

Florida’s New UCC Article 12, Secured Transactions for Digital Assets, and Associated UCC Amendments¹ *White Paper Ver_20230118*

The Uniform Law Commission (“ULC”)² recently proposed an expansion of the Uniform Commercial Code (“UCC”)³ to establish a baseline framework allowing creditors to secure liens on digital assets owned by debtors. This new UCC Article 12 includes a definition intended to describe certain digital assets as “controllable electronic records” (“CERs”). The basis of Article 12’s foundation is UCC Article 9, Secured Transactions, Fla.Stat. 679.1011 - 679.808. The UCC updates clarify debtor creditor relationships and other related transactions for emerging technologies like cryptocurrencies,⁴ distributed ledger technology (“DLT”),⁵ blockchains, non-fungible tokens (“NFTs”),⁶ and certain blockchain-based smart contract systems. The amendments provide commercial law defaults and gap fillers for a new category of transactions: the transfer and leveraging of cryptocurrencies and other similar digital assets.

¹ This White Paper was prepared by a Joint Task Force between the Florida Bar - Business Law Section’s Blockchain and Digital Assets Committee and the Section’s UCC/Bankruptcy Committee. The Joint Task Force’s chairs, Robert Kain, Michael Dunn and Jaime Leggett would like to recognize task force members Josh Lida, BLS fellow Adam Gilbert, and BLS scholars Zachary Hunt, Devin Gobin, Chris Cabrera, and Jen Shiner for their contributions to this White Paper. Notable invaluable contributions were also made by Drew Hinkes, for his work as an Advisor for the Uniform Law Commission’s Article 12, and Prof. Zachary Catanzaro for his academic guidance.

² The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

³ The UCC was promulgated by the ULC and codified in Florida as Fla. Stat. 668-688 (2022). Florida’s UCC provides commercial law rules for broad categories of transactions: UCC Article 2, Fla.Stat. 671, for the sale or lease of goods; Article 3, Fla.Stat. 673, for negotiable instruments (e.g., bank checks); Article 4, Fla.Stat. 674, bank deposits and collections; Article 4a, Fla.Stat. 670, funds transfers; Article 5, Fla.Stat. 675, letters of credit Article 7, Fla.Stat. 677, documents of title; Article 9-106 [RK check cite], Fla.Stat. 678, investment property; and Article 9, Fla.Stat. 679, secured transactions. Today the UCC is the backbone of United States commerce, giving all Americans the legal structure necessary to have confidence when transacting business with strangers.

⁴ Virtual currencies are not fiat currency issued by a government. In August 2022, Barron’s reported the market cap of cryptocurrencies declined to \$1 trillion from nearly \$3 trillion in November 2021. Barron’s “NFTs Are a Favorite With Crooks,” August 29, 2022, at <https://www.barrons.com/articles/nft-crypto-crime-money-laundering-theft-51661527122>, last accessed Sept. 28, 2022.

⁵ Decentralized financing systems or DiFi use DLT to cut out middlemen involved in money transactions. DeFi, by executing applications on distributed ledgers with “smart contracts” can automatically unlock money transactions between parties or peers once certain contractual conditions are met. – Source Wall Street Journal June 2022.

⁶ In the spring of 2021, Beeple’s “Everydays” collage, represented as an NFT token, was sold by Christie’s auction house for \$69 million. –source CNBC, March 2021. In 2021, there were more than 2.5 million crypto wallets belonging to people holding or trading NFTs. In 2020, there were only about 90,000 crypto wallets. – source CNBC. In 2021, there were 2.3 million NFT buyers, up from 75,000 NFT buyers in 2020. – source CNBC. Barron’s reported that NFT digital assets “hit \$44 billion in value in 2021, ... rising from almost nothing in 2019. Prices have since dipped but the market is still worth an estimated \$30 billion. ... Hollywood has caught on with celebrity endorsements and movie deals for characters. Companies including Anheuser-Busch InBev [], Gucci, and Adidas [] have launched NFT projects.” – source Barron’s Feb 2022. By mid-December 2022, NFT valuations have dropped by 80% since June 2021.

While these are technologies in their nascent years, there are already robust markets accounting for billions of dollars' worth of transactions, many of which are peer-to-peer and conducted directly between individuals. Creators, investors, and builders would benefit from clear rules, laws, and guidelines to allow for effective securitization of digital assets.

Florida should adopt the proposed amendments to reduce friction while providing protections to market participants engaged in transactions involving these technologies and assets. In December 2022, Florida's Office of Financial Regulation (OFR) generally endorsed UCC Article 12 and related UCC amendment in its Assessment of Commerce and Regulatory Issues Presented by Blockchain Technology and Virtual Currency.⁷ By not adopting the UCC amendments there will continue to be a lack of clarity under the current law which will inhibit transactions, increase costs, and potentially lead to additional and protracted litigation.^{8,9,10} If adopted, Florida's UCC Article 12 would (a) promote the already booming commercial activity involving digital assets, referred to as "controllable electronic records" ("CERs"); (b) reduce friction for transacting in the various markets; (c) reduce transaction costs and the cost of credit through uniformity; (d) promote innovation as the amendments are crafted to apply to future technologies; (d) preserve uniformity of state commercial law; (e) clarify rules for money in electronic form; (f) update UCC terminology for the "web3 age"; and (g) include a grace period to preserve pre-established priorities.

A. Lack of Clarity and Regulation Hinders Digital Asset Markets

⁷ The OFR indicated that "Blockchain technology created a new asset class or type of property in the form of digital assets. Digital assets, as a type of property, are not easily incorporated into Florida's commercial laws without some change. Amendments to Florida's Uniform Commercial Code, Florida's Business Organization Code, and Florida's Unclaimed Property Act are needed to accommodate digital assets in Florida's commercial laws and to facilitate commerce and the development of the blockchain technology industry in Florida. Further, as new technologies are developed additional amendments are likely." Pg. 25. After briefly discussing UCC Article 12, the OFR explains "Practically speaking, to enable a lender to secure a lien with a digital asset represented on a blockchain, the lender must possess an exclusive right of access to the electronic code that uniquely represents the digital asset. The amendment to the UCC recognizes that control of a controllable electronic record equals possession, and thereby, the traditional rights, privileges, and remedies associated with possession of collateral and transactions in fungible mediums of exchange apply in the realm of digital assets." Pg. 27.

⁸ Crypto Assets and Property of the Bankruptcy Estate: An Analysis, Congressional Research Service, Sept. 28, 2022, <https://crsreports.congress.gov/product/pdf/LSB/LSB10832> (last accessed Nov. 25, 2022).

⁹ The criticality of proposed UCC Article 12 is highlighted by the July 2022 Chapter 11 bankruptcy filing by cryptocurrency brokerage Voyager Digital. In re Voyager Digital Holdings, Inc., case no. 22-10943 (SDNY July 5, 2022). In court, Voyager claimed that its crypto assets were assets of the estate, NOT "custodial assets" belonging to Voyager's customers. If the court held that these crypto assets were property of a bankruptcy estate and not custodial assets belonging to the customers, then the customers would be unsecured claimholders who would be paid after taxes and all other secured creditors. These proposed UCC amendments recognize that if the contractual relationship between the Voyager and its customers was "custodial," the crypto assets held by Voyager would be classified as the customer's property and NOT subject to dilution by secured creditors. See also, bankruptcy of cryptocurrency lender Celsius Network. In re Celsius Network LLC, case no. 22-10964 (SDNY July 13, 2022).

¹⁰ Miami's Mayor Suarez proposes that Miami will be the cryptocurrency capital of the world as commentators compare the city to New York. "Miami wants to become crypto's financial capital. New York's response? Bring it on," NPR.org at Dec. 25, 2021.

Current law does not have provisions specifically addressing digital assets. Many transactions using digital assets as collateral use workarounds. The *traditional, common approach* is based on UCC Article 8, as applied to transactions of general intangibles:

(1) The digital assets are transferred to a securities intermediary.¹¹

(2) The securities intermediary agrees to treat the digital assets as “financial assets”¹² and credits them to the debtor’s securities account, thereby creating a security entitlement¹³ with respect to the financial asset.

¹¹ UCC § 8-102(a)(14); Fla. Stat. 678.1021(1)(n): ““Securities intermediary” means: 1. A clearing corporation; or 2. A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.”

¹² UCC § 8-102(a)(9); Fla. Stat. 678.1021(1)(i): ““Financial asset,” except as otherwise provided in s. 678.1031, means: 1. A security; 2. An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or 3. Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this chapter. As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.” As discussed below, a CER will not be a “security” for purposes of Article 8 and can be a “financial asset” only under the third prong of the definition. New UCC §§ 8-103(h) and 12-102, Comment 2.

¹³ UCC § 8-102(a)(17); Fla. Stat. 678.1021(1)(q): ““Security entitlement” means the rights and property interest of an entitlement holder with respect to a financial asset specified in part V.”

(3) The secured party then obtains “control”¹⁴ of the security entitlement, which perfects the secured party’s security interest in the securities account.^{15,16}

Alternatively, the lender may perfect pursuant to Article 9 of the UCC, by filing a financing statement in the registry maintained in the state of “location” of the debtor to perfect its security interest.¹⁷

While the above steps may be used to legally perfect and establish a first position priority interest in the assets at issue, these steps do not address the unique technical issues required to ensure that the CERs at issue remain under a party’s “technical control.” Thus, market participants may employ a *technologic approach* to retain technical control of the subject CERs, typically by using the following steps: (i) The debtor transacts private key control of the CER to the lender or its designee, and (ii) the lender or its designee will use a multi-sig wallet (i.e., m of

¹⁴ UCC § 8-501, Comments 1 and 4. Florida’s UCC Article 8 establishes “control” by receiving or acquiring the financial asset from another. Fla. Stat. 678.5011(2)(b).

¹⁵ The new UCC amendments confirm the effectiveness of this traditional approach. See UCC § 8-102, Comment 9 and UCC §12-102, Comment 2. CERs do not include “investment property,” as defined in UCC Section 9-102(a)(49); Fla. Stat. 679.1021(1)(ww). For this reason, the rights of an entitlement holder in a CER that is a financial asset with respect to which the entitlement holder has a security entitlement are excluded from the CER definition (although the entitlement holder’s securities intermediary may hold directly an interest in a controllable electronic record that it has credited to a securities account). [RK check quote] See UCC 8-102(a)(9); Fla. Stat. 678.1021(1)(i) (defining ‘financial asset’), UCC 8-102 (a)(14), Fla. Stat. 678.1021(1)(n) (defining ‘securities intermediary’); UCC 8-102(a)(17), Fla. Stat. 678.1021(1) (q) (defining ‘security entitlement’), and UCC Comment 9; UCC 9-102(a)(49), Fla. Stat. 679.1021(1)(ww) (defining ‘investment property’). See also new UCC Section 8-103(h), clarifying that a CER is not a “financial asset” except pursuant to new UCC Section 8-102(a)(9)(iii). Proposed amendment to Fla. Stat. 678.1021(1)(i), amending Florida’s definition of “financial asset,” to add “4. A controllable account, controllable electronic record, or controllable payment intangible is not a financial asset unless Fla. Stat. 678.1021(1)(i)(3) applies.” Fla. Stat. 678.1021(1)(i)(3) states that a financial asset includes “Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this chapter. As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.”

¹⁶ Florida law defines a securities account in Fla. Stat. 678.5011(1) and (2): (1) ““Securities account” means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset. (2) Except as otherwise provided in subsections (4) and (5), a person acquires a security entitlement if a securities intermediary: (a) Indicates by book entry that a financial asset has been credited to the person’s securities account; (b) Receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person’s securities account; or (c) Becomes obligated under other law, regulation, or rule to credit a financial asset to the person’s securities account.”

¹⁷ See generally, Florida UCC Article 9, Fla. Stat. 679.3011 et seq.

n keys required to transact) to control the CER, subject to a legal agreement with a service provider that determines when the service provider may use their key to transact the CER.¹⁸

The *traditional approach* (whether using Article 8 or Article 9 perfection) fails to provide the securities intermediary or the secured party with super priority, or any legal assurance that the debtor owns the digital asset free of other property claims. In case of perfection by filing under Article 9, a party would be required to check the UCC-1 registry of all 50 states for prior filed financing statements. Further, there is no assurance the securities intermediary will acquire the digital asset free of other property claims, or assurances that the securities intermediary would take priority over first filed claims. Although the *technology approach* noted would provide technical control over the CER, it would have no legal significance. These factors create legal doubt in the transaction and risk that must be accounted for when assessing the transaction.

The UCC Article 12 revisions have procedures providing for: (a) assurance to securities intermediaries and secured party creditors they will acquire their interests free of the property claims of others, and (b) the security interest created thereby will confer upon the intermediary super-priority status.

B. UCC Article 12 Summary

B.1 In general, the amendments define a controllable electronic record or CER and provide rules for transfers of CERs to buyers and secured parties.¹⁹ A transferee will take a CER free of a claim to the CER if the transferee is a “qualifying purchaser” (“QP”). Additionally, a secured party that obtains control of the CER will have non-temporal priority over another secured party that does not have control and has perfected its security interest only by the filing of a financing statement. None of these rules exist under current law.

B.2 **Examples²⁰ and Exclusions.** The following are generally *included*: (A) Electronic accounts (generally including accounts receivable), electronic payment intangibles (including electronic promises to pay akin to notes and electronic loan agreements). (B) Cryptocurrencies and similar tokens. (C) Non-fungible tokens (NFTs) that qualify as a CER, with a limited application of the

¹⁸ 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.

¹⁹ A sale of a payment right (instruments, accounts, chattel paper, and payment intangibles) ordinarily creates a “security interest,” wherein the seller is the “debtor,” and the buyer is the “secured party” under the UCC definitions. UCC § 1-201(b)(35), Fla. Stat. 671.201(38); UCC § 9-102(a)(28)(B), Fla. Stat. 679.1021(1)(bb); and UCC § 9-102(a)(73)(D), Fla. Stat. 679.1021(1)(ttt) are subject to the application of Article 9. See UCC § 9-109(a)(3), Fla. Stat. 679.1091(1)(c) (applying Florida’s Article 9, Secured Transactions, to the “sale of accounts, chattel paper, payment intangibles, or promissory notes”). Thus, when a CER evidences a payment right, as discussed below, Article 9 applies to the sales transactions.

²⁰ The new UCC amendments will apply to these assets only if there is an “opt-in,” as described below.

amendments to assets “tethered” to the NFT. (D) Electronic (fiat) money (government initiated and adopted).²¹ The definition of CER *excludes* certain types of assets, even if they would otherwise meet the definition of a CER:²² (i) Money (fiat);²³ (ii) Investment property;²⁴ (iii) Electronic accounts and payment intangibles, if not evidenced by a CER or that lack certain other characteristics described below;²⁵ (iv) Chattel paper in electronic form;²⁶ (v) “Transferable records”²⁷ under the Uniform Electronic Transactions Act (UETA), Fla. Stat. 668.001, et seq.,²⁸

²¹ The application of the UCC amendments to sales of money is limited, as discussed below. See § XX, The UCC amendments do address money in electronic or other non-tangible form. See discussion below.

²² The definition of a CER excludes “controllable account, a controllable payment intangible, a deposit account, an electronic copy of a record evidencing chattel paper, an electronic document of title, electronic money, investment property, or a transferable record.” UCC § 12-102(a)(1), see also UCC § 12-102, Comment 2. The UCC 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.

²³ New UCC § 1-201(b)(24), proposes an amendment to “money” in Fla. Stat. 671.201(24) (“The term does not include an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by the government.”). For example, El Salvador has adopted Bitcoin as fiat currency. CBS News June 10, 2021, online at cbsnews.com. Currently “money” is defined under Florida’s UCC as “a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.” Fla. Stat. 671.201(24). As discussed below, a subset of the UCC Article 1 definition of money is addressed by the UCC Amendments in to Article 9. Certain Task Force members have suggested that the new definition of money should exclude mediums of exchange “authorized or adopted by the a government” prior to the adoption of the UCC 12 Amendments because reference to “the government” may suggest the U.S. government.

²⁴ 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.” Fla Stat. 679.1021 (1)(ww): “‘Investment property’ means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.” See the UCC 12 exclusionary provisions in footnote 22.

²⁵ See footnote 22.

²⁶ See footnote 22.

²⁷ 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 UCC 12 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.

²⁸ Fla. Stat. 668.50(16)(a) defines “transferable records” as “an electronic record that: (1.) Would be a note under chapter 673, or a document under chapter 677, if the electronic record were in writing. [and] (2.) The issuer of the electronic record expressly has agreed is a transferable record.” Fla. Stat. 668.50(2)(g): ““Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.”

and the Electronic Signature in Global Commerce Act (E-SIGN),²⁹ and (vi) Documents of Title under UCC Article 7.³⁰

B.3_What are Controllable Electronic Records (CERs) and How are They Used? Article 12 applies to outright transfers of and security interests in CERs,³¹ controllable accounts, and controllable payment intangibles. The controllable accounts, and controllable payment intangibles must have the “controllable” attribute to be a CER as discussed below. The terms and concepts used in Article 12 are also central to the proposed amendments to UCC Article 9, Fla. Stat. 679, discussed below.³²

B.3.1_UCC Article 12 defines each term in the CER. (A) A CER must first be a “record”³³ which is information stored in some manner. (B) The record must be “electronic.”³⁴ (C). The electronic record must be “controllable.”³⁵

B.3.2_NFTs: An Exemplar of a “Tethered” Asset. A non-fungible token (NFT) 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.³⁶ The

²⁹ 15 USCA §§ 7001 *et seq.*; see also Fla. Stat. 117.021 (electronic notarization).

³⁰ See footnote 22.

³¹ As discussed above, UCC Article 9, Fla. Stat. generally applies to outright transfers of payment rights. See above, footnote [•].

³² See below, § [•]

³³ UCC § 1-201(b)(31), Fla. Stat. 671.201(34): “‘Record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”

³⁴ New UCC § 1-201(b)(16A): “‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” Proposed Fla. Stat. 671.201(16A): “‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.”

³⁵ 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.” See discussion of definition of “control” below.

³⁶ An NFT is a digital asset created on a blockchain with specific attributes that distinguish it as unique to other NFTs on or off the NFT blockchain. NFTs in current use are frequently associated with an audiovisual asset which is maintained on a separate computer system. This association is created by a technical link embedded in the NFT, frequently accompanied by a legal license that determines the use rights, if any, related to that audio visual asset provided to the holder of the NFT. Although the holder or token owner of an NFT has the digital asset with the technical link to the audiovisual asset, and may have a license to use that linked audiovisual asset, in some situations any person can view the audiovisual asset associated with the NFT without any need to hold, control or own the NFT. Control of an NFT ownership token is evidenced on the blockchain; legal ownership of an NFT is a more complex question that relies upon legal rights, not records maintained on a blockchain system. The new provisions of UCC Article 12 may determine rights as to the NFT itself, but would not impact the associated

UCC Article 12 amendments do not address whether the transfer of an asset (an NFT token or coin) to which another asset³⁷ 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.³⁸ For other kinds of tethered assets, the effect of the transfer of the CER on the tethered asset is determined by law other than UCC Article 12.³⁹

B.4 Controllable Accounts and Controllable Payment Intangibles under Article 12. A controllable payment intangible⁴⁰ or a controllable account⁴¹ is an “account” or “payment intangible”⁴² that: (A) is evidenced⁴³ by a CER,⁴⁴ and (B) provides that it is payable to the

audiovisual asset, or the license related thereto. If the NFT is transacted to a new blockchain address, the technical connection to the audiovisual asset would persist; whether the license is also conveyed to the party who has taken control of the NFT is a legal question not addressed by the UCC Article 12.

³⁷ This “other asset” being the audiovisual work discussed in footnote 36.

³⁸ UCC § 12-104(f) (Rights in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible) and UCC § 12-104 Comment 9.

³⁹ UCC Article 12, Prefatory Note, 4.a, explaining that the rights or property linked to a controllable electronic record, except to the extent provided by UCC Article 12, that Article leaves to other law the question whether a purchaser’s acquisition of rights in the controllable electronic record gives the purchaser the right to receive delivery of goods, services or other rights to the tethered asset. The Note provides examples of a CER transfer related to the sale of goods.

⁴⁰ New UCC § 9-102(a)(27B) and proposed Fla. Stat. 679.1021(1)(aa2): “Controllable payment intangible’ means a payment intangible evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under Section 12-105 of the controllable electronic record.”

⁴¹ New UCC § 9-102(a)(27A) ((27A) and proposed Fla. Stat. 679.1021(1)(aa2): “Controllable account’ means an account evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under Section 12-105 of the controllable electronic record.”

⁴² “Account” is defined at UCC § 9-102(a)(2), Fla. Stat. 679.1021(b). “Payment intangible” is defined at UCC § 9-102(a)(61), Fla. Stat. 679.1021(iii).

⁴³ The UCC Amendments have unified the concept that a record that has negotiability characteristics “evidences” the underlying obligation. UCC Article 12 confers a negotiability attribute on CERs because a qualifying purchaser (QP) takes its interest free of conflicting property claims to the record. UCC Article 12, Prefatory Note, 2.a. Since purchasers of controllable accounts or controllable payment intangibles also take free of competing property claims, these rights to payment have this attribute of negotiability. *Id.* The definition of a qualifying purchaser (QP) and take free rules are discussed below at XX. As an example of this unification, For example, Fla. Stat. 672.02 would be amended to provide: “Final ~~written~~ expression; parol or extrinsic evidence.—Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (1) By course of dealing or usage of trade (s. 671.205) or by course of performance (s. 672.208); and (2) By evidence of consistent additional terms unless the court finds the writing record to have been intended also as a complete and exclusive statement of the terms of the agreement.” See new § UCC 2-202.

⁴⁴ The controllable payment intangible or controllable account is not a itself a “CER,” but 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, § [•].

person in control of the CER that evidences the controllable account or controllable payment intangible.⁴⁵

B.5_ “Control” Defined by Article 12. “Control” means that a person has each of the following powers:⁴⁶ (A) the power to avail itself of “substantially” all of the “benefits”⁴⁷ of the electronic record, (B) the “exclusive”⁴⁸ power⁴⁹ to prevent others from enjoying substantially all of the benefits of the electronic record, and (C) the power readily to identify itself as having these powers. **These powers seem to require that the secured party have a private key to the digital asset.**⁵⁰ [Need Task Force approval]

B.5.1_ “Exclusive” Defined by Article 12. The meaning of “exclusive” will allow, in some circumstances, more than one person to have the relevant power.⁵¹ A power is still exclusive even if the power is “shared” with another person,⁵² except in stated circumstances. A power is not “shared” with another person, and therefore is *not exclusive* if:⁵³ (i) The first person (the person asserting “control”) can exercise the power only if the other person also exercises the power, **and** (ii) The other person can exercise the power without the exercise of the power by the first person or the other person is the transferor⁵⁴ of an interest in the CER to the first person.⁵⁵

⁴⁵ 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” feature sometimes referred to in this White Paper. Some might want to avoid the application of the rules for controllable accounts and controllable payment intangibles to avoid the possibility that 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.

⁴⁶ 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.

⁴⁷ “Benefits” refers to the rights afforded by the CER and the uses to which the CER can be put. UCC § 12-105, Comment 3.

⁴⁸ The meaning of “exclusive” is discussed below. See § [•]

⁴⁹ 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. Currently, the secured party needs the private key to establish its power over the digital asset.

⁵⁰ *Id.*

⁵¹ This is sometimes referred to as a multi-signature or “multi-sig” arrangement.

⁵² UCC § 12-105(b): “Meaning of Exclusive. Subject to subsection (c), a power is exclusive under subsection (a)(1)(B)(i) and (ii) even if: (1) the controllable electronic record, a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded limits the use of the electronic record or has a protocol programmed to cause a change, including a transfer or loss of control or a modification of benefits afforded by the electronic record; or (2) the power is shared with another person.”

⁵³ UCC § 12-105(c): “When Power not Shared with Another Person. A power of a person is not shared with another person under subsection (b)(2) and the person’s power is not exclusive if: (1) the person can exercise the power only if the power also is exercised by the other person; and (2) the other person: (A) can exercise the power without exercise of the power by the person; or (B) is the transferor to the person of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record.”

⁵⁴ This might be the seller of the CER or a person creating a security interest in the CER.

⁵⁵ UCC § 12-105, Comment 5 has an extensive discussion and illustrations of the application of the “sharing” rule.

B.5.2 The Presumption of Exclusivity. Because of the difficulty of “proving the negative” that another person does not exist who has these powers, Article 12 creates a presumption that a person who has this power has it “exclusively”.⁵⁶ 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.⁵⁷ 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.^{58, 59}

B.6 The Take Free Rule under Article 12. 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.⁶⁰

B.7 Acquirers and Qualified Purchaser (QP) under Article 12. A person who acquires a CER will acquire all rights in the CER that the transferor had or had the power to transfer.⁶¹ 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

⁵⁶ UCC § 12-105(d): “Presumption of Exclusivity of Certain Powers. If a person has the powers specified in subsection (a)(1)(B)(i) and (ii), the powers are presumed to be exclusive.” However, UCC § 12-105, Comment 5 notes that the 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. See footnote 53 for the determining “When Power not Shared with Another Person.”

⁵⁷ 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); Fla. Stat. 679.3131(3). There are comparable rules for other types of assets where a security interest can be perfected by control. See UCC §§ 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, § [•])

⁵⁸ New UCC §§ 9-107A(b) and 12-104(a) and (b). New UCC §§ 9-107A: “Control of Controllable Electronic Record, Controllable Account, or Controllable Payment Intangible. (a) [Control under Section 12-105.] A secured party has control of a controllable electronic record as provided in Section 12-105. (b) [Control of controllable account and controllable payment intangible.] A secured party has control of a controllable account or controllable payment intangible if the secured party has control of the controllable electronic record that evidences the controllable account or controllable payment intangible.”

⁵⁹ There are significant revisions to UCC Article 9. Proposed amendments to Fla. Stat. 679.1021 include, among others, changes to the definitions of Account, Account Debtor, Accounting, Authenticate (deleted), Assignee, Assignor, Chattel Paper, Controllable Account (newly added to conform to UCC Article 12), Controllable Payment Intangible (new), Electronic Chattel Paper (effectively renamed Electronic Money), General Intangible, Good Faith (deleted), Instrument, Money, Payment Intangible, Proposal, Send (deleted), and Tangible Money (new).

⁶⁰ See generally, UCC Article 12, Prefatory Note. Article 12 rules make CERs negotiable, in the sense that a qualifying good faith purchaser (QP) for value could take a CER free of third-party claims of a property interest in the CER. UCC § 12-104(e). To receive the benefits of negotiability and take free of third-party claims of a property interest in a CER, a person must have control of the CER.

⁶¹ UCC § 12-104(d): “Shelter Principle And Purchase of Limited Interest. A purchaser of a controllable electronic record acquires all rights in the controllable electronic record that the transferor had or had power to transfer, except that a purchaser of a limited interest in a controllable electronic record acquires rights only to the extent of the interest purchased.”

asset.⁶² A “qualifying purchaser” is a person who: (A) Acquires a CER in a transaction that constitutes a “purchase” (as defined in Article 1, requiring a consensual transaction⁶³); (B) Has control⁶⁴ of the CER; (C) Gives value,⁶⁵; (D) Acts in good faith,⁶⁶; and (E) Does not have notice⁶⁷ of a claim of a property right in the CER.

B.7.1 Obtaining Control. 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.⁶⁸ 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 the acquisition of the CER by the QP, even if the acquirer from the QP would itself not qualify as a QP.

B.8 Choice of Law. The choice-of-law rule for matters covered by Article 12 applies based on the first of the following in to apply, which will determine the “controllable electronic record’s jurisdiction”: (A) A jurisdiction “expressly” provided for as the “CER’s jurisdiction” in the CER

⁶² UCC § 12-104(e): “Rights of Qualifying Purchaser. A qualifying purchaser acquires its rights in the controllable electronic record free of a claim of a property right in the controllable electronic record.”

⁶³ UCC §§ 1-201(b)(29) and (30). Fla. Stat. 671.201(32): ““Purchase” means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.” Fla. Stat. 671.201(33): ““Purchaser” means a person who takes by purchase.”

⁶⁴ The transferee may “share” control with another person. The meaning of “share” is discussed below and above. See above, Footnote 47, 48 and 51.

⁶⁵ 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. See Fla. Stat. 673.3031 (Value and consideration defined for negotiable instruments). As opposed to the value that is generally applicable to the UCC. See UCC § 1-204: “Value. Except as otherwise provided in Articles 3, 4, [and] 5, [and] 6, a person gives value for rights if the person acquires them: (1) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; (2) as security for, or in total or partial satisfaction of, a preexisting claim; (3) by accepting delivery under a preexisting contract for purchase; or (4) in return for any consideration sufficient to support a simple contract.” Fla. Stat. 671.211 Value. Except as otherwise provided with respect to negotiable instruments and bank collections as provided in ss. 673.3031, 674.2102, and 674.2111, a person gives value for rights if the person acquires them: (1) in return for a binding commitment to extend credit or for the extension immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; (2) as security for, or in total partial satisfaction of, a preexisting claim; (3) by accepting delivery under a preexisting contract for purchase; or (4) in return for any consideration sufficient to support a simple contract.”

⁶⁶ UCC § 1-201(b)(20) ““Good faith,” except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.” Fla. Stat. 671.201(20) “Good faith”, except as otherwise provided in this code, means honesty in fact and the observance of reasonable commercial standards of fair dealing.”

⁶⁷ UCC § 1-202K

⁶⁸ UCC § 12-104(a) and Comment 2. UCC § 12-104(a): “Applicability of Section to Controllable Account and Controllable Payment Intangible. This section applies to the acquisition and purchase of rights in a controllable account or controllable payment intangible, including the rights and benefits under subsections (c), (d), (e), (g), and (h) of a purchaser and qualifying purchaser, in the same manner this section applies to a controllable electronic record.”

or a record logically associated with the CER. (B) 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. (C) 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. (D) 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. (E) If the preceding clauses do not apply, Washington, DC, if Washington, DC has adopted the amendments. (F) If the preceding clauses do not apply, Washington, DC, as if Washington, DC has adopted the amendments and they are effective in Washington, DC.

B.8.1 Choice of Law related to Perfection. The same choice-of-law rule generally applies to the perfection and priority of a security interest in a CER.⁶⁹

C. Revisions to Article 9 – CERs.⁷⁰ [Task Force to revise following sections C - G]

C.1 Attachment of a security interest (Article 9, amended). 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: (A) CER – “general intangible”;⁷¹; (B) Controllable account – “account”;⁷²; (C) Controllable payment intangible – “payment intangible”.⁷³

Thus a collateral description for a CER, controllable account, or controllable payment intangible will not need to change in documents.⁷⁴

C.2 Perfection of a security interest in a CER, controllable account, and controllable payment intangible (Article 9, amended). A security interest in a CER, a controllable payment intangible, and a controllable account can be perfected by the filing of a financing statement⁷⁵ or by control.⁷⁶ A sale of a controllable payment intangible, as with any payment intangible,⁷⁷ is

⁶⁹ The Article 9 choice-of-law rules are discussed below. See below, § [•].

⁷⁰ Revisions to Article 9 applicable to “money” are discussed below.

⁷¹ UCC § 9-102(a)(42); Fla. Stat. 679.1021(pp).

⁷² UCC § 9-102(a)(2) ; Fla. Stat. 679.1021(b).

⁷³ UCC § 9-102(a)(61); Fla. Stat. 679.1021(iii). A payment intangible can also be described as a “general intangible”, because “payment intangibles” are a subset of “general intangibles”. New UCC § 9-101 Comment 5(a).

⁷⁴ 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, § [•].

⁷⁵ 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. UCC § 9-312(b)(3); Fla. Stat. 679.3121(c).

⁷⁶ UCC § 9-314(a) (“A security interest in controllable accounts, controllable electronic records, controllable payment intangibles, deposit accounts, electronic documents, electronic money, investment property, or letter-of-credit rights may be perfected by control of the collateral under Section 7-106, 9-104, 9-105A, 9-106, 9-107, or 9-107A”); proposed amendment to Fla. Stat. § 679.3141 (providing that a security interest in a CER, controllable account, or a controllable payment intangible is perfected by the secured party obtaining control of the CER).

⁷⁷ UCC § 9-309(a)(3); Fla. Stat. 679.3091(3).

automatically perfected.⁷⁸ A sale of a CER (as a “general intangible”) is not automatically perfected. Article 9 incorporates the Article 12 definition of “control” (discussed above) for CERs, controllable accounts, and controllable payment intangibles.⁷⁹

C.3_Priority of a security interest in a CER, controllable account, and controllable payment intangible (Article 9, amended). 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.⁸⁰ 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.⁸¹

C.4_Choice of law for CERs (Article 9, amended). The choice-of-law rule applies to CERs, controllable accounts, and controllable payment intangibles for matters covered by Article 12⁸²[TS-70] also applies to the perfection and priority of a security interest in a CER,⁸³ 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.⁸⁴ 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.⁸⁵

D._ Revisions to Article 9 – money (Articles 9 and 1, amended)

D.1_General meaning of “money” (Article 1, amended). Article 1 has a modified definition of “money.”⁸⁶ The Article 1 definition is subject to limits in Article 9 for purposes of transactions

⁷⁸ UCC § 9-309(a)(3). 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. UCC § 9-326A (“A security interest in a controllable account, controllable electronic record, or controllable payment intangible held by a secured party having control of the account, electronic record, or payment intangible has priority over a conflicting security interest held by a secured party that does not have control.”); proposed amendments to Fla. Stat. 679.3011-3061 (providing that a security interest in a CER, controllable account, or controllable payments intangible perfected by control has priority over a security interest in the same perfected only by filing or another method other than control)..

⁷⁹ UCC § 9-905A(a). 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. UCC § 9-905A. Would require identical amendment to Chapter 679 of the Florida Statutes to include 679.9051 .

⁸⁰ UCC § 9-326A (“A security interest in a controllable account, controllable electronic record, or controllable payment intangible held by a secured party having control of the account, electronic record, or payment intangible has priority over a conflicting security interest held by a secured party that does not have control.”); UCC § 9-326A; proposed amendments to Fla. Stat. 679.3011-3061 (providing that a security interest in a CER, controllable account, or controllable payments intangible perfected by control has priority over a security interest in the same perfected only by filing or another method other than control). In addition, if a secured party is a QP Article 9’s priority rules defer to the QP rules of Article 12. UCC § 9-331; FL Stat,679.331.

⁸¹ UCC § 9-326A; Fla. Stat. 679.326 [UCC section does not appear to match the section it is cited for? Have cited the corresponding florida statute, but there may be an error in the base document.]

⁸² See above, §

⁸³ UCC § 9-306B(a); Proposed amendment to Fla Stat. 679.3121.

⁸⁴ UCC § 9-306B(b). Proposed amendment to Fla Stat. 679.3121.

⁸⁵ UCC § 9-306B, Comment 2. Proposed amendment to Fla Stat. 679.3121.

⁸⁶ UCC § 1-201(b)(24).; Fla. Stat. 671.201(24).

covered by Article 9 (described below). The existing Article 1 definition of money already accommodates money in intangible form.⁸⁷ Under the new Article 1 definition: (A) The item must be a “medium of exchange”;⁸⁸ (B) The “medium of exchange” must have been adopted or authorized by a government, (C)The term does not include an electronic record that “existed” before it was adopted or authorized by a government as a medium of exchange.

As a result, *existing* types of digital assets (including bitcoin, which has been adopted by the governments of El Salvador and the Central African Republic as legal tender) are not “money” for UCC purposes because they existed before any government adopted the cryptocurrency as legal tender or money. (bitcoin can still be a CER).⁸⁹ This allows *sui generis* central bank digital currencies or governmentally issued digital assets that otherwise meet the definition of money to be considered money under the UCC.

D.2_Meaning of “money” under Article 9 (Article 9, amended). Article 9’s definition of “money” places limits on the Article 1 definition of “money” for purposes of Article 9: (A) 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”.⁹⁰. (B) 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”.⁹¹ Article 9 refers to money in electronic form that is controllable as “electronic money.”⁹² Thus (as described below) money in electronic form that is not controllable will not be subject to the perfection procedures for tangible money⁹³and “electronic money.” Instead money in electronic form that is not controllable will be a “general intangible.”⁹⁴

D.2.1_Perfection of a security interest in money (Article 9, amended). A security interest in tangible money can be perfected only by possession of the money, which continues the current

⁸⁷ 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.

⁸⁸ The term “medium of exchange” is not defined.

⁸⁹ 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.

⁹⁰ UCC § 9-102(a)(54A); proposed amendment to Fla. Stat. 679.1021(bbb). 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.

⁹¹ UCC § 9-102(a)(54A); proposed amendment to Fla. Stat. 679.1021(bbb). This is similar to the rule in Article 12 than an electronic record is not a “CER” if it is not “controllable”. See above, § [•].

⁹² UCC § 9-102(a)(31A); Fla. Stat. 679.1021(ee).

⁹³ UCC § 9-102(a)(79A); proposed amendment to Fla. Stat. 679.201

⁹⁴ 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); Fla Stat. 679,3101(1).

rule.⁹⁵ A security interest in “electronic money” can be perfected only⁹⁶ by control.⁹⁷ 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).⁹⁸

D.2.2_Priority of a security interest in money (Article 9, amended). 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.⁹⁹ The effect of this is that a security interest in money that is perfected by control has priority over a security interest that is not perfected by control.¹⁰⁰

E.3_Revisions to Article 9 – chattel paper

E.3.1_Definition of chattel paper (Article 9, amended). 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.¹⁰¹ As result the relevant record “evidences” the right to payment.¹⁰² The terms “tangible chattel paper” and “electron chattel paper” have been eliminated¹⁰³ and have been

⁹⁵ 3 UCC §§ 9-312(b)(3) and 9-313(a).; Fla. Stat. 679.3121(2)(c) and Fla. Stat. 679.3131(1).

⁹⁶ UCC § 9-312(b). The filing of a financing statement would not be effective to perfect a security interest in electronic money.; Fla. Stat. 679.3121(2).

⁹⁷ 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. Proposed amendment to Fla. Stat. 679.1051.

⁹⁸ UCC § 9-301(1), Comment 5; Fla. Stat. 679.3011(1) “except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.”

⁹⁹ UCC § 9-332(b); Fla. Stat. 679.332(2) “A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.”

¹⁰⁰ 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); Fla. Stat. 679.3151(4). 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.

¹⁰¹ UCC § 9-102(a)(11); Fla. Stat. 679.1021(k) chattel paper means “a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, “monetary obligation” means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include charters or other contracts involving the use or hire of a vessel or records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper. This does not change the substantive meaning of “chattel paper.”. UCC § 9-102, Comment chattel paper

¹⁰² UCC § 9-102, Comment 5.b; Fla. Stat. 679.1021.

¹⁰³ UCC § 9-102, Comment 5.b; Fla. Stat. 679.1021.

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".¹⁰⁴

E.3.2_Further Modifications (Article 9, amended). 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.¹⁰⁵

E.3.3_Perfection of a security interest in chattel paper by control (Article 9, amended). An additional¹⁰⁶ method for perfection of a security interest in chattel paper in electronic form has been added.¹⁰⁷ 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 12.¹⁰⁸ 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.¹⁰⁹

E.3.4_Perfection of a security interest by control through a third person (Article 9, amended) . 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.¹¹⁰

F._ Revisions to definitions in Article 1

¹⁰⁴ See, e.g., §§ 9-105; Fla. Stat. 679.1051 and 9-314A; Fla. Stat. 679.3141

¹⁰⁵ UCC § 9-102(a)(11); Fla. Stat. 679.1021. 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. See generally UCC § 2-102; Fla. Stat. 627.102 and 2A-102; Fla. Stat. 680.1021. This report does not discuss those matters..

¹⁰⁶ 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; Fla. Stat. 679.1051

¹⁰⁷ UCC § 9-105(c). Proposed amendment to Fla. Stat. 679.1051 to include a new subsection (3), to allow for a new form of perfection via control of an authoritative copy.

¹⁰⁸ UCC § 9-105(c). See FN 102 *Supra*

¹⁰⁹ UCC § 9-314A(a). Creating new subsection governing the perfection of possession and control of chattel paper, which would require amendment to Chapter 679 of the Florida Statutes. See also UCC § 9-330(a) and (b). UCC § 9-330(a)(1) and Fla. Stat. 679.330(1)(a) are updated to refer to "each authoritative tangible copy of the record evidencing chattel paper, and obtains control under § 9-105 (Fla. Stat. 679.105) of each authoritative electronic copy of the record evidencing chattel paper." See Proposed Amendment to UCC § 9-330(a)(1).

¹¹⁰ 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. Corresponding proposed amendment to Florida Stat, 679.1051 to include new subsection (g) would be required.

F.1_ The meaning of the term “conspicuous” has been updated (Article 1, amended).¹¹¹ The current definition has statutory examples of what satisfies the requirements of the definition (e.g., ALL CAPS). The revised UCC definition has dropped the statutory examples and instead has a “totality of the circumstances”, factors test.¹¹² The word “signed”¹¹³ has been revised to include electronic signatures.¹¹⁴

F.2_ Perfection of a security interest by control through a third person (Article 1, amended). 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.¹¹⁵

G. Transition rules

G.1_ General. The general rule is that the amendments will have immediate effect.¹¹⁶ 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.¹¹⁷

G.2_ Established priorities. The key exception to the transition rule of immediate effect is that any pre-effective date priority will stay in place for at least one year following the state’s

¹¹¹ 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. Florida Stat. 671.201 would likewise need to be amended to incorporate the “totality of the circumstances” language proposed by the amendment to UCC § 1-201(b)(10). Additionally, the proposed amendment would remove Fla. Stat. 671.201(10)(a) and (10)(b).

¹¹³ 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); Fla. Stat. 679.2031(2)(c)1. 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”); Fla Stat. 671.201(39)(definition of “send”. Not all instances of “writing” have been “replaced by “record”. See, e.g., UCC § 9- 102(a)(47) (definition of “instrument”); Fla. Stat.

679.1021(1)(uu)(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. [UNSURE HOW TO ADDRESS COMMENT TO UCC]

¹¹⁴ This should make it easier to give opinions based on agreements signed electronically. See Draft of “TriBar Report on Opinions Under 2022 Amendments to the Uniform Commercial Code Regarding Emerging Technologies,” Aug. 3, 2022.

¹¹⁵ UCC § 9-105(g). The third party may not be the person who transferred an interest in the collateral to the secured party. Id. Florida Statute 679.1051 would be amended to include an identical subsection (7).

¹¹⁶ UCC 2022 Amendments, Annex, § A-301(a) and A-305(a). Proposed transitional amendments to Chapter 673 of the Florida Statutes.

¹¹⁷ 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.

effective date.¹¹⁸ After that period (the “adjustment date”), the new priority rules will apply, even to transactions completed before the effective date.¹¹⁹ 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.

G.2.1_Example 1 (Part (i)): *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.

G.2.1_Example 1 (Part (ii)): 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.

G.2.1_Example 1 (Part (iii)): 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.

G.2.2_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.

¹¹⁸UCC 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. Proposed transitional amendment to Chapter 673 of the Florida Statutes.

¹¹⁹ UCC 2022 Amendments, Annex, § A-305(c). Proposed transitional amendment to Chapter 673 of the Florida Statutes.