

House Bill No. 1082
House Judiciary Committee
Testimony Presented by
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Chairman Klemin and members of the committee, thank you for the opportunity to testify on the proposed amendments to the Uniform Commercial Code. My name is Candace Zierdt, I teach in the areas of Contracts and Commercial Law, and I have been a North Dakota Commissioner to the Uniform Law Commission for 20 years. I practiced law for 12 years and I have been teaching for 34 years.

I will first explain why we need these amendments and then explain the major revisions in each section. Although there have been a few minor and major revisions to the various UCC articles since they were first written in the 1950's, none of them dealt with technological advances, except some electronic transactions. Consequently, much of the UCC is still paper based and does not recognize the updates that have occurred in digital technology. The UCC needs to keep up with technology, including digital assets, to stay relevant and useful. The proposed amendments do not add any regulatory content and they do not address other law such as taxation of digital assets or money transmission laws. In addition to some minor tweaks to the UCC, the vast majority of the updates to the UCC bring it into the 21st century by allowing creditors and debtors to use digital assets in the various UCC Articles. The amendments are not tied to any specific technology so they should encompass newer relevant technologies in the future. I will go through each Article and address the amendments within each Article. I did not address grammar changes.

Section One – Definitions

- (j) Conspicuous – removed standards relating to paper-based contracts because new technologies display terms in novel ways in electronic records, such as pop-up windows or test balloons. The courts will now consider the totality of the circumstances.
- (o) Delivery was revised to accommodate electronic documents of title.
- (q) Electronic was added to define the term and written so it can accommodate developing technologies, regardless of the medium used.

- (v) Holder now allows parties to use electronic negotiable documents, except in Article 7.
- (y) Money originally defined money to only include tangible money. The amendment broadens the term to include electronic money.
- (bb) Person is updated to include a business designated as a “protected series” because laws have begun to include protected series as a limited liability corporation. This update reflects that change.
- (kk) Send is updated to change the term “writing” to a “record) so it includes electronic transactions and eliminates the limitation that this only includes instruments.
- (ll) Sign this definition now includes the authentication or adoption of records – not just writings.

Section 2

Value excludes new Article 12 because it adopts the Article 3 definition of value.

Section 3 Choice of Law added a reference to new Article 12.

Section 4 Replaced authenticated with signed, because the definition of sign now includes records.

Section 5

Scope – Hybrid transaction are those that include goods (covered by the UCC) and services (not covered by the UCC.) The term is included because they are so prevalent now. This section now references these types of transactions and adopts the test used by the majority of the courts (predominant purpose test) to determine when the UCC will apply in sales transactions under Article 2.

Section 6

Definitions now includes the definition of a hybrid transaction for UCC Article 2.

Sections 7, 8, 9, 10, and 11 replaced writing with record.

Section 12

Scope Includes hybrid transactions in leases and identifies the predominant purpose test as the proper test to be used when determining whether Article 2A of the UCC applies.

Section 13 adds a definition of the term hybrid lease.

Section 14 eliminated the term written, so it now includes more than paper.

Sections 15, 16, 17, 18, & 19 changed writing to record.

Section 20 adds to the definition of a negotiable instrument so that it may now contain a choice of law or forum clause and it will not affect negotiability.

Section 21 updates the section to permit an instrument to be issued by an electronic transmission. This allows a bank to accept electronic images in lieu of paper.

Section 22 deleted (2) as unnecessary considering the revision of the term sign.

Section 23 amends the section to make it clear that destroying a check does not relieve liability for payment when the information is extracted and processed electronically, something very common in the banking industry.

Section 24 replaces the reference to “electronically or in writing” with the term “record” so the medium will remain neutral.

Section 25 updated to make it medium neutral and to clarify that sending an order from a known email, IP address, or phone number is not a security procedure because it is possible to make a payment order appear to be from a different email or IP address than from where it was really sent.

Sections 26, 27, 28, 29, 30, 31, 32, replaced the term writing with the term “record” or “signed record.”

Section 33 eliminated authentication by agreement or standard practice because they are no longer necessary since they are subsumed by the revised definition of “signed.”

Section 34 eliminated authentication and replaced it with record, and added subsection 4 to eliminate a potential ambiguity about a bank branch location.

Section 35 deleted the definitions of record and sign because they are included in the general definition section of Article 1 and are substantively equivalent.

Section 36 contains minor stylistic provisions that are not substantive. The other revisions are:

- (2) replaces assigned with transferred.
- (3) adds a second safe harbor that gives guidance to parties about how to comply with the requirements of (1),
- (4) and (5) explains the meaning of exclusive powers
- (6) states a presumption of exclusivity of powers.
- (7) allows a party to have control on behalf of another person.

- (8) and (9) explain that a 3rd party may have control and does not require the 3rd party to acknowledge who the other person is. The requirements for obtaining control of an electronic document of title relate to new Article 12, section 102 on definitions.

Section 37 changes writing to record and adds cross references to other parts of the UCC.

Section 38 allows a document of title to be a financial asset if the person entitled under the document and the intermediary agree. This is consistent with 8-102 and it prevents the inadvertent application of other rules.

Section 39 states when a person has control. The concept of control is important in various provisions dealing with the rights of purchasers. “Control” means a purchaser has taken the necessary steps in securities or other financial assets, so they can be sold.

- (4) (c) specifies how a purchaser can obtain control of a security entitlement and states the minimum requirements necessary to obtain control.
- (8) and (9) are taken from 9-313(8). It makes clear that a person who has control under this section does not have to acknowledge that it has or will obtain control on behalf of a purchaser.
- (9) leaves the duties of a person that acknowledges that it has or will obtain control to the agreement of the parties and other law.

Section 40 states that the law of the issuer’s or intermediary’s jurisdiction governs. This is consistent with 1-301.

Section 41 aligns the text more closely with new Article 12 (12-104).

Section 42 this section consolidates all the defined terms used in Article 9 in one place.

- (b) clarifies the meaning of account.
- (2) updated to include controllable accounts and uses the new definition of chattel paper.
- (2) (d) & (g) References to authenticate have been eliminated throughout the UCC.
- (2) (h) adds definitions of “Assignee” and “Assignor” to define those terms because they are used in Article 9 but were not previously defined.

- (2) (n) defines “Chattel paper.” “Chattel paper” is a combination of a debt obligation and a security interest if evidenced by a record. This definition eliminated the term software because it is not needed due to the updated definition of “record”, and it added the predominant purpose test (included in Article 2). It also eliminates the right to payment through charters or credit cards because they are “accounts” and not chattel paper.
- (ee) and (ff) added definitions of controllable account and controllable payment intangibles. Article 9 gives special treatment to these types of accounts, so it is appropriate to add these two definitions.
- The definition of “electronic chattel paper” in (gg) is no longer necessary because the revised definition of “chattel paper” and the approach to perfection of a security interest have eliminated the need for a separate definition of “electronic chattel paper.”
- (uu) adds the definition of “controllable electronic record” because it now comes under the definition of “general intangible.” “General intangibles” is a residual category of personal property that are not included in other defined types of collateral.
- (yy) adds “writings that evidence chattel paper” to the list of items excluded under the definition of “instrument.” This clarifies and makes explicit that an obligation on an “instrument” that evidences “chattel paper” should be treated as chattel paper and not an “instrument.”
- (ggg) updated the definition of “money”.” This ensures that even if some deposit accounts became “money” under the Article 1 definition, the provisions in Article 9 relating to perfection and priority for security interests in “deposit accounts”, and not those for “money” will apply to that collateral.
- (uuu) replaced “authenticated” with “signed” as we have done throughout all the amendments.
- The definition of “send” was deleted because it is now defined in Article 1.

- The definition of “tangible chattel paper” in (d) was deleted because a separate definition of this term is not necessary under the revised definition of “chattel paper.”

Section 43 (b) replaces “authenticated” with “signed” and (d) allows a secured party to obtain control of a “deposit account” by acknowledgement of another person, other than the debtor in control of the “deposit account.” This is consistent with the corresponding revisions in other sections of the UCC. See control of electronic deposits of title (7-106), control of a security entitlement (8-106), control of an electronic copy of a record evidencing chattel paper (9-105), control of electronic money (9-105), and control of controllable electronic records (12-105.)

Section 44 allows a secured party to perfect a security interest in chattel paper either by filing, or by taking possession and control. The changes in this section were necessary due to the changed definition of chattel paper. This section provides the requirements for obtaining control of an electronic copy of a record evidencing chattel paper.

- (1) deleted the terms “electronic chattel paper” and “tangible chattel paper” because they are no longer necessary. This is consistent with the deletions of these definitions in the previous section 43.
- (2) “purchaser” replaces the term “secured party” to be consistent with the other amendments.
- (3) provides a safe harbor, so that a party that follows this subsection can be confident that it controls an electronic copy of a record evidencing chattel paper. It also is consistent with new section 12-105 for control of controllable electronic records.
- (4) – (7) set the requirements for a purchaser to have control under this section.

Section 45 This section was necessary because the amendments have added electronic money as a term. A security interest in electronic money as original collateral may only be perfected by control and this new section states how a party can control electronic money. These requirements track new section 12-105. (5) allows a person to obtain control of electronic money by virtue of the acknowledgement by another person in control of the electronic money. This is consistent with other revisions in 7-106 (control of electronic documents of

title), 8-106 (control of security entitlement), 9-104 (control of deposit accounts), 9-105 (control of an electronic of a record evidencing chattel paper), and new 12-105 (control of controllable electronic records.)

Section 46 describes how a secured party may perfect by control by following new section 12-105.

Section 47 makes it clear that a person who has control under the sections listed does not have to acknowledge that it has or will obtain control.

Section 48 (9-203)

- (c) (1) replaces authenticate with sign.
- (4) updates this section to include the new terms used in the UCC of controllable accounts, electronic documents, and electronic money.
- (5) adds another way that a security interest is enforceable against a debtor with the new definition of chattel paper.

Section 49 pertains to after acquired property and future advances.

- (2) provides the consumer protection rule that a security interest does not attach to consumer goods with two exceptions and a security interest will not attach to a commercial tort claim.
- (4) clarifies that subsection (2) will not prevent a secured party from attaching to proceeds of consumer goods, comingled goods (consumer and non-consumer), or commercial tort claims. (An example of proceeds occurs when a consumer sells their car and receives money for it. The money paid for the car is proceeds.)

Section 50 only adds new citations

Section 51 imposes duties on a secured party who has taken control of an asset given as security.

- (2) (a) replaced authenticated with signed.
- (2) (c) Because of the updated definition of chattel paper, this subsection deleted all the references to electronic chattel paper, and it now refers to an electronic copy of chattel paper, so it is consistent with the new definition. This requires the secured party in control to transfer control as directed by the debtor.

- (2) (d) replaced authenticated with signed
- (2) (f) now only applies to electronic documents of title. It simplifies the requirement to transfer control when requested by the debtor.
- (2) (g) and (h) are new sections. (g) was added to cover electronic money and it is consistent with 41-09-05 that covers how to obtain control of electronic money. (h) was added to cover the new definition of controllable electronic record and it is consistent with the new section under Article 12 – 41-12-05.

Section 52 replaced authenticated with signed and updated references to prior amended statutes in Article 9.

Section 53 replaced authenticated with signed.

Section 54 (9-304) changed a reference to updated sections of UCC. (3) eliminated tangible chattel paper to be consistent throughout the amendments and added tangible to the term money because the new definition of money includes electronic money in addition to tangible money. This subsection does not apply to electronic money.

Section 55 applies to law governing perfection and priority of security interests in deposit accounts or certificates of deposits, so this implicates banks. It clarifies that the law of the bank's jurisdiction applies even if there is no relation to the bank's jurisdiction.

Section 56 added (e) to be consistent with Section 55.

Section 57 (9-306 (A)) is a new section covering the law that will govern perfection and priority interests in chattel paper. The section has different rules for chattel paper – depending on the type. This is due to the changes in the definition of chattel paper. This is necessary because secured lenders and debtors may be located in many different jurisdictions.

- (1) and (2) apply to chattel paper that is evidenced only by an authoritative electronic copy of the chattel paper or by an authoritative electronic copy and a tangible copy. These subsections contain the rules for determining the jurisdiction of the chattel paper.
- (3) applies to chattel paper that is only evidenced by an authoritative tangible copy but not an electronic copy. This may occur when no electronic copy exists.
- (4) applies to perfection by filing as opposed to control.

Section 58 (9-306 (b)) This section concerns how to perfect security interests and who has priority that are not covered in 41-09-26.1 (9-306 (a)).

- (1) deals with perfection of a security interest in controllable accounts, controllable electronic records, or controllable payment intangibles other than perfection by filing. These are consistent with new sections in Article 12 105 and 12-107 (c).
- (2) governs perfection by filing, although one needs to look for priority rules. This provision does not change prior law.

Section 59 (9-310)

- (h) covers the type of property that does not have to be perfected by filing because it is perfected by another method, such as possession or control and electronic chattel paper was deleted to be consistent with the new definition of chattel paper.
- (i) exempts the secured party from the filing requirement because they are perfected in a way other than filing.

Section 60 this section adds controllable accounts, controllable electronic records, and controllable payment intangibles because these types of security are consistent with the treatment of chattel paper.

- (2) (c) and (d) differentiate in tangible money and electronic money because the new definition of money includes both types of money and perfection is done differently depending on the type of money. These changes make this section consistent with prior amendments.
- (5) replaced authenticated with signed

Section 61 tangible money was added to (1) to differentiate it from electronic money. (3) changes authenticate to sign to be consistent with the new definition of sign.

Section 62 (9-314) provides for perfection by control for certain property.

- (1) removes investment property and letter of credit rights because they are covered in (3). It removes electronic chattel paper to be consistent with the new definition of chattel paper. Perfection by control of chattel paper evidenced by an authoritative electronic record (formerly defined as electronic chattel paper) is now covered in (2). Controllable accounts, controllable electronic records, and

controllable payment intangibles were added as new definitions in the definition section and they coincide with Article 12.

- (2) also adds the new terms controllable accounts, controllable electronic records, and controllable payment intangibles for the same reason they were added in (1).

Section 63 (9-314A)

- (1) states how a secured party may perfect its security interest under the new definition of “chattel paper” by possession and obtaining control of all the authoritative electronic copies. Historically, perfection of a security interest in chattel paper occurred by taking possession of the collateral which has been understood to mean taking possession of the actual paper original or wet ink “original.” However, this new section is necessary because of emerging technologies and the possibility of the same monetary obligation being evidenced by different media over time, such as when tangible records are converted to electronic records.
- (2) states the rules for the time and continuation of perfection and are consistent with 41-09-33.

Section 64 (9-316)

- (1) updates the law to the correct references for the current North Dakota statutes.
- (6) and (7) deal with changes in the jurisdiction of a bank and add the amended terms the UCC uses throughout the amendments.

Section 65 (9-317)

- (2) no longer applies to chattel paper because of the updated definition of chattel paper and the methods for perfection.
- (4) uses the updated appropriate terms.
- (6)-(9) state the rules when a buyer takes free of a security interest. These sections state the rules for the updated terms of chattel paper, electronic documents, and controllable electronic records.

Section 66 (9-323) is about future advances. The exceptions for buyers in the ordinary course of business have been deleted because, even if the buyer does not meet the requirements to take free of a security interest under 9-320 or 9-321, it still will be entitled to the benefits of

those sections which apply to buyers generally. This change is consistent with the previous amendments to Article 9.

Section 67 (9-324) (2) (b) replaced authenticated with signed

Section 68 (9-326A) adopts an approach to priority for the new type of property of controllable accounts, controllable electronic records, and controllable payment intangibles. This approach is similar to the priority rules for investment property and deposit accounts. This section does not apply if more than one person has control because that is covered in new 12-105.

Section 69 (9-330) Article 9 permits a secured party to perfect a security interest in chattel paper either by filing or possession and control. This section enables secured parties and other purchasers of chattel paper and instruments to obtain priority over earlier perfected security interests which promotes the negotiability of these types of receivables. (1) (a), (2), and (6) add the new terms of authoritative tangible copies and authoritative electronic copies and includes them in the rules relating to priority of a purchaser of chattel paper or an instrument.

Section 70 (9-331) adds the new terms of controllable accounts, controllable electronic records, and controllable payment intangibles and how to deal with priority rights of purchasers of those items. This is consistent with other amendments.

Section 71 (9-332) this section is updated to deal with the new definition of money that now includes electronic money in addition to tangible money.

Section 72 (9-334) replaces signed with authenticated.

Section 73 (9-341) replaces signed with authenticated.

Section 74 (9-401) replaces signed with authenticated.

Section 75 (9-406)

- (1) replaces signed with authenticated.
- (2) adds in new subsection (10) because this section does not apply to the new terms of controllable account and controllable payment intangibles.
- (4) is updated to include promissory notes because of the new definition of chattel paper.
- (7) also adds new (10) for the reason stated above.

- (10) makes it clear that certain sections will not apply to the new terms of controllable account or controllable payment intangible.

Section 76 (9-408) adds in promissory notes because of the new definition of chattel paper and is consistent with previous section 75.

Section 77 (9-509) replaces signed with authenticated.

Section 78 updates to current statutes.

Section 79 (9-605) covers unknown debtors or secondary obligors.

- (1) adds in the exceptions provided in (2)
- (2) states the exceptions and pertain to a situation where a secured party obtains control or attachment of the new types of collateral of controllable accounts, controllable electronic records, and controllable payment intangibles. This is because obtaining control or attachment of this type of security interest is generally a context where a secured party may know that it may be unable to comply with its duties. A secured party may protect itself by not entering transactions where it may be unable to comply with its statutory duties or by requiring disclosure of the debtor's or obligor's identity. This is consistent with **Section 86** (9-624).

Section 80 (9-608) replaces signed with authenticated.

Section 81 (9-611) replaces signed with authenticated.

Section 82 replaces signed with authenticated.

Section 83 replaces signed with authenticated.

Section 84 (9-620) replaces signed with authenticated.

Section 85 replaces signed with authenticated.

Section 86 replaces signed with authenticated.

Section 87 (9-628) add an exception for the new terms of controllable accounts, controllable electronic records, and controllable payment intangibles.

Section 88 covers the typical transitional provisions for the amendments and cross references other sections previously discussed. This includes a savings clause which ensures the rest of the statute will stand if one part is found invalid. It then clarifies dates for when the amendments

take effect and how to treat cases that come under the law that existed before the amendments.

Section 89 creates a new Article 12 pertaining to controllable electronic records. This is a major part of the effort to bring the UCC into the 21st century and beyond by adapting the UCC to emerging technologies as they might affect electronic commerce in the coming years. It applies to controllable electronic records. This article is meant to apply more broadly to electronic intangible assets that are created using existing technologies such as distributed ledger technology including blockchain which records transactions in bitcoin and other digital assets. This article is not tied to any current technology in the hope that it will apply to electronic assets that may be created in the future using new technologies. These new trends will inevitably result among various claimants to electronic records, and related rights and other benefits. Uncertainty as to how resolve these claims creates commercial risks. Article 12 is designed to reduce these risks by providing legal rules for the transfer

41-12-02 (12-102)

- (1) (a) A controllable electronic record must be susceptible to control under 41-12-05 (12-105) to be covered under Article 12. The terms record and electronic are defined in the definition section of Article 1.
- (1) (b) set the requirements to be a qualifying purchaser and were drawn from Article 3 (3-302 (a) (2)). To meet the requirements to be a qualifying purchaser all of the requirements must be satisfied. The purchaser must be able to obtain control.
- (1) (c) links a transferable record to federal law referred to as the “ESIGN ACT.”
- (1) (d) adopts the definition of value from Article 2.
- (2) and (3) links the definitions from other sections of the UCC.

41-12-03 (12-103)

- (1) in case of conflict Article 9 controls.
- (2) retains protections for consumers that exist in the UCC and other law.

41-12-04 (12-104)

- (1) applies to controllable accounts and controllable payment intangibles in the same manner that they apply to electronic records, so this is consistent with Article 9.
- (2) states how a purchaser may obtain control of a controllable account or a controllable payment intangible.
- (3) leaves to other law how questions will be resolved concerning the transfer of rights in a controllable electronic record. Subsections (4) – (8) allow some important exceptions to this. The law “other than this article” includes Article 9.
- (4) restates the “shelter principle” from Article 3. The shelter principal states when a person in possession of a note may enforce the note, as long as the note was “transferred” the person may take shelter in the rights of the transferor. It applies to the purchaser of a controllable electronic record.
- (5) under the next section (41-12-05) a person may have control of a controllable electronic record, even if the person has no property interest in the controllable electronic record. That person would not be a purchaser and so would not be eligible to be a qualifying purchaser under this section.
- (6) states an exception to (1) and (5) and makes a distinction between a controllable electronic record and controllable account or controllable payment intangible as evidenced by the controllable electronic record. A [purchaser may obtain a property interest in the controllable account or controllable payment intangible even if it does not acquire any interest in the controllable electronic record that evidences the account payment intangible. This approach is intended to avoid a trap for the unwary purchaser that obtains an interest in the account or payment intangible but might fail to acquire an interest in the related controllable electronic record, although good practice may encourage a purchaser to acquire an interest in the controllable electronic record as well.
- (7) this subsection is known as the take free rule and derives from Article 3 (3-306) which states that a holder in due course takes a negotiable instrument free of a claim in a property right in the instrument. It applies that rule to controllable

accounts, controllable electronic records, controllable accounts, and controllable payment intangibles. Because Article 3 only applies to written instruments, this article and amendments to Article 9 reach the same result for controllable accounts and controllable payment intangibles.

- (8) A financing statement that is typically filed with the Secretary of State's office is not sufficient to provide notice of a claim of a property right in a controllable electronic record.

42-12-05 (12-105) is about control. Control matters because a person must have control to come under Article 12 and only a person having control of a controllable electronic record may be eligible to be a qualifying purchaser. Also, obtaining control of a controllable electronic record is one way to perfect a security interest under Article 9. An electronic record is a "controllable electronic record" and is subject to Article 12 only if it can be subjected to control under this section. And only a person having control of a controllable electronic record is eligible to become a qualifying purchaser and thus become protected. This protection allows the person to take free of claims of a property interest in the controllable electronic record or any controllable account or controllable payment intangible evidenced by the controllable electronic record and therefor protected by the no action rule. See the previous section, 41-12-04, subsections (5) and (7.)

- (1) this section conditions control on a person's having 3 powers specified in (1) (a). (1) (b) states how this type of control gives a person a way to identify itself.
- (1) (a)(2) States what an exclusive power does. It prevents others from benefitting from the electronic record and allows the person to transfer control of the electronic record.
- (2) allows a power to remain exclusive – even if there is a limitation on the use of the electronic record or the power is shared with another person.
- (3) clarifies the meaning of when a power is "shared" ((2) (b)) by stating when a power is not shared and not exclusive. The conditions are listed in this subsection.
- (4) gives a presumption of exclusivity once it is established that a person has received those powers.

- (5) provides for control when another person acknowledges that it has control on behalf of the person claiming control. This is patterned on 9-313 (c).
- (6) states that there is no requirement that the person having control must acknowledge that it has control on behalf of another person.
- (7) acknowledging that a person has or will obtain control on behalf of another person does not impose a duty (unless stated in other law) to the other person or require confirmation of the acknowledgement.

41-12-06 (12-106) This section is consistent with Articles 3 and 9. It only applies to an account debtor that has undertaken to pay the person that has control of the controllable electronic record that evidences the obligation to pay.

- (1) states when an account debtor may discharge its obligation on the controllable account or the controllable payment intangible by payment.
- (2) protects the transferee by providing that upon effective notice that control has been transferred, the account debtor may discharge its obligation by payment. (2) (a) – (e) lists the requirements for the notice to be effective.
- (3) states how the account debtor may discharge its obligation once it has received the proper notice under this section.
- (4) states when notice under the previous section will be ineffective.
- (5) provides that, on the account debtor’s request, the person giving notice must provide reasonable proof that control of the controllable electronic record has been transferred.
- (6) provides a safe harbor for providing reasonable proof as long as the person follows the requirements listed in (6)
- (7) contains an anti-waiver provision.
- (8) this section is subordinate to other law.

41-12-07 (12-107) states the hierarchy for what law governs the transaction.

