6 Facts Every Lawmaker Needs to Know About the 2022 UCC Amendments and Central Bank Digital Currencies

By Justin Haskins

In July 2022, the Uniform Law Commission and American Law Institute approved new amendments to the Uniform Commercial Code (UCC).[1] As the Uniform Law Commission states, "The Uniform Commercial Code (UCC) is a comprehensive set of laws governing all commercial transactions in the United States. It is not a federal law, but a uniformly adopted state law."[2]

Because commercial activity and technology are always changing, it is prudent that lawmakers occasionally update the UCC. The revisions proposed in July 2022 are one such attempt, and many of the suggested changes offered by the Uniform Law Commission and American Law Institute would provide valuable improvements to states' commercial laws. However, the 2022 amendments to the UCC also include language that unnecessarily encourages the adoption of a central bank digital currency (CBDC), by laying the foundation for the use of CBDCs in commercial transactions. Further, the 2022 amendments do nothing to fix the existing parts of the code that already support the use of CBDCs.

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In the wake of numerous criticisms of the UCC amendments offered in March 2023 by a variety of nonprofit organizations and policymakers, supporters of the amendments distributed a slew of materials defending the passage of the amendments. In many cases, these materials fail to address the key concerns of those who oppose the UCC amendments. In other instances, they outright mislead legislators.

Rather than address those materials and their authors directly, this policy brief will succinctly outline the main issues every policymaker ought to know about the UCC, CBDCs, and how the two issues are related. The fact is, if the UCC amendments as proposed in July 2022 by the Uniform Law Commission and American Law Institute are passed into law, states would be setting the table for the rollout of a programmable, traceable, easily manipulated central bank digital currency. This is particularly troubling since many voters in states now considering the UCC amendments are staunchly opposed to CBDCs.

The UCC does need to be amended, but it shouldn't be altered until those revisions include protections against the use of CBDCs. Without such protections, states would be putting the privacy and liberties of their citizens in grave danger.

The following are six brief facts outlining the most important issues related to CBDCs and the Uniform Commercial Code.

Fact 1

Critics of the 2022 UCC amendments believe a central bank digital currency would pose significant threats to freedom for individuals, families, and businesses

- Proposals for a central bank digital currency in the United States call for the creation of a new digital (non-physical) electronic currency that would be traceable and programmable.
- A programmable CBDC would allow government officials, the Federal Reserve, or another designated organization to track all spending activity for every CBDC user. Thus, a CBDC would destroy privacy rights.
- A programmable CBDC would be designed with features that could be used by government or its partners to limit users' commercial activities.[3]
- The Biden administration has already stated that if a CBDC were created in the United States, it should be designed so that it promotes social and environmental causes the White House favors, including "equity," "financial inclusion," and battling "climate change and pollution."[4]
- Concerns over CBDCs are not merely theoretical. The Biden administration has been working tirelessly to study and develop a U.S. CBDC.[5]

Fact 2

The 2022 UCC amendments would make it easier to use a CBDC in the future, laying the foundation for a U.S. CBDC like the one discussed by the Biden administration

- For example, the amendments to Article 9 of the UCC would establish the category of "electronic money" specifically to account for the creation of a CBDC and its use by consumers and institutions outside of a bank account.[6]
- Further, the amendments would establish legal provisions so that "exclusive control" in commercial transactions could be established for a CBDC outside of a bank account. Exclusive control is important in some commercial arrangements, especially related to lending.[7]

Fact 3

The 2022 UCC amendments would allow for the use of a CBDC that is programmable and easily controlled by a centralized authority

- The UCC amendments to Article 9 allow for the "exclusive control" requirement to be met "even if … The electronic money, a record attached to or logically associated with the electronic money, or a system in which the electronic money is recorded, limits the use of the electronic money or has a protocol programmed to cause a change, including a transfer or loss of control."[8]

Fact 4

The 2022 UCC amendments would not create a central bank digital currency, nor would it necessitate its creation

- Contrary to claims made by some *supporters* of the 2022 UCC amendments, informed critics of the amendments do *not* claim their passage would *create* a U.S. central bank digital currency. As I noted in Fact 2, however, the amendments would help lay the foundation for a CBDC.
- The creation of a U.S. CBDC can only occur at the federal level and would require an act of Congress.

Fact 5

The existing version of the UCC would allow for the use of a programmable CBDC, even if the 2022 amendments are not passed into law

- Although the version of the UCC in place prior to the drafting and passage of the 2022 amendments would preclude the use of a CBDC under a number of conditions, a programmable CBDC *could* still be used under current UCC law in many commercial transactions if it were deposited into a bank or Federal Reserve account.
- Money, including a CBDC, placed in a bank account would be covered by existing UCC provisions governing "deposits." That means if a U.S. CBDC were passed into law tomorrow, it would largely be compatible with many parts of the existing commercial code, but only if users choose to deposit it into a bank or Federal Reserve account or are required to do so because of the design of the CBDC.

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- State lawmakers seeking to make it more difficult for a central bank digital currency to be adopted and used widely would need to amend the UCC so that a CBDC deposited into a bank or Fed account could not be used for commercial purposes under the UCC. Other changes to the UCC or other parts of state codes might also be prudent.

Fact 6

The 2022 UCC amendments would redefine "money" so that existing cryptocurrencies could never be considered "money" under the UCC

- The 2022 amendments clearly establish in Article 1 that "money" under the UCC "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."[9]

- Because all existing cryptocurrencies, including Bitcoin, are "electronic records" serving as a "medium of exchange" prior to being adopted as "money" by the U.S. government, all cryptocurrencies would be prevented from qualifying as "money" under the UCC. Importantly, this would be true under the UCC regardless of whether Congress were to designate a cryptocurrency like Bitcoin as money in the future.

- Instead of being classified as "money," the UCC amendments would designate cryptocurrencies as "controllable electronic records."

    - Many supporters of the 2022 amendments claim that these provisions would help the cryptocurrency market, because there are economic advantages to being classified as a "controllable electronic record" instead of "money."

    - However, numerous critics of the 2022 amendments, myself included, do not object to the 2022 amendments because they would prevent the use of cryptocurrencies. (They wouldn't.) Nor do we object because the amendments would unquestionably harm cryptocurrencies. It's possible, although far from settled, that cryptocurrencies would be better off classified as "controllable electronic records" rather than "money" under the UCC. It's also possible, in critics' view, that some, many, or all cryptocurrency owners would benefit more if one or more existing cryptocurrency were designated as "money" under the UCC.

    - The primary reason critics of the 2022 UCC amendments object to prohibiting existing cryptocurrencies from being considered "money" is simply that there is far too much that remains unknown about the future of both cryptocurrencies and CBDCs. Critics are correctly concerned that updating the UCC so that only a CBDC is "money" might unjustifiably privilege CBDCs over all existing cryptocurrencies, including Bitcoin. Until lawmakers have a better understanding of how a yet-to-be-released CBDC will operate, as well as all of the relevant costs and benefits related to cryptocurrencies being classified as "controllable electronic records" instead of "money," it would be unwise to rush to prohibit cryptocurrencies from being considered "money" under the UCC.

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Endnotes

1 See Uniform Law Commission, "UCC, 2022 Amendments to," uniformlaws.org, last accessed March 20, 2023, https://www.uniformlaws.org/committees/community-home?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac#:~:text=The%202022%20amendments%20to%20the,intelligence%2C%20and%20other%20technological%20developments

2 Uniform Law Commission, "Uniform Commercial Code," uniformlaws.org, accessed March 20, 2023, https://www.uniformlaws.org/acts/ucc

3 For more evidence and arguments on this point, see Justin Haskins, "Biden is planning a new digital currency. Here's why you should be very worried," The Hill, March 26, 2022, https://thehill.com/opinion/finance/599768-biden-is-planning-a-new-digital-currency-heres-why-you-should-be-very-worried

4 "Executive Order on Ensuring Responsible Development of Digital Assets," whitehouse.gov, March 9, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets

5 "FACT SHEET: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Assets," whitehouse.gov, September 16, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets

6 Uniform Law Commission and American Law Institute, "Final Act, With Comments: Uniform Commercial Code Amendments (2022)," uniformlaws.org, last dated February 21, 2023, accessed March 20, 2023, https://www.uniformlaws.org/viewdocument/final-act-164?CommunityKey=1457c422-ddb7-40b0-8c76-39a1991651ac&tab=librarydocuments

7 Uniform Law Commission and American Law Institute, "Final Act, With Comments: Uniform Commercial Code Amendments (2022)."

8 Uniform Law Commission and American Law Institute, "Final Act, With Comments: Uniform Commercial Code Amendments (2022)."

9 Uniform Law Commission and American Law Institute, "Final Act, With Comments: Uniform Commercial Code Amendments (2022)."

About the Author

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