



GENERAL STATUTES COMMISSION

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MEMORANDUM

To: General Statutes Commission
From: David Unwin, Revisor of Statutes
Re: Summary of UCC Fifth Draft
Date: October 3, 2023

This memorandum summarizes the UCC Fifth Draft, which adapts the latest amendments promulgated by the Uniform Law Commission relating to emerging technologies. The draft also includes numerous technical changes that are not discussed in this memorandum. The draft is organized into six parts:

- Part I adds a new Article 12 ("Controllable Electronic Records") to the UCC.
- Part II amends Article 9 ("Secured Transactions") of the UCC by making conforming changes and other amendments relating to emerging technologies.
- Part III amends Articles 1, 2, 2A, 3, 4A, 5, 7, and 8 of the UCC by making conforming changes and other amendments relating to emerging technologies.
- Part IV makes additional conforming changes outside the UCC.
- Part V sets out transitional provisions.
- Part VI directs the printing of drafters comments and provides an effective date.

Part I adds a new Article 12 ("Controllable Electronic Records") to the UCC. This Article discusses three types of new assets, controllable electronic records (defined in G.S. 25-12-102) and controllable accounts and controllable payment intangibles (both defined in G.S. 25-9-102). Controllable accounts and controllable payment intangibles are evidenced by controllable electronic records. The primary substantive provisions of Article 12 are as follows:

- G.S. 25-12-104 discusses what rights a purchaser of one of these three new types of assets acquires. A purchaser of one of these three types of assets acquires all rights in the asset that the seller had or had the power to transfer. A purchaser of a controllable electronic record ("CER") for value, in good faith, and without notice of a third-party claim in the CER (defined as a qualifying purchaser) acquires rights in the CER free of any third-party claim. A qualifying purchaser of a controllable account or controllable payment intangible also acquires rights in the property interest free of any third-party claim; however, for other types of property interest evidenced by a CER, a qualifying purchaser takes the property interest subject to a third-party claim.
- G.S. 25-12-105 provides that a person has control of a CER if the person can readily identify itself as having the power to avail itself of substantially all the benefit of the CER, the exclusive power to prevent others from availing themselves of substantially all the benefit of the CER, and the exclusive power to transfer control of the CER to another person. Control is necessary for a record to be a CER and for a purchaser to be a qualifying purchaser. Under G.S. 25-9-107.1 and G.S. 25-9-314, control is also a method of perfecting a security interest in a CER, and under G.S. 25-9-326.1, a secured party with control has priority over a secured party without control.

- G.S. 25-12-106 discusses in which circumstances an account debtor on a controllable account or controllable payment intangible may discharge its obligation by paying a person who formerly had control of the associated CER. (In any event, an account debtor may pay the person who currently has control of the associated CER.) Generally, if the account debtor is notified that control of the associated CER has been transferred to another person in a commercially reasonable method to which the account debtor previously agreed, the account debtor cannot discharge its obligation by paying the person who formerly had control.
- G.S. 25-12-107 presents a waterfall of rules for determining a CER's jurisdiction and the governing law.

Part II amends Article 9 ("Secured Transactions") of the UCC by making conforming changes and other amendments relating to emerging technologies. Most of these amendments can be grouped into three categories:

- Amendments Related to Article 12 ("Controllable Electronic Records"):
 - G.S. 25-9-102 includes definitions for controllable account and controllable payment intangible, two of the three new types of assets discussed in Article 12.
 - G.S. 25-9-312 and G.S. 25-9-314 provide that a security interest in a CER, controllable account, or controllable payment intangible may be perfected by filing a financing statement or by control, respectively. G.S. 25-9-107.1 provides that a secured party has control of a CER as provided by G.S. 25-12-105 and that a secured party has control of a controllable account or controllable payment intangible if the secured party has control of the associated CER. Under G.S. 25-9-326.1, a secured party with control has priority over a secured party without control.
 - G.S. 25-9-306.2 provides that generally the law of the CER's jurisdiction (as determined under G.S. 25-12-107) governs the perfection and priority of security interests in CERs, controllable accounts, and controllable payment intangibles.
 - G.S. 25-9-317(h) and (i) provide that generally a buyer of a CER, controllable account, or controllable payment intangible takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and obtains control of the asset.¹
- Amendments Related to Chattel Paper:
 - G.S. 25-9-102 contains a rewritten definition of chattel paper and eliminates the definitions of tangible chattel paper and electronic chattel paper. The rewritten definition of chattel paper addresses hybrid transactions in which a lease of goods is combined with a right to receive other property or services. If the predominant purpose of the transaction is the lease of goods, the lessee's monetary obligation falls within the definition of chattel paper.
 - G.S. 25-9-314.1 provides that a security interest in chattel paper may be perfected by taking possession of each authoritative tangible copy of the record evidencing the chattel paper and obtaining control of each authoritative electronic copy of the electronic record evidencing the chattel paper. G.S. 25-9-105 provides for when a

¹ G.S. 25-9-317(g) contains a similar provision for buyers of electronic documents.

secured party has control of an authoritative electronic copy of a record evidencing chattel paper.

- G.S. 25-9-306.1 provides for the law governing the perfection and priority of security interests in chattel paper. If chattel paper is evidenced by an authoritative electronic copy or by both an authoritative electronic copy and an authoritative tangible copy, generally the law of the chattel paper's jurisdiction governs the perfection and priority of security interests in the chattel paper. If chattel paper is evidenced only by an authoritative tangible copy, generally the law of the jurisdiction where the tangible copy is located governs the perfection and priority of security interests in the chattel paper.
 - G.S. 25-9-317(f) provides that generally a buyer of chattel paper takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and receives delivery of each authoritative tangible copy of the record evidencing the chattel paper and obtains control of each authoritative electronic copy.
- Amendments Related to Money:
 - G.S. 25-9-102 includes a new definition of money that references the definition of money in G.S. 25-1-201 but excludes a deposit account and electronic money that cannot be subjected to control under G.S. 25-9-105.1. Under G.S. 25-9-105.1, a person has control of electronic money if the person can readily identify itself as having the power to avail itself of substantially all the benefit of the electronic money, the exclusive power to prevent others from availing themselves of substantially all the benefit of the electronic money, and the exclusive power to transfer control of the electronic money to another person.
 - G.S. 25-9-332(c) provides that a transferee of electronic money takes the money free of a security interest if the transferee does not collude with the debtor against the secured party.

Part II also adds new definitions to G.S. 25-9-102 for "assignee" and "assignor" to clarify that an assignment refers to either the sale of a payment right or a security interest in a payment right. Part II also replaces the term "authenticated" with "signed" in numerous places to conform to the definitions in G.S. 25-1-102, as amended by Part III of the draft.

Part III amends Articles 1, 2, 2A, 3, 4A, 5, 7, and 8 of the UCC by making conforming changes and other amendments relating to emerging technologies. The primary amendments to Article 1 ("General Provisions") consist of the following changes to G.S. 25-1-201, the definitions section for the entire UCC:

- Rewriting the definition of "conspicuous" so that the determination of whether a term is conspicuous is based on the totality of the circumstances. The draft also removes a list of examples.
- Adding a new definition of "electronic." This standard definition is used in numerous Uniform Acts.
- Amending the definition of "money" to exclude an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated before the medium of exchange was authorized or adopted by a government. In other words, Bitcoin

is not "money" even though it has been adopted as an official currency by El Salvador and the Central African Republic.

- Amending the definition of "person" to add a protected series.
- Amending the definition of "send" to provide that a record or notification between parties may be sent to any reasonable address.
- Broadening the definition of "sign" to encompass all records, not just writings.

In Article 2 ("Sales"), the draft addresses when the article applies to hybrid transactions (newly defined in G.S. 25-2-106) that involve both a sale of goods and the provision of services, a lease of other goods, or a sale, lease, or license of other property. G.S. 25-2-102 provides that if the sale-of-goods aspects of the transaction do not predominate, only the provisions of Article 2 that relate primarily to those aspects apply and the provisions of Article 2 that relate primarily to the transaction as a whole do not apply; conversely, if the sale-of-goods aspects of the transaction predominate, Article 2 applies to the transaction but does not preclude the application of other law to aspects of the transaction that do not relate to the sale of goods.

Similarly, in Article 2A ("Leases"), the draft addresses when the article applies to hybrid leases (newly defined in G.S. 25-2A-103) that involve both a lease of goods and the provision of services, a sale of other goods, or a sale, lease, or license of other property. G.S. 25-2A-102 provides that if the lease-of-goods aspects of the transaction do not predominate, generally only the provisions of Article 2A that relate primarily to those aspects apply and the provisions of Article 2A that relate primarily to the transaction as a whole do not apply; conversely, if the lease-of-goods aspects of the transaction predominate, Article 2A applies to the transaction but does not preclude the application of other law to aspects of the transaction that do not relate to the lease of goods.

The primary amendments to Article 3 ("Negotiable Instruments") are as follows:

- G.S. 25-3-104(a) amends the definition of "negotiable instrument" to allow it to contain a choice-of-law clause and choice-of-forum clause.
- G.S. 25-3-105 defines "issue" to allow the recipient of a check to send a photograph of the check to the recipient's bank and then destroy the check. G.S. 25-3-604 provides that this destruction does not discharge the payment obligation.

The primary amendment in Article 4A ("Funds Transfers") is to amend G.S. 25-4A-201 to provide that a security procedure for payment orders may impose an obligation on a receiving bank or customer and that requiring a payment order to be sent from a known email address, IP address, or telephone number is not by itself a security procedure.

The primary amendment in Article 5 ("Letters of Credit") is to amend G.S. 25-5-116 to clarify that, for purposes of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, a branch of a bank is located at the address indicated in the branch's letter of credit or, if more than one address is indicated, the address from which the letter of credit was issued.

The primary amendment in Article 7 ("Documents of Title") is to add an additional safe harbor to G.S. 25-7-106, which establishes when a person has "control" of an electronic document of title. A person has control of an electronic document of title if the person (i) can readily identify each electronic copy as being either authoritative or nonauthoritative, (ii) can readily identify itself as the person to which each authoritative electronic copy was issued or transferred, and (iii) has

the exclusive power to prevent others from adding or changing the person to which each authoritative electronic copy has been issued or transferred and the exclusive power to transfer control of each authoritative electronic copy.

The primary amendments to Article 8 ("Investment Securities") are as follows:

- Adds G.S. 25-8-103(h), which provides that, unless otherwise agreed by a securities intermediary and customer, a controllable account, controllable electronic record, or controllable payment intangible is not a financial asset and thus not subject to the indirect holding system rules of Part 5 of Article 8.
- Amends G.S. 25-8-106(d) to provide that a purchaser has control of a security entitlement if another person, other than the transferor to the purchaser of the security entitlement, has control of the security entitlement and acknowledges that it has control on behalf of the purchaser. For reference, a customer who holds a financial asset through a securities intermediary has a security entitlement to the financial asset.
- Adds G.S. 25-8-110(g), which provides that the law of the issuer's jurisdiction or securities intermediary's jurisdiction generally governs a matter or transaction under Article 8 even if the matter or transaction bears no relation to the jurisdiction.

Throughout Part III, the draft also makes changes to conform to the revised definition of "sign" and replaces or supplements references to a "writing" with references to a "record."

Part IV makes other technical conforming changes outside of the UCC.

Part V consists of transitional provisions. Amended Article 9 and Article 12 generally apply to transactions, liens, and other property interests entered into, created, or acquired before, on, or after the effective date. The remainder of the draft applies only prospectively. The draft also provides a period of adjustment to perfect security interests.

Part VI authorizes the printing of drafters comments and provides an effective date of October 1, 2024.

Below is a table providing examples of some of the terms used in the draft:

Term (by Article)	Examples
Account (Articles 9 and 12)	Right to payment relating to goods or services; right to payment arising from the use of a credit card
Chattel paper (Article 9)	Right to payment under an installment sale contract or personal property lease
Controllable electronic record (Articles 9 and 12)	Electronic record capable of being controlled that evidences a right to payment; cryptocurrency
Document of title (Article 7)	Bill of lading; warehouse receipt
Financial asset (Article 8)	Publicly traded security; money market instrument
Instrument (Articles 3 and 9)	Check; promissory note
Payment intangible (Articles 9 and 12)	Catch-all term for right to payment that is not an account, chattel paper, or other defined type of collateral; right to payment of a loan of funds that is not evidenced by chattel paper or an instrument