



UNIVERSITY OF OREGON

School of Law

To: Charles A. Trost, Reporter  
cc: Rex Blackburn, Co-Chair  
Michael Houghton, Co-Chair  
Date: October 7, 2015  
Re: Revised Uniform Unclaimed Property Act

For consideration by yourselves and the Drafting Committee as well as other interested parties, I am attaching some comments for the several points at which the draft Act intersects with Uniform Commercial Code Article 8 on Investment Securities.

Where it seems feasible I have proposed language for the draft, but where discussion on the Drafting Committee or elsewhere seems needed I have just explained my thoughts. Please note that some of these comments relate to the definition of "securities" and related concepts, on which I know other parties are also making comments.

Of course I would be glad to discuss the attached or other points if desired. Thank you in advance for the opportunity to assist with this important statutory revision.

A handwritten signature in dark ink, appearing to read "C. S. Bjerre", written over a horizontal line.

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Section 2's definition of "Holder":

Suggested edit to second sentence: For purposes of property consisting of a ~~securities distribution or a security~~ a security entitlement [as defined by Article 8 of the Uniform Commercial Code], ~~that is not held in the name of the owner on the records of the issuer, a financial intermediary that holds the property in the name of the owner is deemed the holder for purposes of this [act]~~ is the securities intermediary with whom the security entitlement is maintained.

Possible comment about this point for the draft: Under Article 8, more than one intermediary can exist between the issuer and the entitlement holder, and this definition's phrasing designates the most logical and relevant intermediary, namely the one with whom the customer maintains the securities account. The phrasing is borrowed from UCC § 8-112(c).

Section 2's definition of "Non-freely transferable securities":

*Separating the concepts.* It might be helpful to separate the several concepts in this definition, so they can be treated separately. For example, in §9(h), should the fact that a security is "unpriced" necessarily excuse the holder from delivering it to the administrator? (The security might be very valuable even though it is illiquid; for example, all 100 outstanding shares of stock of a closely-held corporation that owns a downtown office building.) Please also see similar comment under §10(a)(4).

*Accuracy of the term.* The term "non-freely transferable" is not necessarily an accurate description. Some securities that are not freely transferable are nonetheless held with DTC: for example, restricted securities subject to the SEC's Rule 144A or Regulation S. More discussion might be needed in order to pinpoint what concept and word is wanted here. Instead of naming DTC or a similar custodian, maybe this concept could be borrowed from clause (a)(iii) of the current definition of Property (and given an accurate defined term): "restriction imposed by law or by the rules of a clearing corporation, which limits the owner's ability to legally receive, transfer, sell, or otherwise negotiate the ownership interest"

*Direct holding under UCC Article 8.* Is the term "non-freely transferable securities" intended to cover directly as well as indirectly held securities? The phrase "no agent to effect transfer" suggests a transfer agent under the direct holding system, but the absence of a transfer agent doesn't keep the security from being transferable; it just means that the issuer itself is responsible for carrying out the transfer.

Section 2's definition of "Property":

(a) Can all of clause (a)(iii) be condensed into something simple like "a security or security entitlement as defined by [Article 8 of the Uniform Commercial Code]." Stock is explicitly picked up by those definitions.

(b) When a security or security entitlement has no "ascertainable market value," should the obligations of reporting to the administrator, notice to the owner, and transfer be handled directly, instead of by keeping the security out of the definition of "property" altogether? See discussion below under "worthless securities."

(c) If a security or security entitlement has a restriction on transfer, then §9(h) regarding transfer should have an exception (but I am not sure why the security or security entitlement shouldn't still count as "property" for other purposes such as reporting to the administrator and notice to the holder). The same is probably true for a security or security entitlement with a "lien" or "legal hold"; we could discuss what is intended by these terms.

Section 2's definition of "The Depository Trust & Clearing Corporation":

This definition is not needed, if the definition of "Non-freely transferable securities" is reworked (see above). Even without a reworking of "Non-freely transferable securities," the name of this organization does not need a definition as opposed to an explanation in a comment.

Section 2's definition of "Unpriced securities":

This term only seems to be used once, so perhaps no definition is needed at all. If the definition is kept, are both components needed ("illiquid" and "no market valuation") and what is the distinction between them?

Section 2's definition of "Worthless securities":

Securities of a "bankrupt" issuer are not necessarily worthless. For example, there is a large secondary market in debt securities of companies that are in Chapter 11. (Even the equity as opposed to the debt of a company in bankruptcy can have value, because solvent companies such as Manville sometimes use Chapter 11 to collectivize their creditors, and because there is no policing at the time of a bankruptcy filing to make sure a company is truly insolvent.)

The same is true of securities of a "delisted" issuer: they are not necessarily worthless even though they may be "unpriced" depending on what you do with that definition.

The same might even sometimes be true of securities of a "defunct" issuer. If Megacorp files bankruptcy, and its valuable assets are spun off into a new company called Minicorp, then the owner of Megacorp securities could be entitled to Minicorp securities even after Megacorp is dissolved.

Overall, maybe all that is needed in this definition is the catch-all phrase about the cost of liquidation and delivery exceeding the value.

Other definitions for section 2:

I suggest defining "security," "security entitlement" and "financial asset" by means of cross-reference to UCC § 8-102. (The alternative is to parrot the definitions in § 8-102, but some of those definitions depend on others from Article 8 or elsewhere in the UCC and this could be a lot of work to get right.) It is concededly cumbersome to cross-refer to other statutes, but accurately building in an identical set of definitions and other cross-references is likely to be at least as cumbersome if not more so (not to mention the risks of judicial misinterpretations arising from parallel phrases in different statutes).

Section 3, Presumption of Abandonment:

(a) The reference to any "security" should probably be "security or security entitlement." Should similar adjustments be made in most of the substantive sections of the Act (for example, §8(h)(i) and (ii))?

(b) Also in subsection (a)(3), the distinction between a "debt obligation" and other securities can be difficult to make, of course. One way of avoiding this difficult distinction would be the suggestion by the Unclaimed Property Professionals Organization to apply the same time period to debt as to other securities.

#### Section 9, Payment or Delivery:

In subsection 9(d), the reference to "appropriate person" is exactly right if tied to the definition under UCC Article 8 (specifically, UCC § 8-107(a)). But the phrase "to invoke the duty of the issuer or its transfer agent or the securities intermediary to transfer or dispose of the security or the security entitlement" is surplusage: this phrase merely explains out the significance of the term "appropriate person" which is already in the statute. The surplusage could go into a comment rather than the statute.

In subsection 9(e), the whole question of replacement certificates is already addressed by UCC § 8-405 itself. So I would replace subsection 9(e) with: "If the property is a certificated security as defined in [Article 8 of the Uniform Commercial Code], the administrator has the rights of an owner under [§ 8-405 of the Uniform Commercial Code], but without the associated obligation of providing an indemnity bond." (This also avoids another difficulty with the current draft, namely the reference to book-entry form which seems to be incorrect.)

In subsection 9(f), what questions would the administrator's rules cover that are not already covered by subsection 9(d) and this Act's other provisions and UCC Article 8?

In subsection 9(g), UCC §§ 8-115 and 8-404(a)(2), (3) and (4) make very similar provisions regarding the non-liability of issuers, brokers, banks, custodians and others. But those sections have a couple of carefully crafted limitations that should not be overridden here (for example, violation of a court order, or collusion with a wrongdoer). So I suggest starting subsection 9(g) with: "Subject to [sections 8-115 and 8-404 of the Uniform Commercial Code], . . ."

In subsection 9(h), please see comment under "Non-freely transferable securities" above.

#### Section 10, Notice to Owner:

In subsection (a)(4) and subsection (c), the reference to "non-freely transferable securities" seems too broad in light of how that term is defined (see above). It is unclear why an exception for notice to the apparent owner (as opposed to an exception for transfer) should apply if a security is either "unpriced" or not transferable through DTC, either of which are sufficient to trigger this definition.

In subsection (b)(1), the phrase "property in the form of securities held in electronic form" is not entirely clear, and might not be necessary. Under the conditions spelled out here, perhaps electronic notice should be sent for other property too and not just securities? (If not, then is the phrase "property in the form of securities held in electronic form" intended to include security entitlements and also uncertificated securities? This should be clarified or rephrased.)

Subsection (c) seems to overlap in an unneeded way with subsection (a)(4).

Section 13, Public Sale of Abandoned Property:

In subsection (f), the term “possession” should be avoided for security entitlements or uncertificated securities, since those forms of property are not tangible. Should a word relating to the concept of transfer rather than possession be used instead?

In subsection (g), please change “any other reasonable method” to “any other commercially reasonable method”.