

10-10-2024

WHY MONTANA SHOULD AMEND ITS UNIFORM COMMERCIAL CODE

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WHY MONTANA SHOULD AMEND ITS UNIFORM COMMERCIAL CODE*

Jonathon S. Byington**

This Article is about needed updates to Montana’s Uniform Commercial Code. The Uniform Commercial Code provides a structure of rules to facilitate commerce. This Article begins by explaining where the Uniform Commercial Code came from and when Montana enacted it. It then summarizes Montana’s historical amendments to its Uniform Commercial Code and points out a pattern of amendments following new industries or significant changes to existing industries. It highlights the development and expansion of multiple new industries related to e-commerce and cryptocurrency. It then walks through insufficient or outdated aspects of Montana’s Uniform Commercial Code and explains how the Uniform Law Commission’s proposed 2022 amendments provide needed updates. It recommends Montana adopt these amendments to update its Uniform Commercial Code.

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I. INTRODUCTION

Montana’s Uniform Commercial Code (“U.C.C.”) needs to be updated. It was first enacted in 1963. Since then, Montana has amended its U.C.C. approximately eight times, with some amendments being minor and others substantial. The substantial amendments were made to address the emergence of new industries and significant changes within existing ones. Montana’s amendments have primarily been based on proposed uniform acts drafted by the Uniform Law Commission and The American Law Institute.

Montana has not made substantial updates to its U.C.C. for nearly 20 years. With the development and expansion of e-commerce and cryptocurrency, Montana’s U.C.C. once again needs to be updated. In partnership with the American Law Institute, the Uniform Law Commission recently approved the 2022 Amendments to the U.C.C. (“Proposed Amendments”).¹ The Proposed Amendments respond to the need for commercial law rules for transactions related to e-commerce and cryptocurrency.

This Article begins by explaining where Montana’s U.C.C. came from and what it is. It describes Montana’s many amendments to its U.C.C. It then highlights the development and expansion of industries related to

1. The Uniform Law Commission approved and recommended the Proposed Amendments for enactment in all the states at its annual meeting in Philadelphia, Pennsylvania, in July 2022. The full text of the Proposed Amendments is available at <https://perma.cc/UJ48-DJM6>. As of Sept. 19, 2024, 24 States and the District of Columbia have enacted the Proposed Amendments (Alabama, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Indiana, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Virginia, and Washington), and it has been introduced in the 2024 session in 4 other states (Massachusetts, Missouri, New York, and West Virginia). *2022 Amendments to the Uniform Commercial Code*, UNIF. L. COMM’N, <https://perma.cc/UZR8-MKBR> (last visited Sept. 19, 2024). In Montana’s most recent 2023 Legislative Session, a bill (SB370) was introduced to enact the Proposed Amendments. The bill experienced a rollercoaster ride of amendments, unanimous approval on 2nd reading, failed 3rd reading, then a motion to reconsider, and ultimately died in process after a second 3rd reading with 24 “yes” votes and 25 “no” votes. *Montana Legislature Detailed Bill Information*, MONT. LEGISLATURE, <https://perma.cc/9VWX-PGSR> (last visited Apr. 12, 2024).

e-commerce and cryptocurrency. It identifies insufficient or outdated aspects of Montana's U.C.C. and explains how the Proposed Amendments provide needed updates.²

This Article considers the following important aspects of the Proposed Amendments: (A) updating U.C.C. terminology for the digital age, (B) fixing secured lending problems with cryptocurrency collateral, (C) the new provisions on controllable electronic records, (D) the new provisions on secured lending involving collateral that is a controllable electronic record, (E) how the U.C.C. defines and applies to money, (F) the rules for determining if the U.C.C. applies to hybrid transactions, and (G) how the transitional provisions help implement the Proposed Amendments. This Article concludes with the recommendation that Montana adopt the Proposed Amendments.

II. BACKGROUND

A. *The Uniform Law Commission, the American Law Institute, and the Uniform Commercial Code*

The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, is a nonprofit association formed in 1892 to create nonpartisan state legislation.³ There are over 350 volunteer commissioners on the Uniform Law Commission. Commissioners are lawyers, judges, law professors, and state legislative staff appointed by the 50 states, plus the District of Columbia, Puerto Rico, and the United States Virgin Islands.⁴ Commissioners work together to draft uniform and model laws for enactment in all the states.⁵

The American Law Institute is a nonprofit organization founded in 1923.⁶ It produces scholarly work to clarify, modernize, and otherwise improve the law.⁷ It drafts, discusses, revises, and publishes restatements of the law, model codes, and principles of law.⁸

2. Throughout this article, I will cite the 2022 Amendments to the Uniform Commercial Code as "U.C.C. § X-XXX (UNIF. L. COMM'N 2022)." I will cite Montana's current Uniform Commercial Code as "MONT. CODE ANN. § 30-X-XXX (2023)."

3. *About Us*, UNIF. L. COMM'N, <https://perma.cc/54YV-TUHR> (last visited Apr. 2, 2024).

4. *Id.*

5. *Id.*

6. *About ALI*, AM. L. INST., <https://perma.cc/Z89L-HEKP> (last visited Apr. 2, 2024).

7. *Id.*

8. *Id.*

In partnership with the American Law Institute, the Uniform Law Commission promulgated the U.C.C.⁹ Every state in the United States has enacted the U.C.C.¹⁰ In 1961, the Uniform Law Commission and The American Law Institute established a Permanent Editorial Board for the U.C.C. to monitor developments in commercial law and recommend amendments to the U.C.C.¹¹ From time to time, the Uniform Law Commission and The American Law Institute draft and promulgate amendments to the U.C.C. and recommend all states enact the amendments.¹²

The U.C.C. is a set of laws governing transactions involving the sale or lease of goods, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, documents of title, investment property, and secured transactions in personal property.¹³ The U.C.C. has several purposes: (1) to simplify, clarify, and modernize the law governing commercial transactions, (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties, and (3) to make uniform the law among the various jurisdictions to facilitate interstate commerce.¹⁴

B. *Montana's Uniform Commercial Code and Its Many Historical Amendments*

Montana first enacted the U.C.C. in 1963.¹⁵ It was based on the proposed uniform act drafted by the Uniform Law Commission and the American Law Institute. It included chapters governing sales of goods,¹⁶ commercial paper,¹⁷

9. *Uniform Commercial Code*, UNIF. L. COMM'N, <https://perma.cc/S9XW-WHFP> (last visited Apr. 2, 2024) [hereinafter UNIF. L. COMM'N, *Code*]. “An act is designated as a ‘Uniform’ Act if there is substantial reason to anticipate enactment in a large number of jurisdictions, and uniformity of the provisions of the act among the various jurisdictions is a principal objective.” *What is a Uniform Act?*, UNIF. L. COMM'N, <https://perma.cc/M85W-8Z3A> (last visited Apr. 2, 2024).

10. See UNIF. L. COMM'N, *Code*, *supra* note 9. However, Louisiana has not enacted Article 2 of the Uniform Commercial Code.

11. *Id.*; *Permanent Editorial Board for Uniform Commercial Code*, UNIF. L. COMM'N <https://perma.cc/3XC7-5XWK> (last visited Apr. 2, 2024).

12. See UNIF. L. COMM'N, *Code*, *supra* note 9.

13. See *id.*

14. U.C.C. § 1-103(a) (UNIF. L. COMM'N 2001).

15. 1963 Mont. Laws Ch. 1, § 87A-1-101. The Montana Uniform Commercial Code had an effective date of January 1, 1965, *id.* Ch. 264, §10-101. It was originally located in Title 87A of the Revised Code of Montana, see § 87A-1-101, R.C.M. 1947. See also *Moore v. Goran*, 400 P.3d 729, 733 (Mont. 2017) (“Montana has adopted the Uniform Commercial Code (U.C.C.) and it is codified in Montana statute.”).

16. 1963 Mont. Laws Ch. 264, § 2-102.

17. *Id.* § 3-102.

bank deposits and collections,¹⁸ letters of credit,¹⁹ bulk transfers,²⁰ warehouse receipts, bills of lading and other documents of title,²¹ investment securities,²² and secured transactions.²³

Montana has amended its U.C.C. several times since 1963. Some of those amendments have been minor and others substantial. This section highlights those amendments.

1. 1977 Amendment

In 1977, Montana made three minor amendments to its U.C.C. It clarified when and where a financing statement could be filed.²⁴ It updated the definition of a clearing corporation for purposes of investment securities²⁵ and added a disclosure obligation.²⁶ Finally, it added the word “theft” to U.C.C. provisions on the title a purchaser of goods acquires.²⁷

2. 1983 Amendment

In 1983, Montana’s U.C.C. was relocated from Title 87A of the Revised Code of Montana to its current place in Title 30 of the Montana Code Annotated.²⁸ The 1983 amendment was substantial. It adopted the 1972 and 1977 changes recommended by the Uniform Law Commission.²⁹ Montana’s 1983 amendment made significant changes to Chapter 8 on investment securities and Chapter 9 on secured transactions.³⁰

As background on the amendment to Chapter 8 on investment securities, in the late 1960s, securities brokers in the United States used physical paper-based systems that “could not handle the volume of transactions” and “could not locate, process, and move certificates fast enough.”³¹ This led

18. *Id.* § 4-102.

19. *Id.* § 5-102.

20. *Id.* § 6-102.

21. *Id.* § 7-102.

22. 1963 Mont. Laws Ch. 264, § 8-102.

23. *Id.* § 9-102 (including sales of accounts, contract rights, and chattel paper).

24. 1977 Mont. Laws Ch. 265, § 12.

25. *Id.* § 1.

26. *Id.* § 2.

27. *Id.* § 63.

28. 1983 Mont. Laws Ch. 402, § 1.

29. *Id.* § 1. *See also* MONT. CODE ANN. §§ 30-1-105, 30-1-201, 30-2-107, 30-2-207, 30-5-114, 30-5-116, 30-8-102, 30-8-201, 30-8-301, 30-8-401, 30-9-102, 30-9-203, 30-9-301, 30-9-401, 30-9-501, *Annotations* (1984) (Compiler’s Cmts.).

30. 1983 Mont. Laws Ch. 401, §§ 10–84.

31. Wyatt Wells, *Certificates and Computers: The Remaking of Wall Street, 1967 to 1971*, 74 BUS. HIST. REV. 193, 203 (2000).

to the “Paperwork Crunch” of securities markets and the need to decrease the use of paper stock certificates. The amendments to Chapter 8 set forth “rules for the issuers, buyers, sellers and other persons dealing with uncertificated securities, to the same extent [the pre-amendment Chapter 8] deals with these matters with respect to certificated securities.”³² In other words, the rules governing uncertificated securities were “formulated to conform as closely as possible to the rules for certificated securities, consistent, of course, with such changes as [were] demanded by the absence of an indispensable instrument.”³³

The amendment to Chapter 9 on secured transactions clarified and answered a variety of questions that related to fixtures; crops and farm products; timber; oil, gas, and minerals; intangibles, proceeds, and priorities; conflict of laws; motor vehicles and related problems of perfection; matters of scope; filing; and default.³⁴

3. 1991 Amendment

In 1991, Montana made substantial amendments to its U.C.C. It adopted the 1987 and 1990 changes recommended by the Uniform Law Commission.³⁵ Montana’s 1991 amendment added a new Chapter 2A on leases of goods,³⁶ revised Chapter 3 on commercial paper,³⁷ revised Chapter 4 on bank deposits and collections,³⁸ and added a new Chapter 4A on funds transfers.³⁹

The new Chapter 2A defined a lease in a way that distinguished it from a security interest that was disguised as a lease.⁴⁰ It addressed warranties to reflect leasing practices and terminology.⁴¹ It also provided for a lessor’s remedies upon a default by a lessee and for a lessee’s remedies upon a default by a lessor.⁴²

The revisions to Chapter 3 renamed the title from commercial paper to negotiable instruments.⁴³ It established significant updates to the law of negotiable instruments such as checks and promissory notes, including on

32. MONT. CODE ANN. § 30-8-101, *Annotations* (1984) (Ch. Off. Cmt.: Scope).

33. *Id.* (Ch. Off. Cmt.: Approach).

34. *Id.* § 30-9-101 (Ch. Off. Cmt.: Review Committee Explanation of Amendments).

35. *See* MONT. CODE ANN. § 30-2A-101, *Annotations* (2000) (Off. Cmt.: History).

36. 1991 Mont. Laws Ch. 410, §§ 7–86.

37. *Id.* §§ 87–153.

38. *Id.* §§ 156–188.

39. *Id.* §§ 199–201, 205–13.

40. MONT. CODE ANN. § 30-2A-101, *Annotations* (2000) (Off. Cmt.: Rationale for Codification).

41. *Id.*; §§ 30-2A-210–216 (Off. Cmt.: Changes) (noting the difference between the limited interest transferred by a lease contract and the total interest transferred by a sale).

42. *Id.* § 30-2A-101(Off. Cmt.: Rationale for Codification). *See also id.* §§ 30-2A-508–531.

43. 1991 Mont. Laws Ch. 410, § 87.

negotiation, indorsements, warranties, presentment, dishonor, payment, and discharge.⁴⁴ The revisions to Chapter 4 conformed the chapter to the new updates in Chapter 3.⁴⁵ The Chapter 4 revisions also included several amendments “required by the trend toward automation and, ultimately, truncation in the collection process.”⁴⁶ For example, revisions recognized the incapacity of an automated check-clearing system based on magnetic-ink-character-recognition-line information to accommodate postdated checks.⁴⁷ Further, modifications were made to provisions related to “depository banks as holders of an unendorsed item,⁴⁸ the medium and time of settlement,”⁴⁹ delays,⁵⁰ the right of charge-back or refund,⁵¹ when a bank may charge against the account of a customer,⁵² a bank’s liability to a customer for wrongful dishonor,⁵³ and the customer’s right to stop payment.⁵⁴

The new Chapter 4A provided “a comprehensive body of law that” did not exist at the time.⁵⁵ It primarily focused on the rights and obligations that arise from wholesale wire transfers.⁵⁶ It recognized that a “funds transfer is a highly efficient substitute for payments made by the delivery of paper instruments.”⁵⁷ It defined a fund transfer⁵⁸ and addressed payment orders,⁵⁹ misdescriptions,⁶⁰ obligation of sender to pay receiving bank,⁶¹ payment by sender to receiving bank,⁶² obligations of a beneficiary’s bank,⁶³ and discharge of an underlying obligation.⁶⁴

44. *Id.* §§ 88–153.

45. MONT. CODE ANN. § 30-4, *Annotations* (2000) (Ch. Comm’n Notes).

46. *Id.*; MONT. CODE ANN. §§ 30-4-213, 30-4-303, 30-4-216, 3-0-4-111 (1991).

47. MONT. CODE ANN. § 30-4, *Annotations* (2000) (Ch. Comm’n Notes); MONT. CODE ANN. § 30-4-401(3) (1991).

48. MONT. CODE ANN. § 30-4-205 (1991).

49. MONT. CODE ANN. § 30-4, *Annotations* (2000) (Ch. Comm’n Notes); MONT. CODE ANN. § 30-4-211 (1991).

50. MONT. CODE ANN. § 30-4-108 (1991).

51. *Id.* § 30-4-212.

52. *Id.* § 30-4-401.

53. *Id.* § 30-4-402.

54. *Id.* § 30-4-403.

55. MONT. CODE ANN. § 30-4A, *Annotations* (2000) (Ch. Off. Cmt.).

56. *Id.*

57. *Id.*

58. 1991 Mont. Laws Ch. 410, § 192.

59. *Id.* §§ 199–201, 205–13.

60. *Id.* § 215.

61. *Id.*

62. *Id.* § 216.

63. *Id.* § 217.

64. 1991 Mont. Laws Ch. 410, § 219.

4. 1997 Amendment

In 1997, Montana made substantial amendments to Chapter 5 on letters of credit, adopting the 1995 draft recommended by the Uniform Law Commission.⁶⁵ Montana also made changes to Chapter 8 on investment securities.⁶⁶ The 1997 amendment included conforming amendments to Chapter 9 on secured transactions to reflect the revisions in both Chapters 5 and 8.⁶⁷

The 1997 amendments to Chapter 5 updated the rules on letters of credit as well as the rights and obligations arising out of transactions involving letters of credit.⁶⁸ When Chapter 5 was originally drafted, it was written for paper transactions.⁶⁹ However, forty years had passed since the original draft, and electronic and other media transactions were in high use.⁷⁰ The 1997 amendment authorized the use of electronic technology,⁷¹ deferred payment letters of credit,⁷² and two-party letters of credit.⁷³ It also provided rules for unstated expiry dates,⁷⁴ perpetual letters of credit,⁷⁵ documentary conditions,⁷⁶ and successors by operation of law.⁷⁷

The 1997 amendments to Chapter 8 addressed directly held and indirectly held securities.⁷⁸ The industry practice and securities holding system had evolved from beneficial owners holding certificated securities to clearing corporations holding them.⁷⁹ Settlement of securities trading was occurring “not by delivery of certificates or by registration of transfer on the records of the issuers or their transfer agents, but by computer entries in the records of clearing corporations and securities intermediaries.”⁸⁰ This type of indirect holding system was not adequately addressed in Chapter 8. Montana’s 1997

65. MONT. CODE ANN. § 30-5-101, *Annotations* (2000) (Off. Cmt.: History); *see also* Milton R. Schroeder, *The 1995 Revision to U.C.C. Article 5 Letters of Credit*, 29 U.C.C. L.J. 331 (1997); James G. Barnes & James E. Byrne, *Uniform Commercial Code: Revision of U.C.C. Article 5*, 50 BUS. LAW. 1449 (1995).

66. 1997 Mont. Laws Ch. 536, §§ 22–71.

67. *Id.* §§ 72–86.

68. *Id.* § 7.

69. MONT. CODE ANN. § 30-5, *Annotations* (2000) (Ch. Off. Cmt.).

70. *Id.*

71. MONT. CODE ANN. §§ 30-5-122(1)(n), 30-5-124 (1997).

72. *Id.* § 30-5-122(1)(h).

73. *Id.* § 30-5-122(1)(j).

74. *Id.* § 30-5-126(3).

75. *Id.* § 30-5-126(4).

76. *Id.* § 30-5-128(7).

77. MONT. CODE ANN. §§ 30-5-122(1)(o)–30-5-133 (1997).

78. *Id.* § 30-8, *Annotations* (2000) (Ch. Off. Cmt.: Evolution of Securities Holding Systems and Brief Overview of Revised Article 8).

79. *Id.*

80. *Id.* (explaining the roles of the Depository Trust Company, the National Securities Clearing Corporation, broker-dealers, and banks who participate in the indirect holding system).

amendments updated rules on acquiring a security or an interest in a security,⁸¹ warranties,⁸² choice of law,⁸³ clearing corporation rights and obligations,⁸⁴ securities intermediaries,⁸⁵ issuers,⁸⁶ the rights of a purchaser and a protected purchaser,⁸⁷ indorsement,⁸⁸ securities accounts,⁸⁹ security entitlements,⁹⁰ and entitlement holders.⁹¹

The 1997 amendments to Chapter 9 updated the rules on perfection of security interests in letters of credit,⁹² securities,⁹³ and security entitlements.⁹⁴

5. 1999 Amendment

In 1999, Montana made substantial amendments to Chapter 9 on secured transactions, adopting the 1998 draft recommended by the Uniform Law Commission.⁹⁵ Secured financing practices had developed and there was a need to cover additional types of collateral and transactions.⁹⁶ For example, Montana's 1999 amendments expanded the scope of Chapter 9 to include sales of payment intangibles and promissory notes.⁹⁷ The 1999 amendments updated the duties of secured parties,⁹⁸ choice of law rules,⁹⁹ perfection rules,¹⁰⁰ priority rules,¹⁰¹ definition of proceeds,¹⁰² filing rules,¹⁰³ enforcement rules,¹⁰⁴ and rules on consumer-goods transactions and consumer

81. 1997 Mont. Laws Ch. 563, § 24.

82. *Id.* §§ 28–29.

83. *Id.* § 30.

84. *Id.* § 31.

85. *Id.* §§ 35–36, 58–69.

86. *Id.* §§ 37–43.

87. 1997 Mont. Laws Ch. 563, § 49.

88. *Id.* §§ 50–55.

89. *Id.* § 61.

90. *Id.* § 22.

91. *Id.* § 62.

92. *Id.* § 82.

93. 1997 Mont. Laws Ch. 536, § 72.

94. *Id.* §§ 69–70.

95. 1999 Mont. Laws Ch. 305, §§ 1–17; MONT. CODE ANN. § 30-9-101, *Annotations* (2000) (Off. Cmt.: Background and History).

96. MONT. CODE ANN. § 30-9, *Annotations* (2000) (Ch. Off. Cmt.).

97. 1999 Mont. Laws Ch. 305, §§ 8, 69.

98. *Id.* §§ 16–19.

99. *Id.* §§ 20–25.

100. *Id.* §§ 27–36.

101. *Id.* §§ 36–59.

102. *Id.* § 1(III).

103. 1999 Mont. Laws Ch. 305, §§ 71–97.

104. *Id.* §§ 98–110.

transactions.¹⁰⁵ Conforming amendments were made to U.C.C. Chapters 1, 2, 2A, 4, 7, and 8.¹⁰⁶

6. 2001 Amendment

In 2001, Montana renumbered Chapter 9 to 9A, corrected some errors in the 1999 amendments, made minor revisions to Chapter 9A, and updated the definition of a security interest to include a fact-based test to determine if a transaction creates a lease or a security interest.¹⁰⁷

7. 2005 Amendment

In 2005, Montana made substantial amendments to Chapter 7 on warehouse receipts, bills of lading, and other documents of title, adopting the 2003 draft recommended by the Uniform Law Commission.¹⁰⁸ Minor conforming amendments were made to Chapters 1, 2, 3, 4, 4A, 8, and 9A.¹⁰⁹ Several substantive changes were also made to Chapter 1 addressing the rules of construction, course of performance, and updating definitions.¹¹⁰

The 2005 amendments to Chapter 7 were needed because of changes in commercial practices and the development of electronic documents of title.¹¹¹ The goal was to allow for commercial practice to determine what records issued by bailees should be “treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers.”¹¹² This necessitated revisions adopting control of an electronic document of title as “the conceptual equivalent to possession and indorsement of a tangible document of title.”¹¹³

105. *Id.* §§ 1(w)–(x), 110–111.

106. *Id.* §§ 1(w)–(x), 129, 133, 134, 139, 141–143.

107. 2001 Mont. Laws Ch. 305, §§ 1–26 (stating in the caption of SB23 that it is “an act generally revising the secured transaction chapter of the uniform commercial code to adopt errata and revisions to the most recent version of the secured transaction laws”).

108. 2005 Mont. Laws Ch. 575, §§ 1–85; MONT. CODE ANN. § 30-1, *Annotations* (2006) (Ch. Off. Cmts.).

109. 2005 Mont. Laws Ch. 575, §§ 1–23, 30–32, 73, 76–85.

110. *Id.* §§ 1–14.

111. MONT. CODE ANN. § 30-7, *Annotations* (2006) (Ch. Off. Cmts.) (stating the purpose of the revision was “to provide a framework for the further development of electronic documents of title and to update the [chapter] for modern times in light of state, federal, and international developments”).

112. *Id.*; MONT. CODE ANN. § 30-1-201(2)(q) (2005).

113. MONT. CODE ANN. § 30-7, *Annotations* (2006) (Ch. Off. Cmts.).

The 2005 amendments to Chapter 7 updated several defined terms¹¹⁴ and addressed negotiable and nonnegotiable documents of title,¹¹⁵ warehouse liens,¹¹⁶ tangible bills of lading,¹¹⁷ tangible documents of title,¹¹⁸ negotiable electronic documents of title,¹¹⁹ and control of electronic documents of title.¹²⁰

8. 2013 Amendment

In 2013, Montana made several changes to Chapter 9A on secured transactions, adopting the 2010 revisions recommended by the Uniform Law Commission.¹²¹ The 2013 amendments added a new definition of public organic record and revised the definitions of authenticate, certificate of title, and registered organization.¹²² It added rules on how a debtor's change in location or a new debtor impacts a security interest.¹²³ The requirements of the name of the debtor in a financing statement were updated, as well as rules on information statements.¹²⁴

The foregoing summary of Montana's U.C.C. amendments illustrates a pattern that has been repeated since Montana first enacted the U.C.C. in 1963. Industry practices and commerce change over time. New industries develop. This causes a need to update Montana's U.C.C. to account for these changes and "permit the continued expansion of commercial practices through custom, usage, and agreement of the parties."¹²⁵

C. *The Development and Expansion of Industries Related to E-Commerce and Cryptocurrencies*

Several momentous industry changes have occurred since Montana last made substantial amendments to its U.C.C. For example, the development and expansion of networks, email, the internet, e-commerce, and widespread

114. 2005 Mont. Laws Ch. 575, § 35.

115. *Id.* § 37.

116. *Id.* § 48.

117. *Id.* §§ 53–55.

118. *Id.* § 61.

119. *Id.* § 62.

120. 2005 Mont. Laws Ch. 575, § 38.

121. 2013 Mont. Laws Ch. 75, §§ 1–28; MONT. CODE ANN. § 30-9A-101, *Annotations* (2022) (Off. Cmt.: Background and History); *see also* MONT. CODE ANN. § 30-9A-521 (2023) (referring to the official text of the 2010 amendments to Article 9 of the Uniform Commercial Code promulgated by The American Law Institute and the National Conference of Commissioners on Uniform State Laws).

122. 2013 Mont. Laws Ch. 75, § 2.

123. *Id.* §§ 6, 8.

124. *Id.* §§ 11, 12, 16.

125. MONT. CODE ANN. § 30-1-102(1)(b) (2023).

adoption of computers and smartphones have dramatically changed commerce in Montana and throughout the world. Nearly two-thirds of the global population have Internet access.¹²⁶

E-commerce or electronic commerce—the conducting of transactions over the internet—has grown significantly, with entire industries developing from the electronic exchange of goods and services to online banking and electronic data interchange.¹²⁷ The United States Census Bureau estimates retail e-commerce sales in the United States for 2023 at \$1,118.7 billion.¹²⁸ Montana’s brick-and-mortar retailers have been impacted.¹²⁹

The creation and development of cryptocurrency is another example of a new industry that did not exist when Montana last made substantial amendments to its U.C.C.¹³⁰ Cryptocurrency is a digital asset that uses computer-based distributed ledger technology to facilitate transactions.¹³¹ It is a form of computer software that uses cryptographic protocols to secure transactions.¹³² There are thousands of different cryptocurrencies, and their values fluctuate drastically.¹³³ The market capitalization of cryptocurrency—meaning the total value of all circulating coins and tokens listed by cryptocurrency price-tracking websites—has ranged from \$1.3 billion in May 2013 to \$2.7 trillion

126. See Ani Petrosyan, *Number of Internet and Social Media Users Worldwide as of January 2024*, STATISTA (Jan. 31, 2024), <https://perma.cc/R4W-4A3D>; Cisco *Annual Internet Report (2018–2023) White Paper*, CISCO (Mar. 9, 2020), <https://perma.cc/VG9L-4ZY7>.

127. See *E-Commerce Statistics (E-STATS)*, U.S. CENSUS BUREAU (May 9, 2023), <https://perma.cc/HTG4-JRHH>. For example, *compare 2013 E-commerce Multi-Sector Data Tables*, U.S. CENSUS BUREAU (May 28, 2015), <https://perma.cc/RF2A-U8PL>, with *E-Commerce Activity Across Sectors: 2020 and 2021*, U.S. CENSUS BUREAU (May 25, 2023), <https://perma.cc/KZZ8-TMAS> (displaying data for manufacturing, merchant wholesale trade, retail trade, and service industries sectors).

128. *Quarterly Retail E-Commerce Sales 4th Quarter*, U.S. CENSUS BUREAU (Feb. 20, 2024), <https://perma.cc/BBC5-9AKB>.

129. See *Montana Has Seen the 5th Largest Decline in Brick-And-Mortar Retail in the Country*, MONT. RIGHT NOW (Dec. 11, 2023), <https://perma.cc/DU3A-5LBY>.

130. Another example is decentralized finance.

131. See Nathan Reiff, *What Was the First Cryptocurrency?*, INVESTOPEDIA (July 23, 2022), <https://perma.cc/8P8Q-HM8A>; Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (Oct. 31, 2008), <https://perma.cc/5YJD-X5MC>; Matt Levine, *The Crypto Story*, BLOOMBERG BUSINESSWEEK (Oct. 25, 2022), <https://perma.cc/2A8V-N55N>; Kate Ashford, *What is Cryptocurrency?*, FORBES ADVISOR, <https://perma.cc/C7N3-ZFZN> (last updated Feb. 16, 2023); Julie Pinkerton, *The History of Bitcoin, the First Cryptocurrency*, U.S. NEWS (Nov. 14, 2023), <https://perma.cc/Q66L-R3RV>. See also Timothy M. Persons, *Blockchain and Distributed Ledger Technologies*, GOV’T ACCOUNTABILITY OFF. (Sept. 2019), <https://perma.cc/R347-VC4Z>; J. Merrit Francis, *A Beginner’s Guide to Cryptocurrencies: Explaining the Technologies Behind Cryptocurrencies, How the United States Taxes and Regulates them, and offering Changes to the Existing Taxation and Regulation Schemes*, 30 RICH. J.L. & TECH. 45, 49 (2023).

132. Shobit Seth, *Explaining the Crypto in Cryptocurrency*, INVESTOPEDIA (May 15, 2022), <https://perma.cc/RWQ5-9SRB>.

133. *Today’s Cryptocurrency Prices by Market Cap*, COIN MKT. CAP, <https://perma.cc/A6S2-XUST> (last visited Apr. 3, 2024).

in March 2024.¹³⁴ The value of cryptocurrency is extremely volatile. For example, the price of one Bitcoin went from less than 10 cents in October 2010 to \$73,794 on March 14, 2024, with pronounced spikes and slumps in price fluctuations over that time period.¹³⁵ The average number of daily Bitcoin transactions was approximately 378,000 from January 29, 2024, to March 18, 2024.¹³⁶

Although the number of individuals and businesses in Montana that own cryptocurrency is unknown, cryptocurrency *is* owned by Montanans.¹³⁷ Coinbase Global, Inc. is a publicly-traded company that operates a secure online cryptocurrency exchange platform, allowing users to buy, sell, transfer, and store cryptocurrency.¹³⁸ Coinbase Global, Inc. reports that it had nearly 89,000 verified users in Montana in 2022.¹³⁹ Coinbase Global, Inc. is only one of hundreds of different cryptocurrency exchange platforms.¹⁴⁰

The development and expansion of industries related to e-commerce and cryptocurrency is momentous. In 2023, Montana amended its definition of personal property to clarify that digital assets “are considered personal property.”¹⁴¹ It also changed several laws to facilitate digital asset mining or crypto mining.¹⁴² In a similar vein, Montana needs to update its U.C.C. to facilitate commerce involving these assets.

III. NEEDED UPDATES TO MONTANA’S UNIFORM COMMERCIAL CODE

This Part identifies insufficient or outdated aspects of Montana’s current U.C.C. and explains how the Proposed Amendments address those aspects.

134. *Global Live Cryptocurrency Charts & Market Data*, COIN MKT. CAP, <https://perma.cc/Q93Y-9CS7> (last visited Apr. 3, 2024) (excludes non-fungible tokens and metaverse land).

135. John Edwards, *Bitcoin’s Price History*, INVESTOPEDIA, <https://perma.cc/5MN9-4LDN> (last updated Mar. 14, 2024); *See also Bitcoin*, COIN MKT. CAP, <https://perma.cc/3L6B-G7ZH> (last visited Apr. 3, 2024); Dan Ashmore, *Bitcoin Price History 2009 to 2022*, FORBES ADVISOR (Oct. 11, 2022) <https://perma.cc/7J4F-DJAC>.

136. Josh Howarth, *How Many People Own Bitcoin? 95 Blockchain Statistics (2024)*, EXPLODING TOPICS (Mar. 25, 2024), <https://perma.cc/6X4A-ST5N>.

137. Brandon Bridge, *Bitcoin in Montana*, MONT. BUS. QUARTERLY (Apr. 12, 2018), <https://perma.cc/NYE4-F48Y>.

138. *About Coinbase*, COINBASE, <https://www.coinbase.com/about> (last visited Apr. 3, 2024).

139. *States of Crypto: New Poll Data Shows the Importance of Crypto in the State of Montana*, COINBASE, <https://www.coinbase.com/blog/states-of-crypto-new-poll-data-shows-the-importance-of-crypto-in-the-state> (last visited Apr. 3, 2024).

140. Amal Joby, *Best Cryptocurrency Exchanges*, G2, <https://www.g2.com/categories/cryptocurrency-exchanges> (last visited Apr. 3, 2024).

141. MONT. CODE ANN. § 70-1-108 (2023) (defining digital assets to mean “cryptocurrencies, natively electronic assets, including stable coins and nonfungible tokens, and other digital-only assets that confer economic, proprietary, or access rights or powers”); *see also* S. 178, 68th Leg., 2023 Reg. Sess. §§ 1–7 (Mont. 2023).

142. S. 178, 68th Leg., 2023 Reg. Sess. §§ 1–7 (Mont. 2023); MONT. CODE ANN. § 76-2-1003 (2023).

It begins by identifying U.C.C. terminology that should be updated for the digital age. It highlights secured lending problems with cryptocurrency collateral. It then explains the new provisions on controllable electronic records and the new provisions on secured lending involving collateral that is a controllable electronic record. It reviews the difference between money and central bank digital currency. It describes how the U.C.C. defines and applies to money. It then explains the rules for determining if the U.C.C. applies to hybrid transactions and how the transitional provisions help implement the Proposed Amendments.

A. *Update Montana's U.C.C. Terminology for the Digital Age*

Montana's current U.C.C. has language that assumes parties to a transaction are using paper documents.¹⁴³ The Proposed Amendments recognize the need for medium neutrality and the reality of commerce in the digital age. To accomplish this, the Proposed Amendments revise some defined terms, eliminate others, and add a few new ones.

1. *Replace "Writing" with "Record," Eliminate "Authenticate," and Broaden the Definition of the Term "Sign"*

In order to achieve medium neutrality, the Proposed Amendments replace most references to a "writing" with the term "record."¹⁴⁴ The defined term "signed" has also been adjusted.¹⁴⁵ Montana's current U.C.C. definition of the term "signed" is "any symbol executed or adopted with present intention to adopt or accept a writing."¹⁴⁶ The Proposed Amendments keep both aspects of the definition but broaden its scope in several ways.

First, the Proposed Amendments replace the reference to a "writing" with the term "record."¹⁴⁷ This enables the concept of signing to apply to both tangible and electronic records. Second, the Proposed Amendments expand the definition by separately describing the signing of a tangible record and the signing of an electronic record: "execute or adopt a tangible symbol; or

143. For example, the term "signed" means "any symbol executed or adopted with present intention to adopt or accept a writing" and a "writing" includes "printing, typewriting, or any other intentional reduction to tangible form." MONT. CODE ANN. §§ 30-1-201(2)(ll), (qq) (2023).

144. U.C.C. §§ 2-201(1), (2), 2-202, 2-203, 2-205, 2-209, 2A-107, 2A-201(1)(b), (2), (5)(a), 2A-202, 2A-203, 2A-205, 2A-208, 4A-103(1), 4A-202(b), (c), 4A-203(a)(1), 4A-207(c)(2), 4A-208(b)(2), 4A-210(a), 4A-211(a), 4A-305(c), (d), 7-102(a)(10), 8-102(a)(6), 9-616(a)(1), (b)(1)(A), (c) (UNIF. L. COMM'N 2022).

145. *Id.* § 1-201(37).

146. MONT. CODE ANN. § 30-1-201(2)(ll) (2023).

147. U.C.C. § 1-201(b)(37) (UNIF. L. COMM'N 2022).

attach to or logically associate with the record an electronic symbol, sound, or process.”¹⁴⁸

Montana’s current U.C.C. does not require a traditional ink signature—it allows “any symbol.”¹⁴⁹ Recognizing developments in technology, the Proposed Amendments retain the concept of a tangible symbol and expand the definition to include any “electronic symbol, sound, or process.”¹⁵⁰

In addition to executing or adopting, Montana’s current U.C.C. definition of the term “signed” also requires the signor to have a “present intent to adopt or accept a writing.”¹⁵¹ The Proposed Amendments replace this language with a “present intent to authenticate or adopt a record.”¹⁵² Incorporating “authenticate” into the definition of “sign” avoids duplication and overlap between the terms “authenticate” and “sign.” It also provides consistency throughout the entire U.C.C. because all other references to “authenticate” and “authenticated” are replaced with “sign” and “signed.”¹⁵³ Overall, the Proposed Amendments expansively redefine the term “sign” so it is medium neutral and retains the requirement that the party signing do so with present intention to authenticate or adopt the record.

2. *Modernize the Definition of “Conspicuous” For Transactions That Do Not Involve Paper*

The term “conspicuous” appears in Montana’s U.C.C. approximately ten times.¹⁵⁴ In each of these appearances, the goal is to prominently notify the reader of certain language. Because many transactions are now documented

148. *Id.*

149. MONT. CODE ANN. § 30-1-201(2)(II) (2023).

150. U.C.C. § 1-201(b)(37) (UNIF. L. COMM’N 2022).

151. MONT. CODE ANN. § 30-1-201(2)(II) (2023).

152. U.C.C. § 1-201(b)(37) (UNIF. L. COMM’N 2022).

153. *Id.* §§ 1-201(b)(37), 1-306, 5-104, 5-116(a), 7-102(a)(11), 9-102(a)(4)(A), (7), (66), 9-104(a)(2), 9-203(b)(3)(A), 9-208(b)(1), (4), (5), 9-209(b), 9-210(a)(2), (3), (4), (c), (d), (e), 9-312(e), 9-313(c)(1), (2), 9-324(b)(2), (d)(2), 9-334(f)(1), 9-341, 9-404(a)(2), 9-406(a), 9-509(a), 9-513(b)(2), (c), 9-608(a)(1)(C), 9-611(a)(1), (b), (c)(3), (e)(2), 9-615(a)(3)(A), (4), 9-616(a)(2), 9-619(a), 9-620(a)(2), (b)(1), (c)(1), (2), (f)(2), 9-621(a)(1), 9-624(a), (b), (c). Other than in the definition of the term *sign*, the word *authenticate* does not appear in the Proposed Amendments.

154. MONT. CODE ANN. §§ 30-2-316(2), 30-2A-214 (2023) (describing language to exclude or modify warranties); § 30-2A-303(7) (describing language to prohibit the transfer of an interest of a party under a consumer lease of goods); § 30-3-104(4) (describing language to indicate a promise or order is not an instrument governed by Ch. 3); § 30-3-311(2) (describing language to discharge a claim related to an instrument through accord and satisfaction); § 30-7-104(3) (describing language to express in a legend that a document of title is nonnegotiable); § 30-7-203(1) (describing language to indicate a document of title where an issuer does not know if all or part of the goods were received or conform to the description); § 30-7-210(2) (describing language to notify persons of a warehouse’s lien); § 30-7-403(3) (describing language to indicate a partial delivery on a document of title); § 30-7-402 (describing language to identify a duplicate document of title).

through electronic technology instead of paper, the existing definition of “conspicuous” in Montana’s U.C.C. is outdated. The Proposed Amendments update the definition as follows:

“Conspicuous”, with reference to a term, means so written, displayed, or presented that, based on the totality of the circumstances, a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

(a) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(b) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.¹⁵⁵

This change allows parties to utilize a variety of methods in order to make certain language noticeable. Historically, these methods included statutory examples that were limited to paper transactions that had language with a prominent type, font, color, or size. Under the Proposed Amendments, language in an electronic record can be conspicuous “by the use of pop-up windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual elements such as vibrations.”¹⁵⁶ This allows contract drafters flexibility to tailor the method that is used to call attention to language depending on the particular transaction, including adjustments depending on when the person against whom a term is to operate is “a large business buyer or lessee, a small business, or a consumer.”¹⁵⁷ In other words, this change is more protective of Montana consumers but also gives flexibility for documenting non-consumer transactions.

3. *Create Several New Defined Terms*

The Proposed Amendments create several new defined terms in order to accommodate developing technologies and support commercial transactions regardless of the medium used by the parties to document them. For example, there is a new U.C.C. defined term—“electronic.”¹⁵⁸ It has been copied from

155. U.C.C. § 1-201(b)(10) (UNIF. L. COMM’N 2022).

156. *Id.* § 1-201 cmt. 10.

157. *Id.*

158. *Id.* § 1-201(b)(16A) (defining “electronic” to mean “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities”).

the definition of “electronic” in the Uniform Electronic Transactions Act,¹⁵⁹ which Montana adopted in 2001.¹⁶⁰

The concept of “control” is used throughout Montana’s U.C.C.¹⁶¹ Control of an intangible asset is analogous to possession of a tangible asset—the person with control enjoys the benefits and can prevent others from benefiting.¹⁶² The Proposed Amendments create a very important new defined term of a “controllable electronic record” which is addressed in Section III(C) of this Article. The Proposed Amendments also create new definitions in Article 9 of “controllable accounts” and “controllable payment intangibles.”¹⁶³ These are new categories of property that can serve as collateral for a loan that is secured by an Article 9 security interest. These new categories have been established because of the difference between an account and payment intangible evidenced by a controllable electronic record as opposed to an account and payment intangible that are not. Control of the controllable electronic record that evidences the controllable account or controllable payment intangible is the distinction.¹⁶⁴ The Proposed Amendments provide new rules on perfection and priority of security interests in controllable accounts and controllable payment intangibles.¹⁶⁵ They also provide take-free and no-action rules for qualifying purchasers of controllable accounts and controllable payment intangibles.¹⁶⁶ These new provisions will provide greater certainty for parties that enter into transactions involving digital assets, which should in turn allow for their greater integration into the economy.

159. UNIF. ELEC. TRANSACTIONS ACT § 2(5) (UNIF. L. COMM’N 1999).

160. MONT. CODE ANN. § 30-18-101 (2001).

161. MONT. CODE ANN. §§ 30-8-116, 30-9A-104–107 (2023).

162. U.C.C. Prefatory Note cmt. 2(a) (UNIF. L. COMM’N 2022) (“Control is best understood in a general sense as a functional equivalent of ‘possession’ . . .”).

163. *Id.* § 9-102(a)(27A), (27B) (defining a “controllable account” as “an account evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under Section 12-105 of the controllable electronic record” and “controllable payment intangible” as “a payment intangible evidenced by a controllable electronic record that provides that the account debtor undertakes to pay the person that has control under Section 12-105 of the controllable electronic record”).

164. *Id.* §§ 9-107A, 12-105.

165. *Id.* §§ 9-312(a), 9-314(a), 9-326A (providing perfection by filing or control and a priority rule that a security interest held by a secured party having control of a controllable account or controllable payment intangible has priority over a conflicting security interest held by a secured party that does not have control).

166. *Id.* § 12-104 (providing that a qualifying purchaser of a controllable account or controllable payment intangible takes free of all claims of a property right in the purchased controllable account or controllable payment intangible and that an action may not be asserted against a qualifying purchaser based on both a purchase by the qualifying purchaser of a controllable electronic record and a claim of a property right in another controllable electronic record).

The Proposed Amendments also add the terms “assignee” and “assignor” as new definitions in Article 9.¹⁶⁷ They indicate that an “assignor” includes a secured party that transfers a security interest to another person and that an “assignee” includes a person to which a security interest has been transferred by a secured party.¹⁶⁸ Prior to the Proposed Amendments, the U.C.C. did not define the terms “assignee” and “assignor,” and some courts interpreted these undefined terms “in an unduly narrow way.”¹⁶⁹

4. *Modernize the Terms “Issue,” “Security Procedure,” and “Person”*

In a section dealing with instruments, the Proposed Amendments update the term “issue” to permit parties to agree to issue an instrument by the first transmission of an image of an item and information derived from the item that enables the depositary bank to collect the item.¹⁷⁰ They also modernize the definition of “security procedure” for payment orders to approve the use of symbols, sounds, or biometrics.¹⁷¹ The Proposed Amendments expand the definition of a “person” to include a protected series of an entity.¹⁷² In 2013, Montana authorized series limited liability companies.¹⁷³ The Proposed Amendments’ expansion of the defined term “person” provides a helpful clarification.

B. Secured Lending Problems with Cryptocurrency Collateral in Montana’s U.C.C.

Montana’s U.C.C. law on secured transactions needs to be updated. For secured lending purposes, cryptocurrency under Montana’s current U.C.C. is classified as a general intangible. This causes several problems that are explained below.

167. *Id.* §§ 9-102(a)(7A), (7B) (defining an assignee as a person in whose favor a security interest securing an obligation is created or to which an account, chattel paper, or payment intangible or a promissory note has been sold and an assignor as a person that creates a security interest or that sells an account, chattel paper, a payment intangible, or a promissory note).

168. U.C.C. §§ 9-102(a)(7A), (7B) (UNIF. L. COMM’N 2022).

169. *Id.* §§ 9-102(a)(7A), (7B) cmt. 2.b.1.

170. *Id.* § 3-105(a)(2).

171. *Id.* § 4A-201 (clarifying that requiring a payment order to be sent from a known email address, IP address, or telephone number is not by itself a security procedure).

172. *Id.* § 1-201(b)(27) (stating the term “includes a protected series, however denominated, of an entity if the protected series is established under law other than [the Uniform Commercial Code] that limits, or limits if conditions specified under the law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series”).

173. MONT. CODE ANN. § 35-8-202 (2023); *see also* 2013 Mont. Laws Ch. 183, § 4.

1. Montana's U.C.C. Classifies Cryptocurrency as a General Intangible for Secured Transactions

Chapter 9A of Montana's current U.C.C. governs the creation, enforcement, and priority of security interests in personal property.¹⁷⁴ A security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation."¹⁷⁵ A common commercial practice in connection with secured financing involving personal property is for a debtor to grant a lender a security interest in the debtor's personal property. The debtor's personal property that is subject to the lender's security interest is called collateral.¹⁷⁶ If the debtor does not repay the loan as agreed, the lender may collect the loan through a disposition, collection, or acceptance of the collateral.¹⁷⁷

To be enforceable against a debtor, a security interest must attach to collateral.¹⁷⁸ One common method of attaching a security interest is by the debtor entering into a security agreement that provides a description of the collateral.¹⁷⁹ Commercial law attorneys who prepare security agreements must adequately describe the collateral and commonly use Chapter 9A terminology to do so.

A security interest must be perfected to be enforceable against other parties who may also have a claim or interest in the same collateral (meaning parties other than the debtor and lender).¹⁸⁰ The Montana Supreme Court explained: "[P]erfection is the process a creditor uses to establish its priority in relation to other creditors of the debtor in the same collateral by giving notice of its interest."¹⁸¹

Perfection of a security interest usually requires a lender to take additional steps beyond attachment of a security interest.¹⁸² Those additional steps differ depending on the type of collateral. The steps typically relate to public disclosure of an attached security interest in the collateral. For example, a security interest in collateral that is a deposit account is perfected by the lender obtaining control of the deposit account.¹⁸³ A security interest in collateral that is equipment may be perfected by the lender either taking

174. MONT. CODE ANN. § 30-9A-109(1)(a) (2023).

175. *Id.* § 30-1-201(2)(jj).

176. *Id.* § 30-9A-102(1)(l).

177. *Id.* §§ 30-9A-607, 610, 622. For example, in Montana, when a debtor defaults on a car loan, a secured lender has the right to repossess the car and sell it to collect the outstanding loan balance. *See id.* § 30-9A-609.

178. *Id.* § 30-9A-203(1).

179. *Id.* § 30-9A-203(2)(c)(i).

180. MONT. CODE ANN. §§ 30-9A-203(2), 308, 317 (2023).

181. *Stockman Bank of Mont. v. Mon-Kota, Inc.*, 180 P.3d 1125, 1137 (Mont. 2008).

182. MONT. CODE ANN. § 30-9A-308(1) (2023).

183. *Id.* §§ 30-9A-314(1-2), 104.

possession of the equipment or by filing a proper financing statement that creates a public record disclosing the lender's claim to the collateral.¹⁸⁴

Under Montana's current U.C.C., cryptocurrency is considered a general intangible under Chapter 9A terminology because a general intangible is the catch-all category of personal property that does not fit within the other categories.¹⁸⁵ In other words, a general intangible is any personal property "other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, [or] money."¹⁸⁶ None of these other categories encompass cryptocurrency. A security interest in collateral that is a general intangible is perfected by filing a proper financing statement.¹⁸⁷

2. *Problems with Classifying Cryptocurrency as a General Intangible for Secured Transactions*

In a secured financing context, classification of cryptocurrency as a general intangible is problematic for both debtors and lenders. For instance, debtors who own cryptocurrency may have privacy concerns arising from the filing of a public financing statement that indicates the name of the debtor, the debtor owns cryptocurrency, and the debtor may have borrowed against it.¹⁸⁸

Another problem is that compared to other Montana U.C.C. categories of personal property such as money, deposit accounts, negotiable instruments, or even goods, a transferee of a general intangible typically takes subject to any security interests in the general intangible.¹⁸⁹ In other words, general intangibles are not very negotiable. For instance, under Montana's current U.C.C., a transferee of money "takes the money free of a security interest unless the transferee acts in collusion with the debtor."¹⁹⁰ Likewise, "[a] transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor."¹⁹¹ The right of a holder in due course to enforce the obligation of a party to pay a negotiable instrument is free of certain defenses and claims of a property or possessory right in the instrument or its proceeds.¹⁹² Finally,

184. *Id.* §§ 30-9A-310, 313, 504.

185. *See id.* § 30-9A-102(1)(pp).

186. *Id.* § 30-9A-102(1)(pp).

187. *Id.* §§ 30-9A-310(1), 501.

188. *See* Carla L. Reyes, *Emerging Technology's Unfamiliarity with Commercial Law*, 119 NW. U. L. REV. ONLINE 31, 38 (2023); MONT. CODE ANN. §§ 30-9A-503–504 (2023).

189. MONT. CODE ANN. § 30-9A-315(1)(a) (2023).

190. *Id.* § 30-9A-332(1).

191. *Id.* § 30-9A-332(2).

192. *Id.* §§ 30-3-305(2)–306.

a person that buys goods as a buyer in ordinary course of business “takes free of a security interest created by the buyer’s seller, even if the security interest is perfected and the buyer knows of its existence.”¹⁹³

Unlike these rules facilitating the transfer of money, deposit accounts, negotiable instruments, and goods, Montana’s current U.C.C. has no rules promoting the negotiability of general intangibles. That is a major constraint if cryptocurrency is intended to be freely exchanged. As one scholar observed: “[O]nce a general intangible becomes encumbered by a security interest, it can never become unencumbered even by transfer to a bona fide purchaser for value. This could greatly impinge on bitcoin’s liquidity and, therefore, its utility as a payment system.”¹⁹⁴ Put another way, under Montana’s current U.C.C., a transferee of cryptocurrency cannot be sure if the cryptocurrency the transferee received is encumbered with a security interest unless the transferee searches the appropriate U.C.C. filing system for properly filed financing statements.

Another concern relates to the practical enforcement of a lender’s security interest in cryptocurrency. Depending on the type of cryptocurrency and platform structure, upon a debtor’s default, a lender may have no practical way to access cryptocurrency used as collateral if the debtor is unwilling to cooperate.¹⁹⁵ That risk has caused lenders to require debtors to place cryptocurrency collateral in a digital wallet that is controlled by the lenders.¹⁹⁶ If such a lender with practical control fails to file a proper financing statement, under Montana’s current U.C.C., the lender would lose a priority contest over the cryptocurrency collateral if the debtor files bankruptcy or another competing lender had properly filed a financing statement.¹⁹⁷

As the following sections explain, the Proposed Amendments fix this problem by creating the new category of controllable electronic records and establishing rules that support the transferability of cryptocurrency in accordance with emerging business practices.

C. *The New Article 12 on Controllable Electronic Records*

The Proposed Amendments create a new Article 12 of the U.C.C. titled “Controllable Electronic Records.”¹⁹⁸ A controllable electronic record

193. *Id.* § 30-9A-320(1); *see also* § 30-1-201(2)(j).

194. Jeanne L. Schroeder, *Bitcoin and the Uniform Commercial Code*, 24 U. MIA BUS. L. REV. 1, 8 (2016).

195. Reyes, *supra* note 188, at 36–37. (“[C]rypto-native lenders have expressed concern about filing financing statements for a variety of reasons, including uncertainty in proper location of filing, issues related to identifying debtors, and concerns about access to collateral on default.”).

196. *Id.* at 37.

197. MONT. CODE ANN. § 30-9A-322(1)(b) (2023), 11 U.S.C. § 544(a) (2022). *See also* Reyes, *supra* note 188, at 37.

198. U.C.C. § 12-101 (UNIF. L. COMM’N 2022).

includes digital assets recorded on a distributed ledger but is not limited to digital assets using that particular technology. Article 12 contains seven sections.¹⁹⁹ It establishes several ground rules to provide certainty and facilitate commerce related to certain intangible digital assets as well as “electronic assets that may be created using technologies that have yet to be developed, or even imagined.”²⁰⁰

The first ground rule delineates the contours of a controllable electronic record. It does this by focusing on attributes that make an electronic record controllable.²⁰¹ It then establishes several ground rules on transfers of the entire ownership interest of a controllable electronic record as well as transfers of an interest for security.²⁰² These rules promote the commercial utility of controllable electronic records and make such records highly negotiable.

1. Description of a Controllable Electronic Record

A controllable electronic record is “a record stored in an electronic medium that can be subjected to control under Section 12-105.”²⁰³ Because this description would be overly inclusive, Article 12 identifies and excludes several other U.C.C. definitions that may otherwise fall within the scope of a controllable electronic record: a controllable account, a controllable payment intangible, a deposit account, an electronic copy of a record evidencing chattel paper, an electronic document of title, electronic money, investment property, and a transferable record.²⁰⁴

The definition of a controllable electronic record has expansive characteristics arising from the word “record,” which is defined broadly in the U.C.C. to mean “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”²⁰⁵ The requirement that the record be stored in an “electronic medium” narrows the scope a little, but the word “electronic” is also broadly defined to mean “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.”²⁰⁶

The core confining characteristic of the definition of a controllable electronic record comes from the requirement that the electronic record be of

199. *Id.* § 12-101–107.

200. *Id.* Prefatory Note to Article 12 cmt. 1.

201. *Id.* § 12-105.

202. *Id.* § 12-104.

203. *Id.* § 12-102(a)(1).

204. U.C.C. § 12-102(a)(1) (UNIF. L. COMM’N 2022).

205. *Id.* § 1-201(b)(31).

206. *Id.* § 1-201(b)(16A).

such nature that it can be subjected to control under Section 12-105.²⁰⁷ Control under Section 12-105 requires four attributes arising from either the electronic record, a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded.²⁰⁸ Control is defined using technology-neutral language so as to not limit controllable electronic records to a given technology-specific term like blockchain or distributed ledger. Bitcoin is a “prototypical” controllable electronic record.²⁰⁹ In essence, control of an electronic record requires three powers and the ability to identify oneself as the person who has those three powers.

a. The Three Powers of Control

The first attribute is that the record or system must give the person “power to avail itself of substantially all the benefit from the electronic record.”²¹⁰ The second attribute is that the record or system must give the person exclusive power “to prevent others from availing themselves of substantially all the benefit from the electronic record.”²¹¹ The Official Comment explains:

[T]he “benefit” of a controllable electronic record refers to the rights that are afforded by the controllable electronic record and the uses to which the controllable electronic record can be put. These, in turn, depend on the characteristics of the controllable electronic record in question. For example, the benefit afforded by control of a bitcoin is that it can be held or disposed of (sold or spent). And control of a controllable electronic record evidencing a controllable account or controllable payment intangible affords the benefit of the right to collect from the account debtor (obligor).²¹²

The third attribute is that the record or system must give the person exclusive power to “transfer control of the electronic record to another person or cause another person to obtain control of another controllable electronic record as a result of the transfer of the electronic record.”²¹³

Both the power to prevent others from availing themselves and the power to transfer control must be held exclusively by the person claiming control. Article 12 establishes a presumption that if a person has the power to prevent others from availing themselves and the power to transfer control, “the powers are presumed to be exclusive.”²¹⁴ Montana’s current U.C.C. determines the impact of the presumption on the proof process by explaining that “presumed” means that “the trier of fact must find the existence of the

207. *Id.* § 12-102(a)(1).

208. *Id.* § 12-105(a).

209. *Id.* Prefatory Note to Article 12 cmt. 2.

210. U.C.C. § 12-105(a)(1)(A) (UNIF. L. COMM’N 2022).

211. *Id.* § 12-105(a)(1)(B)(i).

212. *Id.* § 12-105 cmt. 3.

213. *Id.* § 12-105(a)(1)(B)(ii).

214. *Id.* § 12-105(d).

fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.”²¹⁵

Although initially seeming incongruent, the power to prevent others from availing themselves and the power to transfer control are considered exclusive even if the record or system “limits the use of the electronic record or has a protocol programmed to cause a change, including a transfer or loss of control or a modification of benefits afforded by the electronic record.”²¹⁶ The Official Comment explains that “the potential for the system to otherwise modify (or even destroy) controllable electronic records would not impair the exclusivity.”²¹⁷ This provision allows for the creation and execution of so-called “smart contracts”—which involve self-executing computer protocols.

In addition, the power to prevent others from availing themselves and the power to transfer control are still considered exclusive even if “the power is shared with another person.”²¹⁸ Section 12-105(c) describes situations that are not considered sharing of powers and that make a power not exclusive.²¹⁹ A power is not shared if:

- (1) the person can exercise the power only if the power also is exercised by the other person; and
- (2) the other person:
 - (A) can exercise the power without exercise of the power by the person; or
 - (B) is the transferor to the person of an interest in the controllable electronic record²²⁰

These rules sort a variety of arrangements, including different types of multi-signature agreements, and determine whether a power is considered shared with another.²²¹ They parse out situations where a person in control grants another person the power to approve or disapprove a transfer of control on the system, permits a system administrator or the system itself to transfer control to another person, or delegates the power to transfer control to an agent or fiduciary.²²² Like the corollary concept of possession of tangible personal property in Chapter 9A of Montana’s current U.C.C., these Article 12 rules clarify when a power is legitimately shared with another or sufficiently

215. MONT. CODE ANN. § 30-1-201(2)(cc) (2023).

216. U.C.C. § 12-105(b)(1) (UNIF. L. COMM’N 2022).

217. *Id.* § 12-105 cmt. 5 (explaining further that “a transfer of control resulting from a program that is a part of a system’s protocol is inherent in the controllable electronic record and does not impair the exclusivity of the power of the person in control of the record”).

218. *Id.* § 12-105(b)(2).

219. *Id.* § 12-105(c).

220. *Id.* § 12-105(c).

221. *Id.* § 12-105 cmt. 5 (providing several examples of different multi-signature arrangements). Multi-signature arrangements are utilized in some cryptocurrency transactions to increase security against fraudulent behavior such as hacking.

222. U.C.C. § 12-105 cmt. 8 (UNIF. L. COMM’N 2022).

divested to a degree that the power is not shared.²²³ This is important because a power that is shared with another person is still considered exclusive.²²⁴

b. Ability to Readily Identify Oneself as the Person Having the Three Powers of Control

The fourth and final attribute of a controllable electronic record is that the record or system “enables the person readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number,” as having the above-described three powers of control.²²⁵ The list of ways to identify derives from Montana’s current U.C.C. section addressing identification of a person to whom an instrument is payable.²²⁶ Even though the person must be able to readily identify itself as having the three powers of control, the person does not have an obligation to identify itself as having control.²²⁷

2. Establish Qualifying Purchaser Rights

The primary purpose of Article 12 is to provide rules on transfers of the entire ownership interest of a controllable electronic record as well as transfers of an interest for security.²²⁸ Establishing certainty and criteria for resolving competing claims to controllable electronic records and their related benefits decreases risk and facilitates commerce.²²⁹ For example, Article 12 establishes the shelter principle that “[a] purchaser of a controllable electronic record acquires all rights in the controllable electronic record that the transferor had or had power to transfer”²³⁰ Both buyers and

223. See MONT. CODE ANN. § 30-9A-313 (2023); U.C.C. § 12-105 cmt. 9 (UNIF. L. COMM’N 2022) (“Control is intended to be a proxy for and a functional equivalent of the transfer of physical possession of goods. In general, a person can obtain control through control by an agent . . .”).

224. U.C.C. § 12-105(b)(2) cmt. 8 (UNIF. L. COMM’N 2022) (“[N]either Article 12 nor any other provision of the U.C.C. would restrict or render ineffective any agreement of a person in control of a controllable electronic record to hold control on behalf of another person. This result is implicit from subsection (b)(2) dealing with sharing of control. It also would follow under principles of agency. But such an arrangement should be effective regardless of any agency or fiduciary relationship.”).

225. *Id.* § 12-105(a)(2).

226. MONT. CODE ANN. § 30-3-126(3) (2023) (“A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number.”).

227. U.C.C. § 12-105 cmt. 7 (UNIF. L. COMM’N 2022) (“This subsection does not obligate a person to identify itself as having control. However, to prove that it has control, a person would need to prove that the relevant records or any system in which the controllable electronic record is recorded readily identifies the person as such.”).

228. *Id.* Prefatory Note to Article 12 cmt. 1.

229. *Id.*

230. *Id.* § 12-104(d).

secured parties are considered purchasers.²³¹ Like other existing Chapters of Montana’s U.C.C., Article 12 facilitates commerce by giving a qualifying purchaser greater rights than its transferor had or had power to transfer.²³² Article 12 accomplishes this with a take-free rule and a no-action rule in favor of a qualifying purchaser.²³³ These rules promote the commercial utility of controllable electronic records and make such records highly negotiable.

a. A Qualifying Purchaser

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 for value, in good faith, and without notice of a claim of a property right in the controllable electronic record.”²³⁴ These requirements derive from Montana’s current U.C.C. Chapter 3 provisions on a holder in due course of a negotiable instrument.²³⁵ Value in this context is narrower than the generally applicable concept of value in the U.C.C. of “any consideration sufficient to support a simple contract.”²³⁶ Instead, value is given if the transferee acquires a security interest in the controllable electronic record or the controllable electronic record is issued or transferred for a promise of performance, to the extent that the promise has been performed.²³⁷

b. Take-Free Rule

The take-free rule provides that a qualifying purchaser “acquires its rights in the controllable electronic record free of a claim of a property right in the controllable electronic record.”²³⁸ This rule facilitates commerce by assuring qualifying purchasers that they will take controllable electronic records free of all claims of a property right in the purchased controllable

231. MONT. CODE ANN. §§ 30-1-201(2)(dd)–(ee) (2023) (stating a purchaser is a person that takes by “sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property”).

232. Examples of similar existing Montana U.C.C. rules include MONT. CODE ANN. §§ 30-2-403(1), 30-3-306, 30-9A-320 (2023).

233. U.C.C. §§ 12-104(e), (g) (UNIF. L. COMM’N 2022).

234. *Id.* § 12-102(a)(2).

235. MONT. CODE ANN. § 30-3-302 (2023) (stating a holder in due course means the holder of an instrument took the instrument “(i) for value; (ii) in good faith; (iii) without notice that it is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; (iv) without notice that the instrument contains an unauthorized signature or has been altered; (v) without notice of any claim to the instrument stated in 30-3-306; and (vi) without notice that any party to the instrument has any defense or claim in recoupment stated in 30-3-305(1)”).

236. *Id.* § 30-1-212(4). See U.C.C. § 12-102(a)(4) (UNIF. L. COMM’N 2022). Compare MONT. CODE ANN. § 30-3-303 with § 30-1-212 (2023).

237. MONT. CODE ANN. § 30-3-303(1) (2023). See U.C.C. § 12-102(a)(4) (UNIF. L. COMM’N 2022).

238. U.C.C. § 12-104(e) (UNIF. L. COMM’N 2022).

electronic record. The rule also makes controllable electronic records “highly negotiable.”²³⁹

c. No-Action Rule

The no-action rule provides a qualifying purchaser protection by prohibiting an action “against a qualifying purchaser based on both a purchase by the qualifying purchaser of a controllable electronic record and a claim of a property right in another controllable electronic record, whether the action is framed in conversion, replevin, constructive trust, equitable lien, or other theory.”²⁴⁰ The no-action rule covers both the qualifying purchaser’s rights in the acquired controllable electronic record and, depending on the type of transaction and controllable electronic record, any “resulting and corresponding derivative creation and acquisition of a new controllable electronic record” associated with the acquired controllable electronic record, even if it is another controllable electronic record.²⁴¹ The comment explains:

[The no-action rule applies when] the “resulting” controllable electronic record . . . purchased by a qualifying purchaser is not the “same” record . . . that was transferred. In such a situation, a person claiming a property right in the transferred asset may assert a claim against a purchaser of the “resulting” asset even though the claimant is *not* asserting a claim of a *property right in* the purchased asset. If the claim is based on both the purchaser’s purchase of the acquired asset and the claimant’s claim of a property right in the transferred asset, [the no-action rule] protects the qualifying purchaser from liability to the claimant based on any theory.²⁴²

Taken together, Article 12 provides helpful ground rules that facilitate commerce involving controllable electronic records. They fix the problem under Montana’s current U.C.C. that categorizes cryptocurrency as a general intangible. Under Article 12, cryptocurrency is a controllable electronic record.

D. New U.C.C. Rules for Secured Lending Involving Collateral that is a Controllable Electronic Record

The Proposed Amendments also create new rules on secured transactions involving a controllable electronic record that is collateral. In other

239. *Id.* § 12-104 cmt. 7.

240. *Id.* § 12-104(g).

241. *Id.* § 12-104 cmt. 4 (“An example of such a resulting controllable electronic record is the unspent transaction output (UTXO) generated by a transaction in bitcoin. The Bitcoin protocol operates by allowing users to ‘spend’ their UTXOs to create one or more new UTXOs for the same amount of bitcoin, so each transfer produces new UTXOs controlled by the transferees (one of which may be the transferor—spender—of the bitcoin).”).

242. *Id.* § 12-104 cmt. 8.

words, they create new rules on how to perfect a security interest in a controllable electronic record. The Proposed Amendments provide that a security interest in a controllable electronic record may be perfected by filing.²⁴³ A security interest in a controllable electronic record may also be perfected by control of the collateral,²⁴⁴ and a secured party has control of a controllable electronic record as provided in Section 12-105.²⁴⁵

As far as priority, the Proposed Amendments clarify that a security interest in a controllable electronic record held by a secured party having control of the controllable electronic record has priority over a conflicting security interest held by a secured party that does not have control.²⁴⁶ These new rules fix the problems under Montana's current U.C.C. relating to perfecting and enforcing a security interest in cryptocurrency and will facilitate the use of cryptocurrency and other controllable electronic records as collateral for secured loans.

E. Money, Central Bank Digital Currency, and How the U.C.C. Defines and Applies to Money

This Section explains what money is. It also describes central bank digital currency and highlights the difference between money in the United States and central bank digital currency. It discusses the limited purposes of the U.C.C.'s definition of money and how the U.C.C. applies to money. It then explains the problems with Montana's current U.C.C. definition of money and the rules on perfection of a security interest in money. It then shows how the Proposed Amendments address these problems.

1. What is Money?

In general, money is something that an organized society accepts as payment for goods and services. Money serves several important functions. It is a medium of exchange in commerce to buy and sell goods and services.²⁴⁷ It serves as a unit of account or measure of value, meaning "it

243. *Id.* § 9-312(a).

244. U.C.C. § 9-314 (UNIF. L. COMM'N 2022).

245. *Id.* §§ 9-107A, 12-105.

246. *Id.* § 9-326A. The local law of the controllable electronic record's jurisdiction governs perfection and priority of a security interest in a controllable electronic record. U.C.C. §§ 9-306B, 12-107(c)–(d). Sections 12-107(c)–(d) provide rules for determining a controllable electronic record's jurisdiction.

247. WILLIAM STANLEY JEVONS, *MONEY AND THE MECHANISM OF EXCHANGE* ch. 1 (1875) ("The earliest form of exchange must have consisted in giving what was not wanted directly for that which was wanted. This simple traffic we call barter or truck, the French *troc*, and distinguish it from sale and purchase in which one of the articles exchanged is intended to be held only for a short time, until it is parted with

can be used to price goods and services.”²⁴⁸ Money also serves as a store of value, meaning it “embod[ies] value in a convenient form” that is preserved over time.²⁴⁹ “Money represents many things—freedom, security, power, and status, among others.”²⁵⁰

In the United States, the power to create money is reserved for the federal government.²⁵¹ The Constitution of the United States provides that “in Order to form a more perfect Union,” . . . “No State shall . . . coin Money”²⁵² and that “Congress shall have Power . . . To coin Money [and] regulate the Value thereof”²⁵³ Under federal law, “United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues.”²⁵⁴

Metal coins and paper currency (also known as dollar bills or Federal Reserve notes) of the United States “are the only type of central bank money available to the general public.”²⁵⁵ Paper currency, also known as Federal Reserve notes or more commonly referred to as dollar bills, are “obligations

in a second act of exchange. The object which thus temporarily intervenes in sale and purchase is money. At first sight it might seem that the use of money only doubles the trouble, by making two exchanges necessary where one was sufficient; but a slight analysis of the difficulties inherent in simple barter shows that the balance of trouble lies quite in the opposite direction. Only by such an analysis can we become aware that money performs not merely one service to us, but several different services, each indispensable. Modern society could not exist in its present complex form without the means which money constitutes of valuing, distributing, and contracting for commodities of various kinds.”). See also JAMES TOBIN, MONEY, CREDIT AND CAPITAL 4 (1998); *The Future of Money and Payments, Report Pursuant to Section 4(b) of Executive Order 14067*, U.S. DEP’T OF THE TREASURY, 3 (Sep. 2022), <https://perma.cc/Y6ST-Q6FJ>.

248. U.S. DEP’T OF THE TREASURY, *supra* note 247, at 3; accord JEVONS, *supra* note 247 (“The chosen commodity becomes a common denominator or common measure of value, in terms of which we estimate the values of all other goods, so that their values become capable of the most easy comparison.”).

249. JEVONS, *supra* note 247, ch. 2; see also U.S. Dep’t of the Treasury, *supra* 247, at 3.

250. Julia Y. Lee, *Money Norms*, 49 LOY. U. CHI. L.J. 57, 62 (2017) (citing HENRY C. LINDGREN, THE PSYCHOLOGY OF MONEY 6 (1991) (“While necessary to satisfy our most basic needs, it also can increase opportunities, elevate and signal our social status, influence others, and free us from a position of dependence.”)).

251. U.S. CONST. art. 1, §§ 8, 10.

252. *Id.* § 10.

253. *Id.* § 8; see also *Houston v. Moore*, 18 U.S. 1, 49 (1820); *Sturges v. Crowninshield*, 17 U.S. 122, 125 (1819); *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Veazie Bank v. Fenno*, 75 U.S. 533 (1869); *Juilliard v. Greenman*, 110 U.S. 421, 448 (1884) (“Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.”).

254. 31 U.S.C. §§ 5103, 5112(h); see also the Federal Reserve Act, 12 U.S.C. §§ 221–552.

255. *Money and Payments: The U.S. Dollar in the Age of Digital Transformation*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., 13 (Jan. 2022), <https://perma.cc/5PPL-W466>. The Bureau of Engraving and Printing produces currency, and the U.S. Mint produces coins. Both organizations are bureaus of the U.S. Department of the Treasury. Although not available to the general public, there are also digital account balances of central bank money that are a liability of the Federal Reserve held by commercial banks and a limited number of other eligible institutions in their accounts at the Federal Reserve.

of the United States.”²⁵⁶ Currency and coins of the United States are currently a fiat-money regime, meaning currency and coins are backed by the issuing government, not a physical commodity like gold.²⁵⁷ The term “cash” typically refers to paper currency and metal coins of the United States.²⁵⁸ For purposes of this Article, the term “Official U.S. Currency” refers to paper currency and metal coins of the United States.

Individuals and businesses in the United States have long used and held alternates to Official U.S. Currency in digital form such as “bank accounts recorded as computer entries on commercial bank ledgers.”²⁵⁹ These “commercial banks” include banks (licensed either by federal or state banking agencies) as well as credit unions.²⁶⁰ Although these account balances are denominated in United States dollars, they are liabilities of commercial banks, not the Federal Reserve.²⁶¹ Many people who are customers of a commercial bank view their account balance as money, but it is not. An account balance at a commercial bank is a liability of the commercial bank. An account balance may be convertible to Official U.S. Currency, but from a legal perspective, an account balance at a commercial bank is not Official U.S. Currency.²⁶²

Commercial banks are widely used because public trust and demand “are based on the creditworthiness, liquidity and reputation of the relevant financial institution.”²⁶³ In addition, commercial banks are regulated and

256. 12 U.S.C. § 411 (stating federal reserve notes “shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank”); *see also* *Milam v. United States*, 524 F.2d 629 (9th Cir. 1974) (denying the demand of an individual who held a \$50 Federal Reserve note and had sought to redeem the note from the Federal Reserve Board in gold or silver); Jess Cheng & Joseph Torregrossa, *A Lawyer’s Perspective on U.S. Payment System Evolution and Money in the Digital Age*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 4, 2022), <https://perma.cc/VN6C-KP8V> (explaining that “a holder of a Federal Reserve note who presents it for redemption in lawful money is likely to receive in exchange lawful money in the form of another Federal Reserve note”).

257. *Gold Reserve Act of 1934*, Pub. L. No. 73–87, ch. 6, § 6, 48 Stat. 337, 340–41 (stating “no currency of the United States shall be redeemed in gold”); Gary Richardson, Alejandro Komai & Michael Gou, *Gold Reserve Act of 1934*, FED. RSRV. HIST. (Nov. 22, 2013), <https://perma.cc/U5GV-WV6B>; GLYN DAVIES, *A HISTORY OF MONEY: FROM ANCIENT TIMES TO THE PRESENT DAY* 482–91 (2002). With respect to the international currency market and international convertibility of the United States dollar to gold by foreign governments, *see* Sandra Kollen Ghizoni, *Nixon Ends Convertibility of U.S. Dollars to Gold and Announces Wage/Price Controls*, FED. RSRV. HIST. (Nov. 22, 2013), <https://perma.cc/CCU4-SPLM>.

258. 12 C.F.R. § 229.2(h) (2020) (“Cash means U.S. coins and currency.”).

259. BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 255, at 3.

260. *Id.* at 25 n.38.

261. *Id.* at 25.

262. In addition, financial institutions must file a report concerning a transaction in excess of \$10,000 in Official U.S. Currency. *See* The Bank Secrecy Act, 31 U.S.C. § 5313, 5331.

263. Anton N. Didenko & Ross P. Buckley, *The Evolution of Currency: Cash to Cryptos to Sovereign Digital Currencies*, 42 *FORDHAM INT’L L.J.* 1041, 1055 (2019).

supervised.²⁶⁴ There is also a government backstop in the form of the Federal Deposit Insurance Corporation insuring deposits at certain commercial banks up to \$250,000 per depositor.²⁶⁵

Digital alternates to official U.S. currency provided by commercial banks are also widely used because they are often more convenient for the public to make payments.²⁶⁶ For example, payment processing for transactions involving digital alternates to Official U.S. Currency routinely occurs via checks, credit and debit cards, automated clearing house (ACH) rails, and wire transfers.²⁶⁷ A customer of a commercial bank who has an account balance typically may redeem the balance in exchange for Official U.S. Currency in accordance with the commercial bank's policies. Thus, it is common to convert on a one-for-one basis Official U.S. Currency into digital alternates to Official U.S. Currency and vice versa. Consumer payment method preferences in the United States are shifting by replacing use of Official U.S. Currency with credit and debit cards, automated clearing house (ACH) rails, and mobile payment applications.²⁶⁸

2. *What is Central Bank Digital Currency?*

A central bank digital currency ("CBDC") is "a digital liability of a central bank that is widely available to the general public."²⁶⁹ In other words,

264. Commercial banks may be regulated and supervised by the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and state banking departments. *BD. OF GOVERNORS OF THE FED. RSRV. SYS.*, *supra* note 255, at 26 n.41.

265. 12 U.S.C. 1821(a)(1)(E); 12 C.F.R. § 330.1(o).

266. U.S. DEP'T OF THE TREASURY, *supra* note 247, at 3–4.

267. *Id.* at 4–6; Mark Burge, *After FTX: Can the Original Bitcoin Use Case Be Saved?*, 72 U. KAN. L. REV. 1, 18 (2023) ("In the United States, for instance, traditional bank accounts across the country contain entries electronically denominated in U.S. dollars. The dollars are not physically present in the bank, but are instead partially backed by reserves, through a well-established system known as fractional-reserve banking . . . Transferring these electronic dollars from one bank to another, or even from one country to another, occurs through established financial rails."); Erin F. Fonte, *Mobile Payments in the United States: How Disintermediation May Affect Delivery of Payment Functions, Financial Inclusion and Anti-Money Laundering Issues*, 8 WASH. J.L. TECH & ARTS 419, 422–23 (2013) ("As has been the case for about the past twenty years, and remains the case today, there are five and only five methods to process and settle payment transactions: cash, check (including substitute checks created pursuant to the federal Check21 Act), credit card and debit card rails (which include debit card, credit card, and stored value card transactions), automated clearing house (ACH) rails, and wire transfers."); Carolyn Lowry, *What's in Your Mobile Wallet? An Analysis of Trends in Mobile Payments and Regulations*, 68 FED. COMM'NS L.J. 353, 359–60 (2016) ("In the United States, there are five methods for processing payment transactions: cash, checks, credit and debit card rails, automated clearing house (ACH) rails, and wire transfers.").

268. Emily Cubides & Shaun O'Brien, *2022 Findings from the Diary of Consumer Payment Choice*, FED. RSRV., 3 (2022), <https://perma.cc/V5SF-S9EW>; U.S. DEP'T OF THE TREASURY, *supra* note 247, at 11.

269. *BD. OF GOVERNORS OF THE FED. RSRV. SYS.*, *supra* note 255, at 1; U.S. DEP'T OF THE TREASURY, *supra* note 247, at 19 (stating a United States CBDC would be legal tender, convertible

it is a digital form of Official U.S. Currency. The Federal Reserve is the central bank of the United States of America. It conducts the nation's monetary policy, regulates banks, seeks to maintain the stability of the financial system, and provides some financial services to the United States government and United States financial institutions.²⁷⁰ The Federal Reserve has not issued a United States CBDC. In January 2022, it took the position that “[t]he Federal Reserve does not intend to proceed with issuance of a CBDC without clear support from the executive branch and from Congress, ideally in the form of a specific authorizing law.”²⁷¹

In March 2022, President Biden issued an executive order titled “Ensuring Responsible Development of Digital Assets” that, among other things, stated, “My Administration places the highest urgency on research and development efforts into the potential design and deployment options of a United States CBDC” including, “assessments of possible benefits and risks for consumers, investors, and businesses; financial stability and systemic risk; payment systems; . . . and the actions required to launch a United States CBDC if doing so is deemed to be in the national interest.”²⁷²

In response to the executive order, the U.S. Department of the Treasury issued a report in September 2022 that made several recommendations, including advancing work on a possible United States CBDC “in case one is determined to be in the national interest.”²⁷³ The report states a United States CBDC has the potential to offer significant benefits, “but further research and development on the technology that would support a U.S. CBDC is needed and could take years.”²⁷⁴

In April 2023, the Federal Reserve Board stated it “has not made any decisions regarding the issuance of a U.S. CBDC” and that the Federal Reserve “would only proceed with the issuance of a CBDC with an authorizing law.”²⁷⁵

A United States CBDC would be different than existing digital forms of money equivalents because a United States CBDC would be a liability of the Federal Reserve instead of a liability of a commercial bank or credit union.

one-for-one into reserve balances or Official U.S. Currency, and would clear and settle with finality nearly instantly).

270. *What is the purpose of the Federal Reserve System?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://perma.cc/A7GP-Q2NP> (last updated Nov. 3, 2023).

271. BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 255, at 3.

272. *Ensuring Responsible Development of Digital Assets*, Exec. Order No. 14067, 87 C.F.R. 14143, 14145 (March 9, 2022).

273. U.S. DEP’T OF THE TREASURY, *supra* note 247, at 45.

274. *Id.*

275. *Money and Payments: The U.S. Dollar in the Age of Digital Transformation, Summary of Public Comments*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., 1 (Apr. 2023), <https://perma.cc/UR38-FUW4>. [hereinafter Bd. of Governors, *Summary*].

There are many legitimate concerns with a United States CBDC. For example, it is unknown how a United States CBDC would change existing financial market structures, including commercial bank deposits and commercial bank lending. It is unclear if or how a United States CBDC would impact the Federal Reserve's approaches to implementing monetary policy.²⁷⁶ In addition, there are significant privacy concerns associated with the data a United States CBDC would generate about a user's financial transactions.²⁷⁷ There is strong concern about how user data would be protected from unauthorized surveillance and if user data would be held, collected, shared, sold, or used.²⁷⁸ In other words, a United States CBDC would enable too much government control of and visibility into payments.²⁷⁹ Existing Official U.S. Currency has several privacy properties, such as anonymity and non-traceability of transactions.²⁸⁰ It is unclear and doubtful if a United States CBDC would replicate those privacy properties. There are also concerns about the trustworthiness of the government. There is also a concern about how a United States CBDC would impact smaller financial institutions that provide financial services to underserved consumers, including rural consumers and small businesses.²⁸¹

The Federal Reserve has indicated it "will only take further steps toward developing a CBDC if research points to benefits for households, businesses, and the economy overall that exceed the downside risks, and indicates that CBDC is superior to alternative methods."²⁸² The Federal Reserve has also stated it "would only pursue a CBDC in the context of broad public and cross-governmental support."²⁸³ It is unknown if the United States will actually implement a United States CBDC at some future date.

3. *The History and Purpose of Montana's U.C.C. Definition of Money*

One of the primary purposes of Montana's U.C.C. is to provide a legal framework to facilitate commerce.²⁸⁴ Montana's U.C.C. does not force or require any individual or business to engage in commercial transactions. It

276. Bd. of Governors of the Fed. Rsrv. Sys., *supra* note 255, at 17–19.

277. *Id.* at 19.

278. Bd. of Governors, *Summary*, *supra* note 275, at 9; Cheng-Yun Tsang, Yueh-Ping Yang & Ping-Kuei Chen, *Disciplining CBDCs: Achieving the Balance between Privacy Protection and Central Bank Independence*, 43 *Nw J. INT'L L. & BUS.* 235 (2023) (identifying many privacy concerns).

279. Bd. of Governors, *Summary*, *supra* note 275, at 11.

280. *Id.*

281. *Id.* at 8.

282. Bd. of Governors of the Fed. Rsrv. Sys., *supra* note 255, at 21.

283. *Id.*

284. MONT. CODE ANN. § 30-1-102(1)(a) (2023) (identifying the underlying purposes and policies as simplifying, clarifying, and modernizing the law governing commercial transactions).

establishes ground rules that provide certainty, consistency, and predictability for parties who choose to engage in commerce.

Montana's U.C.C. has a definition of "money."²⁸⁵ The purpose of Montana's U.C.C. definition of "money" is not to establish what type of money Montanans can or cannot use in their everyday lives. In the United States, that topic is reserved for the federal government.²⁸⁶ In other words, "[t]he definition of 'money' applies to the term only as used in the Uniform Commercial Code. The definition does not determine whether an asset constitutes 'money' for other purposes."²⁸⁷

Montana's U.C.C. has rules that use the term "money" as either (i) a unit of account (meaning a numerical measurement of value), (ii) the thing being paid or claimed, or (iii) as part of a classification system of different types of property that may serve as collateral for a secured loan. For example, Montana's U.C.C. uses the term "money" as a unit of account in a rule that allows the parties to decide how interest is described in an instrument "as a fixed or variable amount of money."²⁸⁸ Montana's U.C.C. uses the term "money" as the thing being paid in a rule that allows the buyer and seller to decide if the price for goods is "payable in money or otherwise."²⁸⁹ Finally, one of the most common uses of the term "money" in Montana's U.C.C. is when money is being used as the collateral of a secured loan.²⁹⁰

The term "money" appears approximately forty-seven times in Montana's U.C.C.²⁹¹ It is defined in the general definitions section.²⁹² The term "money" appears four times in Chapter 2 on sales of goods,²⁹³ five times in Chapter 2A on leases,²⁹⁴ eleven times in Chapter 3 on negotiable instruments,²⁹⁵ two times

285. *Id.* § 30-1-201(2)(y).

286. *See* Section III(E)(1) of this Article.

287. U.C.C. § 1-201(b) cmt. 24 (UNIF. L. COMM'N 2022).

288. MONT. CODE ANN. § 30-3-128(2) (2023).

289. *Id.* § 30-2-304(1) (appearing in a section on the price of goods being payable in money or something other than money), *accord* § 30-2-402(3)(b) (appearing in reference to preexisting claims); § 30-2-508(2) (appearing in connection with a money allowance).

290. *Id.* § 30-9A-313(1) (stating "a secured party may perfect a security interest in . . . money . . . by taking possession of the collateral").

291. This does not include the term "purchase-money." *Id.* § 30-1-201(2)(y).

292. *Id.* It also appears in the definition of a buyer in ordinary course of business, § 30-1-201(2)(j).

293. *Id.* § 30-2-105(1) (appearing in the definition of goods); § 30-2-304(1) (appearing in a section on the price of goods being payable in money or something other than money); § 30-2-402(3)(b) (appearing in reference to preexisting claims); § 30-2-508(2) (appearing in connection with a money allowance).

294. MONT. CODE ANN. § 30-2A-103(1)(a) (2023) (appearing in the definition of buying); § 30-2A-308(2)(a) (appearing in a reference to a preexisting claim for money); §§ 30-2A-309(1)(c), (4)(a) (appearing twice in the name of a purchase money lease); § 30-2A-513(2) (appearing in reference to a money allowance).

295. *Id.* §§ 30-3-102(1)(f), (i) (appearing in the definition of order and promise); § 30-3-104 (appearing twice in the definition of a negotiable instrument); § 30-3-107 (appearing twice in a section on an instrument that states the amount payable in foreign money); § 30-3-122(7) (appearing in a reference to a claim for money); § 30-3-124(1) (appearing in a section stating the chapter does not apply to money);

in Chapter 4A on funds transfers,²⁹⁶ three times in Chapter 5 on letters of credit,²⁹⁷ two times in Chapter 7 on warehouse receipts, bills of lading, and other documents of title,²⁹⁸ four times in Chapter 8 on investment securities,²⁹⁹ and fourteen times in Chapter 9A on secured transactions.³⁰⁰

When Montana first enacted the U.C.C. in 1963, it defined “money” to mean “a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.”³⁰¹ In 1991, Montana deleted the phrase “as a part of its currency” and added the phrase “or intergovernmental organization” to the U.C.C. definition of “money.”³⁰² In response to multiple European nations adopting the euro as a new currency, Montana amended the definition of “money” in 2005 to mean “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.”³⁰³ Montana’s U.C.C. definition of “money” has stayed the same since the 2005 amendment.

4. *The Problems with Montana’s Current U.C.C. Definition of Money and Rules on Perfection of a Security Interest in Money*

For secured lending purposes, Montana’s current U.C.C. rules on perfection of a security interest in money assume that money is tangible paper

§ 30-3-128(2) (appearing in a section on interest being stated in an instrument in a fixed or variable amount of money); § 30-3-310 (appearing twice in a section on discharge of an obligation); § 30-3-601 (appearing in a section on discharging an obligation to pay).

296. *Id.* § 30-4A-103(1)(a) (appearing in a definition of payment order); § 30-4A-406(2) (appearing in a section on a payment to a beneficiary).

297. *Id.* § 30-5-128(9)(d) (appearing in a section on an issuer that has honored a presentation); § 30-5-131(1) (appearing twice in a section on remedies).

298. *Id.* § 30-7-209(2) (appearing in a section on a warehouse lien); § 30-7-501(1)(e) (appearing in a section on duly negotiating a document).

299. *Id.* § 30-8-115(3)(b) (appearing in a section on notice of an adverse claim); § 30-8-212(2)(b) (appearing in a section on the power to borrow money); § 30-8-213(1) (appearing twice in a section on staleness as notice of a defect or defense).

300. MONT. CODE ANN. § 30-9A-102(1) (2023) (appearing in the definitions of an account, cash proceeds, general intangible, goods, new value, and promissory note); § 30-9A-207(3) (appearing twice in a section on a secured party’s duties); § 30-9A-301(3) (appearing in a section on the local law of a jurisdiction); § 30-9A-312(2)(c) (appearing in a section on how to perfect a security interest); § 30-9A-313(1) (appearing in a section on how to perfect a security interest); § 30-9A-332(1) (appearing in a section on a transferee of money takes the money free of a security interest); § 30-9A-614 (appearing five times in a statutory form of notice of disposition of collateral).

301. 1963 Mont. Laws Ch. 264, § 1-201(24). This language was adopted from the proposed uniform act drafted by the Uniform Law Commission and the American Law Institute.

302. 1991 Mont. Laws Ch. 410, § 2(24).

303. 2005 Mont. Laws Ch. 575, § 4(y); *History and Purpose*, EUROPEAN UNION, <https://perma.cc/6KZT-TCRB> (last visited Apr. 10, 2024).

currency or metal coins.³⁰⁴ When money is collateral for a secured loan, Montana’s current U.C.C. provides that “a security interest in money may be perfected *only* by the secured party’s taking possession under 30-9A-313”³⁰⁵ and Section 313 provides that “perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.”³⁰⁶ Only tangible collateral may be possessed. Two impactful developments have occurred since Montana made substantial amendments to its U.C.C. in 2005. These developments are problematic for Montana’s current U.C.C. definition of “money” and its rules on perfection of a security interest in “money” because they implicate things that are intangible.

a. Foreign Nations Issued Their Own Central Bank Digital Currency

In 2020, the Commonwealth of The Bahamas, through its central bank, issued the world’s first CBDC called the sand dollar.³⁰⁷ Several other foreign nations have also issued CBDC, such as the Federal Republic of Nigeria’s eNaira, Zimbabwe’s ZiG, and Jamaica’s Jam-Dex.³⁰⁸ These CBDCs are different than cryptocurrencies because they are backed by their issuing government.

These CBDCs fall within Montana’s current U.C.C. definition of money because they are each a medium of exchange currently authorized or adopted by a foreign government.³⁰⁹ This creates a problem when money is collateral for a secured loan because Montana’s current U.C.C. requires a security interest in money to be perfected only by the secured party taking possession of the money.³¹⁰ Digital currency is intangible and cannot be possessed. This means that under Montana’s current U.C.C., a secured party cannot perfect a security interest in collateral that is CBDC. Admittedly, this “problem” may

304. U.C.C. § 1-201(b) cmt. 24 (UNIF. L. COMM’N 2022) (stating that under the pre-Proposed Amendments version of the definition, “money was generally understood to include *only tangible* coins, bills, notes, and the like, although the statutory text did not explicitly so limit the term.”) (emphasis added).

305. MONT. CODE ANN. § 30-9A-312(2)(c) (2023) (emphasis added).

306. *Id.* § 30-9A-313(4).

307. Central Bank of The Bahamas Act, 2020, § 8(1) (July 27, 2020) (“The currency of The Bahamas shall comprise notes, coins and electronic money issued by the Bank under the provisions of this Act.”); *see About Us*, SANDDOLLAR, <https://perma.cc/J5GX-NDJ8> (last visited Apr. 10, 2024).

308. *See Today’s Central Bank Digital Currencies Status*, CBDC TRACKER (Apr. 2024), <https://perma.cc/P3LL-AVUH> [hereinafter CBDC Tracker]; *Central Bank Digital Currency Tracker*, ATLANTIC COUNCIL (Mar. 2024), <https://perma.cc/3HCM-X23P>. The list of “launched” CBDCs includes several small, Eastern Caribbean island countries such as Grenada, Saint Vincent and the Grenadines, Saint Lucia, Dominica, Montserrat, Antigua and Barbuda, Saint Kitts and Nevis, and Anguilla. Other foreign nations, such as the Republic of Marshall Islands’ Sovereign or SOV and the Bolivarian Republic of Venezuela’s Petro have either failed or sputtered in implementation.

309. MONT. CODE ANN. § 30-1-201(2)(y) (2023).

310. *Id.* § 30-9A-312(2)(c).

be acceptable given there is no United States CBDC and the low probability of secured parties utilizing Montana's current U.C.C. to secure a loan with collateral that is CBDC of foreign nations. In other words, at this point in time, the issuance of CBDC by the Commonwealth of The Bahamas, the Federal Republic of Nigeria, Zimbabwe, and Jamaica does not appear itself to justify a revision of Montana's current U.C.C. The situation may change if larger foreign nations issue their own CBDC.³¹¹

b. Foreign Nation Adopted Bitcoin as Part of its Official Currency

In 2021, the Republic of El Salvador adopted Bitcoin as an official currency.³¹² Bitcoin is a cryptocurrency that is a decentralized, consensus-based, peer-to-peer payment network.³¹³ The adoption of Bitcoin as an official currency is different than issuing a CBDC because the Republic of El Salvador (or more specifically the Central Reserve Bank of El Salvador) does not back Bitcoin. The implementation and acceptability of Bitcoin as money in the Republic of El Salvador has been limited.³¹⁴ But the impact on individuals and businesses in Montana is unclear.

Prior to 2021, Bitcoin would not be classified as money under Montana's current U.C.C. because Bitcoin was not "authorized or adopted by a domestic or foreign government."³¹⁵ But because the foreign government of the Republic of El Salvador adopted Bitcoin as an official currency, Montana's current U.C.C. now classifies Bitcoin as "money" instead of a "general intangible."³¹⁶ This is unworkable for individuals and businesses in Montana. For secured lending purposes, no secured party in Montana can perfect a security interest in collateral that is Bitcoin because Bitcoin is intangible and not subject to possession by anyone. Although most Montanans have no connection to the Republic of El Salvador, the impact is significant to Montanans because it alters how Bitcoin is classified under Montana law. Significantly, Bitcoin accounts for more than half of all cryptocurrencies in circulation, and

311. See CBDC Tracker, *supra* note 308; Atlantic Council, *supra* note 308 (indicating several large foreign nations such as China, India, Russia, Australia, Japan, and Thailand are currently piloting CBDCs).

312. El Salvador Bitcoin Law, Legislative Decree No. 75, Official Record No. 110, Volume No. 431, June 9, 2021. In addition to Bitcoin, the United States dollar continues to be the official currency of the Republic of El Salvador.

313. *Frequently Asked Questions*, BITCOIN, <https://perma.cc/568R-DBCH> (last visited Apr. 11, 2024).

314. Fernando E. Alvarez, David Argente & Diana Van Patten, *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador* 26 (Becker Friedman Inst., Working Paper No. 54, 2022), <https://perma.cc/6TYS-ZUV4> (concluding that "5% of citizens have paid taxes with bitcoin, and despite its legal tender status, only 20% of firms—mostly large ones—accept bitcoin and 11.4% report having positive sales in bitcoin").

315. MONT. CODE ANN. § 30-1-201(2)(y) (2023).

316. Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313, 320 (2022) ("Now that El Salvador has adopted Bitcoin as money, for all purposes in the UCC, money includes Bitcoin.").

presumably there are Montanans who own and trade Bitcoin.³¹⁷ And yet, under Montana's current U.C.C., because Bitcoin cannot be possessed, no lenders can perfect a security interest in collateral that is Bitcoin owned by a borrower from Montana.

5. How the Proposed Amendments Fix Problems Relating to Money in Montana's U.C.C.

The Proposed Amendments fix the problems associated with money under Montana's current law by revising the U.C.C. definitions of money and updating the rules on perfection and priority of security interests in money.

a. Revise the General U.C.C. Definition of Money in Chapter 1

The Proposed Amendments revise the definition of money contained in Chapter 1 of Montana's U.C.C. to mean:

[A] medium of exchange that is currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or pursuant to an agreement between two or more nations. The term does not include an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by the government.³¹⁸

The new last sentence resolves the problem created by the Republic of El Salvador's adoption of Bitcoin as an official currency. Because Bitcoin was recorded and transferable in a system that existed and operated before the Republic of El Salvador adopted it, Bitcoin is not money for U.C.C. purposes under the Proposed Amendments.³¹⁹ This is a desirable outcome because Bitcoin, like other cryptocurrencies, receives more favorable treatment if it is classified under the U.C.C. as a controllable electronic record, as explained in Sections III(C) and III(D) of this Article.

The Proposed Amendments add the phrase "that is currently" to the definition of money to exclude metal coins and paper currency that were previously, but not currently, authorized or adopted as a medium of exchange.³²⁰ In

317. As of March 8, 2024, Bitcoin (BTC) has a market capitalization of just over \$1.3 trillion compared to \$2.59 trillion of all cryptocurrencies. *All Cryptocurrencies*, COINMARKETCAP, (Mar. 8, 2024), <https://perma.cc/X7Q7-C34Y>.

318. U.C.C. § 1-201(b)(24) (UNIF. L. COMM'N 2022) (underlined in original to indicate the revised language).

319. *Id.* § 1-201(b)(24) cmt. 24 (explaining that "an existing medium of exchange created or distributed by one or more private persons is not money solely because the government of one or more countries later authorizes or adopts the pre-existing medium of exchange").

320. *Id.* (explaining that coins and paper currency that are no longer authorized or adopted and that are "owned and traded only for their numismatic or historical value, are not money").

other words, this change excludes from the definition of “money” collections of historical paper currency and metal coins that are not in circulation.

b. Create Sub-Categories of Money for Secured Lending Purposes Only and Update Rules on Perfecting a Security Interest in Money

Chapter 9A of Montana’s current U.C.C. governs “any transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract.”³²¹ It does not regulate or determine what type of money Montanans can or cannot use in their everyday lives. Instead, it establishes the rules for creating and perfecting a security interest in numerous types of personal property.

The method to create or perfect a security interest varies depending on the type of personal property that is the collateral for the secured loan. The U.C.C.’s rules on creation and perfection of security interests take into account how the property is used by applicable industry participants.

For example, Montana’s current U.C.C. has two different rules on perfection of a security interest in a vehicle. If a consumer or business owns and uses a vehicle that is collateral for a secured loan, the lender perfects its security interest in the vehicle by having the motor vehicle department enter the security interest against the electronic record of title for the vehicle and indicate the security interest on the face of the certificate of title.³²² But if a vehicle is held as inventory by a car dealer, a lender perfects its security interest by filing a financing statement with the Montana Secretary of State’s office.³²³ This makes sense because it would be inefficient and burdensome to require car dealers to obtain a certificate of title indicating the car dealer is the owner of the vehicle it is holding for sale and require the lender of the car dealer to note its security interest on a certificate of title. The nature of a car dealer’s business is to acquire and sell vehicles. Montana’s current U.C.C. rules on perfection of a security interest in vehicles that are inventory recognizes industry practices and allows the perfection method to be by filing a financing statement so that car dealers can buy and sell vehicles without having to enter their lenders’ security interests against the title of the vehicles.

Given the recent developments related to CBDC, the Proposed Amendments create a new definition of “tangible money” that means “money in a tangible form,” and a new definition of “electronic money” that means “money in an electronic form.”³²⁴ The Proposed Amendments then estab-

321. MONT. CODE ANN. § 30-9A-109(1)(a) (2023).

322. *Id.* §§ 30-9A-310(2)(c), 30-9A-311(1)–(2), 61-3-103(1).

323. *Id.* §§ 30-9A-310(1), 30-9A-311(4), 61-3-103(2).

324. U.C.C. §§ 9-102(a)(31A), (79A) (UNIF. L. COMM’N 2022). The Proposed Amendments also indicate that for secured transactions, the definition of money “does not include (i) a deposit account or (ii) money in an electronic form that cannot be subjected to control under Section 9-105A.” § 9-102(a)

lish different rules for creating and perfecting a security interest in the two different types of money. For example, the Proposed Amendments clarify that a security interest in electronic money as original collateral may be perfected only by control.³²⁵ Perfection of a security interest in tangible money is only by possession.³²⁶ The Proposed Amendments also update the priority rules to provide broad protection for transferees of tangible money and electronic money.³²⁷ The Proposed Amendments fix the problems associated with money under Montana's current U.C.C.

If there are concerns about a potential United States CBDC or addressing electronic money in Montana's U.C.C., Montana should consider adopting the approach taken by the states of Alabama, Colorado, Indiana, Louisiana, Maine, New Hampshire, Nevada, Oklahoma, Pennsylvania, and Virginia.³²⁸ When those states enacted the Proposed Amendments, they modified the Proposed Amendments by eliminating all references to "electronic money" and adjusting the definition of money to exclude money in an electronic form.³²⁹ Because cryptocurrency is a controllable electronic record under the Proposed Amendments, this approach avoids CBDC concerns while retaining the many benefits of the Proposed Amendments for cryptocurrency.

(54A). This ensures "that even if some deposit accounts were to become 'money' as defined in Article 1, the provisions relating to perfection and priority for security interests in deposit accounts, and not those for money, will apply to that collateral." § 9-102(a) cmt. 12A.

325. *Id.* §§ 9-312(b)(4), 9-314, 9-105A.

326. *Id.* §§ 9-312(b)(3), 9-313(a).

327. *Id.* § 9-332(a) (indicating that a "transferee of tangible money takes the money free of a security interest if the transferee receives possession of the money without acting in collusion with the debtor in violating the rights of the secured party"); § 9-332(c) (indicating that a "transferee of electronic money takes the money free of a security interest if the transferee obtains control of the money without acting in collusion with the debtor in violating the rights of the secured party").

328. H.B. 348 (Ala. 2023); S. 231 (Ala. 2023); 2023 Ala. Acts 201; 2023 Colo. Ch. 136; S. 90 (Colo. 2023); S. 468 (Ind. 2023); S. 110 (La. 2024); H.P. 59 – L.D. 91 (Me. 2024); H.B. 584 (N.H. 2023); Assemb. 231 (Nev. 2023); H.B. 2776 (Okla. 2024); S. 1084 (Pa. 2024); H.B. 1286 (Va. 2024).

329. This may be done by: (i) deleting in Article 1 the new sentence in the Section 1-201(b)(24) definition of "money" and adding an exclusion from the definition for any medium of exchange in an electronic form, (ii) deleting in Article 9 the definitions of "electronic money" and "tangible money" in Section 9-102, (iii) deleting Section 9-105A on control of electronic money, (iv) deleting the new language in Section 9-332 providing a take-free rule for electronic money, (v) deleting the reference to "electronic money" in Section 12-102(a)(1)'s definition of a controllable electronic record, (vi) deleting Section 9-312(b)(4) on control of electronic money as an exclusive means of perfection for electronic money and retaining Montana's current Montana Code Annotated § 30-9A-312(2)(c) providing that perfection for money is only by possession (reference to "tangible" money will be deleted as no longer necessary), (vii) deleting in Section 9-102(a)(54A) the clause referring to money in an electronic form but retaining the clause excluding a deposit account from Article 9 money, and (viii) deleting all other references to "electronic money" and references to "tangible money."

F. Clarify the Scope of Chapters 2 and 2A with Respect to Hybrid Transactions

The Proposed Amendments clarify the scope of Chapters 2 and 2A relating to hybrid transactions. Chapter 2 of Montana's U.C.C. deals with the sale of goods and Chapter 2A deals with the lease of goods.³³⁰ Chapters 2 and 2A do not govern the provision of services. The Proposed Amendments clarify the scope of these chapters applying to bundled or hybrid transactions. A hybrid transaction is "a single transaction involving a sale of goods and: (a) the provision of services; (b) a lease or sale of other goods; or (c) a sale, lease, or license of property other than goods."³³¹ The Official Comment to the Proposed Amendments provides an example of a hybrid transaction:

In a single record, Landscaper agrees to sell plants to Homeowner and to install the plants on Homeowner's property. The agreement specifies a total price but provides no mechanism for determining what portion of the price is allocable to the sale of plants and what portion is allocable to the installation services. Because the terms of the agreement relating to the sale of goods and those relating to services are not severable, the transaction is a hybrid transaction.³³²

The Proposed Amendments provide that Chapter 2 applies to a hybrid transaction if the sale-of-goods aspects predominate.³³³ They add a similar rule to Chapter 2A for leases of goods.³³⁴ They clarify that if the sale-of-goods aspects do not predominate, only the provisions of Chapter 2 that relate primarily to the sale-of-goods aspects of the transaction apply, "and the provisions that relate primarily to the transaction as a whole do not apply."³³⁵ The Official Comment to the Proposed Amendments explains:

The determination of which aspect of a hybrid transaction predominates is left to the court, which should evaluate each transaction on a case-by-case

330. MONT. CODE ANN. § 30-2-102 (2023) ("Unless the context otherwise requires, this chapter applies to transactions in goods."); § 30-2A-102 ("This chapter applies to any transaction, regardless of form, that creates a lease.")

331. U.C.C. § 2-106(5) (UNIF. L. COMM'N 2022). Section 2A-103(1)(h.1) of the Proposed Amendments defines a hybrid lease to mean "a single transaction involving a lease of goods and: (i) the provision of services; (ii) a sale of other goods; or (iii) a sale, lease, or license of property other than goods."

332. *Id.* § 2-106(5) cmt. 5.

333. *Id.* § 2-102(2). This is consistent with case law in Montana. *See* Montana Millwork, Inc. v. Caradco Corp., 648 F. Supp. 88, 90 (D. Mont. 1986) ("Although a contract involves a transaction in goods, it is removed from Article II if the sale of goods is incidental to the rendition of services. In determining whether a contract is one of sale or service, the Court must look to the essence of the agreement; if a sale of goods predominates, incidental services provided do not alter the basic transaction.")

334. *Id.* § 2A-102(2).

335. *Id.* § 2-102(2)(a). Provisions of Chapter 2 that relate primarily to the sale of goods include the rules on warranties, tender of delivery, risks of loss, acceptance, rejection, cure, and remedies. Provisions of Chapter 2 that relate primarily to the transaction as a whole include the rules on contract formation, the requirement of a signed record, and whether consideration is needed to modify the agreement. *See* U.C.C. § 2-102(2)(a) cmt. 5 (UNIF. L. COMM'N 2022).

basis without the necessity of applying any particular formula. Factors that may be relevant to that determination include, but are not limited to, the language of the agreement, the portion of the total price that is attributable to the sale of goods (as to which an agreed-upon allocation will ordinarily be binding on the parties), the purposes of the parties in entering into the transaction (when that is ascertainable), and the nature of the businesses of the parties (such as whether the seller is in the business of selling goods of that kind).³³⁶

The Official Comment to the Proposed Amendments gives an example of when law other than Chapter 2 would apply in a hybrid transaction where the sale-of-goods aspects do not predominate:

Restaurateur hires Remodeler to remodel Restaurateur's kitchen by a specified completion date. The transaction requires Remodeler to supply a new oven, but the services aspects of the transaction predominate. Remodeler breaches by failing to complete the project by the specified date. The measure of Restaurateur's damages for Remodeler's failure to timely complete the project is not determined by this Article.³³⁷

The Proposed Amendments provide a helpful framework for determining when Chapters 2 and 2A apply to a hybrid transaction.

G. Transitional Provisions to Help Implement the Proposed Amendments

The Proposed Amendments make extensive changes to Montana's current U.C.C. The Proposed Amendments have transitional provisions to help implement the new rules addressing attachment, perfection, and priority of security interests under Chapter 9A and the priority of conflicting claims to Article 12 property.³³⁸ The transitional provisions establish an adjustment date that is typically a date that is one year after the effective date of the Proposed Amendments.³³⁹ There are saving provisions that validate transactions entered into before the effective date and grace periods that give parties time to satisfy the requirements of the Proposed Amendments before the adjustment date.³⁴⁰

For example, a security interest may have been attached and perfected before the effective date, but under the Proposed Amendments, the security interest would be unenforceable and unperfected. If the security interest satisfies the new requirements for attachment and perfection under the Proposed Amendments before the adjustment date, the security interest remains

336. *Id.* § 2-102 cmt. 3.

337. U.C.C. § 2-102 cmt. 5 (UNIF. L. COMM'N 2022).

338. *Id.* § A-101 (stating the article may be cited as Transitional Provisions for Uniform Commercial Code Amendments (2022)).

339. *Id.* § A-201.

340. *Id.* §§ A-301–302.

enforceable and continuously perfected thereafter.³⁴¹ The transitional provisions also address the priorities of conflicting claims to collateral that depend on whether the priority of a claim was established before or after the effective date of the Proposed Amendments.³⁴²

IV. CONCLUSION

As explained in this Article, Montana's U.C.C. is insufficient and outdated. The development and expansion of industries related to e-commerce and cryptocurrency are momentous. Montana needs to update its U.C.C. to facilitate commerce involving these industries. The Proposed Amendments adapt Montana's U.C.C. for the digital age and provide helpful new commercial law rules. Montana should adopt the Proposed Amendments.

341. *Id.* § A-302(b).

342. *Id.* § A-305.