

DRAFTING COMMITTEE ON THE UNIFORM COMMERCIAL CODE AND EMERGING TECHNOLOGIES

Issues List

For 2021 Annual Meeting Draft

June 28, 2021

Article 12 – controllable electronic records

1. Is the relationship between what is commonly referred to as a “digital asset” and what the draft refers to as a “controllable electronic record” one that can be readily understood?
2. Is the draft’s distinction between the electronic record (information) and rights that may be “tethered to” or “embodied in” the electronic record an appropriate one?
3. Is the definition of “control” of a controllable electronic record sufficient to be a surrogate for “possession” of a tangible asset while at the same time being technologically neutral?
4. Are the exclusions from the definition of “controllable electronic record” too broad or too narrow?
5. Should all controllable electronic records (not just perhaps virtual currency) be “negotiable” in the sense that a “qualifying purchaser” (a good faith purchaser for value) may take a controllable electronic record free from competing property claims?
6. Is the standard by which a purchaser of a controllable electronic record becomes a “qualifying purchaser” entitled to the “take-free” rule the correct one?
7. With the exception of “controllable accounts” and “controllable payment intangibles,” the draft leaves to other law what rights are “tethered to” or “embodied in” the controllable electronic and whether a “take-free” rule applies. Is this approach appropriate?
8. The effect of recognizing a controllable account and a controllable payment intangible as “tethered to” a controllable electronic record is to create an electronic instrument. Some would argue that a more traditional approach would be to expand UCC Article 3 to address electronic instruments in addition to instruments evidenced by writing. Is the Committee’s approach of addressing these electronic payment rights in Article 12 rather than Article 3 the better approach?
9. An account or payment intangible cannot be a controllable account or controllable payment intangible unless the account debtor has agreed to pay the person in control (in contrast to a named payee). Is that requirement too broad or too narrow?
10. Does the account debtor on a controllable account or controllable payment intangible have sufficient protections against paying the wrong person and not obtaining a discharge?
11. The Uniform Electronic Transactions Act also has provisions for a “transferable record” that deal with electronic payment rights. Should those provisions be preserved or sunset?
12. The draft does not affect the right of parties to “opt-in” to UCC Article 8 when a digital asset is indirectly held through an exchange or other intermediary. In that case, the digital asset is investment property, and it is excluded from Article 12 entirely even if the digital asset would otherwise be a controllable electronic record. Is that flexibility warranted?
13. The Committee has not yet addressed the choice-of-law rule in Article 12. Are there any thoughts as to what that rule should be?

Article 9

1. Does it make sense to permit a security interest in a controllable electronic record to be perfected by control?
2. Does it make sense to permit a security interest in a controllable electronic record perfected by control to have priority over a security interest in the controllable electronic record perfected by filing?
3. Does it make sense for a security interest perfected by control to have that priority even though the secured party is not a “qualifying purchaser”?
4. Is the choice-of-law rule for perfection and priority of the controllable electronic record the correct one?

Money

1. The draft adds provisions for intangible money solely with respect to secured transactions. The rationale is that the law creating the intangible money will have its own “take-free” rules. Is that the correct approach?
2. Just as under current Article 9 a security interest in tangible money perfected by possession has no special non-temporal priority, a security interest in intangible money perfected by control is not entitled to any special non-temporal priority. Is that the correct approach?
3. If electronic money is central bank digital currency held at a central bank or other bank but falls within the definition of “money,” should the deposit account rules nevertheless apply?

Chattel paper

1. Since chattel paper may be tangible or electronic, may be part tangible or electronic, or may be converted from tangible to electronic or vice-versa, the draft no longer distinguishes between tangible paper and electronic chattel paper as a type of collateral. Does that approach make sense?
2. Is there sufficient clarity as to what constitutes chattel paper for a “bundled transaction” consisting of the sale (with a security interest) or lease of goods combined with the provision of software or services for the goods?
3. The definition of “control” turns on distinguishing “authoritative copies” from “non-authoritative copies” of the chattel paper. Is it workable to determine what copies are “authoritative”?

Payment systems

1. A bank customer’s duty to report check forgeries or alterations is triggered by the bank’s sending or making available a statement of account that allows the customer to reasonably identify the checks paid. Is it appropriate that the safe harbor for what constitutes a sufficient statement of account include an image of each check, so that the customer can identify the date and payee?
2. For funds transfers, a comparison of signatures does not, by itself, constitute a security procedure. Is it appropriate to also indicate that requiring a payment order to be sent from a known e-mail address, IP address, or phone number is likewise not, by itself, a security procedure?
3. When there is an error in a payment order transmitted by a third party communications system (not operated by the Federal Reserve Banks), the third-party system is treated as an agent of the sender, with the result that the sender is generally responsible for the error. The draft excepts

third-party communications systems that are part of an agreed-upon security procedure from this rule. Does our draft adequately explain this exception?

Consumer provisions

Should the draft address electronic disablement of collateral in Articles 2A and 9 as a creditor remedy?