
**ALI/ULC JOINT UCC AND EMERGING TECHNOLOGIES STUDY
COMMITTEE**

TO: ED SMITH, CHAIR
STEPHEN HARRIS, REPORTER

FROM: CHUCK MOONEY & CARLA REYES

SUBJECT: REPORT OF ISSUES FROM THE DIGITAL ASSETS OTHER THAN
VIRTUAL CURRENCY SUB-GROUP

DATE: JANUARY 17, 2020

CC: LUCY GRELLE & ODESSA GLAZA, ULC STAFF

The below issue list is premised on the following principles about definitions, about which the sub-group members indicated strong consensus: (i) prior to investigating the identified issues, the committee must collectively set assumptions, perhaps through the use of examples, as to what would constitute a digital asset; (ii) as that work has not yet been undertaken, at this point in the sub-group's exploration, the sub-group has not distinguished virtual currency from other digital assets; and (iii) whatever definitions the broader joint committee ultimately creates, the strong consensus among members of the sub-group was that the process for reaching the definitions, and the definitions themselves, should take a functional approach.

Issues Regarding Which the Sub-Group Members Indicated Strong Consensus (80%-100%)

Article 8/intermediation/custody

1. Consider/clarify when a digital asset does or does not constitute an "uncertificated security" for purposes of UCC Article 8.

87.5% of the sub-group indicated that the study committee should consider this issue. Several of the sub-group respondents believed this issue to be highly correlated to how the term digital assets, and any related terms, ultimately end up being defined. Others noted that this issue is important because of the role that an intermediary may play with regard to an uncertificated security and the potential for digital assets to not rely on intermediaries. At least one respondent requested that the committee consider whether commentary, standing alone, would provide enough clarity on this issue.

2. Consider whether revisions of UCC Article 8 are needed to accommodate a digital asset that is an "uncertificated security."

83.33% of the sub-group members indicated that the study committee should consider this issue. Sub-group member comments echoed those related to Issue 1, namely that the committee should consider this because of the intermediary issue, and that in the end, the committee might find that comments suffice to provide the necessary guidance.

3. Consider the need to develop rules for custody arrangements (e.g., agency, nominee, bailment, other relationships) of digital assets that do not involve security entitlements under UCC Article 8.

87.5% of sub-group members felt this issue should be included on the full committee's agenda. Committee members felt that there should be clear rules here, and that the full committee should consider the need for a multi-pronged approach to custody, in light of the different kinds of digital assets, and in light that some custody issues might be dealt with by law related to tangible assets (for example, where the digital asset is merely a token representing a physical good).

4. Consider whether the approach taken for virtual currency in the Supplement (2018) to the Uniform Virtual Currency Businesses Act is adequate for other digital assets or whether adjustments would be necessary.

83.33% of sub-group members felt this issue should be considered by the full committee. Members pointed out that the UVCBA does not address all issues, particularly related to digital assets that do not rely on intermediaries. Others emphasized one of the principles in the sub-group's preamble; namely that the answer to this issue depends on the function of the digital asset in question. The UVCBA is focused on digital assets used as a payment mechanism.

5. Consider the need to develop rules for the non-custodial, non-intermediated acquisition, holding, and transfer of digital assets.

83.3% of the sub-group members felt this issue should be on the full committee's agenda. In particular, members noted that Wyoming's approach included attention to this issue, and that the ULC should be cognizant of the need to develop appropriate rules for states to follow in this regard.

Security interests/priorities/takes free rules

6. Consider whether some or all digital assets should have attributes of negotiability for purposes of cut-off/takes-free rules.

95.65% of sub-group members felt this issue should be considered by the full committee. Several members commented that this issue is a high priority. Others again emphasized the importance of looking to the function of the digital asset when considering this and other issues (e.g., non-fungible tokens may merit different treatment than fungible tokens). Finally, several members raised the question whether different rules are needed for take free rules and rules cutting off defenses in light of the differing policies underlying each set of rules.

7. Consider the need to develop rules for exogenous assets (e.g., goods, rights to payment, other intangibles) that are tokenized as digital assets. (E.g., UCC Article 7 document of title model).

91.3% of sub-group members felt this issue should go before the full committee. Several members felt this was a high priority. At least one member recommended approaching this issue by starting with Articles 7 & 8 as entry points, then evaluating real transaction models to see what issues, if any, there are, and then working from there as necessary.

8. Consider the need to develop rules for perfection and priority of security interests in digital assets other than perfection by filing (E.g., perfection by “control”).

100% of sub-group members agreed this issue should be considered by the entire committee. Several noted that doing so is consistent with work ongoing in other sub-groups.

9. Consider the need to develop rules for acquisition of interests (e.g., ownership, title) other than security interests (E.g., cut-off/takes-free rules).

91.3% of sub-group members felt this issue should be considered by the entire committee. At least one member noted that with regard to this issue, the full committee should remain cognizant of work ongoing globally to consider additional “interests” for a “data economy” such as those being considered by ALI-ELI’s “Principles for a Data Economy.” There was some disagreement, however, about the level of priority that this issue should take. At least two members indicated this was a high priority issue, while two others indicated this was a low priority issue. Members again re-emphasized the need for a functional approach.

Issues for which there was only marginal consensus (60%-80%)

General rules on transfers/transactions

10. To the extent not already considered by the preceding issues, consider the need to develop default contract law rules for transactions in digital assets. (E.g., UCC Article 2 rules and common-law rules (e.g., warranties, duties, remedies, recoupment and set-off, security procedures/liability, rejection of a Statute of Frauds).

At only 63.64% of sub-group members indicating this issue should move forward, this issue saw the least amount of consensus among the sub-group. In particular, members were concerned that this issue posed a very broad scope entailing substantial work, and might best be left for a subsequent project of its own. As a result, the real consensus around this issue seemed to be that the committee should discuss this further at the next in-person meeting before deciding to move forward with it.

11. To the extent not already considered by the preceding issues, consider the need to develop property law rules for transactions in digital assets. (E.g., UCC Article 2 rules on shelter, title, successive transfers, cut-off/takes-free rules, third-party rights, rules on finality and reversal)

72.73% of sub-group members indicated that this issue should move forward. The sentiment echoed that surrounding Issue 10 – namely, a strong concern that this issue is quite broad in scope, and while important, it may require its own, separate and subsequent project.