

## MEMORANDUM

TO: Committee on the Uniform Commercial Code and Emerging Technologies

FROM: Steven Harris, Reporter

RE: Intangible Money (to be discussed on April 29th, 11 a.m. CT)

DATE: April 18, 2021

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Following are draft amendments to UCC Articles 1 and 9 to accommodate security interests in intangible money. They are marked to show changes from the current official text of the UCC.

### **Reporter's Prefatory Note**

The purpose of these amendments is to address intangible fiat currency (money) that is used as collateral under Article 9. In considering these amendments, please keep in mind that Article 9 “does not apply to the extent that . . . a statute, regulation, or treaty of the United States preempts [the] article.” UCC § 9-109(c)(1). (This would be true even if Article 9 were silent on the issue.) So, for example, if federal law provides that a purported security interest in intangible money is a nullity, the otherwise applicable Article 9 provisions would have no effect.

We have no way of knowing how intangible money might develop. There are indications that some countries might authorize or adopt tokens, whereas others might authorize or adopt credits with a central bank (or commercial bank). The draft would cover both, but it would draw a sharp distinction between token-based money and account-based money.

Section 1-201(b)(24) defines “money” as “a medium of exchange currently authorized or adopted by a domestic or foreign government.” For many purposes, there is no need for the UCC to distinguish among tangible money, intangible money that is token-based, and intangible money that is account-based. *See, e.g.*, UCC § 3-103(a)(12) (“‘Promise’ means a written undertaking to pay money . . . .”) For Article 9 purposes, however, such distinctions must be drawn. Intangible money (whether token- or account-based) is not susceptible of perfection by possession. The acts needed for perfection by control with respect to token-based money will not work for account-based money, and vice versa.

Under this draft, token-based money would fall within the definition of “electronic money” and be governed by new provisions that draw on the draft provisions for controllable electronic records. The existing definition of “deposit account” includes account-based money, which is a deposit with a central or commercial bank. Account-based money is distinguishable from other deposit accounts by the fact that it is “money” and other deposit accounts are not. Accordingly, the existing statutory provisions governing deposit accounts would apply to account-based money.

The treatment of account-based money as both “money” and a “deposit account” is at variance with the Article 9 tradition that collateral belongs in no more than one Article 9 category and subcategory (e.g., *goods and equipment*; *general intangibles* and *payment intangibles*) at any given time. It also might create the misimpression that all deposit accounts are money. The Drafting Committee may wish to consider whether these concerns warrant creating a separate definition of *account-based money* and amending the statutory rules governing deposit accounts to provide for their applicability to account-based money.

## ARTICLE 1

### GENERAL PROVISIONS

#### Section 1-201. General Definitions.

\* \* \*

(b) Subject to definitions contained in other articles of the Uniform Commercial Code that apply to particular articles or parts thereof:

\* \* \*

(16A) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

\* \* \*

(24) “Money” means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

#### Reporter’s Note

This draft would not change the definition of “money.”

*Question:* Is there a need to continue to include within the definition a “monetary unit of account” that may not be a medium of exchange be authorized or adopted by a foreign government (e.g., special drawing rights allocated by the International Monetary Fund)?

## ARTICLE 9

### SECURED TRANSACTIONS

#### Section 9-102. Definitions and Index of Definitions.

(a) [Article 9 definitions.] In this article:

\* \* \*

(29) “Deposit account” means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

\* \* \*

**§ 9-102(a)(31A)—Alternative A**

(31A) “Electronic money” means money that is electronic. The term does not include a money that is a deposit account.

**§ 9-102(a)(31A)—Alternative B**

(31A) “Electronic money” means money issued as an electronic record. The term does not include money that is a deposit account.

\* \* \*

**§ 9-102(a)(79A)—Alternative A**

(79A) “Tangible money” means money that is tangible.

**§ 9-102(a)(79A)—Alternative B**

(79A) “Tangible money” means money issued as a tangible record.

\* \* \*

**Reporter’s Note**

The Alternatives are for the Drafting Committee’s consideration.

**Section 9-105A. Control of Electronic Money.**

(a) A person has “control” of electronic money if the following conditions are met:

(1) the electronic money or the system in which it is recorded, if any, gives the person:

(A) the power to avail itself of substantially all the benefit from the electronic money;

(B) subject to subsection (b), the exclusive power to prevent others from availing themselves of substantially all the benefit from the electronic money; and

(C) subject to subsection (b), the exclusive power to transfer control of the electronic money to another person or cause another person to obtain control of electronic money that is traceable to the electronic money; and

(2) the electronic money, a record attached to or logically associated with the electronic money, or the system in which the electronic money is recorded, if any, enables the person to readily identify itself as having the powers specified in subsection (a)(1).

(b) A power specified in subsection (a) is “exclusive,” even if:

(1) the electronic money or the system in which it is recorded, if any, limits the use to which the electronic money may be put or has protocols that are programmed to result in a transfer of control; or

(2) the person has agreed to share the power with another person.

(c) For the purposes of paragraph (a)(2), a person may be identified in any way, including by name, identifying number, cryptographic key, office, or account number.

### **Reporter’s Note**

Under this draft, the conditions for having control of electronic money would be identical to those for having control of a controllable electronic record.

*Question:* Is this control definition suitable for electronic money?

## **Section 9-109. Scope.**

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(d) **[Inapplicability of article.]** This article does not apply to:

(13) an assignment of a deposit account in a consumer transaction, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.

### **Reporter's Note**

Some money might be a “deposit account” as defined in Article 9. Under UCC § 9-109(d)(13), Article 9 would not apply to a security interest in account-based money in a consumer transaction; rather, non-UCC law would govern security interests in such money.

**Section 9-301. Law Governing Perfection and Priority of Security Interests.** Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, tangible money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

- (A) perfection of a security interest in the goods by filing a fixture filing;
- (B) perfection of a security interest in timber to be cut; and

(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

\* \* \*

### **Reporter's Note**

The choice-of-law rule in paragraph (3) applies only to tangible collateral. Electronic money and account-based money are intangible. Accordingly, the amendment would limit the application of paragraph (3) to money that is tangible.

The choice-of-law rules in paragraphs (1) and (2) would apply to electronic (token-based) money. These are the rules that currently apply to electronic chattel paper and electronic documents of title. The choice-of-law rules governing deposit accounts (UCC § 9-304) would govern money that is account-based.

### **Section 9-310. When Filing Required to Perfect Security Interest or Agricultural Lien; Security Interests and Agricultural Liens to Which Filing Provisions Do Not Apply.**

(a) **[General rule: perfection by filing.]** Except as otherwise provided in subsection (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) **[Exceptions: filing not necessary.]** The filing of a financing statement is not necessary to perfect a security interest:

\* \* \*

(8) in deposit accounts, electronic chattel paper, electronic documents, electronic money, investment property, or letter-of-credit rights which is perfected by control under Section 9-314;

\* \* \*

### **Section 9-312. Perfection of Security Interests in Chattel Paper, Deposit Accounts, Documents, Goods Covered by Documents, Instruments, Investment Property, Letter-of-**

**Credit Rights, and Money; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession.**

(a) **[Perfection by filing permitted.]** A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) **[Control or possession of certain collateral.]** Except as otherwise provided in Section 9-315(c) and (d) for proceeds:

(1) a security interest in a deposit account may be perfected only by control under Section 9-314;

(2) except as otherwise provided in Section 9-308(d), a security interest in a letter-of-credit right may be perfected only by control under Section 9-314; ~~and~~

(3) a security interest in tangible money may be perfected only by the secured party's taking possession under Section 9-313; and

(4) a security interest in electronic money may be perfected only by control under section 9-105A.

**Reporter's Note**

Article 9 currently applies to a security interest in money in a consumer transaction. Under subsection (b)(3), a security interest in money that is not proceeds can become perfected only if the secured party takes possession of the money. Presumably, a secured party would not take tangible money as collateral unless it took possession of the money, and consumers who are asked to deliver possession would understand that they no longer would be able to spend the money and would lose the money altogether if they defaulted on the secured obligation.

Under draft subsection (b)(4), a security interest in electronic money that is not proceeds can become perfected only if the secured party has control.

*Question:* Would a consumer understand from the fact that the secured party obtains control that they would no longer be able to use the electronic money and would lose the money if they defaulted on the secured obligation?

**Section 9-313. When Possession by or Delivery to Secured Party Perfects Security Interest Without Filing.**

(a) **[Perfection by possession or delivery.]** Except as otherwise provided in subsection (b), a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, tangible money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Section 8-301.

\* \* \*

**Section 9-314. Perfection by Control.**

(a) **[Perfection by control.]** A security interest in investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, ~~or~~ electronic documents, or electronic money may be perfected by control of the collateral under Section 7-106, 9-104, 9-105, 9-105A, 9-106, or 9-107.

(b) **[Specified collateral: time of perfection by control; continuation of perfection.]** A security interest in deposit accounts, electronic chattel paper, electronic money, letter-of-credit rights, or electronic documents is perfected by control under Section 7-106, 9-104, 9-105, 9-105A, or 9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

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**Reporter's Note on Priority**

Under current law, the priority of conflicting security interests in tangible money is governed by the first-to-file-or-perfect rule in UCC § 9-322(a)(1). The draft would apply the same rule to conflicting security interests in electronic money. The priority rules applicable to deposit accounts, UCC § 9-327, would apply to money that is a deposit account.



Presumably, the country that authorized or adopted the money will have law that governs the rights of conflicting property claims. In the case of U.S. dollars, that law would be federal law, which might preempt Article 9 in part or entirely. In the case of a conflict over foreign money that is litigated in a domestic forum, the court will need to decide the extent, if any, to which foreign law preempts Article 9.

**Section 9-332. Transfer of Money; Transfer of Funds from Deposit Account.**

(a) [**Transferee of money.**] A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) [**Transferee of funds from deposit account.**] A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

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**Reporter's Note**

Subsection (a) enables a “transferee” of money to take the money free of security interests. Article 9 does not define the word “transferee,” and the comments to Section 9-332 focus on subsection (b), dealing with transferees of funds from deposit accounts. The meaning of “transferee” in the context of subsection (b) has been the subject of more than a dozen appellate opinions, the results of which are inconsistent.

*Question:* Should the comments to this section be revised and expanded?