

Alabama's Uniform Commercial Code Amendments 2022

In 2022 the [American Law Institute](#) and the [Uniform Law Commission](#) concluded its three-year project and recommended that each state adopt the [Uniform Commercial Code Amendments 2022 \(with official comments\)](#). Prior to submission to the Alabama legislature, the [Alabama Law Institute](#) empaneled a study committee composed of Bradley Blair, Hamp Boles, Jackson Colburn (from the [Alabama Law Institute](#)), your author (who served as chair), Professor William H. Henning (who served as reporter), Will Hereford, Professor Julie Hill, Riley Key, Judge David Kimberly (from the [Alabama Law Institute](#)), Jayna Lamar, Randall Morrow, Howard Neiswender, John Pickering, and Jerry W. Powell. Following this study committee recommendation, the [Alabama Law Institute](#) coordinated the forwarding of the Uniform Commercial Code Amendments 2022 adapted to conform to existing Alabama law (see [HB348](#)) to the legislature to produce what is now [Alabama Act #2023-492 \(with Alabama comments\)](#). This article discusses this act and the changes it brings to Alabama law.

The Uniform Commercial Code (the “UCC”) has long provided reliable commercial law rules for broad categories of transactions dealing with the sale or leasing of goods, the creation of consensual security interests, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, documents of title, and securities.¹ As the backbone of United States commerce, its adoption in every state (Alabama’s version of the UCC is [Title 7](#) of the Code of Alabama) has allowed the development of strong interstate markets, reduced transaction costs and provided Alabamians with confidence in their everyday commercial transactions. **Alabama Act #2023-492 effective July 1, 2024** (substantially adopting the [Uniform Commercial Code Amendments 2022](#)) accommodating newly emerged and still emerging technologies including distributed ledger technology (blockchain), brings Alabama’s UCC into the digital age by providing needed commercial guardrails and delivering legal clarity where existing legal structures presently inhibit these newly emerging technologies. The major changes enacted by Alabama Act [#2023-492](#) can be broken down into the following areas (each of which is summarized below and fully discussed *infra*):

- **[Controllable Electronic Records](#)**: Newly enacted UCC Article 12 deals with a category of intangible digital assets referred to as “controllable electronic records.” Article 12 provide rules to determine the rights of persons who receive controllable electronic records and for the perfection and priority of a security interest in controllable electronic records, based on who has control (the power to receive the benefits, prevent others from receiving the benefits, and transferring the benefits) of the controllable electronic record. These newly enacted guardrails

¹ The UCC and the UCC Amendments 2022 only govern consensual transactions. In that vein, the Alabama UCC Amendments 2022 do not regulate the use of controllable electronic records, whether as a security or a commodity, address the taxation of controllable electronic records, or revise anti-money laundering rules. The regulation of these matters continues to be left to law outside of the UCC.

will stimulate economic activity by providing legal certainty to these increasingly common transactions.

- **Standardization of what “control” consist of:** Standardization throughout the UCC of what is meant by “control” to be both consistent with industries’ current practice and to accommodate future realities.
- **Transition Rules for Controllable Electronic Records:** Newly enacted UCC Article 12A contains transition provisions designed to protect the expectations of parties to pre-effective-date transactions. For example, a secured lender who has a priority security interest in collateral under the prior law will retain its priority through a transition period, giving parties to preexisting transactions plenty of time to revise their agreements and if necessary, obtain control to comply with the updated law.
- **Recognition of hybrid transactions:** A hybrid transaction is a transaction where services or licenses of information are supplied in connection with the sale or lease of goods. Revised Ala Code §§7-2-102(2), and 7-2-106(5) for the sale of goods and revised Ala Code §§7-2A-102(2), and 7-2A-103(1)(h.1) for the leasing of goods, now statutorily recognize, using Alabama’s prevailing purpose test, hybrid transactions.
- **Checks and Drafts:** The UCC revisions allow electronic signatures, permits certain ministerial terms within an instrument to not affect the instruments’ negotiability, and permit images of certain instruments to be substituted for the instrument in accordance with federal banking regulations.
- **Security Procedure for Electronic Fund Transfers:** Ala Code § 7-4A-201 has been amended to permit a security procedure to impose an obligation on the receiving bank or the customer, and to clearly delineate that simply requiring a payment order to be sent from a known email address, IP address or telephone number is not by itself a security procedure.
- **Letters of Credit:** The UCC revisions permit electronic signatures on letters of credit and recognize the branch separateness doctrine.
- **Adoption of Terminology which Embraces both Tangible and Electronic Commerce:** The transition from a tangible world into a dual tangible and electronic world requires certain terms to be redefined to become applicable to both worlds (i.e. “sign,” “record” and “conspicuous”).
- **Properly Define “Chattel Paper”:** Chattel paper is now properly recognized as a right to payment as opposed to the record evidencing the right to payment (*see* revised Ala Code §7-9A-102(a)(11)).
- **Clear Choice of Law Rules:** The amendments add clearer choice of governing law rules throughout the UCC.
- **Clarification that the After Acquired Collateral exceptions in Ala Code §7-9A-204(b) do not encompass proceeds:** Ala Code §7-9A-204 was clarified to correct some decisions and interpretations that treated certain proceeds as after acquired collateral and therefore not effective under subsection (b).

- **Updated Safe Harbor Collateral Disposition Notices:** Revised Ala Code §7-9A-613 in the non-consumer space and revised Ala Code §7-9A-614 in the consumer space create new and easier to understand safe harbor forms for notification before collateral dispositions.
- **CBDCs are not “Deposit Accounts”:** Alabama enacted a specific amendment to Ala Code §7-9A-102(a)(29) prohibiting Central Bank Digital Currencies (a defined term in Ala Code §7-9A-102(a)(9) (CBDCs) from being a deposit account.
- **Electronic Money Amendments NOT enacted in Alabama:** The proposed Uniform Commercial Code Amendments 2022’s concept of Electronic Money, which included a concept of virtual currencies, was not enacted in Alabama.
- **Effect on Future Transactions:** Although no one knows the future, the amendments hint at the possibility of permitting an Article 12 controllable electronic record assignee to have the same rights as a holder in due course on a now “electronic” negotiable instrument, the proliferation of smart contracts as control mechanism, and the tokenization of limited liability companies.

With its enactment of Alabama Act [#2023-492](#), Alabama joins the following states who also enacted these UCC amendments in 2023:

- 1) Hawaii [HB525](#) (adoption effective January 20, 2023);
- 2) Indiana [SB468](#) (adoption effective July 1, 2023);
- 3) North Dakota [HB 1082](#) (adoption effective August 1, 2023);
- 4) Colorado [SB90](#) (adoption effective August 6, 2023);
- 5) Delaware [SB157](#) (adoption effective August 18, 2023);
- 6) Nevada [AB231](#) (adoption effective October 1, 2023);
- 7) New Hampshire [HB584](#) (adoption effective October 7, 2023);
- 8) New Mexico [HB90](#) (adoption effective January 1, 2024);
- 9) Washington [SB5077](#) (adoption effective January 1, 2024); and
- 10) California [SB95](#) (adoption effective September 22, 2023).

Despite the various effective dates for the above amendments, they all adopt a **July 1, 2025 adjustment date**, which is discussed within the [transition](#) section of this article. In addition, the amendments have presently been introduced in seventeen other states. The current enactment map along with links to all the enactment history can be found on the [Uniform Laws Commission’s UCC, 2022 Amendments homepage](#)

Controllable Electronic Records

Newly enacted UCC Article 12 provides rules for transactions involving certain types of digital assets including cryptocurrency and non-fungible tokens (NFTs) which use today’s distributed ledger or “blockchain” technology along with any future assets functioning similarly. Prior to the adoption of Article 12 these digital assets would fall under the default definition in Ala Code §7-

9A-102(a)(42) as a “general intangible”² (unless Ala Code § 7-8-102(a)(9)(iii)³ applied and allowed the record to be treated as a financial asset under Article 8). To perfect a security interest in a general intangible a UCC financing statement is filed in the state of the location of the owner (*see* Ala Code §7-9A-307) of the general intangible (Ala Code §7-9A-301). If a general intangible is subject to a security interest perfected by such a filing, the person purchasing the property would typically take it subject to the security interest. This framework conflicts with market expectations and creates problems for market participants that use digital assets to make payments. To deal with this conflict, revised Ala Code §§ 7-9A-310(b)(8), 7-9A-312(a), and 7-9A-314(a) permit a security interest in a controllable electronic record to be perfected by either: (i) "control" under newly enacted Ala Code §7-9A-107A which references Ala Code §7-12-105 or (ii) by the filing a financing statement under revised Ala Code §7-9A-312; with a security interest in a controllable electronic record perfected by “control” having priority over a security interest perfected only by the filing of a financing statement (*see* newly enacted Ala Code §7-9A-326A). A similar result occurs if the controllable electronic record is deemed a financial asset under Article 8 (*see* revised Ala Code §§7-8-106 and 7-9A-314, and Ala Code §7-9A-328).

Definitions of New Terms

Now, having understood the reason for the adoption of new Article 12, we need to define certain terms.

- A “**controllable electronic record**” is
 - i) a “general intangible” under Article 9A (Ala Code §7-9A-102(a)(42)), and
 - ii) a record (“information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form” – Ala Code §7-1-201(b)(31)) in electronic (“relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities” – newly enacted Ala Code §7-1-201(b)(16A)) form that is susceptible to control⁴ (*see* Ala Code §7-12-102(a)(1)).

Ala Code §7-12-102(a)(1) specifically **excludes** from the definition of a controllable electronic record certain digital assets that might otherwise be considered to fall within the

² A classification that is continued in revised Ala Code §7-9A-102(a)(42).

³ Ala Code §7-8-102(a)(9) define “financial asset” as follows:

“(9) "Financial asset," except as otherwise provided in Section 7-8-103, means:

- (i) a security;
- (ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or
- (iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this article. As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.”

⁴ What is control is delineated in newly enacted Ala Code §7-12-105 discussed *infra*. If an electronic record is not susceptible of control, it is not a controllable electronic record and outside the scope of Article 12.

definition of that term. These assets are excluded because commercial law rules already exist for them and generally work well. The **excluded digital assets** include:

- controllable accounts (discussed *infra*).
 - controllable payment intangible (discussed *infra*),
 - an electronic copy of a record evidencing chattel paper (appropriately handled under UCC Article 9A as amended in Ala Code §7-9A-105),
 - electronic document of title (appropriately handled under UCC Article 7 as amended in revised Ala Code §7-7-106),
 - investment property (appropriately handled under UCC Article 8 as amended in revised Ala Code §7-8-106) - by this exclusion Article 12 continues to permit transacting parties to in effect opt-in to Article 8 of the UCC by arranging for a digital asset to be held with a securities intermediary as a financial asset credited to a securities account in accordance with Ala Code §7-8-102(a)(9)(iii),
 - transferable records under the federal E-SIGN law ([12 U.S.C. §7021 et seq](#)) or the Uniform Electronic Transactions Act (UETA) ([Ala Code §8-1A-1 et seq](#)) (nothing in the newly enacted Article 12 disturbs transacting parties' current practices of using transferable records under E-SIGN or UETA),
 - deposit accounts (appropriately handled under UCC Article 9A as amended), and
 - an electronic record that is currently authorized or adopted by a domestic or foreign government and is not a medium of exchange that was recorded and transferable in a system that existed and operated for a medium of exchange before the medium of exchange was authorized or adopted by a government⁵.
- For a person to have “**control**”⁶ of a controllable electronic record, a record attached to or logically associated with the controllable electronic record, or a system in which the controllable electronic record is recorded, newly enacted Ala Code §7-12-105(a) requires the person to have:

⁵ See 2023 Alabama Comment to Ala Code §7-12-102 which states: “Alabama’s deletion of money “in an electronic form” from the Uniform Commercial Code Amendments (2022) definition of “money” in Section 1-201(24) (*see* 2023 Alabama Comment to Section 7-1-201) and its deletion of “electronic money” from Article 9 (*see* 2023 Alabama Comment to Section 7-9A-102) necessitated that “an electronic record that is currently authorized or adopted by a domestic or foreign government and is not a medium of exchange that was 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 a government” be excluded from the definition of a “controllable electronic record” in Subsection 7-12-102(a)(1). *See* Official Comment 24 to Section 1-201 of the Uniform Commercial Code Amendments (2022) for a description of what is “an electronic record that is currently authorized or adopted by a domestic or foreign government and is not a medium of exchange that was 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 a government.”

⁶ Newly enacted Ala Code §7-12-105 introduces a revised concept of “control” which permeates through the Amendments (*see* “[Standardization of what “control” consist of](#)” *infra*). Control in regard to electronic assets is roughly analogous to possession of a tangible asset – the person with control of an electronic asset has the power to “spend” the asset by transferring it to another person in exchange for goods or services, and the power to prevent another from using the property. In the controllable electronic record world, this concept of control is a key prong in determining not only what is a controllable electronic record, but also who can become a qualifying purchaser and be able to take free of property interest claims in the controllable electronic record pursuant to the “take-free” rule in Ala Code §7-12-104(e).

- The power to enjoy “substantially all the benefit” of the controllable electronic record⁷ (newly enacted Ala Code §7-12-105(a)(1)(A)),
- The exclusive power (which may be shared⁸ or obtained through another person⁹) to prevent others from enjoying “substantially all the benefit” of the controllable electronic record (newly enacted Ala Code §7-12-105(a)(1)(B)(i)), *and*
- The exclusive power to transfer control to another person (*see* newly enacted Ala Code §7-12-105(a)(1)(B)(ii)).

In addition, the person holding control must be readily identifiable in some way, including by name, identifying number, cryptographic key, office, or account number (*see* newly enacted Ala Code §7-12-105(a)(2))¹⁰.

As to controllable accounts or controllable payment intangibles (discussed *infra*), one has control over the controllable account or the controllable payment intangible if the person has control over the controllable electronic record evidencing the controllable account or controllable payment intangible (*see* newly enacted Ala Code §7-9A-107A(b) and §7-12-104(b)).

- A “**controllable account**” is an Ala Code §7-9A-102(a)(2) account evidenced by a controllable electronic record provided the party obligated on the account (the “account debtor”) has agreed to pay the person in control of the controllable electronic record (*see* newly enacted Ala Code §7-9A-102(a)(27A) incorporated into Article 12 through Ala Code §7-12-102(b)).
- A “**controllable payment intangible**” is an Ala Code §7-9A-102(a)(61) payment intangible evidenced by a controllable electronic record provided the party obligated on the payment intangible has agreed to pay the person in control of the controllable electronic record (*see* newly enacted Ala Code §7-9A-102(a)(27B) incorporated into Article 12 through Ala Code §7-12-102(b)).
- A “**qualifying purchaser**” is a purchaser of a controllable electronic record or an interest in a controllable electronic record that obtains control of the controllable electronic record

⁷ This power to enjoy “substantially all the benefit” of the controllable electronic record is presumed if newly enacted Ala Code §§7-12-105(a)(1)(B)(i) and (ii) are satisfied (*see* newly enacted Ala Code §7-12-105(d)).

⁸ Exclusive power/control may be shared among more than one person. The exclusivity requirement is satisfied even if there is a sharing of these powers through a “multi-sig” or similar arrangement, or if changes occur automatically as part of the protocol built into the system in which the controllable electronic record is recorded (*see* newly enacted Ala Code §§7-12-105(b) and (c)).

⁹ A person may obtain exclusive power/control through a second person, where that second person (1) has exclusive control of the electronic record and (2) acknowledges that it has control on behalf of the first person, or that it will obtain control of the electronic record on behalf of that first person. This would permit, among other things, a secured party to take control of a controllable electronic record held with a third-party custodian, such as a cryptocurrency exchange, or through a control agreement (in similar manner to investment property) (*see* newly enacted Ala Code §7-12-105(e)).

¹⁰ *i.e.* the person with control can be anonymous but must be positively identifiable in some manner.

for value (as defined in Ala Code §7-3-303(a)¹¹), in good faith, and without notice of a claim of a property right in the controllable electronic record (*see* newly enacted Ala Code §7-12-102(a)(2)). In regard to controllable account or controllable payment intangible, a purchaser is a qualifying purchaser if it obtains control of the controllable electronic record evidencing the controllable account or controllable payment intangible (*see* new enacted Ala Code §7-12-104(b)).

Controllable Accounts and Controllable Payment Intangibles

Since both controllable accounts and controllable payment intangibles are evidenced by controllable electronic records, they are governed by Article 12 priority control-based perfection rules while at the same time being accounts and payment intangibles (a subset of general intangibles) and thus perfectible by filing under Article 9A (*see* revised Ala Code §§7-9A-102(a)(2), 7-9A-102(a)(27A), 7-9A-102(a)(27B), and 7-9A-102(a)(61) all of which are incorporated into Article 12 through Ala Code §7-12-102(b); along with Ala Code 7-9A-312), provided you recognize that, just like in the securities world of Article 8, Article 12 control trumps filing in the perfection hierarchy scheme (*see* newly enacted Ala Code §7-9A-326A).

Controllable Account Debtor Protection

Similar to Ala Code §7-9A-406 for accounts and payment intangibles generally, an account debtor on a controllable account or controllable payment intangible receives a discharge by paying the person in control of the controllable electronic record at the time the controllable account or controllable payment intangible was created, unless the account debtor receives a notification that another party now has control of the controllable electronic record and a payment instruction (often referred to as a “deflection notification” – *see* newly enacted Ala Code §7-12-106(b)) to pay the party who presently has control (*see* newly enacted Ala Code §7-12-106(a)). Following receipt of the deflection notification, the account debtor may obtain a discharge only by paying the party who now has control and may not obtain a discharge by paying the party who previously had control (*see* newly enacted Ala Code §7-12-106(c)). Also, similar to Ala Code §7-9A-406, the account debtor may ask for reasonable proof that the party reflected in the deflection notice is the person currently in control before making payment on the controllable account or controllable payment intangible (*see* newly enacted Ala Code §7-12-106(e)). However, unlike Ala Code §7-9A-406, the method of providing reasonable proof must have been agreed to by the account debtor, presumably as part of the controllable electronic record when it was created (*see* newly enacted Ala Code §7-12-106(d)). Absent an agreed method of providing reasonable proof, the deflection

¹¹ Ala Code §7-3-303(a) provides:

“(a) An instrument is issued or transferred for value if:

- (1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;
- (2) The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;
- (3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;
- (4) The instrument is issued or transferred in exchange for a negotiable instrument; or
- (5) The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

notification is not effective, and the account debtor may obtain a discharge by continuing to pay the party in control at the time the controllable account or controllable payment intangible was created (*see* newly enacted Ala Code §7-12-106(d)). As a practical matter, few account debtors question deflection notifications or ask for reasonable proof. However, if an account debtor does ask for reasonable proof, the relevant parties would have the flexibility to develop market acceptable methods for providing the reasonable proof.

Article 12 Take-Free Rule

Article 12 contains a take-free rule similar to the rules provided in Article 3 with respect to holders in due course of negotiable instruments and under Article 8 with respect to protected purchasers of securities. Under Article 12, a qualifying purchaser (i.e. a good faith purchaser (including a secured party) of a controllable electronic record who obtains control without notice of a competing property right in the controllable electronic record) will acquire rights in the controllable electronic record free of any competing claims of a property interest in the controllable electronic record (newly enacted Ala Code §7-12-104(e)).¹² Although this concept simplifies and facilitates transactions by parties in control of the controllable electronic record, it could have significant ramifications in the case of a stolen controllable electronic record where the thief also acquired control, since in that scenario a good faith downstream purchaser of the stolen controllable electronic record would acquire the controllable electronic record free of any claims by the victim of the theft.¹³

Exceptions to the Take Free Rule

If the purchaser is not a qualifying purchaser, then the take free rules discussed above do not apply (*see* newly enacted Ala Code §7-12-104(d)). When this happens the non-qualifying purchaser only acquires the rights¹⁴ the transferor had in the controllable electronic record being transferred (or the limited rights that the transferor was transferring) under newly enacted Ala Code §7-12-104(d).

Furthermore, Article 12's take free rules (and the shelter principle rule discussed above) only applies to the controllable electronic record itself and not to the underlying property rights tethered to the controllable electronic record (*see* newly enacted Ala Code §7-12-104(f)). The status of these tethered property rights are to be determined by law outside the scope of the UCC. For example, Article 12 would not affect copyright law as it relates to someone in control of a non-fungible token "tethered" to intellectual property. The rights regarding such tethered rights are governed by law other than Article 12.

¹² This take free rule is further strengthened by newly enacted Ala Code §7-12-104(g) which limits what actions can be brought against the qualifying purchaser of a controllable electronic record, controllable account, or controllable payment intangible.

¹³ This rule (newly adopted Ala Code §7-12-104(e)) protecting innocent parties who accept in good faith digital assets in exchange for value without knowledge of any other property claim to the assets, is consistent with the rules for stolen money. If a bank robber uses stolen cash to purchase goods at a store, and the store accepted the cash in exchange for valuable goods without knowing that the cash was stolen, the store is not liable for the bank's loss even if the cash received is later traced to the robbery.

¹⁴ These rights would be the rights the transferor received under Article 12 along with what rights the transferor acquired under laws other than Article 12 (*see* newly enacted Ala Code §7-12-104(c)).

Secured Lending under Article 9A

The provisions applicable to purchasers of controllable electronic records are carefully coordinated with corresponding changes to lending secured by security interests in controllable electronic records under Article 9A and are designed to preserve the availability of existing transaction patterns. Under revised Article 9A, there is no need to change collateral descriptions in security agreements or collateral indications on financing statements. A controllable electronic record is a “general intangible” (Ala Code §7-9A-102(a)(42)), a controllable account is an “account” (Ala Code §7-9A-102(a)(2) and Ala Code §7-9A-102(a)(27A)), and a controllable payment intangible is a “payment intangible” (Ala Code §7-9A-102(a)(27B) and Ala Code §7-9A-102(a)(61)), as those terms are already defined in Article 9A. The normal rules for attachment continue to apply, and a security interest in a controllable electronic record, a controllable account, or a controllable payment intangible can still be perfected by the filing of a financing statement.

However, a security interest in a controllable electronic record, a controllable account, or a controllable payment intangible may also be perfected by the secured party obtaining control, and a security interest perfected by control has priority over a security interest perfected by filing (or by another method other than control) (*see* newly enacted Ala Code §7-9A-326A). Control for purposes of revised Article 9A is the same as described above for Article 12 (*see* newly enacted Ala Code §7-9A-107A which references Ala Code §7-12-105).

Furthermore, consistent with current Article 9A rules, if a secured party takes control over a document, entitlement, deposit account, or record to perfect a security interest in the item, and the obligation which the item serves as collateral is paid in full with no obligation to extend additional advances or credit, then within ten (10) days of the secured party’s receipt of a signed demand from the debtor, the secured party must release the control (*see* revised Ala Code §7-9A-208; *see* also Ala Code §7-9A-209(b) which applies when the secured party takes an assignment of accounts and send deflection notice).

Standardization of what “control” consist of.

In developing the control test for controllable electronic records (newly enacted Ala Code §7-12-105 discussed *supra*) to be consistent with current industry practice for taking control of digital assets, it was discovered that the below referenced control test should also embrace the same industry standards, and be consistent with current practices:

- Ala Code §7-7-106 (pertaining to documents of title),
- Ala Code §7-8-106 (pertaining to security entitlements),
- Ala Code §7-9A-105 (pertaining to the electronic copy of record evidencing chattel paper),
- Ala Code §7-9A-107A (pertaining to controllable electronic records, controllable accounts, and controllable payment intangibles),
- Ala Code §7-9A-314 (pertaining to perfection by control), and
- Ala Code §7-9A-314A (pertaining to perfection by possession and control of records evidencing chattel paper).

In addition to a person having direct control over the document, entitlement, deposit account, or record, another person (other than a transferor to the person) can hold control on behalf of a person,

provided the person having or obtaining control acknowledges¹⁵ that they hold control on that other person's behalf (*see* revised Ala Code §7-7-106(g) for documents of title, §7-8-106(d)(3) for security entitlements, §7-9A-104(a)(4) for deposit accounts, §7-9A-105(g) for electronic copy of record evidencing chattel paper, and §7-12-105(e) for controllable electronic records). When this happens, and unless the agreement between the person holding control and the person for which control is being held provides otherwise, the person holding control i) does not owe a duty to the other person, and ii) is not required to confirm to any other person that the person is holding control on behalf of another (*see* revised Ala Code §7-7-106(i) for documents of title, §7-8-106(i) for security entitlements, §7-9A-107B(b) for deposit accounts or chattel paper, and §7-12-105(g) for controllable electronic records).

Transition Rules

The UCC Amendments 2022 (Alabama Act [#2023-492](#)) will be effective in Alabama on its **effective date, July 1, 2024**. However, to protect any secured parties who hold a security interest in digital assets that were perfected under the prior rules, there will be a transition period (expiring on the **July 1, 2025 adjustment date** (newly enacted Ala Code §7-12A-102(a)(1)) during which the secured party's priority established on the effective date will be maintained. This provides a grace period during which the parties to a pre-existing agreement can renegotiate terms as necessary and comply with provisions of the new law to ensure that their respective interests remain protected.

Recognition of hybrid transactions

Articles 2 and 2A of the UCC apply to the sale and lease of goods, respectively, and not to contracts for services. The line between these categories has blurred with the emergence of transactions involving both the sale or lease of goods and the provision of other property or services. As a result, a new rule was needed for these hybrid transactions. Ala Code §§7-2-102 and 7-2-106 (dealing with the sale of goods) and Ala Code §§7-2A-102 and 7-2A-103 (dealing with the leasing of goods) provide that, absent the parties' agreement otherwise, the UCC rules will apply to a hybrid transaction if the sale/lease of goods is the predominant purpose of the transaction. If the sale of services or provision of other property predominates, the UCC rules will apply only to aspects of the transaction that involve the sale or lease of goods. Whether or not the lease of goods aspects of the transaction predominates, the finance lease provisions of Article 2A (Ala Code §§7-2A-103(1)(g) and 7-2A-209) will apply to those aspects of the transaction.

Checks and Drafts:

The revisions make the following clarifications/changes to Article 3:

- clarify that a choice-of-law or choice-of-forum clause included in an instrument does not affect the negotiability of the instrument (*see* revised Ala Code §§ 7-3-104(a)(3)),

¹⁵ But the UCC imposes no duty on the person holding control to require them to acknowledge that it has control on behalf of another (*see* revised Ala Code §7-7-106(h) for documents of title, §7-8-106(h) for security entitlements, §7-9A-107B(a) for deposit accounts or chattel paper, and §7-12-105(f) for controllable electronic records).

- that an image of a negotiable instrument (i.e., photos of the front and back of a check) may be substituted for the actual instrument in accordance with federal banking regulations (*see* revised Ala Code §7-3-105(a)(2)),
- that a “wet” signature is no longer required on an instrument (*see* revised Ala Code §7-3-401), and
- that the obligation to pay a check is not discharged solely by the destruction of the check in connection with a process in which the image of the check is thereafter transmitted for payment (*see* revised Ala Code §7-3-604(a)).

Security Procedure for Electronic Fund Transfers

Revised Ala Code § 7-4A-201 has been amended to specifically permit a security procedure to impose an obligation on the receiving bank or the customer, and to clearly delineate that simply requiring a payment order to be sent from a known email address, IP address or telephone number is not by itself a security procedure.

Letters of Credit:

The revisions make the following clarifications/changes to Article 5:

- Revisions to Ala Code §7-5-104 removes ambiguity across jurisdictions as to whether electronic signatures are permissible in issuing letters of credit and makes clear that the formal requirements for a letter of credit are simplified to requiring only a record that is signed, using the new general definition of “sign.”¹⁶
- The addition of new subsection Ala Code §7-5-116(d) corrects inconsistent holdings in other jurisdictions, and adopts the branch separateness doctrine (branches are deemed to be located at the address indicated in the undertaking).

Adoption of Terminology which Embraces both Tangible and Electronic Commerce:

The language of many pre-amendment UCC rules assumed parties still use paper documents. The amendments ensure that the law applies equally to electronic transactions. For example,

- “bearer” (revised Ala Code §7-1-201(b)(5)) is expanded to include one having control of an electronic negotiable document of title,
- “deliver” (revised Ala Code §7-1-201(b)(15)) is expanded to include transfer of control of electronic records as well as transfer of possession of tangible records,
- “holder” (revised Ala Code §7-1-201(b)(21)) is expanded to include one having control of an electronic negotiable document of title,

¹⁶ Under revised Ala Code §7-1-201(b)(37), “signed” means, “with present intent to authenticate or adopt a record: (i) [to] execute or adopt a tangible symbol; or (ii) [to] attach to or logically associate with the record an electronic symbol, sound, or process.”

- the term “record” (Ala Code §7-1-201(b)(31)) is substituted for “writing” where appropriate to encompass electronic documents,
- “send” (revised Ala Code §7-1-201(b)(36)) is redefined to permit electronic transmission,
- “sign” (revised Ala Code §7-1-201(b)(37)¹⁷) is redefined to include electronic signatures,¹⁸ and
- the term “conspicuous” (revised Ala Code §7-1-201(b)(10)) is redefined to apply more broadly based on a “totality of circumstances” test to the terms of both paper and electronic documents.

The amendments also use technologically neutral terms rather than terms such as “blockchain,” “distributed ledger,” or “public and private keys.” This is intentional so that the amendments will not only apply to known technologies but to future technologies as well.

In addition to redefining terms to encompass both tangible and electronic transactions, certain other terms were clarified, namely:

- “Assignor” (*see* revised Ala Code §7-9A-102(a)(7B)),
- “Assignee” (*see* revised Ala Code §7-9A-102(a)(7A)), and
- “Person” to also embrace series under Ala Code §10A-5A-11.01 et seq (*see* revised Ala Code §7-1-201(b)(27)).

Properly Define “Chattel Paper”:

“Chattel paper” is defined under old Ala Code § 7-9A-102(a)(11) as a record containing both a monetary obligation and a security interest in goods, e.g. the documents governing an automobile loan. Revised Ala Code § 7-9A-102(a)(11) clarifies this definition to refer to the right to payment evidenced by the record, rather than to the record itself. This makes the rules for chattel paper more consistent with the new rules for controllable electronic records. Similarly, as discussed above the rule governing control of electronic chattel paper is amended for consistency with the rule governing control of controllable electronic records (*see* “[Standardization of what “control” consist of:](#)” *supra* and revised Ala Code §7-9A-105).

Clear Choice of Law Rules:

Because digital assets or electronic records have no physical location, conflict of laws questions often arise. The following revised sections allow the parties to a transaction involving digital assets or electronic records to choose the law that applies to their transaction for commercial law

¹⁷ Ala Code §7-1-201(b)(37): “Sign” means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

“Signed”, “signing”, and “signature” have corresponding meanings.

¹⁸ This expanded definition of “sign” supplants the confusing and unartful term “authenticate” which no longer appears in the revised UCC (i.e. former Ala Code §7-9A-102(a)(7) is now deleted).

purposes and incorporate the choice into the asset, record, or the system in which the asset or record is recorded (along with default rules if no choice is designated):¹⁹

- Ala Code §7-9A-306A (laws governing perfection and priority of security interest in chattel paper),
- Ala Code §7-9A-306B (laws governing perfection and priority of security interest in controllable electronic records, controllable accounts, and controllable payment intangibles), and
- Ala Code §7-12-107 (governing law under Article 12 for controllable electronic records, controllable accounts, and controllable payment intangibles).

In addition to these governing law provisions, the following revised sections mandate certain governing law provisions be recognized even if that law has no relation to the transaction:

- Ala Code §7-8-110 (local law of issuer's or security intermediary's jurisdiction governs even if it bears no relation to the transaction),
- Ala Code §7-9A-304(a) (for deposit accounts, law of the bank's jurisdiction governs even if it bears no relation to the transaction), and
- Ala Code §7-9A-305(a) (laws governing perfection and priority of security interest in investment property controls even if it bears no relation to the transaction).

Finally, revised Ala Code §7-3-104 confirms that choice of law provision in negotiable instrument does not destroy the instrument's negotiability.

Clarification that the After Acquired Collateral exceptions in Ala Code §7-9A-204(b) do not encompass proceeds

Revised Ala Code §7-9A-204 created exceptions in subsection (b.1) to the exceptions in subsection (b) to allow a security interest to continue in after acquired property that is i) consumer goods as proceeds under Ala Code §7-9A-315(a) (*see* revised Ala Code §7-9A-204(b.1)(1)), ii) commingled goods under Ala Code §7-9A-336(c) (*see* revised Ala Code §7-9A-204(b.1)(1)), iii) commercial tort claims as proceeds under Ala Code §7-9A-315(a) (*see* revised Ala Code §7-9A-204(b.1)(2)), or iv) proceeds of consumer goods or commercial tort claims (*see* revised Ala Code §7-9A-

¹⁹ However absent widespread adoption of the amendments, the effectiveness of choosing a jurisdiction to govern perfection and priority of interests in a digital asset or electronic record is not certain.

- If the chosen jurisdiction has not enacted these choice of law provisions and has no nexus with the transaction evidenced by the asset or the record, a court in another jurisdiction may not recognize the parties' choice of law as effective.
- Under non-variable by agreement provisions of pre-amendment Article 9 the jurisdiction for determining perfection and priority of interests in a range of digital assets (including those that would be recognized as Controllable Electronic Records, Controllable Accounts and Controllable Payment Intangibles under Article 12) is usually the jurisdiction where the current owner of the digital asset is "located" (*see* Ala Code §7-9A-307).

204(b.1)(3)). This clarifying revision was made to correct misinterpretations of §9-204 by courts outside of this state.

Updated Safe Harbor Collateral Disposition Notices:

To enhance understanding and readability the safe harbor forms for Notification before Collateral Dispositions in both the non-consumer (Ala Code § 7-9A-613) and consumer (Ala Code § 7-9A-614) space were changed as follows:

BEGINNING OF FORM

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: *[Name of debtor, obligor, or other person to which the notification is sent]*

From: *[Name, address, and telephone number of secured party]*

Name of Debtor(s): *[Include only if debtor(s) are not an addressee]*

[For a public disposition:]

We will sell [or lease or license, as applicable] the *[describe collateral]* to [the highest qualified bidder] in public as follows:

Day and Date:

Time:

Place:

[For a private disposition:]

We will sell [or lease or license, as applicable] the *[describe collateral]* privately sometime after *[day and date]*.

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable] [for a charge of \$_____]. You may request an accounting by calling us at *[telephone number]*.

END OF FORM

BEGINNING OF FORM

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: *[Name of debtor, obligor, or other person to which the notification is sent]*

From: *[Name, address, and telephone number of secured party]*

{1} *[Name of any debtor that is not an addressee: (name of each debtor)]*

{2} We will sell *(describe collateral)* (to the highest qualified bidder) at public sale. A sale could include a lease or license. The sale will be held as follows:

(Date)

(Time)

(Place)

{3} We will sell *(describe collateral)* at private sale sometime after *(date)*. A sale could include a lease or license.

{4} You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell or, as applicable, lease or license.

{5} If you request an accounting you must pay a charge of \$ *(amount)*.

{6} You may request an accounting by calling us at *(telephone number)*.

END OF FORM

Old Safe Harbor Non-Consumer Form

New Safe Harbor Non-Consumer Form²⁰

²⁰ *Instructions for form of notification.* The following instructions apply to the form of notification in subsection (a)(5):

(1) The instructions in this subsection refer to the numbers in braces before items in the form of notification in subsection (a)(5). Do not include the numbers or braces in the notification. The numbers and braces are used only for the purpose of these instructions.

(2) Include and complete item {1} only if there is a debtor that is not an addressee of the notification and list the name or names.

(3) Include and complete either item {2}, if the notification relates to a public disposition of the collateral, or item {3}, if the notification relates to a private disposition of the collateral. If item {2} is included, include the words “to the highest qualified bidder” only if applicable.

(4) Include and complete items {4} and {6}.

(5) Include and complete item {5} only if the sender will charge the recipient for an accounting.

BEGINNING OF FORM

Name and address of secured party

Date

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]

Subject [Identification of Transaction]

We have your *[describe collateral]*, because you broke promises in our agreement.

[For a public disposition:]

We will sell *[describe collateral]* at public sale. A sale could include a lease or license. The sale will be held as follows:

Date:

Time:

Place:

You may attend the sale and bring bidders if you want.

[For a private disposition:]

We will sell *[describe collateral]* at private sale sometime after *[date]*. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back, at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at *[telephone number]*.

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at *[telephone number]* or write us at *[secured party's address]* and request a written explanation. [We will charge you \$_____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at *[telephone number]* or write us at *[secured party's address]*.

We are sending this notice to the following other people who have an interest in *[describe collateral]* or who owe money under your agreement:

[Names of all other debtors and obligors, if any]

END OF FORM

BEGINNING OF FORM

(Name and address of secured party)

(Date)

NOTICE OF OUR PLAN TO SELL PROPERTY

(Name and address of any obligor who is also a debtor)

Subject: (Identify transaction)

We have your *(describe collateral)*, because you broke promises in our agreement.

{1} We will sell *(describe collateral)* at public sale. A sale could include a lease or license. The sale will be held as follows:

(Date)

(Time)

(Place)

You may attend the sale and bring bidders if you want.

{2} We will sell *(describe collateral)* at private sale sometime after *(date)*. A sale could include a lease or license.

{3} The money that we get from the sale, after paying our costs, will reduce the amount you owe. If we get less money than you owe, you (will or will not, as applicable) still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

{4} You can get the property back at any time before we sell it by paying us the full amount you owe, not just the past due payments, including our expenses. To learn the exact amount you must pay, call us at *(telephone number)*.

{5} If you want us to explain to you in *(writing)* *(writing or in (description of electronic record))* *(description of electronic record)* how we have figured the amount that you owe us, *{6}* call us at *(telephone number)* (or) *(write us at (secured party's address))* (or) contact us by *(description of electronic communication method)* *{7}* and request *(a written explanation)* *(a written explanation or an explanation in (description of electronic record))* *(an explanation in (description of electronic record))*.

{8} We will charge you \$ *(amount)* for the explanation if we sent you another written explanation of the amount you owe us within the last six months.

{9} If you need more information about the sale (call us at *(telephone number)*) (or) *(write us at (secured party's address))* (or) contact us by *(description of electronic communication method)*.

{10} We are sending this notice to the following other people who have an interest in *(describe collateral)* or who owe money under your agreement:

(Names of all other debtors and obligors, if any)

END OF FORM

Old Safe Harbor Consumer Form

New Safe Harbor Consumer Form²¹

²¹ *Instructions for form of notification.* The following instructions apply to the form of notification in subsection (a)(3):

(1) The instructions in this subsection refer to the numbers in braces before items in the form of notification in subsection (a)(3). Do not include the numbers or braces in the notification. The numbers and braces are used only for the purpose of these instructions.

(2) Include and complete either item {1}, if the notification relates to a public disposition of the collateral, or item {2}, if the notification relates to a private disposition of the collateral.

(3) Include and complete items {3}, {4}, {5}, {6}, and {7}.

(4) In item {5}, include and complete any one of the three alternative methods for the explanation: writing, writing or electronic record, or electronic record.

(5) In item {6}, include the telephone number. In addition, the sender may include and complete either or both of the two additional alternative methods of communication, writing or electronic communication, for the recipient of the notification to communicate with the sender. Neither of the two additional methods of communication is required to be included.

(6) In item {7}, include and complete the method or methods for the explanation—writing, writing or electronic record, or electronic record, which are included in item {5}.

(7) Include and complete item {8} only if a written explanation is included in item {5} as a method for communicating the explanation and the sender will charge the recipient for another written explanation.

(8) In item {9}, include either the telephone number or the address or both the telephone number and the address. In addition, the sender may include and complete the additional method of communication—electronic communication—for the recipient of the notification to communicate with the sender. The additional method of electronic communication is not required to be included.

(9) If item {10} does not apply, insert “None” after “agreement:”.

Excluding CBDC from being classified as a “deposit account.”

A specific Alabama amendment to Ala Code § 7-9A-102(a)(29) excluded Central Bank Digital Currencies (CBDC)²² from being a deposit account under Article 9A.

Electronic Money Amendments NOT enacted in Alabama

The proposed [Uniform Commercial Code Amendments 2022](#) embraced a concept of electronic money which included a concept of virtual currencies which was not enacted in Alabama (*see* Ala Code §7-1-201(b)(24) definition of “money” which specifically excludes money “in an electronic form”).

Effect on Future Transactions:

With Alabama’s adoption of the 2022 Amendments, current transactional practice will have to be generally reexamined. Parties will want to examine whether the accounts and payment intangibles they are dealing with are “electronic,” and whether they are capable of being “controlled.” If they are, then taking new steps beyond filing to obtain control of those accounts and payment intangibles may be critical to assure a transacting party of the highest priority perfected security interest, and the strongest property interest, in those assets against potential competing claimants.

In addition, these amendments also open our world up to the following possibilities (and many more):

- **Tethering to create electronic negotiable instruments:** If control of a controllable electronic record that evidences a controllable account or controllable payment intangible is transferred, the controllable account or controllable payment intangible travels with the controllable electronic record, and if the transferee is a “qualifying purchaser”²³ who benefits from the same “take-free” rule that applies to the controllable electronic record, then the transferee would be analogous to the Ala Code §7-3-302 definition of a “holder in due course” in respect of a purchaser of negotiable instruments. The effect is to create what is functionally an electronic instrument even though the payment rights continue to be classified as a “controllable account” or “controllable payment intangible.” Further if the terms of the account or payment intangible also provide that the account debtor will not assert claims or defenses against the transferee of the controllable electronic record (as, and

²² Revised Ala Code §7-9A-102(a)(9A) defines: "Central bank digital currency" as “a digital currency, a digital medium of exchange, or a digital monetary unit of account issued by the United States Federal Reserve System, a federal agency, a foreign government, a foreign central bank, or a foreign reserve system, that is made directly available to a consumer by such entities. The term includes a digital currency, a digital medium of exchange, or a digital monetary unit of account issued by the United States Federal Reserve System, a federal agency, a foreign government, a foreign central bank, or a foreign reserve system, that is processed or validated directly by such entities.”

²³ Under newly enacted Ala Code §7-12-102(a)(2) a “qualifying purchaser” is a purchaser that obtains control of a controllable electronic record for value, in good faith, and without notice of a claim of a property right in the controllable electronic record.

to the extent, permitted by Ala Code 7-9A-403), the effect is to create the substantial electronic equivalent of a negotiable instrument.^{24 25}

- **Opening of the door to Smart Contracts:** Those in the industry, see the amendments as also making it possible to enter into control agreements with respect to controllable electronic records by way of “smart contracts” – that is, software programmed to execute pre-determined actions upon completion of pre-determined conditions as communicated via code. These smart contracts would then become a comparatively simple and cost-effective way to perfect a security interest in controllable electronic records by way of control, dispensing with the need to prepare lengthy and costly control agreements.
- **Tokenization of LLC Membership Interest:** Form a non-member managed limited liability company whose membership interest are held by the holders of newly minted non-fungible tokens (controllable electronic records), which are freely transferrable electronically. While this scenario is possible under Alabama entity and UCC laws, this scenario may prove problematic under the Corporate Transparency Act and possible forthcoming securities regulations.

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²⁴ However, it is important to note that even though a negotiable instrument under Article 3 and a payment intangible under Article 12 will work in a functionally equivalent way, they are not one and the same. In order for an electronic form of a physical draft to meet the Article 12 requirements, the content of the traditional draft would need to be altered to replace “pay to the order of” with a buyer’s “promise to pay to the person in control of such draft” and additionally, such draft would need to state on its face that the buyer agrees not to assert claims or defenses against any transferee.

²⁵ Or, as others have stated, consider a buyer of goods who delivers to the buyer’s seller a promissory note in payment for the goods. If the promissory note is in a writing, it might, if certain conditions are met, qualify as a negotiable instrument under Article 3 of the UCC, and potentially a holder of the promissory note could be a holder in due course who would take free of claims and defenses. But, if the promissory note is in electronic form and even if those other conditions are met, Article 3 does not apply because the promissory note is not in a writing. Absent the promissory note qualifying as a “transferable record” under UETA, the rights of a transferee would be governed under normal contract rules and possibly some rules under UCC Article 9. Under newly enacted Article 12, however, the promissory note would be a controllable electronic record, and the take-free rule would apply to a qualifying purchaser of the promissory note. If the buyer also agreed not to assert claims or defenses against a transferee, the electronic promissory note would, subject to applicable consumer laws, have characteristics similar to those of a negotiable instrument has under Article 3.