

# Legal Opinion Letters on Digital Assets

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## TriBar Report on Opinions Under 2022 Amendments to the Uniform Commercial Code Regarding Emerging Technologies

*By the TriBar Opinion Committee<sup>1</sup>*

### I. Introduction

The 2022 amendments (the “Amendments”) will provide a limited set of rules for sales of and security interests in a specific range of digital assets, which will be more precise and attuned to market expectations than are the current rules in the Uniform Commercial Code (UCC).<sup>2</sup> This report will review how these transactions are handled under current law. The report will then summarize<sup>3</sup> the provisions of the amendments that are

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<sup>1</sup> The TriBar Opinion Committee was formed over forty-five years ago by three New York bar associations. Over the years its membership has expanded to include lawyers from across the United States in leadership positions in city, state and national bar groups focusing on third-party legal opinion practice. A list of the Committee members is attached as Appendix I. The views expressed in this report reflect a consensus of Committee members but not necessarily the views of particular members or the law firms, bar associations or other organizations with which they are associated. [update]

<sup>2</sup> The co-sponsors of the UCC have given final approval to the Amendments. The American Law Institute (ALI) approved the amendments at its annual meeting in May 2022. The Uniform Law Commission (ULC) approved the Amendments at its annual meeting in July 2022. The Amendments will now be available for consideration and adoption by the states and other U.S. jurisdictions. All references to the UCC in this report are to the UCC as amended by the Amendments, unless otherwise stated. [This draft of the report cites to the provisions of the draft Amendments (date June 27, 2022) considered by the ULC at its Annual Meeting. There will be clean up style (but not substantive) edits, which will likely include some renumbering of subsections. Those will be updated in subsequent drafts of this report.]

<sup>3</sup> The summary reviews amendments relevant to the types of opinions likely to be requested in connection with transactions subject to the Amendments. There are additional provisions in the Amendments not covered by this report. A more complete summary is available from the ULC website. [ULC URL] (visited [date]).

likely to be covered by opinion letters. The report concludes with a discussion of opinions that are likely to be requested in connection with the Amendments and provides examples of potential opinion language and related implicit and explicit assumptions.

This report supplements the TriBar 2003 Report on opinions under revised Article 9.<sup>4</sup>

## **II. Current law**

Current law does not have provisions specifically addressing these types of digital assets. Thus many transactions using these kinds of assets as collateral use workaround approaches. One common approach is based on UCC Article 8:

- The digital assets are transferred to a securities intermediary.<sup>5</sup>
- The securities intermediary agrees to treat the digital assets as “financial assets”<sup>6</sup> and credits them to the debtor’s securities account, thereby creating a security entitlement<sup>7</sup> with respect to the financial asset.
- The secured party then obtains “control”<sup>8</sup> of the security entitlement, which perfects the secured party’s security interest in the securities account.<sup>9</sup>

Another approach taken under current law is:

- The debtor provides the private key for an asset maintained on a distributed ledger to the secured party,

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<sup>4</sup> In the case of any inconsistencies between this report and the TriBar Article 9 Report, this report prevails.

<sup>5</sup> UCC § 8-102(a)(14).

<sup>6</sup> UCC § 8-102(a)(9). As discussed below, a controllable electronic record will not be a “security” for purposes of Article 8 and can be a “financial asset” only under the third prong of the definition. UCC §§ 8-103(h) and 12-102, Comment 2.

<sup>7</sup> UCC § 8-102(a)(17).

<sup>8</sup> UCC § 8-501, Comments 1 and 4.

<sup>9</sup> The amendments confirm the effectiveness of this approach. UCC §§ 8-102, Comment 9 and 12-102, Comment 2.

- The secured party transfers the asset to the secured party's "wallet", and
- The secured party files a financing statement to perfect its security interest.<sup>10</sup>

Neither of these approaches provides the securities intermediary (in the first approach) nor the secured party (in the second approach) with any legal assurance that the debtor owns the digital asset free of other property claims, nor that the securities intermediary will acquire the digital asset free of other property claims. This leaves some legal doubt in the transaction. As described below, the revisions to the UCC will have processes to provide assurance that:

- the securities intermediary and the secured party in these approaches acquire their interests free of the property claims of others, and
- the security interest will be eligible for super-priority status.

### **III. Summary of UCC amendments**

#### *A. Introduction*

The amendments provide rules for transfers of "controllable electronic records" (CERs) to buyers and secured parties.<sup>11</sup> A transferee of this type will take free of a property claim to the CER if the transferee is a "qualifying purchaser" (QP). In addition, a secured party that obtains control of the CER will have non-temporal priority over another secured party that does not have control, such as a secured party that has perfected

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<sup>10</sup> Note that the secured party will not be perfected if it does not file a financing statement. Neither the secured party's possession of the private key nor placing the digital asset in the secured party's wallet perfects the security interest under the current UCC.

<sup>11</sup> A sale of a payment right (instruments, accounts, chattel paper, and payment intangibles) ordinarily creates a "security interest, the seller is the "debtor, and the buyer is the "secured party" under the UCC definitions (UCC §§ 1-201(b)(35), 9-102(a)(28)(B) and 9-102(a)(73)(D)) and are subject to the application of Article 9. UCC § 9-109(a)(3). Thus when a CER evidences a payment right, as discussed below, Article 9 applies to the sales transaction.

its security interest *only* by the filing of a financing statement. None of these rules exist under current law.

These are examples of types of assets that the new provisions might<sup>12</sup> cover:

- Electronic accounts (generally including accounts receivable), electronic payment intangibles (including electronic promises to pay akin to notes and electronic loan agreements)
- Cryptocurrency
- Non-fungible tokens (NFTs) that qualify as a CER, with a limited application of the amendments to assets “tethered” to the NFT.
- Electronic (fiat) money (government initiated and adopted)<sup>13</sup>

The definition of CER excludes certain types of assets, even if they would otherwise meet the definition of a CER:

- Money (fiat),<sup>14</sup>
- Investment property,<sup>15</sup>
- Electronic accounts and payment intangibles, if not evidenced by a CER or that lack certain other characteristics described below,

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<sup>12</sup> The amendments will apply to these assets only if there is an “opt-in”, as described below. See below, § [•].

<sup>13</sup> The application of the amendments to sales of money is limited, as discussed below. See § The amendments do address money in electronic or other non-tangible form. See discussion below..

<sup>14</sup> UCC § 1-201(b)(24). As discussed below, a subset of the Article 1 definition of money is addressed by the Amendments in to Article 9. See below, § [•].

<sup>15</sup> UCC § 9-102(a)(49). A “security” (including an uncertificated security) that is represented or evidenced by an electronic record (sometimes referred to as a “token”) is still a “security” and thus excluded from the definition of CER as “investment property. UCC § 12-102, Comment 2. The Amendments also confirm that an uncertificated security in electronic form is not an “electronic certificate” for purposes of UCC Article 8 as Article 8 does not make any provision for an “electronic certificate”.. UCC 8-102, Comment 18.

- Chattel paper<sup>16</sup> in electronic form,
- “Transferable records”<sup>17</sup> under the Uniform Electronic Transactions Act (UETA)<sup>18</sup> and the Electronic Signature in Global Commerce Act (E-SIGN)<sup>19</sup>
- Documents of title under UCC Article 7

*B. New Article 12 – controllable electronic records*

Article 12 applies to outright transfers of and security interests<sup>20</sup> in CERs, controllable accounts, and controllable payment intangibles. The terms and concepts used in Article 12 are also central to the Amendments to Article 9, discussed below.<sup>21</sup>

*Controllable electronic records.* Each word in “controllable electronic record”<sup>22</sup> is important :

- A CER must first be a “record”,<sup>23</sup> which is information stored in some manner,
- The record must be “electronic”,<sup>24</sup> *and*

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<sup>16</sup> § 9-102(a)(11). The definition of “chattel paper” has changed, as discussed below. See below, see below § [•].

<sup>17</sup> The parties to an agreement can chose by the terms of the agreement whether a payment right that otherwise would qualify to be subject to one of the following bodies of law: the Amendments and the UCC, UETA or E-SIGN, or neither. A payment obligation will be a transferable record under UETA or E-SIGN only if the payment obligation “expressly” provides that it is a “transferable record.” UETA § 16(a)2), E-SIGN, 15 USCA § 7021(a)(1)(B). A right to payment will be a controllable account or controllable payment intangible only if it provides that the obligor will pay the person in control of the controllable account or controllable payment intangible, as discussed below. If a payment obligation contains neither term, then will likely be an account.

<sup>18</sup> [ULC URL]

<sup>19</sup> 15 USCA §§ 7001 *et seq.*

<sup>20</sup> As discussed above, Article 9 generally applies to outright transfers of payment rights. See above, note [•].

<sup>21</sup> See below, § [•].

<sup>22</sup> UCC § 12-102(a)(1).

<sup>23</sup> UCC § 1-201(b)(70).

<sup>24</sup> UCC § 1-201(b)(16A).

- The electronic record must be “controllable.”<sup>25</sup>

A non-fungible tokens (NFTs) can be a CER, if it meets the definition of “CER.” NFTs are often referred as being “tethered” to one or more other assets such that the transfer of the NFT also transfers an interest in the other asset. The amendments do *not* address whether the transfer of an asset to which another asset is “tethered” has any effect on the other asset, *except* for controllable accounts and controllable payment intangibles that are evidenced by a CER (likely an NFT in this circumstance), which are discussed in more detail below.<sup>26</sup> For other kinds of tethered assets, the effect of the transfer of the CER on the tethered asset is determined by law other than Article 12.<sup>27</sup>

*Controllable accounts and controllable payment intangibles.* A controllable payment intangible<sup>28</sup> or a controllable account<sup>29</sup> Is an “account” or “payment intangible”<sup>30</sup> that:

- Is evidenced<sup>31</sup> by a CER,<sup>32</sup> *and*
- Provides that it’s payable to the person in control of the CER that evidences the controllable account or controllable payment intangible.<sup>33</sup>

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<sup>25</sup> The electronic record does not have to be controlled at all times, but it has to have the characteristics that make it susceptible of “control.” “Control” is defined below.

<sup>26</sup> UCC § 12-104(f) and Comment 9.

<sup>27</sup> Article 12, Prefatory Note, 4.a.

<sup>28</sup> UCC § 9-102(a)(27B).

<sup>29</sup> UCC § 9-102(a)(27A).

<sup>30</sup> Each term as currently defined in Article 9. UCC §§ 9-102(a)(2) and (61).

<sup>31</sup> The Amendments have unified the concept that a record that has negotiability characteristics “evidences” the underlying obligation has been unified throughout the UCC.

<sup>32</sup> The controllable payment intangible or controllable account is not a itself a “CER”, but (as noted) must be “evidenced” by a CER. A buyer or secured party will have control of a controllable payment intangible or controllable account if the person has control of the CER that evidences the controllable payment intangible or controllable account. See below, § [•].

<sup>33</sup> If the account or payment intangible does not provide for this, then it is not a controllable account or controllable payment intangible. This is the “opt out” sometimes referred to in this Report. Some might want to avoid the application of the rules for controllable accounts and controllable payment intangibles to avoid the possibility that

*Control.* “Control” means that a person has *each* of the following powers:<sup>34</sup>

- The *power* to avail itself of “substantially” all of the “benefits”<sup>35</sup> of the electronic record,
- The “exclusive”<sup>36</sup> *power*<sup>37</sup> to prevent others from enjoying substantially all of the benefits of the electronic record, and
- The *power* readily to identify itself as having these powers.

The meaning of “exclusive” will allow, in some circumstances, more than one person to have the relevant power.<sup>38</sup> A power is still exclusive even if the power is “shared” with another person,<sup>39</sup> except in stated circumstances. A power is *not* “shared” with another person, and therefore is not exclusive if:<sup>40</sup>

- The first person (the person asserting “control”) can exercise the power only if the other person also exercises the power, *and*

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another secured party (including a buyer) would obtain control of the controllable account or controllable payment intangible and obtain priority over that person under the new rules.

<sup>34</sup> The use of the word “power”, when used in this context, is distinguished from “right.” A person may have a “right” to do something (often by contract), but without the corresponding “power”, the “right” does not suffice for purposes of “control.” For example, by contract a secured party might have the “right” to have the benefits of a token on a blockchain. But without the related private key, the secured party would not have the “power” to make a transfer. UCC § 12-105, Comment 2.

<sup>35</sup> “Benefits” refers to the rights afforded by the CER and the uses to which the CER can be put. UCC § 12-105, Comment 3.

<sup>36</sup> The meaning of “exclusive” is discussed below. See § [•].

<sup>37</sup> The use of the word “power” (as opposed to “right”) is intentional as the person asserting control must in fact have the actual ability to achieve the effect described.

<sup>38</sup> This is sometimes referred to as a “multi-sig” arrangement.

<sup>39</sup> UCC § 12-105(b)(2).

<sup>40</sup> UCC § 12-105(c).

- The other person can exercise the power without the exercise of the power by the first person *or* the other person is the transferor<sup>41</sup> of an interest in the CER to the first person.<sup>42</sup>

Because of the difficulty of proving the negative that another person does not exist who has these power, Article 12 creates a presumption that a person who has this power has it “exclusively”.<sup>43</sup>

A person may have control through another person who has control if the other person acknowledges that it has control on behalf of the first person.<sup>44</sup>

A person will have control of a controllable account or a controllable payment intangible only if it obtains control of the CER that evidences the controllable account or controllable payment intangible.<sup>45</sup>

*“Take free” rule.* Article 12 applies to outright transfers of and security interests in CERs, controllable accounts, and controllable payment intangibles. Article 12 provides many of the characteristics of negotiability for these types of assets, which do not exist under current law.<sup>46</sup>

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<sup>41</sup> This might be the seller of the CER or a person creating a security interest in the CER.

<sup>42</sup> § 12-105, Comment 5 has an extensive discussion and many illustrations of the application of the “sharing” rule.

<sup>43</sup> UCC § 12-105(d). That presumption does not apply if more than one person has the relevant power and the “sharing” rule of § 12-105(b)(2) does not apply because § 12-105(c) does apply. § 12-105, Comment 5.

<sup>44</sup> UCC § 12-105(e). The acknowledgement under Article 12 does not have to be signed. The third party may not be the person who transferred an interest in the collateral to the secured party. This rule is similar to the existing provision in Article 9 that a person may have possession of tangible collateral for purposes of perfecting a security interest in that tangible collateral if a bailee has possession of the tangible collateral and acknowledges in a signed record that holds possession for the secured party’s benefit. UCC § 9-313(c). There are comparable rules for other types of assets where a security interest can be perfected by control. See §§ 8-106(d), 8-301(a)(2), and 9-106 (investment property); § 9-104(a)(4) (deposit accounts); § 9-105(g) (electronic copy of record evidencing chattel paper); § 9-105A (electronic money, which is discussed below, § [•])

<sup>45</sup> UCC §§ 9-107A(b) and 12-104(a) and (b).

<sup>46</sup> See generally, Article 12, Prefatory Note.

A person who acquires a CER will acquire all rights in the CER that the transferor had or had the power to transfer.<sup>47</sup> In addition, under this rule, a “qualifying purchaser” (QP) will take its interest in a CER, controllable account, or controllable payment intangible “free” of any property claim to the asset.<sup>48</sup>

A “qualifying purchaser” is a person who:

- Acquires a CER in a transaction that constitutes a “purchase” (as defined in Article 1, requiring a consensual transaction<sup>49</sup>)
- Has control<sup>50</sup> of the CER,
- Gives value,<sup>51</sup>
- Acts in good faith,<sup>52</sup> *and*
- Does not have notice<sup>53</sup> of a claim of a property right in the CER

As discussed above, a person obtains control of a controllable account or a controllable payment intangible by obtaining control of the CER that evidences the controllable account or controllable payment intangible. Correspondingly, a person will be a QP with respect to a controllable account or controllable payment intangible only if it is a QP with respect to the CER that represents the controllable account or controllable payment intangible.<sup>54</sup>

Because a person who acquires a CER *from* a QP will acquire all rights in the CER that the QP had or had the power to transfer, the person who will acquire the CER free of any property claim in the CER that preceded

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<sup>47</sup> UCC § 12-104(d).

<sup>48</sup> UCC § 12-104(e).

<sup>49</sup> UCC § 1-201(b)(29) and (30).

<sup>50</sup> The transferee may “share” control with another person. The meaning of “share” is discussed below above. See above, § [•].

<sup>51</sup> “Value” is defined, in UCC § 12-102(a)(4), by incorporating the meaning of “value” in Article 3 (UCC § 3-303(a)) and not the broader definition in UCC § 1-204.

<sup>52</sup> UCC § 1-201(b)(20).

<sup>53</sup> UCC § 1-202.

<sup>54</sup> UCC § 12-104(a) and Comment 2.

the acquisition of the CER by the QP, even if the acquirer from the QP would itself not qualify as a QP.

*Choice of law.* The choice-of-law rule for matters covered<sup>55</sup> by Article 12 applies based on the first of the following in to apply, which will determine the “controllable electronic record’s jurisdiction”:<sup>56</sup>

- A jurisdiction “expressly” provided for as the “CER’s jurisdiction” *in* the CER or a record logically associated with the CER,
- If the preceding clause does not apply, a jurisdiction “expressly” provided for as the “CER’s jurisdiction” by the system in which the CER is recorded,
- If the preceding clauses do not apply, a jurisdiction “expressly” provided for as the “jurisdiction” that governs the CER in the CER or a record logically associated with the CER,
- If the preceding clauses do not apply, the jurisdiction “expressly” provided for as the “jurisdiction” that governs the CER by the system in which the CER is recorded,
- If the preceding clauses do not apply, Washington, DC, if Washington, DC has adopted the amendments,
- If the preceding clauses do not apply, Washington, DC, *as if* Washington, DC has adopted the amendments and they are effective in Washington, DC.

The same choice-of-law rule generally applies to the perfection and priority of a security interest in a CER.<sup>57</sup>

*C. Revisions to Article 9 – CERs<sup>58</sup>*

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<sup>55</sup> The choice-of-law rule in Article 12 does not apply to matters not “covered” by Article 12. UCC § 12-107, Comment 2.

<sup>56</sup> UCC § 12-107.

<sup>57</sup> The Article 9 choice-of-law rules are discussed below. See below, § [•].

<sup>58</sup> Revisions to Article 9 applicable to “money” are discussed below.

*Attachment of a security interest.* There are very few changes that affect attachment of a security interest in a CER, a controllable account, and a controllable payment intangible. The assets subject to Article 9 affected by the amendments will fall within the following types of collateral:

- CER – “general intangible”<sup>59</sup>
- Controllable account – “account”<sup>60</sup>
- Controllable payment intangible – “payment intangible”<sup>61</sup>

Thus a collateral description for a CER, controllable account, or controllable payment intangible will not need to change in documents.<sup>62</sup>

*Perfection of a security interest in a CER, controllable account, and controllable payment intangible.* A security interest in a CER, a controllable payment intangible, and a controllable account can be perfected by the filing of a financing statement<sup>63</sup> or by control.<sup>64</sup> A sale of a controllable payment intangible, as with any payment intangible,<sup>65</sup> is automatically perfected.<sup>66</sup> A sale of a CER (as a “general intangible”) is not automatically perfected. Article 9 incorporates the Article 12 definition of “control”

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<sup>59</sup> UCC § 9-102(a)(42).

<sup>60</sup> UCC § 9-102(a)(2).

<sup>61</sup> UCC § 9-102(a)(61). A payment intangible can also be described as a “general intangible”, because “payment intangibles” are a subset of “general intangibles”.

<sup>62</sup> As discussed above, it would be good practice for a buyer or secured party obtain an interest in a controllable account or controllable payment intangible also to describe and obtain an interest in the CER that evidences the controllable account or controllable payment intangible. See above, § [•].

<sup>63</sup> UCC § 9-312(a). As discussed below, a security interest in “money”, other than electronic money (which by definition in Article 9 is not controllable), cannot be perfected by the filing of a financing statement.

<sup>64</sup> UCC § 9-314(a).

<sup>65</sup> UCC § .

<sup>66</sup> As noted below, a security interest in a CER, controllable account, or controllable payment intangible perfected by control will have priority over a security interest perfected only by another method.

(discussed above) for CERs, controllable accounts, and controllable payment intangibles.<sup>67</sup>

*Priority of a security interest in a CER, controllable account, and controllable payment intangible.* A security interest perfected by “control” of a CER (and any controllable account or controllable payment intangible evidenced by the CER) will have priority over a security interest not perfected by control.<sup>68</sup> Unlike the qualifying purchaser provision of Article 12, this Article 9 priority does not require that the secured party not have notice of someone else’s property claim to the collateral.<sup>69</sup>

*Choice of law for CERs.* The choice-of-law rule applies to CERs, controllable accounts, and controllable payment intangibles for matters covered by Article 12<sup>70</sup> also applies to the perfection and priority of a security interest in a CER,<sup>71</sup> except for the perfection of a security interest in a CER by the filing of a financing statement, which is governed by the existing rule applying the “location” of the debtor.<sup>72</sup> Even for a security interest in a CER perfected by the filing of a financing statement, the *priority* of the security interest is governed by the controllable electronic record’s jurisdiction.<sup>73</sup>

*D. Revisions to Article 9 – money*

*General meaning of “money.”* Article 1 has a modified definition of “money.”<sup>74</sup> The Article 1 definition is subject to limits in Article 9 for purposes of transactions covered by Article 9 (described below). The

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<sup>67</sup> The meaning of “control” for a CER, controllable account, and controllable payment intangible is different from the definition of “control” for other types of collateral in Article 9.

<sup>68</sup> UCC § 9-326A. In addition, if a secured party is a QP (see above, § [•]), Article 9’s priority rules defer to the QP rules of Article 12. UCC § 9-331.

<sup>69</sup> UCC § 9-326A. See above, § [•].

<sup>70</sup> See above, § [•].

<sup>71</sup> UCC § 9-306B(a).

<sup>72</sup> UCC § 9-306B(b).

<sup>73</sup> UCC § 9-306B, Comment 2.

<sup>74</sup> UCC § 1-201(b)(24).

existing Article 1 definition of money already accommodates money in intangible form.<sup>75</sup> Under the new Article 1 definition:

- The item must be a “medium of exchange”,<sup>76</sup>
- The “medium of exchange” must have been adopted or authorized by a government,
- The term does not include an electronic record that “existed” before it was adopted or authorized by a government as a medium of exchange,

Thus *existing* types of cryptocurrency (including bitcoin) will never be “money” under the UCC because they existed before any government adopted the cryptocurrency as money. (bitcoin can still be a CER).<sup>77</sup>

*Meaning of “money” under Article 9.* Article 9’s definition of “money” places limits on the Article 1 definition of “money” for purposes of Article 9:

- Central bank digital currency (CBDC) can be “money” under the Article 1 definition, but will not be “money” for purposes of Article 9 – it will instead be a “deposit account”.<sup>78</sup>

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<sup>75</sup> There are other problems concerning the application of the existing definition to money in intangible form. Current law provides that a security interest in “money” can be perfected only by possession of the money. It is not possible to possess an intangible. The Amendments fix these problems. The Amendments do not address the application of existing law.

<sup>76</sup> The term “medium of exchange” is not defined.

<sup>77</sup> As a consequence, El Salvador’s and Central African Republic’s use of bitcoin as the currency of those countries after bitcoin came into existence means that bitcoin will not be “money” for UCC purposes. An existing cryptocurrency can be a CER. If a cryptocurrency is “money” under the definition, it is excluded from the definition of CER. See above, § [•].

<sup>78</sup> UCC § 9-102(a)(54A). A security interest in central bank digital currency as original collateral is perfected under the rules that apply to deposit accounts, i.e., only by control. UCC § 9-102, Comment 12A. Thus the collateral description, perfection, and priority of a security interest in CBDC will follow the existing rules for collateral descriptions, perfection, and priority of a security interest in a deposit account.

- An electronic record that would be “money” under the Article 1 definition will not be “money” for purposes of Article 9 if it is not “controllable”.<sup>79</sup> Article 9 refers to money in electronic form that is controllable as “electronic money.”<sup>80</sup> Thus (as described below) money in electronic form that is not controllable will not be subject to the perfection procedures for tangible money<sup>81</sup> and “electronic money.” Instead money in electronic form that is not controllable will be a “general intangible.”<sup>82</sup>

*Perfection of a security interest in money.* A security interest in tangible money can be perfected *only* by possession of the money, which continues the current rule.<sup>83</sup> A security interest in “electronic money” can be perfected *only*<sup>84</sup> by control.<sup>85</sup> There is no special choice-of-law rule for the perfection and priority of a security interest in electronic money, so the default rule of the debtor’s “location” applies (unless preempted by federal law).<sup>86</sup>

*Priority of a security interest in money.* The “take free” rules for transferees of money who are not in collusion with debtor have been revised to apply to electronic money in a manner similar to their application to tangible money.<sup>87</sup> The effect of this is that a security interest

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<sup>79</sup> UCC § 9-102(a)(54A). This is similar to the rule in Article 12 than an electronic record is not a “CER” if it is not “controllable”. See above, § [•].

<sup>80</sup> UCC § 9-102(a)(31A).

<sup>81</sup> UCC § 9-102(a)(79A).

<sup>82</sup> UCC § UCC § 9-102, Comment 12A. As a general intangible, a security interest in non-controllable money in intangible form may be perfected *only* by the filing of a financing statement. UCC § 9-310(a).

<sup>83</sup> UCC §§ 9-312(b)(30 and 9-313(a).

<sup>84</sup> UCC 9-312(b)(4). The filing of a financing statement would not be effective to perfect a security interest in electronic money.

<sup>85</sup> Control is defined comparably to the definition for control of a CER, including a comparable presumption of exclusivity, the meaning of sharing, and holding control through another person. § 9-105A. See § [•] for the meaning of control of a CER.

<sup>86</sup> UCC § 9-301(1), Comment 5..

<sup>87</sup> UCC § 9-332(b).

in money that is perfected by control has priority over a security interest that is not perfected by control.<sup>88</sup>

*E. Revisions to Article 9 – chattel paper*

*Definition of chattel paper.* The term “chattel paper” itself has been modified to refer to the relevant right to payment and not to the record that evidences the right to payment.<sup>89</sup> As result the relevant record “evidences” the right to payment.<sup>90</sup> The terms “tangible chattel paper” and “electron chattel paper” have been eliminated<sup>91</sup> and have been replaced by references to a “tangible copy of the record evidencing the chattel paper” and an “electronic copy of the record evidencing the chattel paper”.<sup>92</sup>

The definition of “chattel paper” has also been modified for hybrid transactions, which are transaction that include both the sale or lease of goods and other aspects, such as the sale of services or the license of intellectual property. In a hybrid transaction, the term “chattel paper” will apply to a lease of goods only if the “predominant” purpose of the lease transaction relates to the possession and use of the goods.<sup>93</sup>

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<sup>88</sup> For example, a security interest in tangible money or electronic money might be perfected as “proceeds” of other collateral in which a security interest has been perfected by the filing of a financing statement. See generally, UCC § 9-315(d). A security interest in that money perfected by control would have priority in the money ahead of , in collateral where money is proceeds of other collateral where the security interest in the original collateral was perfected by another method

<sup>89</sup> UCC § 9-102(a)(11). This does not change the substantive meaning of “chattel paper.”. UCC § 9-102, Comment chattel

<sup>90</sup> UCC § 9-102, Comment 5.b.

<sup>91</sup> UCC § 9-102, Comment 5.b.

<sup>92</sup> See, e.g., §§ 9-105 and 9-314A.

<sup>93</sup> UCC § 9-102(a)(11). This characterization can be important because a security interest in “chattel paper” can be perfected by possession or control as appropriate. If the right to payment in the sale or lease is not “chattel paper”, it is likely an “account” and the only way to perfect a security interest in an account is by the filing of a financing statement. The predominant purpose test is also applicable to determine the scope of the application of Article 2 and Article 2A to a transaction involving the sale or lease of goods. UCC §§ 2-102(20 and 2A-102(2)). This report does not discuss those matters.

*Perfection of a security interest in chattel paper by control.* An additional<sup>94</sup> method for perfection of a security interest in chattel paper in electronic form has been added.<sup>95</sup> The new method has a definition, sharing rules, a presumption of exclusivity, and provision for control through another person comparable to the meaning of control for a CER in Article 12.<sup>96</sup> If the relevant right to payment that constitutes chattel paper is evidenced by *both* a tangible copy and an electronic copy, the secured party can perfect by possession and control by having possession of *each* authoritative tangible copy and control of *each* authoritative electronic copy.<sup>97</sup>

*Perfection of a security interest by control through a third person.* Provisions have been added to confirm that a secured party can perfect a security interest in chattel paper by control through a third party in control if the third party “acknowledges that it has control of behalf of” the secured party.<sup>98</sup>

*F. Revisions to definitions in Article 1*

The meaning of the term “conspicuous” has been updated.<sup>99</sup> The current definition has statutory examples of what satisfies the requirements of the definition (*e.g.*, ALL CAPS). The revised definition has dropped the statutory examples and instead has a “totality of the circumstances”,

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<sup>94</sup> The Amendments preserve the existing method of perfecting a security interest in the electronic record evidencing chattel paper”. UCC § 9-105(b). The method is not suitable for chattel paper maintained on a distributed ledger. § 9-105, Comment 4.

<sup>95</sup> UCC § 9-105(c).

<sup>96</sup> See above, § [•].

<sup>97</sup> UCC § 9-314A(a). See also UCC § 9-330(a) and (b).

<sup>98</sup> UCC § 9-105(g). The third party may not be the person who transferred an interest in the collateral to the secured party. *Id.* These rules are comparable to the similar rule for control of a CER. See above § [•].

<sup>99</sup> UCC § 1-201(b)(10). Because contract law in general does not have a definition of “conspicuous,” the courts often look to the UCC definition for contract law purposes. If applicable contract law requires that a provision be conspicuous to be enforceable (*e.g.*, a waiver of jury trial in some jurisdictions), the opinion giver may want to consider the UCC’s revised definition.

factors test.<sup>100</sup> The word “signed”<sup>101</sup> has been revised to include electronic signatures.<sup>102</sup>

*Perfection of a security interest by control through a third person.*

Provisions have been added to confirm that a secured party can perfect a security interest in chattel paper by control through a third party in control if the third party “acknowledges that it has control of behalf of” the secured party.<sup>103</sup>

### G. Transition rules

*General.* The general rule is that the amendments will have *immediate* effect.<sup>104</sup> It is *not* anticipated that each state will have the same effective date. Thus the *choice-of-law* rules (discussed above) may be very important to determine which state’s *transition* rules apply.<sup>105</sup>

*Established priorities.* The key exception to the transition rule of immediate effect is that any pre-effective date priority will stay in place for

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<sup>100</sup> The statutory examples are now mentioned in the Comments, as part of an extensive discussion of the totality of the circumstances test. UCC § 1-201, Comment 10.

<sup>101</sup> As a result the use of the word “authenticate” in other articles of the UCC has been revised to use “signed” instead of “authenticate”, as appropriate. *See, e.g.*, UCC § 9-203(b)(3)(A). Also the word “writing” has sometimes been replaced by “record” to accommodate electronic records. *See, e.g.*, UCC § 1-201(b)(36) (definition of “send”). Not all instances of “writing” have been “replaced by “record”. *See, e.g.*, UCC § 9-102(a)(47) (definition of “instrument”). A writing signed electronically will ordinarily be sufficiently signed (in a non-UCC sense) under UETA or E-SIGN to be effective as a contract, but will not be a “signed writing” where required by the UCC. *See* UCC § 1-201, Comment 37.

<sup>102</sup> This should make it easier to give opinions based on agreements signed electronically. [Reference to TriBar statement on use of electronic signatures]

<sup>103</sup> . UCC § 9-105(g). The third party may not be the person who transferred an interest in the collateral to the secured party. *Id.*

<sup>104</sup> UCC 2022 Amendments, Annex, §§ A-301(a) and A-305(a).

<sup>105</sup> Note that a court applies the choice-of-law rules of its state. If the court is in a state that has adopted the Amendments, it will apply the choice-of-law rules of the Amendments. That might or might not lead to a state or other jurisdiction that has adopted the Amendments. If the court is in a state that has not adopted the Amendments will apply the rules of Article 9 as they exist in that state under Article 9 unaffected by the Amendments.

at least *one year* following the state's effective date.<sup>106</sup> *After* that period (the "adjustment date"), the new priority rules will apply, even to transactions completed *before* the effective date.<sup>107</sup> Thus, as shown in the examples below, a secured party with pre-effective date "control" can jump ahead of a secured party that before the effective date had perfected only by the filing of a financing statement. The goal is to have the adjustment date be the same in a critical mass of state.

*Examples.* Here are some examples:

- *Example 1:*

*Before* the effective date, Secured Party 1 perfects a security interest in the debtor's accounts and general intangibles by filing a financing statement, which indicates the collateral is "accounts" and "general intangibles". The accounts and general intangibles are evidenced by what would be a CER if the Amendments were in effect. *Before* the effective date and *after* Secured Party 1 files its financing statement, Secured Party 2 perfects in the same collateral in the same manner. Secured Party 2 *also* takes actions that would give it control of the CER that evidences the controllable accounts and controllable payment intangibles if the new law were in effect. The "control" acts do not (yet) perfect the security interest because the new law is not yet in effect.

On the *effective* date, Secured Party 2 has "control" of the collateral and is perfected by control (as well as by the filing of a financing statement). Although under the Amendments Secured Party 2's perfection by control would have priority over Secured Party 1's security interest (perfected only by the filing of a financing statement), because *before* the effective date Secured Party 1 perfected only by filing a financing statement (the only available method at that time), Secured Party 2 is still junior to Secured Party 1 because their relative priority was established *before* the effective date

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<sup>106</sup> UCC § UCC 2022 Amendments, Annex, § A-305(b). It is expected that an adjustment date will be set based on the anticipated effective dates in a critical mass of states.

<sup>107</sup> UCC § UCC 2022 Amendments, Annex, § A-305(c).

On the *adjustment* date, Secured Party 2 will *then* obtain priority under the new rules because Secured Party 2 has “control” under the new rules.

- *Example 2:*

*Before* the effective date, Secured Party 1 perfects a security interest in a CER by filing a financing statement. *After* the effective date, Secured Party 2 perfects a security interest in the same CER by obtaining control of the CER. Secured Party 2 immediately has priority under the Amendments because the priorities between the two secured parties were not established before the effective date.

#### **IV. Opinions**

##### *A. General*

This report (as a description of “customary practice”<sup>108</sup>) will apply whether or not referred to in an opinion letter.

##### *B. Establishing facts*

As evident from the discussion above, there may be “substantial practical limitations”<sup>109</sup> in making some of the factual and legal determinations necessary to give an opinion on the matters covered by the Amendments. A great deal of the opinion will depend on whether the collateral is a CER, a controllable account, a controllable payment intangible, or electronic money. Thus there will have to be a determination of whether a CER, an electronic record or money in intangible form is “controllable” on the system where the collateral is recorded. The opinion giver may also have to determine whether the buyer or secured party in fact has “control” of that collateral, which will also depend on whether in fact the relevant steps have been taken to obtain control under the terms of the CER or the system on which the CER is recorded.

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<sup>108</sup> See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 *Bus.Law.* 1277 (August 2008);

<sup>109</sup> UCC § 12-107, Comment 3. See also § 12-105, Comment 7 (difficulty of proving a negative).

Given these difficulties, as a matter of customary practice, when an opinion addresses assets with negotiable characteristics, such as the Amendments provide for CERs, controllable accounts, and controllable payment intangibles, and electronic money, such as deposit accounts, securities accounts, securities, and instruments, it is customary for the opinion to include assumptions<sup>110</sup> on many of the elements of the opinion.<sup>111</sup> These assumptions<sup>112</sup> include:

- Applicable law,<sup>113</sup>
- The transferor's ownership of an interest in the asset being sold or in which a security interest has been created,<sup>114</sup>

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<sup>110</sup> If reliance on an unstated assumption is unreasonable and the information is "unreliable", the opinion giver should not rely on it. TriBar II, § 2.1.4. In addition, the opinion giver should not provide opinions that the opinion giver believes, in the circumstances, will mislead the opinion recipient. TriBar II, § 1.4(d).

<sup>111</sup> TriBar II, § [•]; TriBar Article 9 Report, §§ [•]; TriBar Secondary Sales Report, §§ [•].

<sup>112</sup> These sample assumptions use (i) the term "asset" to refer, as appropriate, to a CER, a controllable account, controllable payment intangible, electronic money, an electronic copy of the record evidencing chattel paper; (ii) the term "transferor" to refer to the seller of a relevant asset or the debtor creating a security interest in the asset; (iii) the term "purchaser" to refer to the buyer of the asset or the secured party receiving a security interest in the asset and (iv) "transaction" to refer to a sale of or a security interest in an asset. See above, note [•] (regarding the term "purchaser"); UCC § 9-332, Comment 2A (regarding the term "transfer"). Appropriate other terms can be substituted. As discussed above, when the asset is a controllable account or controllable payment intangible, the seller may also be a debtor and the buyer a secured party. See above, note [•].

<sup>113</sup> In the absence of an affirmative opinion on choice of law, the opinion is understood as being given under the law is covered generally by the opinion. TriBar Secondary Sales Report, § 2.6. Opinions on a deposit account control agreements and securities account control agreements customarily assume the bank's jurisdiction securities intermediary's jurisdiction in account control agreements and securities account control agreements.

<sup>114</sup> If an opinion is being given on a purchaser qualifying as a qualifying purchaser, the transferor's ownership status is not relevant as the opinion addresses the property rights received by the purchaser. TriBar Article 9 Report, § [•]; TriBar Secondary Sales Report, § [•]. No opinion should be requested for an opinion on the transferor's ownership of the transferred asset. TriBar Article 9 Report, § [•]; TriBar Secondary Sales Report, § [•].

- Characterization of the asset,<sup>115</sup>
- A transferee's absence of notice of claims to the asset or collateral,<sup>116</sup>
- The transferee's good faith,<sup>117</sup>
- Status of third parties,<sup>118</sup>
- The giving of value,<sup>119</sup>
- The steps taken to effect the transaction have occurred.<sup>120</sup>

The following are sample of assumptions that can be sued for particular opinions regarding CERs, controllable accounts, controllable payment intangibles, electronic money, and an electronic copy of the record evidencing chattel paper:

*[Choice of Law]*

The [asset's<sup>121</sup>] jurisdiction for purposes of Uniform Commercial Code Article [9] [12] is [•].<sup>122</sup>

*[Characterization]*

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<sup>115</sup> For opinions on deposit account control agreements and securities account control agreements, an assumption customarily covers the status of the relationship between the debtor and the bank or securities intermediary as creating a "deposit account" or "securities account."

<sup>116</sup> TriBar II, § 8.1(b).

<sup>117</sup> The assumption that the parties to the transaction are acting in good faith is implied in all opinions. TriBar II, § 3.3.4; TriBar Article 9 Report, § 5.3.

<sup>118</sup> Opinions on deposit account control agreements and securities account control agreements customarily assume the status of a party to the agreement as a bank or securities intermediary.

<sup>119</sup> The giving of value is usually apparent in the transaction and is customarily assume without so stating. TriBar Article 9 Report, § 3.3(b); TriBar Secondary Sales Report, § 3.2. Some expressly assume that value has been given.

<sup>120</sup> For an opinion on a certificated security, this would include the delivery of the security to the buyer or secured party. TriBar Secondary Sales Report, § 4.1.

<sup>121</sup> Substitute the appropriate type of asset where this concept applies. See above, §§ [•] and [•].

<sup>122</sup> As discussed above, this assumption would not be relevant for a security interest in electronic money or a security interest in another type of asset.

The [asset] is a [insert type of asset].<sup>123</sup>

[*Control*]

Purchaser has obtained control of the [asset].<sup>124</sup>

[*Value*<sup>125</sup> ]

Purchaser has given value for control of the [asset].

[*Good faith*]

Purchaser has acted in good faith in the [transaction].

[*Absence of notice*]

Purchaser does not have notice of a claim of a property right in the [asset].<sup>126</sup>

If an opinion giver does not rely on assumptions as to characterization and control, additional considerations come into play. Descriptions of the operation of a system are often provided system descriptions or factual

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<sup>123</sup> If the opinion giver is aware that an asset that would be a CER comes within one of the exclusions from the definition, the opinion giver should consider whether relying on the assumption is appropriate. See above, § [•]. Similarly if “money is in the form of a deposit account the opinion giver should consider whether relying on the assumption is appropriate. See above, § [•].

<sup>124</sup> If the secured party is aware that more than one person has control of the asset and the arrangement does not satisfy the meaning of “share”, the opinion giver should consider whether to use this assumption or whether to qualify it. See above § [•]. Similarly, if the opinion giver is aware that the purchaser has control through another person, the secured party should confirm that the other person has acknowledged that it has control “on behalf of” the secured party and that the other person is not the transferor. See above § [•].

<sup>125</sup> As discussed above, the term “value” for this purpose has the meaning of “value” in UCC Article 4 (§ 3-303(a)) and not the meaning of value in Article 1 (§ 1-204). See above note [•].

<sup>126</sup> This assumption is relevant for a CER only if the opinion addresses the purchaser’s status as a qualifying purchaser. This assumption is worded to correspond to UCC § 12-102(a)(2), which applies to CERs, controllable accounts, and controllable payment intangibles. Different wording would be used for non-temporal priorities in , an electronic copy of the record evidencing chattel paper (UCC § 9-330(a) and (b)), electronic money (§ 9-332(b)).

summaries. It may be difficult for the opinion giver obtain assurance that the system description is “the” appropriate system description. The descriptions may be highly technical in nature and not within the regular competence of a lawyer to evaluate. Opinion givers issuing opinions with respect to CERs, controllable accounts, controllable payment intangibles,, an electronic copy of the record evidencing chattel paper, and electronic money may rely on system descriptions and other factual summaries which have been provided to them by others or obtained from the web page of the relevant system, unless the opinion giver believes, in the circumstances, will mislead the opinion recipient.<sup>127</sup> Opinion givers issuing opinions with respect to these assets are not required to determine whether the statements in system descriptions and other factual summaries are accurate.

The language of the opinion should follow carefully the relevant statutory text, especially for any limited “priority” opinions. The “take free” and “priority” rules apply only to certain other rights as stated in the UCC and the wording of the opinion should strictly follow the words of the UCC.

*C. Sample opinion language*

These samples do not address where a secured party perfects a security interest by filing of a financing statement.<sup>128</sup> An opinion giver should review discussion in this report of the relevant facts for a particular type of asset and include the relevant assumptions for the kind of assent involved.

*Opinion on attachment of a security interest.*

“The Security Agreement is effective to create in favor of Secured Party a security interest in the [assets]”<sup>129</sup>

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<sup>127</sup> See above, note [•].

<sup>128</sup> The TriBar Article 9 Report provides guidance on that circumstance.

<sup>129</sup> If the asset is a controllable account or controllable payment intangible the collateral description in the security agreement should also refer both to those assets (as applicable) *and* to the CER that evidences the controllable account or controllable payment intangible. See above, note [•].

*Opinion on control of a CER, a controllable account, a controllable payment intangible, an electronic copy of the record evidencing chattel paper and electronic money.*

‘The security interest in the [asset] [is perfected by control] [will be perfected by control upon] [•].’

*Priority of security interest.*<sup>130</sup>

‘The security interest in the [asset] will be prior to any other security interest created under Article 9 that is not perfected by control.’

*Qualifying purchaser.*<sup>131</sup>

‘[Purchaser] will be a qualifying purchaser and will acquire its rights in the [asset] free of a claim of a property right in the [asset].’

## **V. Conclusion**

Opinions on the types of assets covered by the Amendments will involve learning new terminology and perfection procedures. With careful study, opinions can be given on these new matters.

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<sup>130</sup> The wording of this opinion is based on UCC § 9-326A.

<sup>131</sup> The wording of this opinion is based on UCC § 12-104(e).

**APPENDIX A [update]**

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