

Control of Digital Assets: Indicative Formulation

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(a) A person has control of a digital asset [to be defined; definition will be limited to electronic records] if:

(1) the digital asset readily enables the person to be identified as the person having control of the digital asset;

(2) the identified person has the power to amend the digital asset to provide that another person has control of the digital asset;

(3) the identified person is the only person having the power to prevent other persons from amending the digital asset, unless the identified person consents; and

(4) the identified person has the power to retrieve the information constituting the digital asset in perceivable form.

(b) A person may be identified in any way, including by name, identifying number, office, or account number.

Reporter's Notes

1. *What record constitutes the digital asset?* This draft proceeds from the assumption that there is a record that constitutes digital asset. With some technologies, a digital asset will consist of a single copy of a record that serves as the functional equivalent of an “original” tangible record. Control of this record (which might be referred to as an “authoritative record”) constitutes control of the digital asset. Other copies of the record are not the digital asset in question and so are irrelevant to control. With other technologies, the digital asset may consist of multiple copies. As a practical matter, in the case of a digital asset on a blockchain, control of one copy will constitute control of all and so will constitute control of the digital asset. Copies of the record that are not on that blockchain are not the digital asset in question and so are irrelevant to control. (Consider this analogy: There are two “duplicate originals” of a written

equipment lease. A purchaser of the lease acquires possession of the lease when it acquires possession of the two originals. A copy of an original is irrelevant to possession.)

2. *Determining whether a record is the digital asset in question.* Consider a purchaser who wishes to afford itself of superpriority under § 9-330(d) by taking possession of a writing that appears to constitute an instrument. The taker must satisfy itself that the writing is in fact what it purports to be. The UCC does not give guidance as to how the taker is to determine whether the writing is the instrument itself, with respect to which possession is relevant, or a copy thereof, with respect to which possession is irrelevant. This draft adopts the same approach with respect to a digital asset. The burden will be on the person who has control to determine that the asset over which control has been taken is in fact a digital asset having value. If the person's control becomes the subject of dispute, the person must demonstrate that fact.

3. *Person identified as having control.* Under subsection (a)(1), a person would not have control of a digital asset unless the digital asset readily identifies the person as having control. Subsection (b), which derives from Section 3-110(c), would allow for identification other than by name. Of course, a person does not have control merely because the digital asset identifies the person as having control. The conditions in subsections (a)(2) through (a)(5) must also be satisfied.

4. *Power to amend.* Subsections (a)(2) and (a)(3) refer to the physical power to amend the digital asset. A person having control ordinarily should be able to transfer control. Accordingly, under subsection (a)(2), a person would not have control unless it can amend the digital asset to provide that another person has control. A person having control should be able to ensure that others cannot interfere with the digital asset. Accordingly, subsection (a)(3) conditions control on a person's having the exclusive power to prevent others from amending the digital asset. In this regard, it should be noted that an attribute of the digital asset itself may have the power to amend the digital asset. Likewise, the system with which the digital asset is stored may have this power. The official comments or additional statutory language could clarify that by having control, a person has consented to amendments by the digital asset or the system, or, put otherwise, that the power of the digital asset or the system to make amendments does not prevent a person from having control.

5. *Power to retrieve in perceivable form.* A digital asset would be an electronic record, and UCC Article 1 defines "record" to include "information that is . . . stored in an electronic or other

medium and is retrievable in perceivable form.” Subsection (a)(4) would condition control on a person’s having the power to retrieve the digital asset in perceivable form.