

**Memorandum To:** Drafting Committee, UCC and Emerging Technologies  
**From:** Edwin E. Smith, Chair  
Charles W. Mooney, Jr., Reporter  
**Date:** January 17, 2022

This memorandum provides a brief overview of the proposed transition provisions for the revisions of the Uniform Commercial Code now underway. A somewhat more detailed summary outline and explanation of the proposed revisions follows this memo. Thanks to Committee members Neil Cohen and Steven Weise for input and assistance in preparing these materials.

This project updates many existing provisions of the UCC in light of developments in emerging technologies and adds (or substantially rewrites) material to address digital assets of various sorts. Many transactions (including those involving controllable electronic records) will commence before the effective date of the enacting legislation but have performance obligations or other aspects that continue to exist after the effective date. In many cases pre-effective date property rights may come into competition with post-effective date rights. For these reasons transition rules are necessary to manage the change from prior law to new law. We expect the proposed transition rules will adopt the very successful approach taken in the 1999 substantial rewrite of UCC Article 9, employing a uniform effective date. Moreover, the basic, default rule would preserve pre-effective date rights, subject only to express exceptions.

In general, the transition rules will have three aspects:

**1. *Delayed uniform effective date.*** As was the case with the 1999 revision of UCC Article 9, Secured Transactions, the drafting committee will consider providing for a uniform effective date that is far enough in the future to enable enactment by most states so that all or most states can move to the new regime at the same time. This approach was quite successful in connection with the 1999 amendments. It has two advantages. First, if the new law would be effective in all or most states on the same date, choice-of-law issues and incentives for forum shopping will be minimized. Second, the delay can give transaction parties time to learn the new rules and adapt their business practices to them. (Unlike the situation with the 1999 amendments, however, some states may be quite anxious to adopt the legislation and may opt for an earlier effective date.)

**2. *(Mostly) prospective application of rules other than those in Articles 9 and 12.*** The amendments to UCC provisions other than those in Articles 9 and 12 primarily address issues between parties to a transaction. The proposed transition rules that will be considered by the drafting committee will recommend that most of the amended rules apply only prospectively to transactions entered into after the effective date of the new law. (One exception to this principle is the updated definition of “conspicuous,” for which the draft will recommend application to all records adopted or communications sent after the effective date, even if the transaction began before the effective date.) Some of the amended rules are intended to reflect existing case law. In those cases, Official Comments will indicate that the amendments intend to codify existing law and that no change in the law is intended

**3. *Nuanced balancing of interests in Articles 9 and 12.*** The UCC amendments will address not only issues between parties to a transaction but also effectiveness of property rights against third parties and rank-ordering of property claims. As was the case with the 1999 amendments, which addressed similar issues, the proposed rules would provide for a transition period during which rights with respect to third parties that were established under prior law will continue. After the end of that transition period, however, certain of the new rules will apply to those rights. During the transition period, parties will be able to take actions (such as filing financing statements or taking “control” of certain assets) to protect and preserve their claims. For various other issues, the draft also will recommend largely following the approach taken in the 1999 amendments.

## **Summary Outline of Proposed Transition Provisions UCC and Emerging Technologies**

The following is a summary of proposed transition provisions being developed by a working group consisting of the Drafting Committee Chair, Reporter, Associate Reporter, and other committee members and observers. This summary is not intended to be comprehensive and does not identify every exception to the general descriptions of proposed transition rules.

References to the Effective Date (“ED”) mean the date on which the Act adopting the revisions to the UCC takes effect. The ED has not yet been determined, although a uniform ED for adopting States is being considered.

### **1. Prospective application of Post-ED UCC.**

Transactions entered into and rights and interests acquired pre-ED remain valid and may be terminated, completed, and enforced under the pre-ED law.

### **2. Post-ED UCC provisions that reflect pre-ED case law or clarify provisions of the pre-ED UCC.**

Several changes in law provided by the post-ED UCC reflect pre-ED case law and are intended primarily as clarifications. The official comments will make this clear.

### **3. Pre-ED litigation.**

The Revised UCC will not affect actions or proceedings commenced before the ED.

### **4. Established priorities.**

The pre-ED UCC will determine the relative priorities of conflicting claims to property to the extent that the priorities were established pre-ED.

### **5. Certain pre-ED security interests and rights of certain pre-ED purchasers.**

Additional proposed transition rules would address the rights of certain pre-ED purchasers, including secured parties. *These rules would apply the post-ED UCC to pre-ED transactions, rights and interests in certain situations and would provide limited exceptions to some or all of the rules discussed above.*

#### **a. Controllable electronic records (CERs), controllable accounts, and controllable payment intangibles.**

For convenience, the following discussion refers only to CERs, although the relevant transition rule would apply also to controllable accounts and controllable payment intangibles.

The affected purchasers may be secured parties, whose security interests secure loans or other obligations, or buyers. The rule would apply when the purchaser's interest is subordinate to a conflicting interest in the CER under the pre-ED UCC but would qualify for priority over, or would take free of, the conflicting interest if the post-ED Article 9 or Article 12 were applicable. The Drafting Committee will be asked to consider two alternatives. Under one alternative, upon the ED the purchaser would immediately achieve priority over or take free of the conflicting interest pursuant to the post-ED UCC. Under the other alternative, the purchaser would achieve priority or take free one year after the ED.

Consider two examples:

**Example 1.** Secured Party (*SP*) has a security interest in all general intangibles of Debtor (*D*), perfected by filing a financing statement in the appropriate filing office. (General intangibles would include *D*'s CERs and controllable payment intangibles.). *D* transfers a CER to Buyer (*B*) and *B* obtains control (as provided in the post-ED UCC) of the CER. Under the pre-ED Article 9, *B* acquired the CER subject to *SP*'s perfected security interest. However, under post-ED Articles 9 and 12, *B* would be a qualifying purchaser and would take free of *SP*'s security interest. Either on the ED or one year after the ED, depending on which alternative were to apply, *B* would take free of *SP*'s security interest.

**Example 2.** As in Example 1, *SP* has a security interest in all general intangibles of *D*, perfected by filing a financing statement in the appropriate filing office. *D* then grants to Lender (*L*) a security interest in a CER to secure a loan and *L* obtains control (as provided in the post-ED UCC) of the CER. *L* fails to file a financing statement in the proper filing office. Because control is not a method of perfecting a security interest in a general intangible (such as a CER) under pre-ED Article 9, *L*'s security interest is unperfected and *SP*'s security interest has priority. However, under post-ED Article 9, *L*'s security interest would be perfected by control and would have priority over *SP*'s security interest perfected by filing. Upon either the ED or one year after the ED, depending on which alternative were to apply, *L*'s security interest would have priority.

The proposed transition rule seeks to balance the interests of the relevant competing parties. It is reasonable to assume that in many cases buyers of CERs will fail to appreciate the need to search the relevant filing office to discover whether a secured party has filed a financing statement. It is also reasonable to assume that in many cases a secured party whose security interest is perfected by filing may be unaware that its debtor owns CERs that are subject to its security agreement and financing statement covering "all general intangibles."

It also is possible that before the ED *SP* may enforce its security interest in the CER upon *D*'s default, terminating *B*'s or *L*'s interest. However, because *B* and *L* are assumed to have control over the CER, *SP*'s enforcement might require a judicial proceeding. Even if the one-year rule applies, after the ED but before the one year expires, *B* or *L* might transfer the CER to a *C*, a qualifying purchaser. In that case, *C* would take free of *SP*'s security interest.

**b. Electronic money, electronic documents of title, and electronic authoritative copies of chattel paper.**

Rules similar to those described above for CERs would apply to electronic money, electronic documents of title, and electronic authoritative copies of chattel paper. Like a CER, a security interest in electronic money could not be perfected by control under pre-ED Article 9. Whether a transferee of electronic money could take free of conflicting interests under pre-ED law is unclear. A pre-ED secured party, whose security interest secures a loan or other obligation, or buyer might take control of electronic money before the ED and, for reasons similar to those described above, arguably would take subject to a pre-ED perfected security interest. Similarly, it also would be possible, although unlikely, for a pre-ED secured party or buyer to take steps that would achieve control of an electronic document of title or an electronic authoritative copy of chattel paper if the pre-ED UCC were applicable, although those steps might not comply with the requirements for control under the pre-ED UCC. Such secured parties or buyers would take subject to pre-ED perfected security interests. However, as described above, the interests of these pre-ED secured parties and buyers could be promoted at the ED or one year after the ED.