

**Permanent Editorial Board for the Uniform Commercial Code**

**PEB COMMENTARY NO. [ ]**

**PERFECTION OF A SECURITY INTEREST IN INTANGIBLE MONEY  
AND RELATED CHOICE-OF-LAW RULES**

**Draft for Public Comment**

**August 5, 2021**

*Comments on this draft must be submitted by no later than October 4, 2021.*

Comments may be submitted by email to [UCCComments@ali.org](mailto:UCCComments@ali.org)

**This draft has been approved for publication by the PEB  
subject to revisions based on comments received.  
The PEB reserves the right to withdraw this proposed Commentary.**

The American Law Institute and the Uniform Law Commission have appointed a committee (the “Committee”) to recommend amendments to the Uniform Commercial Code to accommodate emerging technologies. The Committee is in the process of developing its recommendations. It is expected that the recommendations will include recommendations relating to the emerging market of virtual currencies including those that may qualify as “money” even though not in tangible form. While this Commentary addresses so-called “intangible money” under the current Official Text of the Uniform Commercial Code, the Committee’s recommendations may provide for the treatment of intangible money in the amended Uniform Commercial Code different from that under the current Official Text of the Code. A copy of the current draft of the recommendations may be found on the Uniform Law Commission website, Uniform Commercial Code and Emerging Technologies Committee-Uniform Law Commission ([uniformlaws.org](http://uniformlaws.org)).

## PREFACE TO PEB COMMENTARY

The Permanent Editorial Board for the Uniform Commercial Code acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The PEB has resolved to issue supplemental commentary on the UCC from time to time. The supplemental commentary of the PEB generally will be known as a *PEB Commentary*, to distinguish it from the Official Comments to the UCC. A *PEB Commentary* may be denominated a commentary, a report, or otherwise as determined by the PEB.

The Resolution states that:

The underlying purposes and policies of the *PEB Commentary* are those specified in UCC Section 1-103(a). A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the beginning of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to the inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with UCC Section 1-103(a)(2), to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and federal and state consumer protection statutes) and general principles of law and equity pursuant to UCC Section 1-103(b); or (6) to otherwise improve the operation of the UCC.

For more information about the Permanent Editorial Board for the Uniform Commercial Code, visit [www.ali.org](http://www.ali.org) or [www.uniformlaws.org](http://www.uniformlaws.org).

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**RELATED CHOICE-OF-LAW RULES**

**INTRODUCTION**

The Uniform Commercial Code (the “UCC”) contains several provisions that apply to “money” – a term that is defined in Section 1-201(b)(24) 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.” The definition does not, in so many words, require that money be tangible. It is likely that, when the definition and the provisions that use it were drafted, the drafters did not consider the possibility that money would be intangible except perhaps in very narrow circumstances.<sup>1</sup> Recent events, however, have raised the possibility that some intangible property arising in a modern context may constitute money (herein referred to as “intangible money”) under the UCC’s definition. While this Commentary does not address the application of the definition to intangible property or whether any particular governmental action has resulted in intangible money,<sup>2</sup> it does address the effect that the existence of intangible money would have on the proper interpretation of four provisions in Article 9 that refer to money – Sections 9-312(b)(3), 9-313(a), 9-301(2), and 9-301(3)(C).

Application of these four provisions to intangible money would be problematic for some commercial transactions in which the collateral includes intangible money. Under Section 9-312(b)(3), a security interest in money as original collateral may be perfected only by possession under Section 9-313.<sup>3</sup> However, because intangible property is incapable of being possessed, application of this rule to intangible money would result in a type of property as to which a security interest is impossible to perfect. Sections 9-301(2) and (3)(C) provide choice-of-law rules for perfection, the effect of perfection and non-perfection, and the priority of a security interest in money that are based on the location of the money. But because intangible property has no physical location, it would be impossible to apply these choice-of-law rules to intangible money.

Assuming that intangible money does or will exist, this Commentary addresses the proper application of Sections 9-312(b)(3), 9-313(a), 9-301(2), and 9-301(3)(C) to security interests in intangible money. The Commentary does not address whether intangible property can ever

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<sup>1</sup> The “monetary unit of account” referred to in the second sentence of the definition of “money” is arguably intangible money. The reference is likely historical, being included in the definition to capture the European monetary unit-of-account system in effect before the adoption of the Euro by member countries of the European Union. Today the sentence is arguably applicable to special drawing rights allocated by the International Monetary Fund to its members.

<sup>2</sup> For example, the Marshall Islands has adopted a blockchain-based currency as its legal tender. The Declaration and Issuance of the Sovereign Current Act of 2018, 17 MIRC §301 *et seq.* Also, El Salvador enacted legislation to recognize, effective September 7, 2021, Bitcoin as a medium of exchange in that country. Legislative Decree No. \_\_\_ of the Republic of El Salvador.

<sup>3</sup> U.C.C. §§ 9-315(c) and (d) provide an exception for perfection of a security interest in money that is proceeds of other collateral.

constitute money under the UCC's current statutory definition or whether any particular intangible property currently constitutes money.

## DISCUSSION

Article 9 is a “comprehensive scheme” for regulating security interests in personal property and fixtures.<sup>4</sup> The Article addresses security interests in all types of personal property, with limited exceptions.<sup>5</sup> Section 1-103(a) provides for the UCC to be interpreted liberally to promote its underlying purposes. Those purposes include “clarifying” and “modernizing” the law governing commercial transactions<sup>6</sup> and permitting “the continued expansion of commercial practices through custom, usage, and agreement of the parties.”<sup>7</sup> The UCC was drafted to provide “flexibility” so that it would contain “its own machinery for expansion of commercial practices” and for it “to be applied by the courts in the light of unforeseen and new circumstances and practices.”<sup>8</sup> The interpretation below gives effect to these policies.

Article 9 classifies personal property into various collateral types, including a residual collateral type of “general intangibles” for personal property that does not fall into other types of collateral.<sup>9</sup> Likewise, while Article 9 provides various methods by which a security interest must or may be perfected, it also provides a general rule in Section 9-310(a) that, except as otherwise provided in Sections 9-310(b) and 9-312(b), all security interests must be perfected by the filing of a financing statement.

Section 9-312(b)(3) is an exception to Section 9-310(a)'s general rule of perfection by filing. Section 9-312(b)(3) provides, as a mandatory method of perfection, that a security interest in money may be perfected only by possession. As a result, when Section 9-312(b)(3) is applicable, a security interest in money as original collateral cannot be perfected by the filing of a financing statement or by any other method. But “[t]he proper construction of the Uniform Commercial Code requires, of course, that its interpretation and application be limited to its reason.”<sup>10</sup> As noted above, it is likely that the drafters of the UCC did not consider the possibility that money could be intangible, except perhaps in very narrow circumstances, when Section 9-312(b)(3) was enacted. Accordingly, that section, when enacted, operated to provide a method of perfection for a security interest in money as original collateral that was both exclusive and possible to accomplish. Its reason for enactment was certainly not to create a category of security interests with respect to which perfection was impossible. Section 9-312(b)(3) would create exactly that situation, however, if applied to property that constitutes intangible money.

Interpreting Section 9-312(b)(3) to require perfection of a security interest in intangible money by possession, even though intangible money cannot be possessed, would create an

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<sup>4</sup> U.C.C. § 9-101, cmt. 1.

<sup>5</sup> See U.C.C. § 9-109(c), (d).

<sup>6</sup> U.C.C. § 1-103(a)(1).

<sup>7</sup> U.C.C. § 1-103(a)(2).

<sup>8</sup> U.C.C. § 1-103, cmt. 1.

<sup>9</sup> U.C.C. § 9-201(a)(42).

<sup>10</sup> U.C.C. § 1-103, cmt. 1.

anomalous situation - a security interest that cannot be perfected. That result would be inconsistent with the comprehensive scheme of Article 9.

The proper interpretation of Section 9-312(b)(3) is that it applies only to tangible money, such as bills, notes, and coins, that are susceptible of being possessed. If the money is intangible and therefore is not susceptible of being possessed, Section 9-312(b)(3) does not apply, and the general perfection-by-filing rule in Section 9-310(a) applies. Similarly, Section 9-313(a) provides that a security interest in money may be perfected by possession; that section is properly interpreted to refer only to tangible money.

Other provisions of Article 9, referring or applying to perfection of a security interest in money, should be interpreted similarly to avoid leading to rules that have no sensible meaning if applied to intangible money. Sections 9-301(2) and 9-301(3)(C) provide choice-of-law rules for perfection, the effect of perfection or non-perfection, and the priority of a security interest in money, referring those issues to the law of the jurisdiction in which the money is located.<sup>11</sup> Because intangible property, including any intangible money, has no location, those provisions are properly interpreted to apply only to tangible money, with the result that the general choice-of-law rule in Section 9-301(1) would apply to intangible money.

Sections 9-301(2), 9-301(3)(C), 9-312(b)(3), and 9-313(a) are properly interpreted to be applicable only to tangible money. Interpreting those provisions in this way promotes the underlying purposes of the UCC of permitting the expansion of commercial practices as contemplated by Section 1-103(a). Furthermore, so interpreting those provisions recognizes the UCC's flexibility to accommodate unforeseen and new circumstances and practices while at the same time limiting the provisions to their reason, at the time they were drafted when money was understood to be tangible, of establishing coherent choice-of-law and perfection rules for tangible money.<sup>12</sup>

## AMENDMENTS TO OFFICIAL COMMENTS

Official Comment 4 to Section 9-301 is amended by adding the following new paragraph after the first paragraph of the comment.

Because money in intangible form would have no physical location and would not be susceptible of being possessed, subsections (2) and (3) apply only to money in tangible form, with the result that the general choice-of-law rule in Section 9-301(1) would apply to the perfection, the effect of perfection or non-perfection, and the priority of a security interest in money in intangible form. See PEB Commentary No. [ ], dated \_\_\_\_\_, 202\_.

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<sup>11</sup> U.C.C. § 9-301(2)'s choice-of-law rule addresses perfection, the effect of perfection or non-perfection, and the priority of a possessory security interest in money based on the money's location. U.C.C. § 9-301(3)(C)'s choice-of-law rule addresses the effect of perfection or non-perfection and the priority of a non-possessory security interest in money based on the money's location.

<sup>12</sup> There are other provisions in Article 9 and the other Articles of the UCC that refer to money and that might also yield results unanticipated at the time of enactment if applied to intangible money. This Commentary does not address the interpretation of those other provisions if applied to intangible money.

The Official Comments to Section 9-312 are amended by adding the new Official Comment 6a immediately after Official Comment 6:

6a. **Security interest in money.** Because money in intangible form would not be susceptible of being possessed, subsection (b)(3) would apply only to money in tangible form, with the result that the general perfection-by-filing rule in Section 9-310(a) would apply to the perfection of a security interest in money in intangible form. See PEB Commentary No. [ ], dated \_\_\_\_\_, 202\_.

Official Comment 2 to Section 9-313 is amended by adding after the word “money” in the second paragraph of the comment the words “(in tangible form; see Comment 6a to Section 9-312).”