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Gavel to Gavel: Jurisdictional issues in obtaining “control” of crypto

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Oklahoma and 24 other states (as of this writing) have adopted Article 12 of the Uniform Commercial Code and accompanying amendments to other UCC sections (the “**Amendments**”). The path is now more clear, but not entirely clear, for lenders to utilize cryptocurrency—classified by the Amendments as a “controllable electronic record” (“**CER**”)—as collateral in secured lending. To take advantage of the

Amendments, Lenders who are asked to consider accepting a form of cryptocurrency as collateral must understand tricky requirements relating to the CER’s “jurisdiction” to ensure their security interests have the desired priority.

The Amendments permit a lender to perfect its interest in a CER either by filing a financing statement or by obtaining control, though a lender with “control” has priority. Because the Amendments have not been adopted by all jurisdictions, however, whether perfection by control is available to a lender depends on the (1) location of the debtor (usually an individual’s principal place of residence or an entity’s state of formation), (2) jurisdiction of the CER, and (3) law chosen in the loan documents (the “**governing law**”).

The CER’s jurisdiction is determined by a complicated set of rules that refers to the body of law adopted in the CER, in an associated record, or in the CER’s system. The fallback (which may often apply because many CERs and their systems do not reference governing law) is the law of the District of Columbia.

Perfection by control of a security interest in a CER is possible only if the Amendments are in effect in both the CER’s jurisdiction and in the governing law, or if the Amendments are in effect in the debtor’s location and not under the governing law. If, on the other hand, the Amendments are in effect under the governing law but not the CER’s jurisdiction, or the Amendments are not in effect under the governing law or in the debtor’s location, perfection via control is not available to a lender.

In sum, there is growing certainty about how to perfect a security interest in cryptocurrency, but the roadmap to implement the preferred method of perfection, by “control,” remains extremely complex because of difficulties in determining applicable law. Lenders should consult counsel if they seriously consider cryptocurrency as collateral.

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