

Clients & Friends Memo

TriBar Releases Report on Digital Asset Opinions under UCC Article 12

June 20, 2024

The official drafting committees of the Uniform Commercial Code have promulgated proposed amendments (the “2022 Amendments”) to address transactions with certain digital assets, notably adding a new Article 12 on Controllable Electronic Records.¹ As the 2022 Amendments are slowly enacted by states, one key question finance lawyers and their clients need to address is how to adapt current legal opinion practice for the 2022 Amendments in real-world transactions. The TriBar Opinion Committee (“TriBar”) has now provided some important guidance.

On May 28, 2024, TriBar released its report² (the “Article 12 Report”) on legal opinions under the 2022 Amendments. The Article 12 Report, in addition to providing a useful thumbnail summary of the 2022 Amendments, considers and recommends approaches for legal opinions on the key digital assets addressed in the 2022 Amendments—namely controllable electronic records (“CERs”), controllable accounts (“CAs”), controllable payment intangibles (“CPis”), electronic money, and chattel paper when the chattel paper is evidenced by an electronic record (collectively, “Electronic Opinion Assets”).

The legal opinions that the Article 12 Report particularly focuses on are perfection by control of security interests with heightened priority, and the “take free” right afforded to certain purchasers of Electronic Opinion Assets; that is, those that tie to the unique “negotiability” and control features afforded to such Electronic Opinion Assets by the 2022 Amendments. The Article 12 Report provides a walk-through of the constituent elements of such legal opinions, and provides illustrative language for the legal opinions for use in live deals.

¹ Uniform Commercial Code Amendments (2022) (Uniform Law Comm’n, in partnership with American Law Institute, 2022). The 2022 Amendments to date have enacted in twenty-one states and the District of Columbia, and have been introduced in seven further states. <https://www.uniformlaws.org/committees/community-home?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac> For further information about the 2022 Amendments generally, see C. McDermott, M. Stempler, “New UCC Article 12 Matters to More than Just Cryptocurrency”, *The Nat’l Law Rev.* (Mar. 10, 2023). <https://natlawreview.com/article/new-ucc-article-12-matters-to-more-just-cryptocurrency>

² *TriBar Report on Opinions Under 2022 Amendments to the Uniform Commercial Code Regarding Emerging Technologies*, 79 *Bus. Law.* 407 (2024). https://www.americanbar.org/groups/business_law/resources/business-lawyer/2024-spring/tribar-report-on-opinions-under-2022-amendments/

The Article 12 Report also acknowledges two uniquely difficult areas for legal opinions under the 2022 Amendments. One such area pertains to the establishment of facts and the use of assumptions in relation to Electronic Opinion Assets. Most of the key elements relevant to characterizing assets as CERs, CAs, CPIs or other electronic asset categories, as well as the elements of control under the 2022 Amendments, require factual inputs about the technology underlying the assets and the electronic platforms hosting such assets. The heavily technical nature of such predicate facts might put both lawyers and finance professionals at a disadvantage.

The Article 12 Report acknowledges this difficulty, and discusses the potential to use extensive assumptions regarding such facts. Indeed, the forms of opinions appended to the Article 12 Report for perfection of a security interest by control and for “take free” of Electronic Opinion Assets include numerous assumptions, including, among others: i) as to the characterization of the asset as the relevant type of Electronic Opinion Asset (including, with respect to CAs and CPIs, whether the relevant CER provides for the obligor to pay the person controlling the CER); ii) as to the four elements of “control” under the 2022 Amendments; iii) as to the sharing of control powers with third persons or the holding of control powers through a third person; and iv) as to the good faith and lack of notice of other claims of a purchaser of a CER, CA or CPI.³

It is not obvious that financing markets will accept bare assumptions on all of such matters. The Article 12 Report acknowledges that its recommendations should not be read to mean that broad assumptions are appropriate in all circumstances, and that opinion givers need to determine when facts can be established by factual investigation or whether assumptions are needed. However, “[i]f an opinion is not based on assumptions as to characterization, control, and related matters, opinion preparers will need to do additional work before they can give the opinion.”⁴ What such additional work might consist of, and what type of technical consultation will be necessary to inform it, remains for the market, opinion givers and their clients to determine.

The other difficult area noted by the Article 12 Report is choice of law. The 2022 Amendments introduce new choice of law rules for several of the types of Electronic Opinion Assets, which the Article 12 Report helpfully summarizes. In addition, since the 2022 Amendments have not been enacted in all states (although they have become law in a number of important jurisdictions), and since even where they have been enacted they have complex built-in transition rules, the resulting picture is an inconsistent and complicated jigsaw puzzle. The Article 12 Report also notes that further difficulty results from most existing CERs, CAs and CPIs having been designed before the wide dissemination of the principles of Article 12, and thus choice of law may not have been reflected in their inherent engineering.

³ See Article 12 Report at 435 and following.

⁴ Article 12 Report, 431.

The Article 12 Report's prescription in the case of choice of law, as with the problem of factual development generally, is to look to an assumption to cut the Gordian Knot—this time proposing that opinion givers may expressly assume that a CER's jurisdiction is the District of Columbia.⁵ As with the previous discussion about assumptions to establish facts, the Article 12 Report also acknowledges here that assumptions are not a universal remedy in all circumstances, and that “[i]t may be prudent for the opinion giver to seek to determine whether there is readily available information identifying the CER's jurisdiction.”⁶

The Article 12 Report provides lawyers and their clients a welcome and long-awaited framework for legal opinions on Electronic Opinion Assets. However, legal opinion practice is certain to continue its evolution as the markets assess the extent to which the assumption-based approach reflected in the Article 12 Report model opinions will gain currency, or whether something more may be required.

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⁵ Ibid., 433.

⁶ Ibid., 433 fn. 183.