



UNIVERSITY OF OREGON
School of Law

To: Edwin E. Smith, Chair, and Steven L. Harris, Reporter,
Article 9 Joint Review Committee
From: Carl S. Bjerre and Kenneth C. Kettering
Re: Possible *Highland Capital* amendment
Date: March 2, 2009

At the Joint Review Committee's February 2009 meeting, Sandra Stern and the undersigned were asked to consider and draft a possible amendment to UCC Article 8 that would address the *Highland Capital* problem.¹ Sandra recently convened a productive conference call on this subject, in which several members of the Committee and other knowledgeable parties participated. The draft language attached hereto is based on an earlier draft that was discussed in that call, as revised to reflect the participants' comments.

We have framed this language as an addition to section 8-103, rather than to section 8-102(a)'s definitions of registered form and security, for three reasons. First, section 8-103 would be a natural home for the addition, because it is already a repository of similar interpretive rules relating to the definition of security. Second, the 8-102(a) definitions of registered form and security are crucial to much of Article 8 and, apart from the *Highland Capital* case itself, have functioned well with only minor modifications since the Code's inception, meaning that it would be best to avoid tinkering there that might have unforeseen consequences. And third, the registrability concept at the heart of *Highland Capital* appears in both definitions, meaning that any 8102(a) amendment on this score would have to be similarly duplicated.

Highland Capital's holding on the registered form point is somewhat difficult to pin down, but under a broad reading it can be seen as making either or both of two errors. The first might be called the "wrong books" error, and the second might be called the "hypothetical books" error. These two errors are addressed in subparagraphs (h)(i) and (ii), respectively.

Carl S. Bjerre
University of Oregon School of Law

Kenneth C. Kettering
New York Law School

¹ *Highland Capital Management LP v. Schneider*, 8 N.Y.3d 406 (2007).

FACULTY OFFICES

1515 Agate Street, 1221 University of Oregon, Eugene OR 97403-1221

T (541) 346-3837 F (541) 346-1564 www.law.uoregon.edu

Draft statutory addition

8-103. Rules for Determining Whether Certain Obligations and Interests are Securities or Financial Assets.

* * *

(h) An obligation, share, participation or interest does not satisfy 8-102(a)(13)(ii) or 8-102(a)(15)(i) merely because the issuer or a person acting on its behalf:

(i) records [transfers thereof] [the holders of interests therein] for a purpose other than registration of transfer, or

(ii) [could record transfers thereof] [could, but does not, maintain books] for the purpose of registration of transfer.

Draft Official Comment addition

9. Subsection (h) rejects the holding of *Highland Capital Management LP v. Schneider*, 8 N.Y.3d 406 (2007). The registrability requirement in the definition of “registered form,” and its parallel in the definition of “security,” are satisfied only if the business arrangement is such that books are maintained for the purpose of registration of transfer, including the determination of rights under Section 8-207(a) (or if, in the case of a certificated security, the security certificate so states). It is not sufficient that the issuer records ownership, or records transfers thereof, for other purposes. Nor is it sufficient that the issuer, while not in fact maintaining books for the purpose of registration of transfer, could do so, for such is always the case. Subsection (h) is declaratory of the proper interpretation of the foregoing definitions, not a change in law.