

Central Bank Digital Currencies and the Uniform Commercial Code

By Jack McPherrin and Justin Haskins

Talking Points: The Problem

- Central bank digital currencies (CBDCs) are being widely considered as the currency of the future by most countries, including the United States.
- The Biden administration has been particularly supportive of a Federal Reserve-backed CBDC.
- Central bankers are attempting to degrade cryptocurrencies because of the threat that cryptocurrencies pose to their power. CBDCs are their solution to that threat.
- CBDCs would allow central planners to engineer society in accordance with their every objective, with no accountability or oversight.
- Recently proposed amendments to the Uniform Commercial Code (UCC) would facilitate CBDCs, and potentially prevent cryptocurrencies from being used as money.
- More specifically, the 2022 UCC amendments would establish the category of “electronic money” to account for the creation of a CBDC and its use by consumers and institutions outside of a bank account. 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.
- Moreover, the 2022 amendments would redefine “money” so that existing cryptocurrencies—many of which are decentralized, as opposed to a centralized CBDC—could never be considered “money” under the UCC.
- Current provisions within the UCC already facilitate the use of CBDCs.

Talking Points: The Solutions

- State policymakers could consider resisting changes to the UCC and other state legal codes that would make it easier for financial institutions to adopt a CBDC in the future.
- Legislators could revise the definition of a “deposit account” in the UCC and state legal codes so that a CBDC could not be used as a “deposit account” in state-regulated banks.
- State lawmakers could pass legislation that recognizes gold and silver as “legal tender,” which could serve as an important escape hatch if a CBDC is imposed by the Federal Reserve or federal government in the future.
- State lawmakers could pass laws to eliminate taxes on gold and silver, as well as to make it easier to develop, transact with, and store cryptocurrencies.
- States could pass laws that ban state and local law enforcement from helping federal officials confiscate paper money. Exceptions could be made for appropriate criminal convictions.
- Federal policymakers could pass a law prohibiting the Federal Reserve and all government agencies from issuing, studying, designing, or formally supporting a CBDC.

Central bank digital currencies (CBDCs) have only recently become a widely discussed topic among influential figures in academia, media, and public policy institutions. However, initiatives to implement CBDCs around the globe have existed for years, especially in countries with autocratic governments, such as China and Russia. As of September 2023, 131 countries have said they are exploring CBDCs.¹ The Biden administration has also signaled that it’s supportive of a Federal Reserve-backed U.S. CBDC, a development that will be discussed further in a separate *Tip Sheet*.

A U.S. CBDC would pose a significant threat to individual liberty, because it would allow central planners to engineer society in accordance with their every objective, with little accountability or oversight. They pose a tremendous threat to privacy, freedom, limited government democratic institutions, and society at large, as outlined in separate *Tip Sheets*.²

Although the creation of a CBDC would likely require an act of Congress, some policymakers and activists appear to be attempting to lay the groundwork for CBDCs at the state level, by offering amendments to the Uniform Commercial Code (UCC).

UCC Background

Amendments to the UCC are typically drafted by the Uniform Law Commission (ULC), an influential organization of practicing lawyers, judges, legislators, legislative staff, and law professors. According to the ULC’s website, it “provides states with non-partisan, well-conceived and well-drafted legislations that brings clarity and stability to critical areas of state statutory law.”³

The ULC explains that the 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. Uniformity of law is essential in this area for the interstate transaction of business. Because the UCC has been universally adopted, businesses can enter into contracts with confidence that the terms will be enforced in the same way by the courts of every American jurisdiction. . . . For this reason, the UCC has been called ‘the backbone of American commerce.’”⁴

As the ULC accurately depicts, the UCC is a vital set of laws that allows for commercial activity to

be conducted in a relatively cohesive manner across all 50 states. Because commercial activity and technology are always changing, it is prudent for lawmakers to occasionally update the UCC.

In 2022, the ULC and the American Law Institute proposed new revisions to the UCC, many of which would make valuable improvements to states' commercial laws.⁵ However, the 2022 amendments to the UCC also included language that unnecessarily encourages the adoption of a CBDC by laying the foundation for the use of CBDCs in commercial transactions. Further, the 2022 amendments would do nothing to fix the existing parts of the UCC code that already allow for the use of CBDCs.

CBDCs and the 2022 UCC Amendments

It is important to note that nothing within the 2022 amendments to the UCC would create or necessitate the creation of a CBDC. The best legal scholars suggest that the creation of a publicly available U.S. CBDC could only occur as a result of an act of Congress, although it's possible the Biden administration or another president could attempt to develop a CBDC using executive action. The concerns outlined in this paper are focused on how state UCC laws could be used to help expedite the use of a CBDC in the future, not create one.

It's also important to note that this paper's analysis of the 2022 UCC amendments addresses issues pertaining specifically to the Uniform Law Commission's version of the 2022 amendments. Some lawmakers have already sought to make additional changes to 2022 UCC amendments, which means multiple versions of the 2022 amendments now exist.

The ULC's amendments to Article 9 of the UCC relate to CBDCs in a number of ways. For example, the 2022 Article 9 amendments 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 deposit account.⁶ Further, the amendments would allow for a person or organization to have "exclusive control" of a CBDC without the use of a deposit account. Exclusive control is important in some commercial arrangements, especially those related to lending.

The 2022 UCC Article 9 amendments would also add special provisions so that a programmable CBDC could be used even if it is easily controlled by a centralized authority. More specifically, Article 9 would 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."⁷

Additionally, the 2022 amendments would redefine "money" so that existing cryptocurrencies—which, unlike CBDCs, are typically decentralized⁸—could never be considered "money" under the UCC. The 2022 amendments would clearly establish 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 crypto-

currencies 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." Though there might be economic benefits to the latter designation, updating the UCC so that only a CBDC is considered "money" unjustifiably privileges CBDCs over all existing cryptocurrencies, including Bitcoin, in debates about the future of money in the United States.

CBDCs and the Current UCC

Beyond these changes, the existing, pre-2022-amendments version of the UCC already allows for the use of a programmable CBDC. Policymakers opposing the use of CBDCs should consider making changes to the code that would make it more difficult for CBDCs to be used in commercial activities. The 2022 UCC amendments do not achieve this goal, or even attempt to do so. As we previously noted, it would have the opposite effect.

Under the existing UCC, money placed into a bank account legally becomes a "deposit account." The current UCC's provisions related to deposit accounts do nothing to stop the use of a programmable CBDC. As such, if a U.S. CBDC were created by a federal law tomorrow, it would instantly be compatible with many parts of the existing commercial code, but only if users choose or are required to deposit CBDCs into a bank or Federal Reserve account. (In our opinion, this requirement is highly likely to be part of a CBDC design.)

Policy Recommendations

First, legislators could push back against any alterations to state or federal legal codes that would change the definition of money to facilitate a CBDC.¹⁰

Second, legislators could revise the definition of a "deposit account" in state legal codes so that a CBDC could not be used as a "deposit" in banks. For more information about this strategy, see our *Tip Sheet* about the Uniform Commercial Code and the definition of money.¹¹

Third, state legislatures could pass laws that recognize gold and silver as "legal tender," as well as establish policies that ensure they are customarily used and accepted as a medium of exchange—reforms that are clearly allowed under the U.S. Constitution.¹² This could serve as an important escape hatch in the event that a CBDC is imposed by the federal government or Federal Reserve in the future.

Fourth, state legislatures could pass laws that make it easier for citizens and businesses to store gold and silver legal tender, as well as to transact using gold and silver.¹³

Fifth, states could pass laws that ban state and local law enforcement from helping federal officials confiscate paper money, in the event that paper money is banned by the federal government. Exceptions could be made for appropriate criminal convictions.

Sixth, Congress could pass a law prohibiting the Federal Reserve or any federal government agency from issuing, studying, designing, or formally supporting a CBDC, now or in the future.

Endnotes

- 1 Atlantic Council, "Central Bank Digital Currency Tracker," accessed September 15, 2023, <https://www.atlanticcouncil.org/cbdctracker/>
- 2 For more information, see Jack McPherrin, "CBDCs: A Basic Primer," The Heartland Institute, Henry Dearborn Liberty Network, and Pro-Family Legislative Network, Policy Tip Sheet, November 2023.
- 3 Uniform Law Commission, "About Us," [uniformlaws.org](https://www.uniformlaws.org/aboutulc/overview), accessed September 25, 2023, <https://www.uniformlaws.org/aboutulc/overview>
- 4 Uniform Law Commission, "Uniform Commercial Code," [uniformlaws.org](https://www.uniformlaws.org), accessed September 26, 2023, <https://www.uniformlaws.org/acts/ucc>
- 5 See Uniform Law Commission, "UCC, 2022 Amendments to," [uniformlaws.org](https://www.uniformlaws.org/committees/community-home?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac#:~:text=The%202022%20amendments%20to%20the%20intelligence%2C%20and%20other%20technological%20developments), last accessed September 26, 2023, <https://www.uniformlaws.org/committees/community-home?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac#:~:text=The%202022%20amendments%20to%20the%20intelligence%2C%20and%20other%20technological%20developments>.
- 6 Uniform Law Commission and American Law Institute, "Final Act, With Comments: Uniform Commercial Code Amendments (2022)," [uniformlaws.org](https://www.uniformlaws.org), last dated June 1, 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 Jack McPherrin, "CBDCs: A Basic Primer."
- 9 Jack McPherrin, "CBDCs: A Basic Primer."
- 10 See Justin Haskins, "6 Facts Every Lawmaker Needs to Know About the 2022 UCC Amendments and Central Bank Digital Currencies," The Heartland Institute, March 22, 2023, <https://heartland.org/publications/6-facts-every-lawmaker-needs-to-know-about-the-2022-ucc-amendments-and-central-bank-digital-currencies/>
- 11 See Justin Haskins, "6 Facts Every Lawmaker Needs to Know About the 2022 UCC Amendments and Central Bank Digital Currencies."
- 12 United States Constitution, Article I, Section 10, Clause 1.
- 13 See transactionalgold.com, "Constitutional Texas-Based Transactional (Gold & Silver) Currency," Accessed September 15, 2023, <https://transactionalgold.com/>