

The Banking Law Journal

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I've Read the U.C.C. Amendments So You Do Not Have To – Part II

*By Mercedes Kelley Tunstall**

This series examines the impact of the 2022 amendments to the Uniform Commercial Code (U.C.C.). In this second part, the author discusses changes to the U.C.C.'s definition of "money."

The reason that the definition of money has been changed in the 2022 amendments (the 2022 Amendments) to the Uniform Commercial Code (UCC) is to accommodate and address the rise of digital assets and cryptocurrency. Please note that this Part II addresses the main definition of "money" in the U.C.C. – the definition that appears in the General Provisions. Article 9 has additional money-related definitions that are not addressed here.

As noted in Part I of this series, the 2022 Amendments include an entirely new Article 12 that deals with "Controllable Electronic Records" which is the U.C.C. term for cryptocurrencies like Bitcoin, Ethereum and Litecoin.

This means that the changes to the definition of "money" are to exclude these cryptocurrencies from the definition. But, note that while the definition now excludes cryptocurrencies, it does not exclude all digital assets. Specifically, a central bank digital currency (CBDC) could still meet the definition of money, for purposes of the U.C.C.

As a refresher, the Office of the Comptroller of the Currency describes CBDC as follows¹ – "CBDC is generally defined as a digital liability of a central bank that is widely available to the general public. Today in the United States, Federal Reserve notes (i.e., physical currency) are the only type of central bank money available to the general public. Like existing forms of money, a CBDC would enable the general public to make digital payments. As a liability of the Federal Reserve, however, a CBDC would be the safest digital asset available to the general public, with no associated credit or liquidity risk." They published this whitepaper on CBDC in January 2022.

Because the definition of money in the U.C.C. means "a medium of exchange that is currently authorized or adopted by a domestic or foreign government," if a government issues a CBDC of its own, then it would meet that definition.

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¹ <https://www.federalreserve.gov/central-bank-digital-currency.htm>.

Cursorily, cryptocurrencies would seem to be excluded from the definition of “money” already, as they are not generally authorized or adopted by governments as a medium of exchange. However, there have been instances where certain foreign governments, such as El Salvador, have adopted Bitcoin as legal tender, in which case Bitcoin would then be a “medium of exchange” that is “authorized or adopted” by El Salvador. To address this kind of situation, the 2022 Amendments have added the following concept to the definition of money: “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.”

The Official Comment for the money definition, which went from one paragraph to six paragraphs, explains “an existing medium of exchange created or distributed by one or more private persons is not money solely because the government of one or more countries later authorizes or adopts the pre-existing medium of exchanges.” The Official Comment provides greater elucidation of this in a set of examples, involving “spitcoin” and “beebucks.” Basically, the examples illustrate that only a digital asset or cryptocurrency that started as money (i.e., was authorized or adopted by a government to start) can be deemed money, for purposes of the U.C.C.

The reason that digital assets or cryptocurrencies that did not start as money, cannot become money for purposes of the U.C.C. is primarily because of Article 9 of the U.C.C. – the article governing secured transactions which prescribes how a perfected security interest can occur with “tangible coins, bills, notes, and the like”, which occurs through possession of those tangible items. As the previous major amendments to the U.C.C. established by introducing the term “electronic chattel paper” in 1998, money that is intangible can only have a perfected security interest when control of the intangible can be reliably transferred in a manner that allows verification of the identity of the transferor or the source of the transferor’s title to the intangible. And, a pre-existing digital asset or cryptocurrency (especially the ones in the marketplace now) cannot meet those requirements. Never fear, though, pre-existing digital asset or cryptocurrency transactions are not being ignored by the U.C.C. – that is the entire point of the new Article 12.

* * *

Editor’s note: This series will continue in the next issue of *The Banking Law Journal*.