

Virtual Currency Subcommittee  
Proposal to UCC and Emerging Technologies Taskforce  
Regarding Virtual Currencies

To: Ed Smith and Steve Harris

From: Rob Isham and Steve Weise, Co-chairs of the Virtual Currency Subcommittee.

Date: January 16, 2020

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The virtual currency subcommittee has considered revisions to the UCC with respect to virtual currencies (the “Virtual Currency Subcommittee” or this “Subcommittee”), This Proposal summarizes the Subcommittee’s recommendations to the UCC and Emerging Technologies Taskforce (the “Taskforce”), broken into Sections A, B and C.

Section A proposes that the Taskforce consider updates to the definition of “money” under UCC Article 1 and related provisions in the UCC with respect to government-issued fiat virtual currencies that, when issued, would fall into the definition of “money” under the UCC (a “Digital Dollar”). Section B proposes that the Taskforce consider drafting a definition of non-fiat virtual currencies that are not digital securities or digital debt instruments (a “Digital Medium of Exchange”).<sup>1</sup> Section C includes some additional comments provided by members of the Subcommittee in connection with the first and second parts of this Proposal.<sup>2</sup>

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<sup>1</sup> The terms “Digital Dollar” and “Digital Medium of Exchange” are not meant to express any preference on the terminology used and are placeholder terms.

<sup>2</sup> There are several other subcommittees whose subject matter overlap or may overlap with the subject matter of the Virtual Currency Subcommittee. The Virtual Currency Subcommittee will continue to coordinate with those groups to prevent conflicting or duplicative work.

In preparing this Proposal the co-chairs held a conference call with members of the Virtual Currency Subcommittee, coordinated with other subcommittees on potential overlapping issues and conducted an online survey completed by twenty-nine members of the Virtual Currency Subcommittee (the “Respondents”).

A. Digital Dollars.

1. Update the definition of “money” (see UCC 1-201(24)): propose to revise the definition of money specifically to include Digital Dollars; or propose a new definition of “virtual” money that would cover a Digital Dollar.

1.1. 75.86% of the Respondents recommended pursuing this issue.

1.2. The policy analysis as to whether Digital Dollars should be treated the same as money in all respects or only in certain respects will drive the drafting approach of whether the “Digital Dollar” should be folded into the definition of “money” or if a separate definition should be drafted. A possible model is the treatment of tangible and intangible chattel paper.

1.3. The Other Digital Asset Subcommittee will be drafting definitions with respect to digital assets that are not virtual currencies. The Virtual Currency Subcommittee should coordinate with the Other Digital Asset Subcommittee to ensure a coherent definitional framework.

2. Clarify perfection/priority rules with respect to Digital Dollars: propose clarifications to perfection and priority rules with respect to Digital Dollars.

2.1. 93.10% of the Respondents recommended pursuing this issue.

2.2. Currently, perfection in a Digital Dollar (assuming that it is “money”) may be achieved only by possession (UCC 9-312; 9-313), which is not possible. Possible alternatives would be either to perfect by a method of control similar to control over electronic chattel paper (UCC 9-105) or require perfection by a deposit account (or similar account) (UCC 9-104).

2.3. Generally, Respondents were of the opinion that some form of non-temporal control should be an available method of perfection for Digital Dollars. A couple of Respondents asked whether multi-signature arrangements would satisfy “possession” requirements under the UCC or if “possession” could be clarified.<sup>3</sup>

2.4. The Draft Term Sheet for Intangible Negotiable Instruments, dated January 2, 2020, explores control-related concepts with respect to intangible negotiable instruments. In addition, the Other Digital Asset Subcommittee is exploring the concept of control with respect to digital assets.

3. Determine if Take Free Rules should apply to Digital Dollars: propose to confirm the proper policy position is that transferees of Digital Dollars should take such Digital Dollars free of a security interest unless such transferee is colluding with debtor, like transferees of money or funds from a deposit account. (UCC 9-332).

3.1. 89.66% of the Respondents recommended pursuing this issue. Some Respondents noted that the policy conclusion may not be obvious.

4. Clarify that an Article 3 instrument may be payable in Digital Dollars: propose to determine if a clarification is needed that an Article 3 instrument may be payable in Digital Dollars (see UCC 3-107).

4.1. 58.62% of the Respondents recommended pursuing this issue. Most Respondents noted that the answer to this question would depend on how the definition of “money” would be revised. Another Respondent noted that this may be achieved by updating the official comment. One Respondent expressed that any changes to Article 3 should not capture checks.<sup>4</sup>

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<sup>3</sup> Another Respondent noted that they assumed that perfection by filing would be an option as well.

<sup>4</sup> Consistent with the comment above, the proposals to be prepared by the Payment Systems (other than Checks) Subcommittee also specifically excludes checks.

B. Digital Medium of Exchange.

1. Propose definition of Digital Medium of Exchange: propose a definition of Digital Medium of Exchange that covers a non-fiat digital asset whose value is derived from its use solely as a medium of exchange.

1.1. 79.31% of the Respondents recommended pursuing this issue.

1.2. The Subcommittee should coordinate with Other Digital Assets Subcommittee so that the definition of Digital Medium of Exchange would be a subset of a unified digital asset definitional framework.

1.3. Some Respondents asked whether “medium of exchange” adequately captures the concept of non-fiat virtual currency. Another Respondent suggested that the Subcommittee take a functional approach with respect to Digital Dollars and Digital Mediums of Exchange. A functional approach would raise questions of predictability of whether a particular asset is “in” or “out” of the category. Another Respondent recommended that the Subcommittee’s definition should stay as close as possible to the definition provided in the Uniform Regulation of Virtual Currency Businesses Act.

2. Provide perfection/priority rules with respect to a Digital Medium of Exchange: propose to determine whether a Digital Medium of Exchange should receive same treatment as Digital Dollar/money or be subject to the perfection/priority regime to be proposed by the Other Digital Assets Subcommittee. A possible model is chattel paper, which has some, but not all, characteristics of negotiability.

2.1. 75.86% of the Respondents recommended pursuing this issue.

3. Provide direct holding rules with respect to a Digital Medium of Exchange: propose to determine whether there should be direct holding rules with respect to a Digital Medium of Exchange.

3.1. 88.46% of the Respondents recommended pursuing this issue.

3.2. The direct holding rules of a Digital Medium of Exchange would be analogous to the Article 8 direct holding rules. However, because a Digital Medium of Exchange wouldn't be a "security" under Article 8, the direct holdings rules governing Digital Medium of Exchange may best be placed in a different Article of the UCC.<sup>5</sup>

3.3. The Other Digital Asset Subcommittee is currently reviewing this issue with respect to other digital assets. The Virtual Currency Subcommittee should coordinate with them on this issue as well.

4. Provide that an Article 3 instrument may be payable by a Digital Medium of Exchange: add provision that an Article 3 instrument may be payable in a Digital Medium of Exchange (see UCC 3-107).

4.1. 61.54% of the Respondents recommended pursuing this issue. Generally the same comments expressed with respect to Section A.4. were reiterated with respect to this Section B.4.

#### C. Additional Comments.

1. Some Respondents identified issues that are generally in the purview of other subcommittees (e.g. Article 4/4A payment systems).
2. Some Respondents also identified questions regarding the enforcement of a security interest in Digital Dollars or a Digital Medium of Exchange (e.g. how can a court enforce a transfer of a Digital Medium of Exchange?)
3. Another Respondent reiterated the position that the Virtual Currency Subcommittee adopt a functional approach to virtual currencies in general.

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<sup>5</sup> Putting aside the opt-in provisions under Section 5 of Article 8.