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The use of 'money' and 'virtual currency' in the Uniform Commercial Code

Rob Isham

Steve Weise

Introductory notes

- Goal is to make as few changes as possible to the text of the UCC as a whole and still to make the appropriate changes to accommodate the use of intangible money and virtual currency
- This goal is implemented by the use of an 'umbrella' definition of 'money' to cover tangible and intangible fiat money
- 'Virtual currency' would not include intangible money
- In general, Article 9's existing structure for tangible and intangible chattel paper is used as a model for definitions
- As to negotiability of virtual currency, two alternatives are offered:
 - Treat virtual currency akin to chattel paper (§ 9-330)
 - To give greater negotiability to virtual currency, treat virtual currency akin to investment property (§ 9-328)
- As shown below, the word 'money' is currently used a lot in the UCC
 - The amendments could add references to 'tangible money' and 'intangible money' in each place where 'money' is used, but that would be ungainly
- Rather, the proposal is to make 'money' an umbrella term as follows:
 - 'Money' would include only fiat currency
 - 'Money' would have two sub-definitions: 'tangible money' and 'intangible money'
 - Where the word 'money' now appears in the UCC, whenever possible, the umbrella term ('money') would be used
 - Where the umbrella term does not 'work', one of the sub-definitions would be used
- The words used to create the defined terms are placeholders, no particular recommendation on the actual terms (other than to retain the word 'money' as an umbrella term)
- The suggested edits below to the UCC highlight the word 'money' where it can be left *as is*, using the umbrella concept

- Where the word 'money' appears in a Comment, the Comment is noted, but no edits are made in this document
- The list below of where 'money' is used and where further edits to the UCC would be needed is not complete
 - This is offered for now as a proof of concept
 - A more complete list will be added before the meeting the end of this month
- No proposal is made to create a set of rules for the transfer of money or virtual currency (*i.e.*, nothing akin to an Article 3 for money or virtual currency)

Article 1

UCC § 1-201:

(9) 'Buyer in ordinary course of business' means ... 'Buyer in ordinary course of business' does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a *money* debt.

(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.

[Comment 24]

§ 1-201 [new provisions]

([•]) 'Tangible money' means money evidenced by a record consisting of information that is inscribed on a tangible medium.

This is drawn from the definition of tangible chattel paper.

([•]) 'Intangible money' means money other than tangible money.

The 'other than' locution is taken from other definitions in § 9-102 (e.g., 'equipment').

([•]) 'Virtual currency' means means a digital representation of value that is used as a medium of exchange, unit of account, or store of

value that can be readily exchanged for money. Virtual currency does not include (i) money, and (ii) a digital representation whose value is determined by reference to the value of another thing [, other than money].

This is taken from the definition in the Uniform Regulation of the Virtual-Currency Business Act, with an addition (the clause at the end of the first sentence beginning with 'that') suggested by Ben Geva, to exclude, for example, a digital representation of a bank account. That addition uses language from Canada's proposed definition of 'virtual currency' in a proposed regulation of virtual currency for some purposes (referenced by Ben in one of his e-mails).

The definition excludes money.

*The definition also excludes virtual currency that is tied to the value of something else. The very last bracket would allow 'virtual currency' to include virtual currencies such as stablecoin **if** (and only if) tied to the value of money.*

Article 2

§ 2-105(1)

'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the **money** in which the price is to be paid, investment securities (Article 8) and things in action.

It should not be necessary to add 'virtual currency' to this subsection, except that the reference to 'things in action' creates a possible ambiguity. See the definition of 'goods' (below) in Article 2A, which excludes 'general intangibles'. That exclusion seems unnecessary as general intangibles are not 'movable' in the sense used there.

§ 2-304(1)

The price can be made payable in **money** or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

§ 2-402(3)

Nothing in this Article shall be deemed to impair the rights of creditors of the seller

...

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for *money*, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this Article constitute the transaction a fraudulent transfer or voidable preference.

§ 2-508(2)

Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without *money* allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Comments and headings:

§ 2-105, Comment 1

§ 2-201, Comments 1 and 2

§ 2-304, Heading and Comment 2

§ 2-609, Comment 4

§ 2-612, Comment 5

§ 2-711, Comment 1

Article 2A

§ 2A-102(1)

‘Buyer in ordinary course of business’ means a person who in good faith and without knowledge that the sale to him [or her] is in

violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a *money* debt.

§ 2A-102(1)

(h) 'Goods' means all things that are movable at the time of identification to the lease contract, or are fixtures (Section 2A-309), but the term does not include *money*, documents, instruments, accounts, chattel paper, general intangibles, virtual currency, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

§ 2A-308(2)

Nothing in this Article impairs the rights of creditors of a lessor if the lease contract (a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for *money*, security, or the like, and (b) is made under circumstances which under any statute or rule of law apart from this Article would constitute the transaction a fraudulent transfer or voidable preference.

Article 2A

§ 2A-513

If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without *money* allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee.

If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with

or without *money* allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee.

Article 3

§ 3-102

(A) This Article applies to negotiable instruments. It does not apply to *money*, to payment orders governed by Article 4A, or to securities governed by Article 8.

Comment 2

§ 3-103(a)

(8) 'Order' means a written instruction to pay *money* signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(12) 'Promise' means a written undertaking to pay *money* signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

§ 3-104

(a) Except as provided in subsections (c) and (d), 'negotiable instrument' means an unconditional promise or order to pay a fixed amount of *money*, with or without interest or other charges described in the promise or order, if it:

...

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of *money* ...

...

(f) 'Check' means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "*money* order."

...

(j) 'Certificate of deposit' means an instrument containing an acknowledgment by a bank that a sum of *money* has been received by the bank and a promise by the bank to repay the sum of *money*. A certificate of deposit is a note of the bank.

§ 3-106

Comment 2

§ 3-107

Unless the instrument otherwise provides, an instrument that states the amount payable in foreign *money* may be paid in the foreign *money* or in an equivalent amount in dollars calculated by using the current bank-offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid.

Comment 2

§ 3-112

(b) Interest may be stated in an instrument as a fixed or variable amount of *money* or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.

§ 3-118

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for *money* had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this Article and not governed by this section must be commenced within three years after the [cause of action] accrues.

Articles 3 (balance) – Article 7

[TBD]

Article 8

§ 8-105

Notice of Adverse Claim

...

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

one year after a date set for presentment or surrender for redemption or exchange; or

six months after a date set for payment of *money* against presentation or surrender of the certificate, if *money* was available for payment on that date.

§ 8-202

Issuer's Responsibility and Defenses; Notice of Defect or Defense

(b) The following rules apply if an issuer asserts that a security is not valid:

...

(2) Paragraph (1) applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow *money* or issue the security.

Comment 3

§ 8-203

Staleness as Notice of Defect or Defense

After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer, if the act or event:

(1) requires the payment of *money*, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the *money* or security is available on the date set for payment or exchange, and the purchaser takes the security more than one year after that date;

§ 8-207

Comment 1

§ 8-306

Comment 2

Article 9

§ 9-102(a)

(9) ‘Cash proceeds’ means proceeds that are *money*, checks, deposit accounts, **virtual currency**, or the like.

If the definition of ‘virtual currency’ (as proposed above in the amendments to Article 1) is kept fairly narrow by retaining the requirement of ‘medium of exchange’ and the exclusion of digital representations anchored to the value of something else (other than money), then the including of virtual currency in the definition of ‘cash proceeds’ seems fine.

(42) ‘General intangible’ means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, **virtual currency**, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(44) “Goods” ... does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, **virtual currency**, or oil, gas, or other minerals before extraction.

§ 9-105(A) – Control of Intangible Money [new]

TBD

§ 9-105(A) – Control of Virtual Currency [new]

TBD

§ 9-310(b)

The filing of a financing statement is not necessary to perfect a security interest:

...

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

§ 9-313(a)

Except as otherwise provided in subsection (b), a secured party may perfect a security interest in 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.

§ 9-312(a) and (b)(3) and (4)

(a) A security interest in chattel paper, negotiable documents, instruments, virtual currency, or investment property may be perfected by filing

(b) ...

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

(4) a security interest in intangible money may be perfected only by the secured party's obtaining control under under Section 9-105A.

§ 9-314

A security interest in investment property, deposit accounts, letter-of-credit rights, ~~or~~ electronic chattel paper, intangible money, or virtual currency may be perfected by control of the collateral under Section 9-104, 9-105, 9-105A, 9-105B, 9-106, or 9-107.

Add provisions for control through non-agent, akin to UCC § 9-313(c) and § 8-106(d)(3) [Steve H has already noted this and it's listed here for completeness]

This term sheet provides immediately below two approaches to the priority of persons who have control of virtual currency – one roughly following § 9-328 and one roughly following § 9-330. The § 9-328 version has greater protection for the person who has control of the virtual currency. If the definition of ‘virtual currency’ (as proposed above in Article 1) is kept fairly narrow by retaining the proposed requirement of ‘medium of exchange’ and the exclusion of digital representations anchored to the value of something else (other than money), then the § 9-328 template seems appropriate.

§ 9-328A – Priority of [security] interests in Virtual Currency

The following rules govern priority among conflicting security interests in the same virtual currency:

(1) An interest held by a purchaser having control of virtual currency under Section 9-105(B) has priority over a security interest held by a secured party that does not have control of the virtual currency, unless the purchaser acts in collusion with the debtor in violating the rights of the secured party.

(2) Conflicting security interests held by secured parties each of which has control under Section 9-105B rank according to priority in time of obtaining control.

*§ 9-328A(1) gives priority to a **secured party** that has control of virtual currency over a secured party that does not have control (e.g., perfects by filing). This is the same rule as applies under § 9-328 to a secured party with a security interest in investment property perfected by control as against a secured party perfected only by another method.*

*Subsection (1) **also** addresses the question of whether a **buyer** of virtual currency should take free of a security interest in the virtual currency if the buyer has control and the secured party does not. Note that a buyer of virtual currency would take free under the § 9-330A formulation because it applies to ‘purchasers’, although there are additional hurdles for the buyer (good faith, ordinary course, lack of knowledge) compared to § 9-328A. A buyer with control of virtual currency should have at least as much protection as a secured party*

with a security interest in virtual currency, where the secured party has control of the virtual currency.

This anomaly comes up because a sale of virtual currency does not create a 'security interest'. Buyers of instruments and chattel paper are protected under § 9-330, buyers of money are protected under § 9-332(a) (and the law of money), and buyers of investment property are protected under Article 8.

If the policy point that buyers of virtual currency should have protection is right, there are several ways to go about it; the revisions to "(1)" above adopt the last approach listed below:

- Make the sale of virtual money a "security interest" (with automatic perfection) so that § 9-328A(1) would apply – this seems like a bad idea as most non-lending transactions in virtual currency will be "sales" with automatic perfection, so what's the point?*
- Have § 9-328A(1) apply to 'purchasers', but that would give a buyer of virtual currency more protection than a buyer of money under § 9-332(a) (because of § 9-332(a)'s no-collusion condition)*
- Create an analog to § 9-332(a) for buyers (not 'mere' transferees) of virtual currency who do not collude – but that goes too far in favor of buyers, especially if they don't have control*
- Create an analog to § 9-332(a) for buyers (not 'mere' transferees) of virtual currency who **do** have control and do not collude – but that would give buyers less protection than a secured party would have under § 9-328A(1), as § 9-328A(1) does not have a no-collusion rule*
- Expand § 9-328A(1) to apply to 'purchasers' (like § 9-330(d)) and add a no-collusion rule for all purchasers (like § 9-332(a)), but unlike § 9-330(a), do not apply the 'take free' rule to transferees who are not purchasers*

§ 9-330A – Priority of purchaser of Virtual Currency

A purchaser of virtual currency has priority over a security interest in the virtual currency if the purchaser gives new value and obtains control of the virtual currency under Section 9-105B in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

§ 9-332

(a) 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.