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From: Sandra Stern

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Re: Final Report of the Consumer Issues Subgroup

What Happens if the Existing Consumer Provisions in Article 12 are Deemed Insufficient by New York?

In the event that Article 12 is rejected, in whole or in part, by the NY State Legislature because the Act's consumer protections are deemed insufficient or inadequate, an issue that I have been told the Legislature will prioritize, I would suggest that one or more of the following events might occur. My objective in writing this memorandum is to explore how we might respond to these possibilities.

(1) New York rejects Article 12 in its entirety. We should address the possibility that the law chosen as the governing law (and/or the law of the debtor's location) is a nonenacting jurisdiction. (Fortunately, this was considered twenty years ago, so we won't have to invent it from scratch.)

Over the long term, it is likely that persons dealing with digital assets will decide to adopt the law of an enacting jurisdiction (possibly Delaware). Assuming that legal opinions will still be given in complex transactions, this would not make New York law firms enthusiastic about Article 12, but it would preserve the integrity of Article 12's substantive provisions.

During our discussion of chattel paper, a comment was made that it is essential that Article 12 be enacted in every jurisdiction. Could the industry adjust if this doesn't happen?

(2) New York enacts its own version of Article 12, perhaps a very much simplified version essentially providing that the person that is able to transfer the asset on the ledger system has ownership or a security interest, as the case may be, in the asset. This is what New York did in

enacting the Electronic Signatures and Records Act ("ESRA"), which is a very simple version of UETA. (In this scenario, there could be two opinions given in a transaction involving the law of several jurisdictions: a New York opinion, and an opinion relying on the law or laws of enacting jurisdictions.)

Could the affected industries work with a significant variation in the substantive law affecting digital assets?

(3) New York adopts Article 12, except for the revisions to Articles 3 and 4. As we know, a rule that banks be required to provide check images (which banks declined to agree to) was a significant reason for New York's refusal to enact current Articles 3 and 4. Would it be acceptable if ULC were to agree to excision of the revisions to Articles 3 and 4 in New York as the price of enacting the rest of Article 12? After all, as Stephanie and others have noted, fewer and fewer paper checks are being written now that other payment methods are becoming increasingly popular. We have also lived with nonuniformity in Articles 3 and 4 for many years. Could we accept this as a solution? If so, would that predispose the legislature to overlook the lack of robust consumer protections, if they deem that to be the case, elsewhere in the Act?

(4) New York enacts all of Article 12, but adds a provision in its Banking Law requiring banks to return images to all checking account customers. When current Articles 3 and 4 were being debated in New York, this alternative would have been highly unlikely. However, today both houses are not only Democratic, but are increasing populist. Although I still consider this unlikely, I mention it because it is now possible. This would not affect the draft of Article 12, but would, of course, likely cause the banking industry to oppose enactment.

(5) New York enacts all of Article 12, except that it includes a nonuniform provision stating that Article 12 does not apply to New York consumers. This would, of course, at a minimum affect (a) home mortgage obligations, to the extent now subject to Article 12; (b) chattel paper with New York obligors; (c) and consumers entering into transactions relating to assets held on a distributed ledger.

Could the affected industries live with excluding New Yorkers from (a) and (b)? If so, what of the increased costs of credit?

As to (c), it's difficult to see how this would even work. On the Internet, no one knows that you're a dog - or a consumer.

Conclusion: All of the above notwithstanding, we should still be prepared to make the argument that consumer issues were carefully considered and were addressed when they emerged from the new rules created by Article 12. So - all of the foregoing can be considered as Plan B. However, it would be prudent to prepare for one or more of these eventualities.