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Mo' Money Mo' Problems: More on the Changes to the UCC's Definitions of Money – UCC 9-102(a)(54A) – Part Four

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The following article is part four of our series on the 2022 Amendments to the UCC. You can find the previous articles here. Our last article explored the amendments to the main definition of "money" in Article 1 of the UCC. We promised to look at the amended money-related definitions in Article 9 in another article. Well, here we go.

UCC Article 9 (Secured Transactions) did not have its own definition of "money" before the 2022 Amendments. Now the 2022 Amendments have added a definition, which is basically the same as the Article 1 definition (i.e., "a medium of exchange that is currently authorized or adopted by a domestic or foreign government"), except that the Article 9 definition *excludes* from the definition of money (i) a deposit account and (ii) money in electronic form that cannot be subjected to control under Section 9-105A.[1] The reason for excluding deposit accounts is because of the changes to the definition of "money" in Article 1 and because the UCC already provides for how a deposit account can be secured. The reason for excluding money in electronic form that cannot be subject to control from the Article 9 definition is that such money is not something that can be secured like other money—it would be a general intangible under Article 9.[2]

But recent developments in the market potentially complicate what is deemed to be a "deposit account." Major banks (such as JPMorgan, read more here and here] and Citibank) have implemented permissioned blockchain solutions permitting their customers to transact with funds on deposit via tokenized coins. While bank regulators might regard bank deposits as a kind of money,[3] what about the UCC? Are deposit tokens "money" under the new Article 9 definition?

The answer turns on whether or not such deposit tokens are "deposit accounts," and would therefore be excluded from Article 9 "money." And, as with so much in the 2022 Amendments, the law looks to the technology for answers.

For example, let's say that Bank A creates a "Bank A Coin" token for deposited funds. Further, let's say that the permissioned blockchain system where Bank A Coin resides functions, not only as a payment rail, but also as Bank A's deposit account ledger itself. On those facts, Bank A Coin would seem to be a deposit account, analogous to a deposit on a traditional off-chain ledger. But what if Bank A Coin was just a tokenized *representation* of a deposit held in a traditional ledger off-chain, a kind of shadow token. Would Bank A Coin be a deposit account in that case? Less clear.

Even if Bank A Coin is not a deposit account, though, does it pass muster under the other tests for Article 9 "money" that are inherited from Article 1? In particular, would the Bank A Coin be currently "authorized" or "adopted" by a government as a medium of exchange? Even if Bank A obtained approval for the Bank A Coin solution from its prudential banking regulator, for UCC purposes, without some kind of new regulation from the Department of Treasury blessing such approval as being tantamount to governmental authorization or adoption of the Bank A Coin, the Bank A Coin would not be deemed money under the UCC. And that means that, unless things change, from an Article 9 perspective the Bank A Coin would potentially be subject to the provisions of Article 12 (see below).

The second exclusion in the Article 9 definition deals with "control". We are familiar with possessory control of tangible money (e.g., put bills and coins under your mattress) and Section 9-104 control of deposit accounts (DACAs, anyone?). But the 2022 Amendments to Article 9 add a new set of principles for taking control of "electronic money." (The 2022 Amendments define "electronic money" as, naturally, "money in electronic form"[4]).

These control principles for electronic money are set out in new Section 9-105A, and track the rules created under Article 12 for control of "controllable electronic records" ("CERs"). Such control principles reference three powers: they require the electronic money (or a logically related record or system) to give the controlling party (i) the power to avail itself of substantially all the benefit of the electronic money, (ii) the *exclusive* power to prevent others from availing themselves of substantially all the benefit of the electronic money, and (iii) the *exclusive* power to transfer control of the electronic money to another person.**[5]** (You can find some of our deeper dives into the concepts of control and the nuts and bolts of Article 12 **here** and **here.**

If these rules for control strike you as kind of open-ended, that is exactly their intent. The 2022 Amendments seek to be technology-neutral, and once again demand those interpreting the law to look to the tech.

In other words, when money that is not excluded from Article 9's definition is subjected to control pursuant to Section 9-105A, lawyers will have to look under the hood of technological control mechanisms—how crypto wallets work, how tokens are programmed, how blockchain protocols are governed, and so on—to figure out if tokens like Bank A Coin are capable of being "controlled", and thus can be considered "money" under Article 9.

Why bother with all this?" After all, Bitcoin is not considered "money" for UCC purposes, and stablecoins like UST or USDC are not considered money either (they're probably best classified as CERs). The reason all of this matters is because UCC characterizations of assets are not optional— every asset must be defined as one thing or another. And it is important to understand whether the cryptocurrency token you are dealing with is or is not "money" under Article 9 because the answer can have serious knock-on ramifications.

For example, even though one token might look identical to another technologically, how the tokens are characterized under Article 9 makes a difference in how to perfect a security interest by control over that token. "Control" for electronic money is different from "control" for deposit accounts, which in turn is different from "control" for uncertificated securities, for electronic chattel paper, for transferable records, for CERs, and so on. In sum, you need to take the time to understand which rule book applies.

One additional sticky wicket regarding "money" in Article 9 exists—the question of "monetary obligations." That sneaky phrase shows up in some places in the UCC and not in others. Importantly, "accounts" and "payment intangibles" are defined under Article 9 as monetary obligations. Crucially, however, the "money" that may constitute part of such "monetary obligations" is the Article 1 definition of "money" (*not* the Article 9 definition "money").**[6]** Meaning that "monetary obligations" does *not* exclude deposit accounts or non-controllable electronic forms of money.

Here's how that works—imagine a receivable that is denominated, not in dollars, but in Bank A Coin. That receivable could be a monetary obligation and therefore an "account" or "payment intangible," even if Bank A Coin were deemed a "deposit account" and therefore in and of itself *not* "money" under Article 9.**[7]**

On the other hand, if the receivable were payable in Bitcoin or USDC (i.e., CERs), then that receivable could *not* constitute a "monetary obligation," because Bitcoin and USDC are not money under Article 1. And, for purposes of Article 9, those receivables would not be "accounts" or "payment intangibles." They would be something else.

Finally, by following the differences in the definitions of "money" in the UCC and considering whether something can be a "monetary obligation," you can go even further into the weeds. For example, "instruments," like negotiable instruments, must evidence the right to a "monetary obligation,"**[8]** but the UCC definition of "letter of credit" only requires payment or delivery of "an item of value"—not necessarily money.**[9]**

The landscape of digital asset transactions is evolving rapidly. Questions of which types of such tokens or cryptocurrencies would be considered "money" under the 2022 Amendments (and which are not) are important questions and can be quite complex. And, it is important to get the answers right so as to apply the appropriate rules for transacting with them. As more different types of "money" get invented for use on-chain, the more urgent it becomes to find answers to these questions.

The Notorious B.I.G. may not be your go-to authority for UCC analysis. But in this case, you've got to admit that he's on to something:

I don't know what they want from me

It's like the more money we come across

*The more problems we see...**[10]***

[1] UCC (Amended) §9-102(a)(54A).

[2] UCC (Amended) §9-102(a), official comment 12A.

[3] *See* Money and Payments: The U.S. Dollar in the Age of Digital Transformation, Board of Governors of the Federal Reserve (Jan 2022), Appendix B. **https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf**

[4] UCC (Amended) §9-102(a)(31A).

[5] UCC (Amended) §9-105A(a)(1)(A), (B). For the parallel control rules for CERs, *see* UCC (Amended) §12-105(a)(1)(A), (B).

[6] UCC (Amended) §9-102, official comment 12A.

[7] Those receivables could even be "controllable accounts" or "controllable payment intangibles" under Article 12—which in many ways could be considered even *better* than plain accounts or payment intangibles. *See* our discussion of controllable accounts and controllable payment intangibles here **https://natlawreview.com/article/new-ucc-article-12-matters-to-more-just-cryptocurrency**.

[8] UCC (Amended) §9-102(a)(47).

[9] UCC (Amended) §5-102(a)(10).

[10] Bernard Edwards, Christopher Wallace, J Phillips, Mason Betha, Nile Gregory Rodgers, Sean Combs, Steve Jordan, "Mo Money Mo Problems," lyrics © Sony/ATV Music Publishing LLC, Warner Chappell Music, Inc - link **here**.