

Florida’s New UCC Article 12 - Secured Transactions for Digital Assets and Associated UCC Amendments¹

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, Diane Wells, Task Force member, 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 Uniform Law Commission (“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, for bank deposits and collections; Article 4a, Fla. Stat. 670, for funds transfers; Article 5, Fla. Stat. 675, for letters of credit; Article 7, Fla. Stat. 677, for documents of title; Article 9-106 Fla. Stat. 678, for investment property; and Article 9, Fla. Stat. 679, for secured transactions. Today, the UCC is the backbone of U.S. 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. In April 2023, Bitcoin’s market cap is about \$600 billion.

⁵ Decentralized financing systems or DeFi 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 procedural 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.

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⁷ The new UCC amendments will apply to these assets only if there is an “opt-in,” as described below.

A. Introduction

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. The number of transactions occurring are likely to increase over time as the technology is adopted leading to more potential legal conflicts and questions. Creators, investors, and builders would benefit from clear rules, laws, and guidelines to allow for effective secured transactions in digital assets.

Florida should adopt the proposed amendments to reduce transaction costs while providing protections to market participants engaged in transactions involving these technologies and assets. Also, the amendments will encourage traditional market players to more readily interact with these markets and assist consumers. As of February 2023, four states have adopted Article 12 and related UCC amendments.⁸ However, Florida would be the largest state to have adopted it thus far. 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.⁹ By not adopting the UCC amendments there will continue to be a lack of clarity under the current law associated with digital assets and debtor-creditor rights which will inhibit transactions, increase costs, and potentially lead to additional and protracted litigation with results likely to be conflicting.^{10,11,12}

⁸ Indiana, New Hampshire, Iowa, and Nebraska adopted the UCC amendments.

⁹ 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.

¹⁰ 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) (herein "CRS Crypto Assets Analysis").

¹¹ 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" as evidenced by a "controllable electronic record" (a CER), the crypto assets held by Voyager would be classified as the customer's property and NOT subject to dilution by secured creditors. See CRS Crypto Assets Analysis at fnt. 7. However, Article 12 amendments to Article 9, UCC § 9-102(a)(49), exclude "investment property" which is defined in Fla. Stat. 679.1021(1)(ww). See also, bankruptcy of cryptocurrency lender Celsius Network. *In re Celsius Network LLC*, Case No. 22-10964 (S.D.N.Y. July 13, 2022).

¹² 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.

Also, since some states have adopted Article 12 and related UCC amendments, creditors relying upon Article 9's perfection by filing will risk losing priority due to the new qualifying purchaser rule and the non-temporal super-priority provided under amended Article 9, Section 9-326A.¹³ 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.

B. Lack of Clarity and Regulation Hinders Digital Asset Markets

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,¹⁴ (2) the securities intermediary agrees to treat the digital assets as "financial assets"¹⁵ and credits them to the debtor's securities account, thereby creating a security entitlement¹⁶ with respect to the financial asset, (3) the

¹³ New Sec. 9-326(a) states: "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." The non-temporal priority is discussed in Article 12 Comments 4 to amended Article 90, Section 9-105; Comment 2, Amended Section 9-330; and the Introduction to Article 12.

¹⁴ 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."

¹⁵ 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. See new UCC §§ 8-103(h) ("A controllable account, controllable electronic record, or controllable payment intangible is not a financial asset unless Section 8-102(a)(9)(iii) applies.") and 12-102, Comment 2 ("The provisions of Article 12 also do not apply to certain specified types of electronic records, and the definition has been limited accordingly. For example, the definition does not include a 'transferable record' under E-SIGN or UETA. It also does not include 'investment property,' as defined in Section 9-102(a)(49)"). UCC Section 8-102(a)(9)(iii) states "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 Article." See Fla. Stat. 678.1021(1)(i)(3) requiring an express agreement.

¹⁶ 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."

secured party then obtains complete “control”¹⁷ of the security entitlement, which perfects the secured party’s security interest in the securities account.^{18,19}

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.²⁰

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., an electronic “wallet” containing the private keys needed to access the CER which can be opened by using some or all of the “keys” (passcodes) to the wallet) 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.²¹

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

¹⁷ 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).

¹⁸ 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). 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.”

¹⁹ 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.”

²⁰ See generally, Florida UCC Article 9, Fla. Stat. 679.3011 et seq.

²¹ 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.

the debtor owns the digital asset free of other property claims. Also, these digital assets can be transferred quickly to other jurisdictions. 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 *technologic approach* described above would provide technologic control over the CER, such control would have no legal significance in a priority dispute under Articles 8 and 9 with prior perfected creditors. Mere control, without legally defined control, does not establish a priority secured interest in the assets. 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 to confer upon the intermediary super-priority status.

C. UCC Article 12 and Related Amendments

1. **Summary.** In general, the UCC amendments define a “controllable electronic record” or CER and provide rules for transfers of CERs to buyers and secured parties.²² 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 priority²³ 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.

2. **Examples²⁴ and Exclusions.** The following are generally *included*: (A) Electronic accounts (generally including accounts receivable) and 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 amendments to assets “tethered” to the NFT; and (D) Electronic (fiat) money (government-initiated and adopted).²⁵

²² A sale of a payment right (i.e., instruments, accounts, chattel paper, and payment intangibles) ordinarily creates a “security interest” with the seller being the “debtor” and the buyer being 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 any sales transactions.

²³ Non-temporal priority is expressly provided for in the UCC amendments. In other words, once the UCC amendments become effective and after the transition period (also established by the amendments), the secured interest in the CER trumps prior and post common Article 9 filings with the respective Secretary of State. See also, note 12 discussing the non-temporal nature of a CER.

²⁴ The new UCC amendments will apply to these assets only if there is an “opt-in,” as described below.

²⁵ 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.

The definition of CER *excludes* certain types of assets, even if they would otherwise meet the definition of a CER:²⁶ (i) Money (fiat);^{27,28} (ii) Investment property;^{29,30} (iii) Electronic accounts and payment intangibles, if not evidenced by a CER or that lack certain other characteristics described below;³¹ (iv) Chattel paper in electronic form;³² (v) “Transferable records”³³ under the Uniform Electronic Transactions Act (UETA), Fla. Stat. 668.001, et seq.,³⁴ and the Electronic Signature in Global Commerce Act (E-SIGN);³⁵ and (vi) Documents of Title under UCC Article 7.³⁶

The definition of CER specifically excludes “investment property”³⁷ and the amendments do not change the definitions of investment property in Article 9 or “financial asset” in Article 8.

²⁶ 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.

²⁷ 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, in 2021, 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.

²⁸ The Task Force recommends that the new definition of money should exclude mediums of exchange “authorized or adopted by ~~the a~~ government” because reference to “the government” may suggest the U.S. government.

²⁹ 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.”

³⁰ See Comment 18 to Article 8, section 8-102(9). Comments following the definition of “uncertificated security,” section 8-102(9), provide examples in which CERs may play a role in Article 8 transactions.

³¹ See footnote 23.

³² See footnote 23.

³³ The parties to an agreement can choose, by the terms of the agreement, whether a payment right that otherwise would qualify be subject to one of the following bodies of law: the UCC 12 Amendments and the UCC in general, 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 it will likely be an account not subject to Article 12.

³⁴ 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.”

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

³⁶ See footnote 23.

³⁷ See CER definition at section 12-102(a)(1), see also note 25.

The new UCC Comments for Article 8 state: “If the parties agree to treat a digital asset as a financial asset under Article 8 and the digital asset is in fact held in a securities account for an entitlement holder, the rules applicable to controllable electronic records under Article 12 would not apply to the entitlement holder’s security entitlement related to the financial asset. If the financial asset itself is a controllable electronic record, however, then the rules in Article 12 could apply to the securities intermediary’s rights with respect to the controllable electronic record if the intermediary holds the asset directly.”³⁸ The parties may agree to treat digital assets as investment property and transact them to a financial intermediary under Article 12. Although deposit control agreements may vary, it is likely that many will provide the intermediary with control as defined by Article 12.

3. **What are Controllable Electronic Records (CERs) and How are They Used?** Article 12 applies to outright transfers of and security interests in CERs,³⁹ 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.⁴⁰

4. **UCC Article 12 defines each Term of the CER.** (A) A CER must first be a “record,”⁴¹ which is information stored in some manner, “retrievable in perceivable form” (for example,

³⁸ See Comment 18 to Article 8, section 8-102(9). Comments following the definition of “uncertified security,” section 8-102(9), provide examples in which CERs may play a role in Article 8 transactions.

³⁹ As discussed above, UCC Article 9, Fla. Stat. generally applies to outright transfers of payment rights. See above, note 21.

⁴⁰ See below.

⁴¹ 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.”

identifying digital asset, debtor and lender data).⁴² (B) The record must be “electronic.”⁴³ (C). The electronic record must be “controllable.”⁴⁴

5. **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.⁴⁵ Article 12 does not address whether the transfer of an asset (an NFT token or coin) to which another asset⁴⁶ 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.⁴⁷ For other kinds of tethered assets, the

⁴² The nominal data in the example seems reasonable but it is not required by the UCC amendments. In keeping with the basic premise that the UCC provides a nominal legal framework for transactions, the marketplace most likely will impose more or less perceivable data requirements in CERs. Since the UCC defines “control” in UCC § 12-105 as requiring, inter alia, the lender to “readily identify itself in any way including by name, identifying number” etc. and similarly identify the underlying digital asset subject to the secured transaction, such data must be perceivable in some manner, either in human readable form or some decoding function provided by software platform or system supporting the CER (the Comments often refer to systems, see, for example, Comment 21, definition of “holder”, in Section 1-201, General Definitions). One may assume that the marketplace will demand higher degrees of perceivable and identifiable data in the CER if the underlying digital asset is highly transferable. The Comments often discuss identifiable aspects of the electronic record. Stated otherwise, the system maintaining the CER may impose additional obligations on an inquiring third party, such as KYC (know your customer) data, prior to decoding non-human perceivable data in the CER but this additional level of data security for anonymous data limits the transferability of the digital asset to only entities having system access.

⁴³ 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.”

⁴⁴ 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.

⁴⁵ 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 typically 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 audiovisual 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 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 UCC Article 12. The technologic implementation of CERs into blockchain systems, including embedded and off-chain smart contracts or artificial intelligence (AI) sub-systems should enable better financial processing of digital transactions.

⁴⁶ This “other asset” being the audiovisual work discussed in note 44.

⁴⁷ UCC § 12-104(f), Rights in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible, and UCC § 12-104 Comments 6 and 9.

effect of the transfer of the CER on the tethered asset is determined by law other than UCC Article 12.⁴⁸

6. Controllable Accounts and Controllable Payment Intangibles⁴⁹ Defined.

Certain CERs are subsets of payment intangibles and accounts.⁵⁰ A controllable payment intangible⁵¹ or a controllable account⁵² is an “account” or a “payment intangible”⁵³ that: (A) is evidenced⁵⁴ by a CER,⁵⁵ and (B) provides that it is payable to the person in control of the CER that evidences the controllable account or controllable payment intangible.⁵⁶ A security interest

⁴⁸ UCC Article 12, Prefatory Note, 4.a, explaining that for the rights or property linked to a controllable electronic record, except to the extent provided by UCC Article 12, UCC Article 12 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). This Prefatory Note provides examples of a CER transfer related to the sale of goods.

⁴⁹ Commentators have indicated that CERs for controllable accounts and controllable payment intangibles may be one of the best financial uses of Article 12. See ALI CLE “New UCC Article 12: Everything You Need to Know,” Jan. 27, 2023, by J. Moringiello, E. Smith and S. Weise (adrafters of Article 12).

⁵⁰ A CER is a “general intangible,” and a controllable account is an “account,” and a controllable payment intangible is a “payment intangible,” as those terms are already defined in Article 9 of the UCC. “Proposed 2022 Amendments to the Uniform Commercial Code: Digital Assets,” E. Smith, et al., ABA, Business Law Today, March 25, 2022, at <https://businesslawtoday.org/2022/03/proposed-2022-amendments-uniform-commercial-code-digital-assets/>.

Accordingly, there is no need to change collateral descriptions in security agreements or financing statements because the UCC amendments are designed to preserve the availability of existing transaction patterns. Changes to Article 9 commensurate with new Article 12 are carefully coordinated.

⁵¹ 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.”

⁵² New UCC § 9-102(a)(27A) and proposed Fla. Stat. 679.1021(1)(aa1): “‘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.”

⁵³ “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).

⁵⁴ 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 later. As an example of this unification, 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.

⁵⁵ 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.

⁵⁶ 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.

in a CER, a controllable account, or a controllable payment intangible can be perfected by the secured party obtaining “control” of the CER. A security interest in a CER, a controllable account, or a controllable payment intangible perfected by “control” would have priority over a security interest in the CER, controllable account, or controllable payment intangible perfected only by filing (or by another method other than control).

7. **“Control” Defined by Article 12.** “Control” means that a person has each of the following powers:⁵⁷ (A) the power to avail itself of “substantially” all of the “benefits”⁵⁸ of the electronic record, (B) the “exclusive”⁵⁹ power⁶⁰ 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.⁶¹ As an example, these powers require that the secured party have the private key to the digital asset⁶² even if the platform or system maintaining the CER is not available. “The goal is to embrace [CERs,] records and systems that are connected to a particular electronic record in such a manner that the information contained in or the functions performed by those ‘attached’ or ‘associated’ records are appropriately and reasonably attributable to and identifiable as connected with the electronic record itself.”⁶³

8. **“Exclusive” Defined by Article 12.** The meaning of “exclusive” will allow, in some circumstances, more than one person to have the relevant power.⁶⁴ A power is still exclusive even if the power is “shared” with another person,⁶⁵ except in stated circumstances. A power is not “shared” with another person, and therefore is *not exclusive* as required for “control” if:⁶⁶ (1) the first person (the person asserting “control”) can exercise the power only if the other person also exercises the power, **and** (2) the other person: (A) can exercise the power without the

⁵⁷ 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.

⁵⁸ “Benefits” refers to the rights afforded by the CER and the uses to which the CER can be put. UCC § 12-105, Comment 3. Examples of substantial benefits include the sale, transfer, trade, lease, lend, pledge, and encumber the asset.

⁵⁹ The meaning of “exclusive” is discussed below.

⁶⁰ 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. As an example, the secured party needs the private key to the digital asset to establish its power over the asset. See UCC § 12-105, Comment 2.

⁶¹ UCC § 12-105(a)(1)-(2).

⁶² *Id.*

⁶³ UCC 12-105, comment 2.

⁶⁴ This is sometimes referred to as a multi-signature or “multi-sig” arrangement.

⁶⁵ 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.”

⁶⁶ 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.”

exercise of the power by the first person or (B) the other person is the transferor⁶⁷ of an interest in the CER to the first person.⁶⁸

9. **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 CER power has it “exclusively”.⁶⁹ 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.^{70,71} 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.^{72,73} Several articles describe interactions between filing financial statements, non-temporal aspects, and securing an interest in a CER in addition to the example in the footnote.⁷⁴

⁶⁷ This might be the seller of the CER or a person creating a security interest in the CER.

⁶⁸ UCC § 12-105, Comment 5, discusses and illustration applications of the “sharing” rule.

⁶⁹ 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 application of § 12-105(c) causes the sharing rule of § 12-105(b)(2) not to apply. UCC § 12-105(c) does apply. See note 65, power not shared with another person.

⁷⁰ 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 it 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).

⁷¹ Several examples describing perfecting a security interest on digital assets with CERs is provided in “Explaining the 2022 UCC Amendments through Illustrations,” *The Transactional Lawyer*, S. Sepinuck, vol. 12, Oct. 2022. Mr. Sepinuck was the Associate Reporter for UCC Article 12.

⁷² 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.”

⁷³ 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).

⁷⁴ An example of a non-temporal event follows. SP-1 lends to Debtor, (i) obtains a security interest in Debtor’s accounts, payment intangibles, and general intangibles, and (ii) perfects the security interest by the filing of a financing statement. SP-2 later lends to Debtor, obtains a security interest in a CER in which is functionally an electronic promissory note payable to the person in control of the CER, and files a financing statement to perfect its security interest. SP-1’s security interest has priority under the first to file or perfect priority rule of Article 9. If SP-2 obtains control of the CER, SP-2’s security interest in the electronic promissory note is senior to SP-1’s security interest in the electronic promissory note. In this example, the CER’s security interest is non-temporal. For more examples, see “Explaining the 2022 UCC Amendments through Illustrations,” *The Transactional Lawyer*, S. Sepinuck, vol. 12, Oct. 2022.

10. **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.⁷⁵

11. **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.⁷⁶ 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 claims to the asset.⁷⁷ A QP is a person who: (a) acquires a CER in a transaction that constitutes a “purchase” (as defined in Article 1, requiring a consensual transaction⁷⁸); (b) has control⁷⁹ of the CER; (c) gives value;⁸⁰ (d) acts in good faith;⁸¹ and (e) does not have notice⁸² of a claim of a property right in the CER.

12. **Obtaining Control.** 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

⁷⁵ See generally, UCC Article 12, Prefatory Note. Article 12 rules make CERs negotiable, in the sense that a QP acting in good faith 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.

⁷⁶ 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.”

⁷⁷ A QP is similar to bona fide purchaser. See Fla. Stat. 678.302(1). 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.”

⁷⁸ 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.”

⁷⁹ The transferee may “share” control with another person. The meaning of “share” is discussed below and above. See notes 64, 65.

⁸⁰ 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; Fla. Stat. 671.201(44): “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.” See also, 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.”

⁸¹ See 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.” See also, 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.”

⁸² UCC § 1-202; Fla. Stat. 671.201(25).

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.⁸³ Because a person who acquires a CER from a QP acquires 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.

D. Choice of Law. The choice-of-law rule for matters covered by Article 12 applies based on the first of the following 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 or a record logically associated with the CER.⁸⁴ (b) If the preceding clause does not apply, a jurisdiction “expressly” provided for as the “CER’s jurisdiction” by the system or platform where 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 or platform where the CER is recorded. (e) If the preceding clauses do not apply, Washington, DC, if Washington, DC has adopted the UCC amendments. (f) If the preceding clauses do not apply, Washington, DC, as if Washington, DC has adopted the UCC amendments and they were effective in Washington, DC.

1. Choice of Law related to Perfection. The same choice-of-law rule as for security interests in other property generally applies to the perfection and priority of a security interest in a CER.⁸⁵

E. Revisions to Article 9 – CERs.⁸⁶

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, or 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”;⁸⁷ (b) controllable account – “account”;⁸⁸ or (c) controllable payment intangible – “payment intangible”.⁸⁹ Thus, a collateral

⁸³ 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.”

⁸⁴ A record can be logically associated with the CER by a system. See, for example, amendments to Article 8, Section 9-105(c) discussing a system and logical association. See also, Section 9-105(d)(meaning of exclusive).

⁸⁵ The Article 9 choice-of-law rules are discussed below..

⁸⁶ Revisions to Article 9 applicable to “money” are discussed below.

⁸⁷ UCC § 9-102(a)(42); Fla. Stat. 679.1021(pp).

⁸⁸ UCC § 9-102(a)(2) ; Fla. Stat. 679.1021(b).

⁸⁹ 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).

description for a CER, a controllable account, or a controllable payment intangible will not need to change in documents.⁹⁰

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, or a controllable account can be perfected by the filing of a financing statement⁹¹ or by acknowledged control over the CER.⁹² A sale of a controllable payment intangible, as with any payment intangible,⁹³ is automatically perfected.⁹⁴ A sale of a CER (as a “general intangible”) is *not* automatically perfected. Article 9 incorporates the Article 12 definition of “control” for CERs, controllable accounts, and controllable payment intangibles.⁹⁵

3. Priority of a security interest in a CER, controllable account, and controllable payment intangible (Article 9, as amended). A security interest perfected by “control” of a

⁹⁰ 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 UCC § 12-104(f), (Rights in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible,) and UCC § 12-104 Comments 6 and 9. Once the secured party obtains control of the CER, there is no need to change collateral descriptions in security agreements or financing statements because the UCC amendments are designed to preserve the availability of existing transaction patterns. See “Proposed 2022 Amendments to the Uniform Commercial Code: Digital Assets,” E. Smith, et al., ABA, Business Law Today, March 25, 2022, at <https://businesslawtoday.org/2022/03/proposed-2022-amendments-uniform-commercial-code-digital-assets/>.

⁹¹ 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), amending Fla. Stat. 679.3121(c).

⁹² 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 amendments to Fla. Stat. § 679.3141 will provide 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.

⁹³ UCC Amendments identified as UCC § 9-309(a)(3) will be applied to Fla. Stat. 679.3091(3).

⁹⁴ UCC § 9-309(a)(3) many amend Fla. Stat. 679.3091(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, such as filing. UCC § 9-326A may be added to Florida’s Article 9 after Fla. Stat. 679.326. UCC § 9-326A states: “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.”

⁹⁵ The ULC proposed amendments for UCC § 9-306A “Law Governing Perfection and Priority of Security Interests in Chattel Paper;” Section UCC § 9-306B “Law Governing Perfection and Priority of Security Interests in Controllable Accounts, Controllable Electronic Records, and Controllable Payment Intangibles” (no corresponding Florida UCC provision); Section UCC § 9-312. Perfection of Security Interests in Chattel Paper, Controllable Accounts, Controllable Electronic Records, Controllable Payment Intangibles, Deposit Accounts, Negotiable Documents, Goods Covered by Documents, Instruments, Investment Property, Letter-of-Credit Rights, and Money; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession;” Section UCC § 9-314A “Perfection by Possession and Control of Chattel Paper;” Section UCC § 9-326A. Priority of Security Interest in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible;” Section UCC § 9-331 “Priority of Rights of Purchasers of Controllable Accounts, Controllable Electronic Records, Controllable Payment Intangibles, Instruments, Documents, Instruments, and Securities Under Other Articles; Priority of Interests in Financial Assets and Security Entitlements and Protection Against Assertion of Claim Under Articles 8 and 12”. Changes may be required to Fla. Stat. 679.3011; .3051; .3121; .3141; and others. At this time, the Task Force cannot map these proposed UCC changes to Florida’s Article 9. Once an Article 12 bill is introduced, the Task Force will review the suggested changes and compare them to the ULC’s UCC changes.

CER (and any controllable account or controllable payment intangible evidenced by the CER) will have priority over a security interest not perfected by control.⁹⁶ This is the non-temporal, super-priority perfection function of the Article 12 amendments.⁹⁷ Unlike the qualifying purchaser (QP) provision of Article 12, the amended Article 9 priority does not require that the secured party not have notice of someone else’s property claim to the collateral.

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 12 also applies to the perfection and priority of a security interest in a CER,⁹⁸ 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.⁹⁹ 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, rather than location of the debtor.¹⁰⁰

F. **Revisions to Article 9 – Money (Articles 9 and 1, amended)**

1. **General meaning of “money” (Article 1, amended).** Article 1 has a modified definition of “money”.¹⁰¹ The Article 1 definition is subject to limits in Article 9 for purposes of transactions covered by Article 9 (described below). The existing Article 1 definition of money already accommodates money in intangible form.¹⁰² Under the new Article 1 definition: (a) the item must be a “medium of exchange”,¹⁰³ (b) the “medium of exchange” must have been adopted or authorized by a government; and (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.¹⁰⁴

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

⁹⁶ UCC § 9-326A, to be added to Florida’s UCC Article 9, states: “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.”

⁹⁷ See note 73, and also examples in “Explaining the 2022 UCC Amendments through Illustrations,” The Transactional Lawyer, S. Sepinuck, vol. 12, Oct. 2022.

⁹⁸ UCC § 9-306B(a) proposed amendment to Florida’s Article 9.

⁹⁹ UCC § 9-306B(b) proposed amendment to Florida’s Article 9.

¹⁰⁰ UCC § 9-306B, Comment 2.

¹⁰¹ UCC § 1-201(b)(24). Fla. Stat. 671.201(24) to be amended by primarily adding “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~~ a government.” The Task Force recommends this minor change referring to “a government” to avoid confusion over whether “the government” refers solely to U.S. issued currency.

¹⁰² 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.

¹⁰³ The term “medium of exchange” is not defined.

¹⁰⁴ The Task Force recommends that the new definition of money should exclude mediums of exchange “authorized or adopted by ~~the~~ a government” because reference to “the government” may suggest the U.S. government.

cryptocurrency as legal tender or money. Regardless, bitcoin can still be a CER.¹⁰⁵ 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.

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”;¹⁰⁶ and (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”.¹⁰⁷ Article 9 refers to money in electronic form that is controllable as “electronic money”.¹⁰⁸ As described below, money in electronic form that is not controllable will not be subject to the perfection procedures for tangible money¹⁰⁹ and “electronic money.” Instead, money in electronic form that is not controllable will be a “general intangible.”¹¹⁰

3. **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 rule.¹¹¹ A security interest in “electronic money” can be perfected only¹¹² by control.¹¹³ There is no special choice-of-law rule for the perfection and priority of a security interest in electronic

¹⁰⁵ 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.

¹⁰⁶ UCC § 9-102(a)(54A) may be captured by changes to Fla. Stat. 679.1021(cc)(definition of deposit account), or Fla. Stat. 679.1021(2). “(54A) ‘Money’ has the meaning in Section 1-201(b)(24), but does not include (i) a deposit account or (ii) money in an electronic form that cannot be subjected to control under Section 9-105A.” The ULC comments note that a security interest in central bank digital currency (CBDC) 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.

¹⁰⁷ 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”.

¹⁰⁸ UCC § 9-102(a)(31A) deletes “electronic chattel paper” and replaces that with “‘Electronic money’ means money in an electronic form.” Fla. Stat. 679.1021(ee) provides “‘Electronic chattel paper’ means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.” New section UCC § 9-105(a) establishes the general rules for electronic money, focused on control.

¹⁰⁹ UCC § 9-102(a)(79A); proposed amendment to Fla. Stat. 679.201.

¹¹⁰ 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) will require an amendment to Fla Stat. 679.3101(2)(h) by adding “controllable accounts, controllable electronic records, controllable payment intangibles” to the current list which includes “deposit accounts, electronic chattel paper, electronic documents, [and] investment property.”

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

¹¹² UCC § 9-312(b). The filing of a financing statement would not be effective to perfect a security interest in electronic money.

¹¹³ Control is defined in a manner similar to the definition for control of a CER, including a presumption of exclusivity, the meaning of sharing, and holding control through another person. UCC § 9-105A will require an amendment to Fla. Stat. 679.1051, control of electronic chattel paper.

money, so the default rule of the debtor’s “location” applies (unless preempted by federal law).¹¹⁴

4. **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.¹¹⁵ 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.¹¹⁶

G. **Revisions to Article 9 – Chattel Paper**

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.¹¹⁷ As result, the relevant record “evidences” the right to payment rather than being itself “chattel paper”.¹¹⁸ The terms “tangible chattel paper” and “electronic chattel paper” have been eliminated¹¹⁹ and have been replaced by references in other sections of the UCC to a “tangible copy of the record evidencing the chattel paper” and an “electronic copy of the record evidencing the chattel paper”.¹²⁰

¹¹⁴ Fla. Stat. 679.3011(1) now provides “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.”

¹¹⁵ UCC § 9-332(b). Fla. Stat. 679.332(2) currently states: “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.” The proposed amendments refer to “tangible money” and indicate that the take free rule for electronic money is supported “without acting in collusion with the debtor in violating the rights of the secured party.”

¹¹⁶ 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 ahead of others who did not have control, in collateral where money is proceeds of other collateral where the security interest in the original collateral was perfected by another method.

¹¹⁷ UCC § 9-102(a)(11). This does not change the substantive meaning of “chattel paper.” UCC § 9-102, Comment 5.b. UCC § 9-102(a)(11). Fla. Stat. 679.1021(k) defining chattel paper as “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.” The UCC amendments generally refer to chattel paper as: “a right to payment of a monetary obligation secured by specific goods, if the right to payment and security agreement are evidenced by a record.”

¹¹⁸ UCC § 9-102, Comment 5.b. See Fla. Stat. 679.1021.

¹¹⁹ UCC § 9-102, Comment 5.b. See Fla. Stat. 679.1021.

¹²⁰ See, e.g., UCC § 9-105 and Fla. Stat. 679.1051; UCC § 9-314A and Fla. Stat. 679.3141.

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.¹²¹

3. **Perfection of a security interest in chattel paper by control (Article 9, amended).** An additional method¹²² for perfection of a security interest in chattel paper in electronic form has been added.¹²³ 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 12.¹²⁴ 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.^{125,126}

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.¹²⁷

H. Revisions to definitions in Article 1

¹²¹ UCC § 9-102(a)(11), see also 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 UCC § 2A-102; Fla. Stat. 680.1021. This White Paper does not discuss those matters.

¹²² The UCC 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. UCC § 9-105, Comment 4; see also Fla. Stat. 679.1051.

¹²³ 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.

¹²⁴ UCC § 9-105(c).

¹²⁵ 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).

¹²⁶ “A secured party can perfect a security interest in chattel paper by filing. See Section 9-312(a). Alternatively, a secured party can perfect a security interest in chattel paper by taking possession of all authoritative tangible copies of the record evidencing the chattel paper and obtaining control of all authoritative electronic copies of the record evidencing chattel paper. Section 9-314A. Possession and control also are conditions for achieving priority under Section 9-330(a), (b), and (c). A secured party’s possession or control of chattel paper also may substitute for a signed security agreement for purposes of attachment under Section 9-203.” Comment 1, Article 9, Section 9-105.

¹²⁷ 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 Fla. Stat. 679.1051 includes new subsection (g).

1. **The meaning of the term “conspicuous” has been updated (Article 1, amended).**¹²⁸ The current definition of conspicuous 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.¹²⁹ The word “signed”¹³⁰ has been revised to include electronic signatures.

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.¹³¹ In providing examples of CERs perfecting security interests, commentators often refer to acknowledgement by the system or platform holding the CER.¹³²

I. **Transition rules**

1. **General.** The general rule is that the UCC amendments will have immediate effect.¹³³ 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.¹³⁴

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 (1) year following the

¹²⁸ UCC § 1-201(b)(10) (“Conspicuous,” with reference to a term, means so written, displayed, or presented that, based on the totality of the circumstances, a reasonable person against which it is to operate ought to have noticed it. Whether a term is ‘conspicuous’ or not is a decision for the court”). Because contract law in general does not have a definition of “conspicuous,” the courts look to the UCC definition for contract law purposes. Fla. Stat. 671.201 should be amended to incorporate the proposed “totality of the circumstances” language. Additionally, the proposed amendment would remove Fla. Stat. 671.201(10)(a) and (10)(b).

¹²⁹ Statutory examples are mentioned in the comments for UCC § 1-201(b)(10).

¹³⁰ The word “authenticate” has been replaced by “signed.” See, e.g., UCC § 9-203(b)(3)(A); Fla. Stat. 679.2031(2)(c)1. Also, “record” replaces “writing” in some instances in reference to electronic records. See, e.g., UCC § 1-201(b)(36) (definition of “send”); Fla Stat. 671.201(39) (definition of “send”). Some instances of “writing” remain. 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.

¹³¹ UCC § 9-105(g). The third party may not be the person who transferred an interest in the collateral to the secured party. *Id.* Fla. Stat. 679.1051 is amended to include an identical subsection (7).

¹³² Several examples describing perfecting a security interest in digital assets with CERs is provided in “Explaining the 2022 UCC Amendments through Illustrations,” *The Transactional Lawyer*, S. Sepinuck, vol. 12, Oct. 2022.

¹³³ UCC 2022 Amendments, Annex, § A-301(a) and A-305(a). Proposed transitional amendments to Chapter 673 of the Florida Statutes.

¹³⁴ 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, the court will apply the rules of Article 9 as they exist in that state under Article 9 unaffected by the Amendments.

statute's effective date.¹³⁵ After that period (the "adjustment date"), the new priority rules will apply, even to transactions completed before the effective date.¹³⁶ 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 states.

3. **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 UCC 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.

4. **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.

5. **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.

6. **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.

Fla. Bar UCC Article 12 Joint Task Force
Blockchain and Digital Assets Committee and
UCC/Bankruptcy Committee
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¹³⁵UCC 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.

¹³⁶ UCC 2022 Amendments, Annex, § A-305(c).