided:
11

12 **SECTION 502. PROPERTY INTERESTS AND ENTITLEMENTS TO**
13 **VIRTUAL CURRENCY.**

14 (a) A licensee or registrant that has control of virtual currency for one or
15 more persons shall maintain in its control an amount of each type of virtual
16 currency sufficient to satisfy the aggregate entitlements of the persons to the type
17 of virtual currency.

18 (b) If a licensee or registrant violates subsection (a), the property interests
19 of the persons in the virtual currency are pro rata property interests in the type of
20 virtual currency to which the persons are entitled, without regard to the time the
21 persons became entitled to the virtual currency or the licensee or registrant
22 obtained control of the virtual currency.

23 (c) The virtual currency referred to in this section is:

24 (1) held for the persons entitled to the virtual currency;

25 (2) not property of the licensee or registrant; and

26 (3) not subject to the claims of creditors of the licensee or

27 registrant.

28 The official comments to Section 502 of the URVCBA included the following:

29 1. This section is based on Uniform Commercial Code (“UCC”) Sections
30 8-503 and 8-504 and protects the owner of virtual currency that is entrusted to a
31 licensee or registrant for a purpose governed by this act. Enforcement is by the
32 department, but also by private rights of action under this section as mentioned in
33 Section 407. In essence, this section takes the virtual currency under the control
34 of a licensee or registrant off the balance sheet of the virtual-currency business
35 and beyond the business’ right to deal with it as their own property. This
36 formulation reduces the need for greater net worth and reserves than Section 204
37 requires without sacrificing user protection.

38 2. This section favors the interests of persons who place virtual currency
39 under the control of a licensee or registrant over the interests of a licensee’s or
40 registrant’s creditors. Section 502 (a) requires the virtual-currency business with
41 “control” over virtual currency that belongs to residents of the enacting state to
42 maintain an amount of each type of virtual currency sufficient to satisfy the
43 aggregate entitlements of the persons to each type of virtual currency for the
44 benefit of its resident customers, and (b) favors the interests of persons who place
45 virtual currency under the control of a licensee or registrant over the interests of
46 creditors of the licensee or registrant. To clarify the rights of persons that place

1 their virtual currency under the control of virtual-currency businesses and of the
2 virtual-currency businesses themselves, the Uniform Law Commission is
3 developing an act that will provide, when approved and enacted, a substitute for
4 Section 502 of this act that instead adopts UCC Article 8’s more balanced
5 approach to this matter. This act is expected to be ready for enactment in 2018.
6

7 This act addresses the three sets of issues presented in Section 502 of the URVCBA, viz.,
8 the requirement that a sufficient amount of each type of virtual currency under the control of the
9 licensee or registrant be maintained, that the property interests of all persons who gave control to
10 the licensee or registrant be on a pro-rata basis if the licensee or registrant should violate
11 subsection 502(a), and protection of the virtual currency under “control” (as defined in the
12 URVCBA) from claims of creditors of the licensee or registrant.
13

14 The balance of this Prefatory Note addresses how this act addresses the issues that pertain
15 to the treatment of virtual currency under the “control” – a term defined in the URVCBA – of a
16 “virtual-currency business” – another term defined in the URVCBA, and how that treatment
17 relates to core requirements of Article 8 of the Uniform Commercial Code.
18

19 **Application of UCC Article 8 Concepts to Virtual-Currency Transactions.** UCC
20 Article 8 is a statute of broad coverage that, in some circumstances, permits parties to “opt in” to
21 the Article 8 scheme, and for their transactions to be governed by the rules of UCC Article 8, for
22 purposes of the indirect holding relationships to which they have agreed. The essential
23 components of using UCC Article 8 rules in aid of the rights of parties to a transaction in which a
24 licensee or registrant subject to the Uniform Regulation of Virtual-Currency Businesses Act and
25 its customer agree that the provider will have “control” of the customer’s virtual currency.
26

27 This act establishes some commercial law rules for businesses that control others’ virtual
28 currency. This act is not intended to affect the provisions of UCC Article 8 or their interpretation.
29 Third-party intermediaries maintaining “control” of virtual currencies for their customers and
30 their customers should be able to take advantage of judicial decisions affecting obligations under
31 UCC Article 8.
32

33 **a. Application of Terminology.** This act makes use of the definitions from three
34 sources -- Section 103 of the Uniform Regulation of Virtual-Currency Businesses Act, UCC
35 Article 8 or incorporated by reference in it, and the Convention on the Law Applicable to Certain
36 Rights in Respect of Securities Held with an Intermediary. The Convention, which was
37 concluded on July 5, 2006 (“Hague Securities Convention”), and consented to by the Senate,
38 became effective as of April 1, 2017. It determines the applicable law for indirectly held
39 securities and, thus, arguably, virtual currency held in a securities account. (The Convention is
40 available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>.)
41

42 For a licensee or registrant governed by the URVCBA to be subject to UCC Article 8’s
43 rules, the licensee or registrant must assume “securities intermediary” status and maintain a
44 “securities account” to which a “financial asset” is or may be credited. The definitions of the
45 three terms – “securities intermediary,” “securities account,” and “financial asset,” taken together,
46 indicate that a licensee or registrant, which maintains accounts for users to which virtual currency

1 is or may be credited as a financial asset, could agree expressly with the users to be subject to the
2 rules of UCC Article 8. More information on this “opt-in” is provided below.
3

4 The definition of “securities intermediary” in UCC Section 8-102 is not confined to a bank
5 or broker or to a person who is regulated under banking or securities law. The definition in
6 Section 8-102(a)(14)(ii) includes “a person...that in the ordinary course of its business maintains
7 securities accounts for others and is acting in that capacity.”
8

9 The definition of “securities account” similarly is not confined to an account at a bank or
10 broker or to an account maintained by a person regulated under banking or securities law. UCC
11 Section 8-501(a) defines the term as “an account to which a financial asset is or may be credited
12 in accordance with an agreement under which the person maintaining the account undertakes the
13 treat the person for whom the account is maintained as entitled to exercise the rights that
14 comprise the financial asset.”
15

16 Also, the definition of “financial asset” is not confined to a security. The term is defined
17 in UCC Section 8-102(a)(9)(iii) to include “any property that is held by a securities intermediary
18 for another person in a securities account if the securities intermediary has expressly agreed with
19 the other person that the property is to be treated as a financial asset under [Article 8].”
20

21 A financial asset may be “any property” so long as there is an express agreement between
22 the securities intermediary and the entitlement holder that the property be treated as a financial
23 asset. As Official Comment 9 to UCC §8-102 states: “The term financial asset is defined to
24 include not only securities but also a broader category of obligations, shares, participations, and
25 interests.” For a decision in which a bank certificate of deposit was treated as a financial asset
26 credited to a securities account, see *Flenner v. Alexander (In re Alexander)*, 429 B.R. 876
27 (Bankr. W.D.Ky. 2010 *aff’d*, 2011 WL 9961118 (6th Cir. 2011).
28

29 The goal of drawing concepts from UCC Article 8 is to afford to both a licensee or
30 registrant under the URVCBA and their respective customers the benefits of many protections
31 that Article 8, and particularly its Part 5, offer. The use of these terms in this act is intended to
32 comport with UCC Article 8 and to have the advantages of judicial decisions interpreting its
33 provisions.
34

35 **b. Article 8 “Opt-in.”** A licensee or registrant in the business of maintaining
36 control of virtual currencies for users may expressly agree with the users that virtual currency of
37 which the licensee or registrant has control for the users will be treated as “financial assets”
38 credited to the users’ “securities accounts” under UCC Article 8. Article 8 does not dictate what
39 form the express agreement might take, but it would certainly permit the express agreement to be
40 contained in the account agreement between the licensee or registrant and a user. The permissive
41 reference “may expressly agree” should not mask the rule in Section 4 of this act that a licensee
42 or registrant must enter into a qualifying agreement or will be deemed to have done so.
43

44 **c. Application of UCC Article 8, Part 5 Duties.** When the licensee or registrant
45 expressly agrees with users to treat virtual currency of which the licensee or registrant has
46 control for the users as financial assets credited to the users’ securities accounts, then the licensee

1 or registrant has the following UCC Article 8, Part 5 duties as relevant for the virtual currency
2 and enforceable by the users:

- 3
4 • *The duty to maintain sufficient financial assets to satisfy all security entitlements to the
5 financial assets.* UCC §8-504(a).

6
7 The licensee or registrant would need to maintain control of sufficient virtual currency of
8 each type to satisfy all entitlements of the users to virtual currency of that type.

- 9
10 • *The duty to comply with the entitlement holder's entitlement orders to transfer or redeem
11 a financial asset.* UCC §8-507.

12
13 The licensee or registrant must comply with a user's instructions to transfer virtual
14 currency of which the licensee or registrant has control for the user to another person, as
15 and when, for example, the user wishes to exchange the virtual currency for goods,
16 services, fiat currency, or any other type of virtual currency.

- 17
18 • *The duty to change the entitlement holder's security entitlement to another form or
19 holding for which the entitlement holder is eligible, or to deliver out a financial asset, at
20 the request of the entitlement holder.* UCC §8-508.

21
22 The licensee or registrant must comply with a user's instructions to transfer virtual
23 currency of which the licensee or registrant has control for the user to another licensee or
24 registrant for the account of the user or to another eligible account of the user.

25
26 These UCC Article 8, Part 5 Duties are not controversial. They should be consistent with
27 a user's expectations of the licensee's or registrant's performance with respect to virtual currency
28 of which the licensee or registrant has control for the user.

29
30 **d. Protection of Licensee or Registrant Following Instructions of its**
31 **Customers.** If a licensee or registrant with control over a customer's virtual currency transfers
32 virtual currency as instructed by the user, the licensee or registrant generally cannot be held
33 liable for the transfer by an adverse claimant to the virtual currency unless the licensee or
34 registrant acted in collusion with the wrongdoer in violating the rights of the adverse claimant.
35 UCC §8-115(3).

36
37 **e. Claims of Creditors of Licensee or Registrant.** A licensee or registrant that
38 expressly agreed with users to treat virtual currency of which the licensee or registrant has
39 control for the users as financial assets credited to the users' securities accounts, then a financial
40 asset giving rise to a security entitlement generally is not subject to the claims of creditors of the
41 securities intermediary in priority over the security entitlement. *See* UCC §8-503(a). As a result,
42 virtual currency of which a licensee or registrant has control for a user would not be subject to
43 claims of creditors of the licensee or registrant.

44
45 Under UCC Article 8, the virtual currency would be subject to a claim of a creditor of the
46 licensee or registrant, senior in priority to the user's entitlement, if (a) the licensee or registrant

1 has granted to the creditor a security interest in the virtual currency, (b) the creditor has “control”
2 of the virtual currency as defined in UCC § 8-106, and not as in the URVCBA § 103, and (c) the
3 licensee or registrant has not complied with its duty to maintain sufficient virtual currency of that
4 type to satisfy the entitlement in addition to satisfying the security interest of the creditor. UCC
5 §§8-503(a) and 8-511(a), (b). The licensee or registrant, though, is not permitted under Article 8
6 to grant a security interest in the virtual currency without the consent of the user. UCC §8-
7 504(b).

8
9 This act has a limited objective in subjecting virtual-currency transactions to the
10 commercial law rules of the Uniform Commercial Code, especially those under Article 8 and, in
11 consequence, Articles 1 and 9. The objectives largely are to codify the UCC Article 8, Part 5
12 Duties of the licensee or registrant with respect to users and to solve the commercial law
13 problems referred to in comment 5 to Section 4 of this act.

14
15 Accordingly, Section 7 of this act provides that the treatment under this act and UCC
16 Article 8 of virtual currency as a financial asset credited to a securities account should not
17 determine the characterization or treatment of the virtual currency for purposes of other laws,
18 such as laws dealing with the regulation of securities or commodities.

19
20 This act should not be enacted alone or in a jurisdiction not enacting the URVCBA even
21 if the law of that jurisdiction addresses the regulation of virtual currency providers or of virtual
22 currencies themselves, as too little coordination would result. Compare Section 3 of this act. The
23 parties in states that have not enacted the URVCBA could achieve a similar result by careful
24 drafting in their agreement.

1 **UNIFORM SUPPLEMENTAL COMMERCIAL LAW FOR THE UNIFORM**
2 **REGULATION OF VIRTUAL-CURRENCY BUSINESSES ACT**

3
4 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Supplemental
5 Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act.

6 **SECTION 2. DEFINITIONS.**

7 (a) In this [act]:

8 (1) “Article 8” means Article 8 of the Uniform Commercial Code [as amended],
9 in substantially the form promulgated by the American Law Institute and the Uniform Law
10 Commission, of the Uniform Commercial Code jurisdiction determined under Section 4(a)(1).

11 (2) “Control” has the meaning provided in Section 102(3)(A) of [insert citation to
12 Uniform Regulation of Virtual-Currency Businesses Act].

13 (3) “Hague Securities Convention” means the Convention on the Law Applicable
14 to Certain Rights in Respect of Securities Held with an Intermediary, concluded 5 July 2006.

15 (4) “Uniform Commercial Code jurisdiction” means this state or another state that
16 has enacted Article 8.

17 (5) “Uniform Regulation of Virtual-Currency Businesses Act” means [insert
18 citation to Uniform Regulation of Virtual-Currency Businesses Act of this state].

19 (6) “User” means a person for which a licensee or registrant has control of
20 virtual currency.

21 (b) Except as otherwise provided in subsection (a), terms defined in the Uniform
22 Regulation of Virtual-Currency Businesses Act or defined or incorporated by reference in Article
23 8 have the same meanings in this [act].

24 **Legislative Note:** *In states in which the constitution, or other law, does not permit the phrase “as*
25 *amended” when statutes of other jurisdictions are incorporated into state law, the phrase should*
26 *be deleted in subsection (a)(1).*

1 **Official Comment**

2 As explained in the comment to Section 4, the applicable Article 8 of the Uniform
3 Commercial Code will usually be the Article 8 of the state whose law governs or that is
4 otherwise chosen in the account agreement between the licensee or registrant and the user. This
5 concept is explained in comment 4.f to Section 4. Accordingly, the definition of “UCC Article
6 8” means the Article 8 of the jurisdiction chosen by the parties and determined under Section
7 4(a)(1). For Article 8 to apply, the jurisdiction must be a jurisdiction that enacted Article 8,
8 defined in this section as a “UCC jurisdiction.” The applicable Article 8 need not be the Article
9 8 of the enacting state. However, at this time there are no material differences among the Article
10 8 enactments of the various states on the matters addressed in this act.

11
12 The term “user” includes but is not confined to a “resident” as defined in the Uniform
13 Regulation of Virtual-Currency Businesses Act. The broader definition is necessary so that the
14 same protections afforded to a “resident” of the enacting state under this act are afforded to non-
15 residents for whom the licensee or registrant controls virtual currency. If the protections of this
16 act were afforded only to a “resident” of the enacting state, the “resident” would be able to
17 benefit from the protections of this act in the enacting state but could also make claims under the
18 laws of another jurisdiction to the prejudice of residents of the other jurisdiction and other non-
19 residents.

20
21 **Reporter’s Note**

22
23 The issue of covering “users” as opposed to “residents” in this act has been discussed by
24 the Commissioners at the Annual Meeting and, since then, by members of the Drafting
25 Committee including at a March 2018 meeting of the Drafting Committee. The consensus
26 remains that this act should use the broader definition. U.C.C. Article 8 takes an approach
27 consistent with coverage of “users” by not limiting the term “entitlement holder” to residents of
28 the enacting state.

29
30 **SECTION 3. SCOPE.** This [act] applies to:

31 (1) a person or transaction governed by the Uniform Regulation of Virtual-Currency
32 Businesses Act; and

33 (2) a user that is not a resident if the user or transaction with the user would be governed
34 by the Uniform Regulation of Virtual-Currency Businesses Act if the user were a resident.

35 *Legislative Note: This act should be enacted only in a state that previously has enacted or*
36 *concurrently enacts the Uniform Regulation of Virtual-Currency Businesses Act.*
37

1 **Official Comment**

2 This uniform act is designed to work in conjunction with the Uniform Regulation of
3 Virtual-Currency Businesses Act (URVCBA).
4

5 Specifically, when enacted in states that enact the Uniform Regulation of Virtual-
6 Currency Businesses Act, this act substitutes for the duties specified in Section 502 of the
7 URVCBA. The substance of prior Section 5 of this act has been incorporated into Section 4 of
8 this draft. Other alternative approaches to the approach in current Section 4 include an absolute
9 prohibition on re-pledging by the intermediary, leaving this issue to the agreement of the parties
10 without limitation, or restricting limitations on re-pledging to accounts and transactions
11 involving consumer users rather than those involving all users. This Annual Meeting draft of
12 this act uses the formulation in current Section 4 after much reflection.
13

14 **Reporter’s Note**

15
16 For additional explanation of the use in this act of the term “user” as opposed to the term
17 “resident” used in the URVCBA, please consult the Reporter’s Note to Section 2 of this act.
18

19 **SECTION 4. INCORPORATION OF ARTICLE 8.**

20 (a) The relationship between a licensee or registrant and a user must be evidenced by an
21 agreement in a record signed by the licensee or registrant and by the user. The agreement:

22 (1) must specify the jurisdiction whose law governs the agreement;

23 (2) if governed by the law of a jurisdiction that is not a Uniform Commercial
24 Code jurisdiction, must state that:

25 (A) the securities intermediary’s jurisdiction for purposes of Article 8 of
26 the Uniform Commercial Code is a particular Uniform Commercial Code jurisdiction; and

27 (B) the law in force in the Uniform Commercial Code jurisdiction under
28 subparagraph (A) applies to all issues specified in Article 2(1) of the Hague Securities
29 Convention;

30 (3) must state that:

31 (A) the licensee or registrant is a securities intermediary;

32 (B) the control of virtual currency by the licensee or registrant for the

1 benefit of the user creates a securities account of which the user is the entitlement holder;

2 (C) the parties agree that the virtual currency is to be treated as a financial
3 asset credited or held for credit to the securities account of the user;

4 (D) the licensee or registrant will not grant a security interest in virtual
5 currency which the licensee or registrant is obligated to maintain under Section 8-504(a) of
6 Article 8;

7 (4) may not provide a standard for the licensee or registrant to comply with its
8 duties under Part 5 of Article 8 which is less protective of the user than the standard that would
9 apply under Part 5 of Article 8 in the absence of an agreement concerning the standard; and

10 (5) may not provide that:

11 (A) the securities intermediary’s jurisdiction for the purpose of Article 8
12 of the Uniform Commercial Code is a jurisdiction that is not a Uniform Commercial Code
13 jurisdiction; or;

14 (B) the law in force in a jurisdiction that is not a Uniform Commercial
15 Code jurisdiction applies to all issues specified in Article 2(1) of the Hague Securities
16 Convention.

17 (b) If there is no agreement that complies with subsection (a), the relationship between
18 the licensee or registrant and the user is determined as if the licensee or registrant and the user
19 have an agreement that complies with subsection (a) and specifies the law of this state governs
20 the agreement.

21 (c) The effect of this section may not be varied by agreement.

22 **Official Comment**

23
24 **1.General.** The primary goal of this act is to provide commercial law rules for licensees
25 and registrants and their customers – “users” under the definitions of this act – so that both sides

1 of a relationship that involves the licensee or registrant taking “control” of virtual currency under
2 the definition of “control” in the URVCBA know what their respective rights and duties are.
3 The manner selected is to facilitate the parties’ “opt-in” to provisions of Part 5 of UCC Article 8
4 as a substitute for compliance with Section 502 of the URVCBA.
5

6 A distinct advantage of the approach taken in this act is that it provides a clear path for
7 persons that seek to grant and persons that seek to enforce Article 9 security interests in virtual
8 currencies. Under this act, for purposes of Articles 8 and 9, virtual currencies under the
9 “control” of licensees or registrants as that term is defined in the URVCBA and their customers
10 will become “investment property” and not “payment intangibles” or “general intangibles” for
11 Article 9 purposes. Thus, as “investment property,” virtual currencies under third-party “control”
12 will be subject to UCC Sections 9-106, 9-203(b)(3)(D), and eligible for “automatic perfection”
13 (perfection upon attachment) pursuant to Section 9-309, as opposed to pursuant to a filing, which
14 is the proper method for “payment intangibles” as a sub-class of “general intangibles” under
15 Article 9. It also avoids distinctions between “sales” of “payment intangibles” under and
16 “security interests” in them that are the subject of more complicated treatments under Article 9.
17

18 Subsection 4(a)(1) requires that the choice-of-law rules of the enacting state point to
19 Article 8 of the Uniform Commercial Code (“Article 8”) of a Uniform Commercial Code
20 jurisdiction so that the commercial law rules provided by Article 8 will apply in this act. The
21 section addresses the concern that otherwise the form of agreement between the licensee or
22 registrant and the user may select a governing law of a jurisdiction that is not a Uniform
23 Commercial Code jurisdiction in order to avoid the commercial law rules intended for this act
24 after application of the choice-of-law rules of Article 8 or of the Convention on the Law
25 Applicable to Certain Rights in Respect of Securities Held with an Intermediary, concluded 5
26 July 2006 (“Hague Securities Convention”). The Convention is available at
27 <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>. The choice-of-law rules are
28 further explained in comment 3 to this section.
29

30 Section 4(a) is the key provision by which the licensee or registrant and the user “opt-in”
31 to Article 8. The “opt-in” provisions of Article 8 are further explained in the comment. This
32 section requires a licensee or registrant operating under the Uniform Regulation of Virtual-
33 Currency Businesses Act and user to “opt-in” to Article 8. This comment describes the effect of
34 them doing so. When they do so and upon compliance with provisions of this section, the parties
35 are substituting their rights and duties under Article 8 for their rights and duties under Section
36 502 of the Uniform Regulation of Virtual-Currency Businesses Act. See Section 7 of this act.
37 The theory is that the parties have agreed to using Article 8, particularly its Part 5, even though
38 such agreement is mandated for a licensee or a registrant and deemed to exist if the applicable
39 effective date for this act arrives and they have not agreed expressly on this subject. Following
40 that theory, at a later date, the parties could agree as long as their agreement complies with the
41 requirements for it.
42

43 Subsection (a)(3)(D) of this section imposes a restriction in any agreement between the
44 licensee or registrant and a user on the ability of the licensee or registrant to grant a security
45 interest in any virtual currency over which it has control on behalf of users. This restriction on
46 licensee or registrant from pledging its customers’ virtual currency relates to the URVCBA’s

1 lower net-worth requirements for virtual-currency businesses, whether licensees or registrants.

2
3 In the event that a licensee or registrant violates the restriction in subsection 4(a)(3)(D),
4 that violation would constitute a violation of the URVCBA subjecting the licensee or registrant
5 to enforcement action and a breach of contract that the user could pursue using the rights it has
6 under Article 8 or under Section 407 of the URVCBA. The fact of a violation of Section 4 of this
7 act or a breach of a contract with a user, however, does not result in a void transaction between
8 the licensee or registrant and the entity to which it may have granted the security interest. Thus,
9 subsection 4(a)(3)(D) is not intended to disturb the innocent downstream “purchaser” – that is,
10 holder of the resulting security interest or others who may be relying on its rights.

11
12 Article 8 permits a user to consent to the licensee or registrant granting a security interest
13 in virtual currency of which the licensee or registrant has control for the user. UCC §8-504(b).
14 Article 9 of the Uniform Commercial Code provides to the licensee or registrant the right to
15 grant such a security interest absent the licensee’s or registrant’s agreement with the user to the
16 contrary. UCC §9-207(c)(3).

17
18 To address the concern that, without a user’s informed assent, a licensee’s or registrant’s
19 standard form agreement would permit the licensee or registrant to grant a security interest in or
20 transfer, for the licensee’s or registrant’s own account, any virtual currency of which the licensee
21 or registrant has control for the user, or that the licensee or registrant will do so if the agreement
22 is silent on the issue, this act requires that the licensee or registrant affirmatively agree with user
23 that the licensee or registrant will not grant such a security interest or make such a transfer.

24
25 However, in light of the regulatory purpose of the section 4(a) agreement, and of the
26 deemed 4(b) agreement, any purported waiver or amendment of the requirements imposed by
27 section 4 that would not have passed muster under this act in the first instance is ineffective as
28 between the licensee or registrant and the user under section 4(b). In other words, section 4(b)
29 already expressly restricts the parties’ agreement and puts additional muscle into 4(a) not only at
30 the time of the original agreement between the parties, but also extends the same restrictions
31 through the course of the agreement and relationship.

32
33 Section 4 does not prohibit (a) the user from granting a security interest to a licensee or
34 registrant in virtual currency of which the licensee or registrant has control for the user in order
35 to secure payment of customary amounts owing to the licensee or registrant by the user or
36 payment of any credit extended by the licensee or registrant to the user, or (b) the licensee or
37 resident from enforcing the security interest granted by the user following the user’s default.

38
39 Although this section also does not prohibit the user from granting a security interest in
40 the virtual currency to a third party, it does not obligate the licensee or registrant to assume any
41 duties to the third party.

42
43 **2. Summary of the Substantive Provisions of Article 8.** Article 8 sets forth a statutory
44 scheme for the holding and transfer of investment property, including investment securities, such
45 as stocks and bonds, and other “financial assets.” The statutory scheme relevant to this act
46 applies to investment securities held indirectly by an investor through a bank, broker or other

1 intermediary (so-called “indirectly-held securities”). Although the primary focus of Article 8 is
2 generally on investment securities, Article 8 itself is not so limited in its provisions relating to
3 the indirect holding system, as Official Comment 9 to UCC Section 8-102 explains.
4

5 **a. Terminology.** Understanding the scope of Article 8 in respect of the indirect
6 holding system requires an understanding of the terminology used in Article 8 for the indirect
7 holding system. Under Article 8, a bank, broker or other person that in the ordinary course of its
8 business maintains securities accounts for others and is acting in that capacity is referred to as a
9 “securities intermediary” § 8-102(a)(14). A “securities account” is an account to which a
10 “financial asset” is or may be credited in accordance with an agreement under which the person
11 for whom the account is maintained is entitled to exercise the rights that comprise the financial
12 asset, as these terms are defined in UCC Sections 8-501(a)(1) and 9-102(a)(9), respectively. A
13 financial asset under Article 8 includes not only a “security” as defined in UCC Section 8-
14 501(b)(1), but also “*any property* that is held by a securities intermediary for another person in a
15 securities account if the securities intermediary has expressly agreed with the other person that
16 the property is to be treated as a financial asset” (8-102(a)(9) (emphasis added). (The quoted
17 language is in clause (iii) of UCC Section 8-102(a)(9)’s definition of the term “financial asset.”)
18

19 Once the securities intermediary has indicated by book entry that a financial asset has
20 been credited to a person’s securities account, the person is referred to as an “entitlement holder”
21 (8-102(a)(7)), and the person has what Article 8 calls a “security entitlement” with respect to the
22 financial asset § 8-501(b)(1). A security entitlement encompasses the rights and property interest
23 of an entitlement holder with respect to a financial asset as specified in Section 8-102(a)(17).
24

25 **b. Part 5 Duties of the Securities Intermediary in the Indirect Holding**
26 **System.** The rights comprising a security entitlement with respect to a financial asset include the
27 rights of the entitlement holder to enforce the duties of the securities intermediary to the
28 entitlement holder under Part 5 of UCC Article 8. Those duties (the “Part 5 Duties”) consist of
29 the duty to maintain sufficient financial assets to satisfy all security entitlements to the financial
30 assets (8-504), the duty to take action to obtain a payment or distribution made by the issuer of
31 the financial asset (8-505), the duty to exercise rights in respect of the financial asset as directed
32 by the entitlement holder (8-506), the duty to comply with the entitlement holder’s instruction
33 (referred to in Article 8 as an “entitlement order,” which is defined in UCC Section 8-102(a)(8))
34 to transfer or redeem a financial asset (8-507), and the duty to change the entitlement holder’s
35 security entitlement to another form of holding for which the entitlement holder is eligible, or to
36 deliver out a financial asset, at the request of the entitlement holder (8-508).
37

38 The property interest comprising a security entitlement with respect to a financial asset
39 consists, pursuant to UCC Section 8-503(b), of a pro rata property interest in all interests of the
40 securities intermediary in that financial asset. For example, an entitlement holder may have 100
41 shares of XYZ stock maintained for it in an account with a securities intermediary, but nine other
42 entitlement holders may each have 100 shares of XYZ stock maintained for each of them in their
43 accounts with the securities intermediary. A clearing corporation, such as Depository Trust
44 Company, may show on its books and records that, of all the XYZ stock that the clearing
45 corporation holds, 1000 shares are for the securities intermediary’s account. The securities
46 intermediary would then reflect on its books and records that 100 shares of XYZ stock are held

1 by the securities intermediary through the clearing corporation as being for the account of each
2 of the ten entitlement holders. The entitlement holder’s security entitlement will be to 100 of the
3 1000 shares of XYZ stock as the entitlement holder’s pro rata share of the “fungible bulk” of
4 XYZ stock held by the securities intermediary, as Official Comment 1 to UCC Section 8-503
5 explains.
6

7 The Part 5 Duties of Article 8 are generally enforceable by the entitlement holder against
8 the securities intermediary under the UCC. As UCC Section 1-305(b) explains: “Any right or
9 obligation declared by [the UCC] is enforceable by action unless the provision declaring it
10 specifies a different or limited effect.” A Court of Appeals, surprisingly, concluded that an
11 entitlement holder has no private right of action under Part 5 of UCC Article 8 unless a provision
12 in Part 5 expressly provides for a private right of action. *See Harris v. T.D. Ameritrade, Ind.*,
13 805 F.3d 664 (6th Cir. 2015). However, the court did not address Section 1-305(b) of the
14 Uniform Commercial Code in the opinion. Accordingly, the opinion should not be relied upon.
15 In addition, Section 407 of the Uniform Regulation of Virtual-Currency Businesses Act
16 explicitly confers a private right of action for a violation of its Section 502. When this act
17 becomes effective to replace Section 502 of the Uniform Regulation of Virtual-Currency
18 Businesses Act, there should likewise be a private right of action under this act.
19

20 While the securities intermediary is subject to the UCC Part 5 Duties, the securities
21 intermediary has certain protections under UCC Article 8. For example, under UCC Section 8-
22 115(3), a securities intermediary that transfers a financial asset pursuant to an effective
23 entitlement order generally cannot be held liable to an adverse claimant to the financial asset for
24 the transfer, whether in conversion or otherwise, unless the securities intermediary acted in
25 collusion with the wrongdoer in violating the rights of the adverse claimant. The collusion
26 standard suggests that the behavior of the licensee or registrant governed by the Uniform
27 Regulation of Virtual-Currency Businesses Act and this act must be egregious, or close to it, for
28 the securities intermediary to be liable to an adverse claimant. (*See generally* Official Comment
29 5 to UCC § 8-115.)
30

31 **c. Claims of Creditors of the Securities Intermediary.** A financial asset that
32 gives rise to a security entitlement is generally not subject to the claims of creditors of the
33 securities intermediary in priority over the security entitlement. However, a financial asset will
34 be subject to a claim of a creditor of a securities intermediary, senior in priority to the security
35 entitlement, pursuant to UCC Sections 8-503(a) and 8-511(a), (b), and even if the entitlement
36 holder did not consent, as described below, if (a) the securities intermediary has granted to the
37 creditor a security interest in the financial asset, whether to secure the securities intermediary’s
38 own obligations to the creditor or otherwise, (b) the creditor has “control” of the financial asset,
39 and (c) the securities intermediary has not complied with its duty to maintain sufficient financial
40 assets to satisfy the security entitlement in addition to satisfying the security interest of the
41 creditor. Of course, the securities intermediary would be liable to its customers.
42

43 “Control” for purposes of UCC Article 8 should be distinguished from “control of virtual
44 currency” as defined in Section 103 of the Uniform Regulation of Virtual-Currency Businesses
45 Act. UCC Section 8-106’s “control” generally would require the financial asset to be credited to
46 accounts that would qualify as a securities account of the creditor at another securities

1 intermediary or be put into the name of the creditor. Also, under UCC Section 8-106(d)(2), a
2 creditor could obtain control by entering into an agreement (a so-called “control agreement”)
3 with the securities intermediary by which the securities intermediary agrees that it will comply
4 with entitlement orders originated by the creditor without further consent of the entitlement
5 holder. However, under UCC Section 8-106(g), the securities intermediary may not enter into a
6 control agreement in respect of a securities account without the consent of the entitlement holder.
7 Pursuant to UCC Section 8-504(b), the securities intermediary similarly is not permitted to grant
8 a security interest in the financial asset without the consent of the entitlement holder.
9

10 It follows from a securities intermediary’s duty to maintain sufficient financial assets to
11 satisfy security entitlements (as noted in Official Comment 2(b)) that, if the securities
12 intermediary holds financial assets of a particular class and issuer that in part give rise to security
13 entitlements and in part are financial assets of the securities intermediary maintained for its own
14 account, then the security entitlements in the financial assets have priority over the securities
15 intermediary’s ownership of its own financial assets unless a creditor of the securities
16 intermediary has control of the financial asset. If, for some reason, the securities intermediary
17 does not maintain sufficient financial assets of the class or issuer delivered by its customers to
18 satisfy all security entitlements to those financial assets, then, pursuant to UCC Section 8-503(b),
19 the entitlement holders of the financial assets share ratably in the remaining financial assets of
20 that class or issuer still maintained by the securities intermediary and have ratable unsecured
21 claims against the securities intermediary for the shortfall.
22

23 For example, in the traditional application of this principle under UCC Article 8, if ten
24 entitlement holders of a securities intermediary each have security entitlements to 1000 shares of
25 XYZ stock, but the securities intermediary has only 800 shares of XYZ stock credited to its
26 account at a clearing corporation (inclusive of shares held by the securities intermediary for its
27 own account) and has no other XYZ shares, each entitlement holder will have a security
28 entitlement to 80 shares of XYZ stock and an unsecured claim against the securities intermediary
29 for the value of 20 shares of XYZ stock.
30

31 Translated to show how it would apply to virtual currencies, if the entitlement holders
32 had 1000 bitcoin, and the securities intermediary had only 800 bitcoin, the same ten entitlement
33 holders each would have 80 bitcoin, and an unsecured claim against the securities intermediary
34 for the value of 20 bitcoin. They would have no claim against the 100 units of the other types of
35 virtual currency. If the securities intermediary also had 100 units of another virtual currency on
36 hand, it would not change the analysis in this paragraph.
37

38 **3. Summary of the Choice-of-law Rules of Article 8 relating to the Indirect Holding** 39 **System; Effect of the Hague Securities Convention.** 40

41 **a. The Article 8 Choice-of-law Rules.** UCC Article 8’s choice-of-law rules are
42 set forth in Section 8-110. As a general matter, if a dispute arises in a court in a jurisdiction
43 which has adopted the Uniform Commercial Code (a “UCC jurisdiction”), pursuant to UCC
44 Subsections 8-110(b) and (e), the court would apply the law of the jurisdiction that governs the
45 account relationship between the securities intermediary and the entitlement holder to determine
46 an issue addressed under Article 8 with respect to the indirect holding system. There are

1 currently no material differences between the Article 8 texts of any UCC jurisdiction in respect
2 of matters relating to the indirect holding system. If the account agreement were governed by a
3 law of a jurisdiction that has not adopted the Uniform Commercial Code and the account
4 agreement did not provide that a particular UCC jurisdiction is the “securities intermediary’s
5 jurisdiction” for purposes of the Uniform Commercial Code, then the non-UCC substantive law
6 of the jurisdiction whose law governs the account relationship would determine the rules for the
7 holding and transfer of investment securities, including whether the financial assets are subject to
8 the claims of the securities intermediary’s creditors. UCC §§ 8-110(b) and (e)(1) and (2).

9
10 **b. Impact of the Hague Securities Convention.** UCC Article 8’s choice-of-law
11 rules for securities credited to a securities account are affected by the Hague Securities
12 Convention. The Convention became effective in the United States on April 1, 2017. Even
13 though the Convention applies only to “securities” as defined in the Convention, it is plausible
14 that the definition of “securities” in the Convention might include virtual currency. The
15 definition of “security” in the Convention, like the definition of the same term in UCC Article 8,
16 is independent of its definition for purposes of federal or other regulatory law, because both the
17 language and the purposes of the definitions differ from one another.

18
19 The choice-of-law rules in the Hague Securities Convention pre-empt the choice-of-law
20 rules in UCC Article 8 for the issues covered by Article 2(1) of the Convention. Those issues
21 substantially overlap with the issues addressed in the choice-of-law rules in Article 8 for
22 securities held in the indirect holding system. Even so, the choice-of-law rules of the
23 Convention, in most cases, will produce the same results as under the choice-of-law rules of
24 Article 8.

25
26 Under Article 4(1) of the Convention, as a general matter, the court would apply to an
27 issue covered by its Article 2(1) the law of the jurisdiction that governs the account agreement
28 between the securities intermediary and the entitlement holder to determine the issue so long as
29 the securities intermediary maintains an office that deals with securities in the country of the
30 jurisdiction (a “qualifying office”). The second sentence of Article 4(1) of the Convention sets
31 forth the minimal office activity that is required for the qualifying office test to be met.
32 Accordingly, because the Convention considers the United States is a “multi-unit” country, the
33 qualifying office test for the choice-of-law in the account agreement is met if the account
34 agreement between the securities intermediary and the entitlement holder selects the law of a
35 particular state in the United States and the qualifying office is located in any state of the United
36 States. Hague Securities Convention, Art. 12(1)(b). As a result, assuming that the qualifying
37 office test is met, the issues to be determined by the choice-of-law rules of either the Convention
38 or Article 8 generally would be determined by the law governing the account agreement.

39
40 **c. Parties’ Autonomy to Modify Choice of Law.** If the parties wish for the law
41 of another jurisdiction to determine the UCC Article 8 choice-of-law issues, they can choose in
42 the account agreement for the “securities intermediary’s jurisdiction” to be that jurisdiction
43 pursuant to UCC Subsection 8-110(e)(1). If the parties wish for the law of another jurisdiction to
44 determine Article 2(1) issues, Article 4(1) of the Hague Securities Convention permits them to
45 specify the preferred jurisdiction in the account agreement so long as the “qualifying office” test
46 is met. They, however, may not select for less than all the Article 2(1) issues to be determined by

1 the law of the other jurisdiction.

2
3 **4. Application of Article 8 to Virtual-Currency Transactions.** UCC Article 8 is a
4 statute of broad coverage that in some circumstances permits parties to “opt in” to the Article 8
5 scheme by agreement, and for their transactions to be governed by the rules of UCC Article 8, for
6 purposes of the indirect holding relationships to which they have agreed.

7
8 **a. Application of Terminology.** For a licensee or registrant to be subject to
9 Article 8, the licensee or registrant must be a “securities intermediary” maintaining a “securities
10 account” to which a “financial asset” is or may be credited. The definitions of these three terms,
11 taken together, indicate that a licensee or registrant governed by the URVCBA, which maintains
12 accounts for users to which virtual currency is or may be credited, could expressly agree with the
13 users to be subject to the rules of UCC Article 8.

14
15 The definition of “securities intermediary” in UCC Section 8-102 is not confined to a bank
16 or broker. Moreover, it is not confined to a person who is regulated under banking or securities
17 law. The definition in Section 8-102(a)(14)(ii) includes “a person...that in the ordinary course of
18 its business maintains securities accounts for others and is acting in that capacity.” Likewise, the
19 definition of “securities account” is not confined to an account at a bank or broker or to an
20 account maintained by a person regulated under banking or securities law. The term is defined
21 in UCC Section 8-501(a) as “an account to which a financial asset is or may be credited in
22 accordance with an agreement under which the person maintaining the account undertakes the
23 treat the person for whom the account is maintained as entitled to exercise the rights that
24 comprise the financial asset.”

25
26 Similarly, the definition of “financial asset” is not confined to what other laws define as a
27 “security.” The term is defined in UCC Section 8-102(a)(9)(iii) to include “any property that is
28 held by a securities intermediary for another person in a securities account if the securities
29 intermediary has expressly agreed with the other person that the property is to be treated as a
30 financial asset under [Article 8].”

31
32 A financial asset may be “any property” so long as there is an express agreement between
33 the securities intermediary and the entitlement holder that the property be treated as a financial
34 asset. As Official Comment 9 to UCC §8-102 states: “The term financial asset is defined to
35 include not only securities but also a broader category of obligations, shares, participations, and
36 interests.” (For a decision in which a bank certificate of deposit was treated as a financial asset
37 credited to a securities account, see *Flenner v. Alexander (In re Alexander)*, 429 B.R. 876
38 (Bankr. W.D.Ky. 2010 *aff’d*, 2011 WL 9961118 (6th Cir. 2011).)

39
40 **b. Article 8 “Opt-in.”** A licensee or registrant in the business of maintaining
41 control of virtual currencies for users may expressly agree with the users that virtual currency of
42 which the licensee or registrant has control for the users will be treated as “financial assets”
43 credited to the users’ “securities accounts” under Article 8. Article 8 does not dictate what form
44 the express agreement might take, but it would certainly permit the express agreement to be
45 contained in the account agreement between the licensee or registrant and a user. Article 8, Part
46 5 sets limits on provisions in the agreement, as are described in subsection c of this Official

1 Comment below.
2

3 **c. Application of UCC Article 8, Part 5 Duties.** If the licensee or registrant
4 expressly agrees with users to treat virtual currency of which the licensee or registrant has
5 control for the users as financial assets credited to the users' securities accounts, then the licensee
6 or registrant has the following Part 5 Duties relevant for a virtual currency and enforceable by
7 the users by private right of action:
8

- 9 • *The duty to maintain sufficient financial assets to satisfy all security entitlements to the*
10 *financial assets.* UCC §8-504(a).
11

12 The licensee or registrant would need to maintain control of sufficient virtual currency of
13 each type to satisfy all entitlements of the users to virtual currency of that type.
14

- 15 • *The duty to comply with the entitlement holder's entitlement orders to transfer or redeem*
16 *a financial asset.* UCC §8-507.

17 The licensee or registrant would need to comply with a user's instructions to transfer
18 virtual currency of which the licensee or registrant has control for the user to another
19 person, as and when, for example, the user wishes to exchange the virtual currency for
20 goods, services, fiat currency, or any other type of virtual currency.
21

- 22 • *The duty to change the entitlement holder's security entitlement to another form or*
23 *holding for which the entitlement holder is eligible, or to deliver out a financial asset, at*
24 *the request of the entitlement holder.* UCC §8-508.
25

26 The licensee or registrant would need to comply with a user's instructions to transfer
27 virtual currency of which the licensee or registrant has control for the user to another
28 licensee or registrant for the account of the user or to another eligible account of the user.
29

30 These Article 8, Part 5 Duties are not controversial. They should be consistent with a
31 user's expectations of the licensee's or registrant's performance with respect to virtual currency
32 of which the licensee or registrant has control for the user.
33

34 **d. Protection of Licensee or Registrant.** If licensee or registrant transfers virtual
35 currency as instructed by the user, the licensee or registrant cannot be held liable to an adverse
36 claimant to the virtual currency for the transfer unless the licensee or registrant acted in
37 contravention of Uniform Commercial Code § 8-115, including, pursuant to Uniform
38 Commercial Code §8-115(2), if it acted in collusion with the wrongdoer in violating the rights of
39 the adverse claimant.
40

41 **e. Claims of Creditors of Licensee or Registrant.** When the licensee or
42 registrant expressly agrees with users to treat virtual currency of which the licensee or registrant
43 has control for the users as financial assets credited to the users' securities accounts, then a
44 financial asset giving rise to a security entitlement is generally not subject to the claims of
45 creditors of the securities intermediary in priority over the security entitlement. *See* Uniform
46 Commercial Code §8-503(a). Accordingly, virtual currency of which a licensee or registrant has

1 control for a user would not be subject to claims of creditors of the licensee or registrant.

2
3 Under Article 8, the virtual currency would be subject to a claim of a creditor of the
4 licensee or registrant, senior in priority to the user’s entitlement, even if the security interest is
5 not consented to by the user, if (a) the licensee or registrant has granted to the creditor a security
6 interest in the virtual currency, (b) the creditor has “control” of the virtual currency as defined in
7 UCC § 8-106, and (c) the licensee or registrant has not complied with its duty to maintain
8 sufficient virtual currency of that type to satisfy the entitlement in addition to satisfying the
9 security interest of the creditor. §§8-503(a) and 8-511(a), (b). The licensee or registrant, though,
10 is not permitted under Article 8 to grant a security interest in the virtual currency without the
11 consent of the user, and, thus, the grant constitutes a violation of this act. UCC §8-504(b).

12
13 **f. Choice of Law.** If an express agreement to “opt-in” to Article 8 is contained in
14 an agreement, presumably the account agreement between the licensee or registrant and the user,
15 then, in order for a court in a jurisdiction to apply the substantive commercial law rules of Article
16 8 to the virtual currency held in the account, the law governing the account agreement would
17 need to be that of a jurisdiction or the agreement would need to provide for a jurisdiction to be
18 the “securities intermediary’s jurisdiction” (UCC §§8-110(b) and (e)(1) and (2)) and for the
19 issues governed by Article 2(1) of the Hague Securities Convention to be governed by the law of
20 a jurisdiction. Hague Securities Convention, Art. 4(1). Subsection 4(a)(1) of this act ensures that,
21 once the Article 8 “opt-in” provisions are contained in an agreement, whether an actual agreement
22 or a “deemed” one, the Article 8 and, assuming that the qualifying office test is met the Hague
23 Securities Convention, choice-of-law rules will point to the law of a particular jurisdiction where
24 the substantive commercial law rules of Article 8 will actually apply. This section addresses the
25 concern that otherwise the form of agreement between the licensee or registrant and the user may
26 select a governing law of a jurisdiction that is not a UCC jurisdiction in order to avoid the
27 commercial law rules of this act after application of the choice-of-law rules of Article 8 and the
28 Hague Securities Convention.

29
30 However, as provided in Section 6 of this act, the licensee or registrant must maintain a
31 qualifying office in the United States to make certain that the Article 8 protections are effective
32 after applying the choice-of-law rules of the Hague Securities Convention.

33
34 **5. Problems in Practice Addressed by the Article 8 “Opt-in.”** When the licensee or
35 registrant expressly agrees or is deemed to agree with users to treat virtual currency over which
36 the licensee or registrant has control for the users as financial assets credited to the users’
37 securities accounts, then several problems that exist under secured transactions law without
38 giving effect to this act will be addressed. It is intended that addressing these problems will
39 facilitate the greater availability of credit or lower its costs for a user who wishes to offer the
40 user’s virtual-currency account and the virtual currency in the user’s account maintained with the
41 licensee or registrant as collateral for a loan or other obligation and will otherwise facilitate the
42 utility of virtual currency as a medium of exchange.

43
44 **a. Security Interests.** One problem concerns the method of perfection and the
45 priority of a security interest that the user might grant in the user’s virtual-currency account.
46 Absent the licensee or registrant expressly agreeing with users to treat virtual currency that the

1 licensee or registrant has credited to the users' securities accounts, a user's entitlement to virtual
2 currency maintained for the user by the licensee or registrant would be considered under UCC
3 Article 9 to be a "general intangible" pursuant to §9-102(a)(42). (We do not believe that virtual
4 currencies would necessarily be "payment intangibles" under the definition in Section 9-
5 102(a)(61).) The filing of a 9-521 financing statement would be the sole method for the secured
6 party to perfect its security interest in the "general intangible"/virtual-currency account under
7 Section 9-310. The priority of competing security interests in the virtual-currency account would
8 be determined in favor of the first secured party to file or perfect its security interest. UCC §9-
9 322(a)(1).

10
11 However, if the licensee or registrant expressly agreed with users to treat virtual currency
12 over which the licensee or registrant has control for the users as "financial assets" credited to the
13 users' securities accounts, a user's virtual-currency account would be considered to be
14 "investment property" under Article 9. UCC Section 9-102(a)(49) defines "investment property"
15 to include a "security entitlement" and a "securities account". In this regard, Section 7 of this act
16 provides that the characterization of virtual currency in this act does not govern for purposes of
17 other laws.

18
19 The method of perfection of a security interest in the user's virtual-currency account as
20 "investment property" would be by either the filing of a financing statement or the secured party
21 obtaining control of the investment property. UCC §§9-312(a) and 9-314(a). A secured party
22 who obtains control would have priority over a secured party who perfects by filing even if the
23 filing preceded in time the control secured party obtaining control. UCC §9-328(a).

24
25 It is preferable as a policy matter for the investment property perfection and priority
26 scheme to apply to the virtual-currency account instead of the scheme for general intangibles.
27 The policy rationale is analogous to that for the perfection and priority of security interests in
28 investment property generally. A secured party taking a security interest in investment property
29 and relying upon that collateral in extending credit should demonstrate that reliance by taking the
30 steps to obtain control. If the secured party takes those steps, its security interest is entitled to
31 priority over a secured party who had perfected its security interest merely be the filing of a
32 financing statement and who, presumably by not taking the steps to obtain control, was not
33 substantially relying on the investment property in extending credit.

34
35 A secured party that extends credit in reliance on the virtual-currency account as
36 collateral would want its security interest to be senior. It would take the necessary steps to
37 obtain "control" as that term is defined in UCC Sections 8-106 and 9-106. Absent "investment
38 property" treatment of the virtual-currency account, though, "control" would not be a permitted
39 method of perfection or a method for obtaining priority. The secured party would need to
40 bargain with any other secured party who had already filed a financing statement covering
41 general intangibles to obtain a release or subordination of the other secured party's security
42 interest and who presumably is not relying to any extent on the virtual-currency account as
43 collateral. There would seem to be no policy justification for the filed secured party to be
44 entitled to the priority benefit and negotiating leverage over the later secured party, that would be
45 relying on the account as collateral, merely because the filed secured party has, without that
46 reliance, taken a general security interest in the user's assets that includes a security interest in

1 general intangibles.

2
3 For a secured party to take “control” of a virtual-currency account for purposes of Article
4 9, some new techniques may need to be developed. Unless the licensee or registrant itself is the
5 secured party or the virtual currency is credited to an account of the secured party at another
6 licensee or registrant, the secured party, the user and licensee or registrant would need to enter
7 into a control agreement by which the licensee or registrant would agree to follow instructions
8 from the secured party to transfer the virtual currency without any further consent of the user.
9 *See* UCC §§8-106(d) and (g) and 9-106(a). Such an agreement may require a mechanism for the
10 user confidentiality to inform the secured party of the user’s private key, or for the secured party
11 to have its own private key, to the virtual-currency account.

12
13 Note: the sale of a payment intangible is covered as a secured transaction under UCC § 9-
14 109(a)(3) and the security interest is perfected without notice pursuant to UCC § 9-309(3), which
15 leads to the discussion in the next subsection of this comment.

16
17 **b. “Negotiability” of Virtual Currency.** Another problem concerns the rights of
18 transferees of virtual currency. If a secured party’s security interest in a virtual-currency account
19 is perfected as general intangible, any transfer of the virtual currency by the user out of the
20 account will be subject to the secured party’s security interest unless the secured party had
21 authorized the transfer free of the security interest. *See* §9-315(a)(1). This is a problem under
22 current law, before giving effect to this act, because there is no rule under Article 9 that
23 otherwise cuts off what a security interest in a virtual-currency account perfected as a general
24 intangible on attachment or by the filing of a financing statement as there is under Section 9-332
25 of Article 9 for a transfer of funds from a deposit account. A secured party of the transferee,
26 thinking of extending credit against the virtual currency credited to the account, is subject to a
27 security interest in favor of a prior transferor’s secured party.

28
29 However, if the licensee or registrant expressly agreed with users to treat virtual currency
30 over which the licensee or registrant has control for the users as financial assets credited to the
31 users’ securities accounts, then the adverse claim cut-off rule of Article 8 would apply. Under
32 that rule, when a transferee acquires for value a “security entitlement” in the transferred virtual
33 currency resulting from a credit of the virtual currency to the transferee’s account at its licensee
34 or registrant, the transferee will have acquired its interest in the virtual currency free of any
35 “adverse claims” of which the transferee did not have notice. Specifically, UCC section 8-502
36 provides that “[A]n action based on an adverse claim to a financial asset, whether framed in
37 conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted
38 against a person who acquires a security entitlement under UCC section 8-501 for value and
39 without notice of the adverse claim.”

40
41 An “adverse claim” is defined in UCC §8-102(a)(1) as “a claim that a claimant has a
42 property interest in a financial asset and that it is a violation of the rights of the claimant” for the
43 transferee to acquire an entitlement in the financial asset. Notice of an adverse claim under UCC
44 § 8-105 means generally that the transferee knows of the adverse claim (which under UCC § 1-
45 202(b) means actual knowledge) or has acted with willful blindness to avoid knowing about the
46 claim. A notice of an adverse claim also can arise if the transferee had a statutory or regulatory

1 duty to investigate the existence of an adverse claim and an investigation would have revealed
2 the adverse claim. *See* UCC §8-105(a)(3). Such a statutory or regulatory duty in this context
3 seems unlikely.
4

5 The mere fact that the transferee may suspect or even be aware that its transferor may
6 have granted a security interest in the transferor’s virtual-currency account at its licensee or
7 registrant does not put the transferee on notice of an adverse claim to the virtual currency. Often,
8 the secured party will have authorized the transfer of the virtual currency free of the security
9 interest. For a transferee to be on notice of an adverse claim, the transferee must know, or have
10 been willfully blind in avoiding knowing, that the acceptance by the transferee of a security
11 entitlement in the transferred virtual currency violates the rights of the adverse claimant.
12

13 **6. Additional Protections for Users.** This act contains several other protections for
14 users that supplement the provisions of Article 8.
15

16 **a. Standard of Licensee or Registrant Performance of Part 5 Duties.** Article 8
17 provides a good deal of flexibility for the securities intermediary and the entitlement holder to
18 agree to standards for the performance by the securities intermediary of its Part 5 duties.
19 Subsection 4(a)(3) of this act provides, however, that the licensee or registrant may not, through
20 its form of agreement or otherwise, cause itself to be subject to a lower standard than if there had
21 been no agreement at all. The subsection thereby establishes a “floor” to the standard-setting that
22 Article 8 would allow. At a minimum, under this act, the licensee or registrant must act in respect
23 of its Part 5 duties with “due care in accordance with reasonable commercial standards,” which is
24 the default standard under Article 8. *See* UCC §§8-504(c)(2), 8-505(a)(2), 8-506(2), 8-507(a)(2)
25 and 8-508(2).
26

27 **b. Failure to “Opt-in.”** In addition, this act provides that, whether through
28 inadvertence or otherwise, if the licensee or registrant and the user fail to “opt in” to Article 8 by
29 an actual agreement, their respective rights and obligations will be determined as if the “opt in”
30 has occurred. Thus, a user is assured that the user will have the protections of Article 8 even if
31 there is no actual agreement between the licensee or registrant and the user or the agreement does
32 not include the “opt-in” provisions required.
33

34 **SECTION 5. QUALIFYING OFFICE UNDER HAGUE SECURITIES**
35 **CONVENTION.**

36 (a) A licensee or registrant shall maintain in any state an office that complies with the
37 second sentence of Article 4(1) of the Hague Securities Convention.

38 (b) The effect of this section may not be varied by agreement.

1 **Official Comment**

2 The Hague Securities Convention requires that the intermediary maintain an office in any
3 state of the United States, not that the intermediary maintain an office in each state of the United
4 States. Because many of the providers that may be subject to the Uniform Regulation of Virtual-
5 Currency Businesses Act will be online businesses and many will be start-up businesses, the
6 single U.S. office requirement in the Convention is a sensible approach to an otherwise
7 considerable burden of maintaining offices in all U.S. jurisdictions. To require otherwise would
8 chill innovation by imposing needless expenses on providers large and small.
9

10 This section is necessary so that the choice-of-law provisions of the agreement between
11 the licensee or registrant and the user that otherwise point to the law of a jurisdiction under the
12 Hague Securities Convention do not fail to be effective because the licensee or registrant did not
13 at the time the agreement was entered into maintain a qualifying office in the United States.
14 Accordingly, this act requires a licensee or registrant to maintain an office that satisfies the
15 “qualifying office” test of the second sentence of Article 4(1) of the Hague Securities Convention.
16 The qualifying office need not be located in the enacting state. The test under the Hague
17 Securities Convention requires only that the qualifying office be located in the United States.
18 Hague Securities Convention, Art. 12(1)(b).
19

20 This section then also requires that the qualifying office be located in a jurisdiction in the
21 United States. An office located, for example, in a territory or insular possession of the United
22 States that is not a UCC jurisdiction would satisfy the requirement of this section. Only one office
23 in a jurisdiction of the United States is required for compliance with the Convention and with this
24 act.
25

26 The requirements to satisfy the qualifying office test in a jurisdiction in the United States
27 under the Hague Securities Convention are minimal. The requirements may be met by the
28 licensee or registrant in a variety of ways: effecting transactions from the office in the jurisdiction,
29 monitoring virtual-currency transactions from the office in the jurisdiction, or administering
30 payments, or otherwise being engaged in a regular activity of maintaining virtual-currency
31 accounts, from the office in the jurisdiction. Hague Securities Convention, Art. 4(1)(a). The test
32 may also be met if the licensee or registrant, by a specific means of identification, identifies on its
33 books and records that virtual-currency accounts are maintained in the jurisdiction. Hague
34 Securities Convention, Art. 4(1)(b). Moreover, it is not necessary that the test apply to the
35 virtual currency of which the licensee or registrant has control for the user so long as test is met
36 for any virtual-currency accounts of which the licensee or registrant has control for any users.
37

38 There is no requirement – and should be no requirement -- that licensees or registrants
39 maintain offices in each state that enacts this act and the Uniform Regulation of Virtual-Currency
40 Businesses Act.
41

42 A failure to maintain an office in a jurisdiction in the United States is a regulatory
43 violation of this act, as Section 6 provides.
44

1 **SECTION 8. SUPPLEMENTARY LAW.** Unless displaced by the particular
2 provisions of this [act], the principles of law and equity supplement the provisions of this [act].

3 **SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
4 applying and construing this uniform [act], consideration must be given to the need to promote
5 uniformity of the law with respect to its subject matter among the states that enact it.

6 **SECTION 10. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
7 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
8 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not
9 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
10 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section
11 7003(b)).

12 **SECTION 11. SEVERABILITY CLAUSE.** If any provision of this [act] or its
13 application to any person or circumstance is held invalid, the invalidity does not affect other
14 provisions or application of this [act] which can be given effect without the invalid provision or
15 application, and to this end the provisions of this [act] are severable.

16 *Legislative Note: Include this section only if this state lacks a general severability statute or a*
17 *decision by the highest court of this state stating a general rule of severability.*

18
19 **SECTION 12. EFFECTIVE DATE.** This [act] takes effect on

20 *Legislative Note: The effective date of this act in this state should not be prior to the effective*
21 *date of the Uniform Regulation of Virtual-Currency Businesses in this state.*

22
23 **SECTION 13. REPEALS; CONFORMING AMENDMENTS.**

24 (a) Uniform Regulation of Virtual-Currency Businesses Act Section 502 and the
25 references to it in the Legislative Note to the Uniform Regulation of Virtual-Currency
26 Businesses Act Section 103 and in Uniform Regulation of Virtual-Currency Businesses Act

1 Section 206(b)(7) are repealed.

2 (b) Any amendment to this state’s money transmission statute (insert proper citation if the
3 state has enacted such a statute) that adds virtual currency or cryptocurrency to its coverage is
4 repealed.

5 (c) Except in Uniform Regulation of Virtual-Currency Businesses Act Section 407(c), in
6 place of the repealed references to Uniform Regulation of Virtual-Currency Businesses Act
7 Section 502 designated in subsection (a) add “Section 4 (a)(3)(D) of the Uniform Supplementary
8 Commercial Law for the Uniform Regulation of Virtual-Currency Businesses Act.”

9 ***Legislative Note:*** *The URVCBA enacted in this state should have an effective date as shortly*
10 *before as possible the effective date of this act.*