

Spring 1992

South Carolina's New UCC Article Eight: Towards a Uniform Securities System

Martin C. McWilliams Jr.

Lee Ann Anderson

University of South Carolina School of Law

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

McWilliams, Martin C. Jr. and Anderson, Lee Ann (1992) "South Carolina's New UCC Article Eight: Towards a Uniform Securities System," *South Carolina Law Review*. Vol. 43 : Iss. 3 , Article 4.

Available at: <https://scholarcommons.sc.edu/sclr/vol43/iss3/4>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

**SOUTH CAROLINA'S NEW UCC
ARTICLE EIGHT: TOWARDS A
UNIFORM SECURITIES SYSTEM**

MARTIN C. McWILLIAMS, JR.*
LEE ANN ANDERSON**

I.	INTRODUCTION	475
A.	<i>The Uncertificated Security Concept</i>	477
B.	<i>The Transfer Concept</i>	478
II.	THE MECHANICS OF TRANSFER	480
A.	<i>Certificated Securities, Briefly</i>	480
B.	<i>Uncertificated Securities</i>	481
1.	<i>Initiation of Transfer: Instructions</i>	482
2.	<i>Transferors' Warranties</i>	483
a.	<i>Warranties of the Originator of an Instruction</i>	483
b.	<i>Warranties by Purchasers for Value</i>	484
c.	<i>Warranties of Secured-Party Transferors</i> ..	484
3.	<i>Guarantees</i>	485
a.	<i>Indorsement and Signature Guarantees</i> ...	485
b.	<i>Indorsement and Instruction Guarantees</i> ..	488
c.	<i>Transferors' Warranties to Guarantors</i>	488
4.	<i>Preconditions to an Issuer's Duty to Register</i> ..	489
a.	<i>Signatures of Appropriate Persons</i>	490
b.	<i>Assurances of the Effectiveness of Indorsements and Instructions</i>	491
c.	<i>Issuer's Duties Relating to Adverse Claims</i>	492
d.	<i>Compliance with Tax Law</i>	494
e.	<i>Wrongful Transfers</i>	494
f.	<i>Satisfaction of Duty with Either Form of Security</i>	495
5.	<i>Issuers' Liabilities Relating to Registration and Actions for Wrongful Transfer</i>	495
a.	<i>Issuers' Liabilities</i>	495

* Associate Professor of Law, University of South Carolina School of Law. B.A. 1969, University of Virginia; J.D. 1975, University of Mississippi; LL.M. 1976, Harvard University.

** B.A. 1988, Wellesley College; J.D. 1992, University of South Carolina.

b. <i>Actions for Wrongful Transfer</i>	496
C. <i>Time at Which Transfer Occurs; Methods of Transfer</i>	497
1. <i>Transfers by Purchase</i>	497
2. <i>Transfers of Securities Held by Third Persons</i> ..	498
3. <i>Transfers Within a Central Depository System</i> ..	500
4. <i>Transfers of Security Interests</i>	501
III. <i>THE ISSUER'S OBLIGATION TO PROVIDE STATEMENTS</i>	502
A. <i>Initial Transaction Statements</i>	502
1. <i>Unauthorized or Altered Initial Transaction Statements</i>	504
2. <i>Unauthorized Instructions</i>	505
3. <i>Warranties of Authenticating Agents</i>	506
4. <i>Effect on the Statute of Frauds</i>	506
B. <i>Transaction Statements</i>	507
C. <i>Periodic Statements</i>	507
IV. <i>SECURITY INTERESTS</i>	507
A. <i>Attachment and Perfection</i>	508
1. <i>Creation and Attachment</i>	509
2. <i>Sections 8-313(1)(h)-(j): Transfers Applying Only to Security Interests</i>	510
a. <i>Subsection 8-313(1)(h): Security Interests in Securities Held by Bailees</i>	510
b. <i>Subsection 8-313(1)(i): Security Interests Created by Agreement</i>	511
c. <i>Subsection 8-313(1)(j): Security Interests in Securities Held by Financial Intermediaries</i> ..	512
3. <i>Perfection</i>	512
B. <i>Parties' Rights</i>	513
1. <i>Continued Application of Article Nine</i>	513
2. <i>Registered Pledgees, Their Rights, and the Rights of Issuers and Registered Owners</i>	513
C. <i>Termination</i>	519
V. <i>CREDITORS' RIGHTS</i>	520
A. <i>Certificated Securities</i>	520
B. <i>Uncertificated Securities</i>	521
C. <i>Section 8-317 Liens</i>	522
D. <i>Other Remedies</i>	522
VI. <i>RIGHTS OF PURCHASERS AND BONA FIDE PURCHASERS</i>	523
A. <i>Rights of Purchasers</i>	524
1. <i>Certificated Securities</i>	525
2. <i>Uncertificated Securities</i>	525
a. <i>Issuers' Responsibilities and Defenses</i>	526
b. <i>Issuers' Liens and Restrictions on Transfer</i> ..	528

3. Completion or Alteration of Initial Transaction Statements	531
4. Warranties to Purchasers for Value	532
5. Adverse Claims	533
B. Bona Fide Purchasers	534
1. Creation of BFP Status	535
2. Rights of Bona Fide Purchasers	535
VII. CONCLUSION	537
APPENDIX	539

I. INTRODUCTION

In 1977 the Permanent Editorial Board for the Uniform Commercial Code proposed revisions to Article Eight of the Uniform Commercial Code, which deals with investment securities.¹ These amendments are best known for providing for the issuance, registration, and transfer of securities not represented by certificates—uncertificated securities.² However, these amendments accomplish a good deal more. In particular, they change the mechanisms for creation and perfection of security interests in securities, certificated and uncertificated, and move those

1. The concept of investment securities under the Uniform Commercial Code (UCC) is not coextensive with the concept of securities for purposes of federal and state securities regulation. U.C.C. § 8-102 official cmt. 3, 2C U.L.A. 287 (1991); *Motobacane Am., Ltd. v. Patrick Petroleum Co.*, 600 F. Supp. 1419, 1424 n.4 (E.D. Mich. 1985) (mem.). In this Article the term “security” will refer to an investment security as contemplated by the UCC: “a share or participation in an enterprise or an obligation that is of a type commonly traded in organized markets for such interests or is commonly recognized as a medium for investment.” U.C.C. § 8-102 official cmt. 2, 2C U.L.A. 286 (1991); *accord id.* § 8-102(1)(a)-(b), 2C U.L.A. at 283-84 (defining certificated security and uncertificated security). The definition of security includes shares of stock in closely held corporations, but excludes deposit obligations of any financial institution whose deposits are insured by a United States governmental entity. *See* S.C. CODE ANN. § 36-8-102 S.C. reporter’s cmts. to the 1991 amendment (Law. Co-op. Supp. 1991). The definition also excludes limited partnership interests, except when those partnership interests are represented by an instrument. *See id.* The definition of certificated security is intended to have exactly the same meaning as before the amendment. The only difference is that the concept of a certificate has been added to distinguish uncertificated securities. *Id.* “The definition of uncertificated security is intended to be narrower in scope than the definition of certificated security. To this end, the phrase ‘or commonly recognized . . . as a medium for investment’ has been omitted from the definition of uncertificated security.” *Id.* The purpose of the omission is to limit the application of the UCC, in the case of uncertificated interests, to those cases in which the issuer intended to issue a traditional sort of security. *See id.*

2. *See* U.C.C. § 8-102 (1977). These amendments permit South Carolina corporations to issue stock not represented by certificates. *See* S.C. CODE ANN. § 33-6-260(a) (Law. Co-op. 1990). Unlike the statutory provisions relating to shares of stock, the statutory authority for South Carolina corporations to issue debt securities never required debt securities to be represented by certificates. *See id.* § 33-3-102(7).

mechanisms from Article Nine of the UCC³ to Article Eight. The amendments also attempt to clarify certain aspects of transfers of securities that do not involve delivery of certificates, such as book entry transfers and electronic transfers.

Forty-five states have adopted some version of the Permanent Editorial Board's proposed amendments (the Uniform Amendments) as of this writing.⁴ South Carolina was the most recent state to adopt the Uniform Amendments. South Carolina's version of these amendments, a project of the South Carolina Law Institute,⁵ became effective on June 12, 1991.⁶ South Carolina's 1991 amendments to Article Eight (the 1991 Amendments) vary only slightly from the Uniform Amendments.⁷ This Article is intended as an introduction to the new pattern of Article Eight and to changes from the former law that applied to certificated securities. Those parts of Article Eight that were not affected by the amendments are not addressed in detail.

The Uniform Amendments were developed in response to the perceived "Paperwork Crunch" experienced in the securities markets during the late 1960s.⁸ They were designed to address the problem of excess paperwork in two ways: By providing for the issuance of securities not represented by certificates, thereby reducing the primary role of paper in clearing trades, and by clarifying the means and effects of clearing trades in electronic securities generally.⁹ As will be seen, success in both areas was qualified.

The general approach of the Uniform Amendments was to estab-

3. South Carolina's version is codified at S.C. CODE ANN. §§ 36-9-101 to -607 (Law. Co-op. Supp. 1991).

4. For a list of the other states that have adopted the Uniform Amendments, see U.C.C. art. 8, adoption of revised art. 8, 2C U.L.A. 278-79 (1991).

5. Professor McWilliams and Ms. Anderson were reporter and research assistant, respectively, to the South Carolina Law Institute committee that prepared the amendments for introduction to the South Carolina General Assembly. Professor McWilliams and Ms. Anderson also authored the South Carolina Reporter's Comments to the amendments.

6. 1991 S.C. Acts 556, 676, No. 161 § 4.

7. South Carolina's amendments contain only one nonuniform provision. Compare S.C. CODE ANN. § 36-8-101(2) (Law. Co-op. Supp. 1991) (expressly providing that the Uniform Act for Simplification of Fiduciary Security Transfers, S.C. CODE ANN. §§ 35-7-10 to -120 (Law. Co-op. 1976), controls in the event of any conflict between it and Article Eight) with U.C.C. § 8-101 (1977) (containing only subsection (1) of S.C. CODE ANN. § 36-8-101 (Law. Co-op. Supp. 1991)). This Article therefore will cite to the South Carolina Commercial Code and the UCC interchangeably.

8. U.C.C. art. 8, reporter's introductory cmt., 2C U.L.A. 267 (1991).

9. See U.C.C. § 8-102 (1977). The term "electronic securities" is used to refer to uncertificated securities, which can exist only electronically, and to securities that are certificated, but in which trades are for various reasons cleared electronically—book entry securities.

lish a system for dealing with uncertificated securities that resembled as closely as possible the existing system for dealing with certificated securities and that altered Article Eight as little as possible.¹⁰ When appropriate, new material was added to existing sections. Only four new sections were created: Sections 8-108,¹¹ 8-407,¹² and 8-408,¹³ which have no application to entirely certificated securities, and section 8-321.¹⁴ Few changes were made respecting the treatment of certificated securities.

Two key concepts lie at the heart of revised Article Eight: The concept of transfer and the concept of the uncertificated security with its mechanism of the initial transaction statement. These two concepts are introduced below.

A. The Uncertificated Security Concept

Under preamendment Article Eight the notion of a security as residing in its certificate was so fundamental that no distinction was made between the bundle of rights that constituted the security and its representative certificate. For example, the term "security" was defined as "an instrument which . . . is issued in bearer or registered form."¹⁵ The confusion of the rights inhering in a security with their physical manifestation in a certificate naturally led to difficulties when the certificate became disassociated from ownership of the rights. These were among the difficulties addressed by the Uniform Amendments.

The Uniform Amendments preserve the essential role of the certificate with respect to certificated securities¹⁶ and preserve the status of the certificated security as a negotiable instrument.¹⁷ For uncertificated securities the Amendments establish a system of registration and transfer of ownership interests, including security interests, that

10. U.C.C. art. 8, reporter's introductory cmt., 2C U.L.A. 268 (1991).

11. Section 8-108 provides for the registration with the issuer of pledges of uncertificated securities. For a discussion of security interests in uncertificated securities, see *infra* part IV.

12. Section 8-407 governs the exchange of uncertificated for certificated securities. See *infra* notes 21-23 and accompanying text.

13. Section 8-408 governs statements that issuers must provide in connection with uncertificated securities. See *infra* part III.

14. Section 8-321 controls security interests in certificated and uncertificated securities. See *infra* part IV.

15. U.C.C. § 8-102(1)(a)(i) (1962).

16. Sections that contain changes relating to certificated securities include § 8-313, § 8-317, and new § 8-321.

17. U.C.C. § 8-105(1) (1977). Transfer instructions and initial transaction statements are not. *Id.* § 8-105(2).

closely parallels the existing system for certificated securities.¹⁸

Necessarily, a parallel system for uncertificated securities required some analogue to the certificate, with its dual function of representing ownership and of providing notice to the owner of rights. Under the system developed for uncertificated securities, ownership of and rights in a security are established in the issuer's records. The analogue for the notice function of the certificate was found (ironically, in view of the purpose of the Amendments to reduce paperwork) in two pieces of paper: The transfer instruction,¹⁹ sent to the issuer to initiate some change in ownership of a security, and the initial transaction statement,²⁰ sent by the issuer to confirm registration of the transaction and as notice of rights in the security.

An issue of securities may be certificated, uncertificated, or mixed; that is, available in either form. When an issue, such as a series of stock, is mixed, an owner or registered pledgee²¹ may compel the issuer to exchange a security for the other form²²—certificated for uncertificated, or vice versa—so long as both forms of security “are regularly issued to the category of owners, which includes the person in whose name the new security is to be registered.”²³ The latter qualification indicates that issuers may limit exchangeability by limiting the categories of owners to whom one form of security or the other is regularly issued.

B. The Transfer Concept

The essential mechanical concept of the Uniform Amendments is

18. Uncertificated securities may be issued for equity or debt interests. Whether to allow uncertificated securities to represent debt obligations apparently was subject to some debate among the Permanent Editorial Board members. See U.C.C. § 8-201 official reasons for 1977 change, 2C U.L.A. 312 (1991) (stating that “[c]urrent thinking about uncertificated securities has focused primarily on equities and the difference in the relationship between a shareholder and a corporation in contrast to that between a creditor and his debtor may militate in favor of retaining instruments to represent debt securities,” but ultimately rejecting that view).

19. *Id.* § 8-308(4).

20. *Id.* § 8-408. For a detailed discussion of the transfer instruction and the initial transaction statement, see *infra* part III(A).

21. U.C.C. § 8-407(3) (1977).

22. In the case of mixed issues, an issuer may purchase and deliver either form of security to avoid overissue. *Id.* § 8-104(1)(a). This appears to conflict with § 8-407, which gives the owner the choice of form. The authors believe, however, that the owner's choice of form under § 8-407 is subject to the condition of availability under § 8-104(1)(a), so that an owner offered a security could not, by demanding the alternate form, obtain cash instead under § 8-104(1)(b).

23. *Id.* § 8-407.

that of "transfer," contained in subsection 1 of section 8-313.²⁴ Although section 8-313(1) nominally addresses only the time at which a transfer occurs, it does so by means of establishing the requisites of effective transfer. The Uniform Amendments broaden section 8-313 to encompass every transfer of an interest in a security, including a security interest.

Section 8-313 is exclusive. As a result, the valid transfer of any interest in a security to a purchaser requires compliance with one of section 8-313's methods of transfer.²⁵ Section 8-313(1) sorts transfers into three categories: Transfers by purchase,²⁶ transfers of securities controlled by third parties,²⁷ and transfers to create or release security interests.²⁸

New section 8-321 treats creation of a security interest as a transfer lying within the ambit of section 8-313(1),²⁹ thereby making an effective section 8-313(1) transfer a requirement for the creation of an enforceable security interest in securities. The other requirements of enforceability and attachment have been brought over from preamendment section 9-203(1).³⁰ The prerequisites to enforceability and attachment are also the requirements for perfection; it is impossible to create an enforceable unperfected security interest under amended Article Eight.³¹

24. *Id.* § 8-313(1).

25. *See id.* Transfers by operation of law are excepted because they are not transfers to a purchaser.

26. The concept of transfer by purchase encompasses all voluntary transactions, including gifts. *See id.* § 1-201(32). For a detailed discussion of transfer by purchase, see *infra* part II(C)(1).

27. These types of transactions are commonly known as book entry transactions and must be distinguished from the concept of transfers of uncertificated securities. In a book entry system transfers of securities take place not physically, but on the books of a financial intermediary that holds securities, certificated or uncertificated, in customer accounts. *See* U.C.C. § 8-313(4) (1977). The financial intermediary may hold the securities by possessing certificated securities, by being the registered owner of uncertificated securities, by being the registered pledgee of any type of securities, or by maintaining an account in its own name with another financial intermediary. U.C.C. § 8-313 official cmt. 2, 2C U.L.A. 405 (1991).

For a detailed description of transfer of securities controlled by third parties, see *infra* part II(C)(2).

28. U.C.C. § 8-313(1) (1977). For a detailed discussion of transfers to create or release a security interest, see *infra* part IV.

29. U.C.C. § 8-313(1) (1977).

30. *See infra* note 257 and accompanying text.

31. *See infra* notes 277-78 and accompanying text.

II. THE MECHANICS OF TRANSFER

The creation of any interest in a security, whether it be a complete ownership interest or a partial interest, such as the creation or release of a pledge, is a transfer for purposes of section 8-313. The term "transfer" will be used in this sense throughout the remainder of this Article. An enforceable transfer to a purchaser—that is, other than by operation of law—can be made only by one of the methods described in section 8-313(1).³²

As this section will make clear, the Uniform Amendments have modified the mechanics of transfers that apply to certificated securities in only minor ways, with a few exceptions. In the case of a certificated security, a registration request usually will occur after transfer of the ownership interest and, often, after transfer of the certificate. Transfer typically is initiated by the transferee's delivery of the certificate, properly endorsed, together with a request for registration of transfer. This procedure is unchanged from preamendment law.

In the case of uncertificated securities, however, the change of ownership is itself accomplished by registration. Transfer is initiated by delivery to the issuer of transfer instructions that bear the signatures of appropriate persons, typically of the transferor. This fundamental difference has interesting ramifications, which are discussed below.

In either case, before the issuer's duty to perform a requested transfer comes into effect, the issuer is entitled to demand assurances of the authenticity and effectiveness of indorsements or signatures, as the case may be. Issuers' assurances, the associated warranties, and the subsequent duty to transfer are the second topic of this section.

The third topic addressed by this section is the time at which transfer occurs. This discussion primarily involves section 8-313(1), which establishes the categories of Article Eight transfers and their prerequisites.

A. *Certificated Securities, Briefly*

The Uniform Amendments made few changes to preamendment

32. "Transfer of a security or a limited interest (including a security interest) therein to a purchaser occurs *only* . . ." U.C.C. § 8-313(1) (1977) (emphasis added). In explaining the changes to the section, the Permanent Editorial Board stated: "The addition of the word 'only' . . . is intended to provide that the methods of transfer listed are exclusive and that compliance with one of them is essential to a valid transfer. Transfers by operation of law are excepted because they are not transfers to a 'purchaser'." U.C.C. § 8-313 official reasons for 1977 change, 2C U.L.A. 403-04 (1991).

law relating to transfers that involve certificates. Sections 8-309³³ and 8-310³⁴ were amended only to make clear that they do not apply to uncertificated securities.

Section 8-405³⁵ was altered only to give the issuer the option, in the case of mixed issues,³⁶ of replacing a lost, destroyed, or stolen certificated security with an uncertificated security.³⁷

No change was made in the concept of indorsement or, to the extent it relates to certificated securities, to the concept of appropriate person under section 8-308.³⁸ Former subsections (1) and (2) were preserved in place; the balance of former subsection (3) is now part of subsections (6) and (8). The content of former subsections (4), (6), and (7) was broadened to apply to uncertificated as well as to certificated securities and moved to subsections (9), (10), and (11) respectively.

Preamendment law under section 8-402,³⁹ which related to the issuer's ability to demand assurances of the effectiveness of the indorsement of a certificated security, was not modified. Again, however, substantial changes were made in the relevant section to accommodate uncertificated securities.⁴⁰

B. *Uncertificated Securities*

To initiate the transfer of an uncertificated security or of an interest in one, the registered owner or another "appropriate person"⁴¹ must

33. Section 8-309 is entitled "Effect of Indorsement Without Delivery." U.C.C. § 8-309 (1977).

34. Section 8-310 is entitled "Indorsement of Certificated Security in Bearer Form." *Id.* § 8-310.

35. Section 8-405 is entitled "Lost, Destroyed, and Stolen Certificated Securities." *Id.* § 8-405.

36. The term "mixed issues" refers to securities that the issuer may issue as either certificated or uncertificated securities. The concept of mixed issues provides greater flexibility to the issuer. *See id.* § 8-104(1)(a) (giving an issuer who is obligated to deliver a security of a mixed issue the right to deliver either a certificated or uncertificated security); *id.* § 8-107(1) (permitting any person who is obligated to deliver a security of a mixed issue the right to deliver either a certificated or uncertificated security). Article Eight also provides special rights to the securityholders of a mixed issue. *See id.* § 8-407 (permitting the holder of a security of a mixed issue to demand exchange of a security in one form for the other form).

37. For a discussion of § 8-407, "Exchangeability of securities" and related matters, see *supra* note 21 and accompanying text.

38. Section 8-308 is entitled "Indorsements; Instructions." U.C.C. § 8-308 (1977).

39. U.C.C. § 8-402 (1962).

40. *See* U.C.C. § 8-402 (1977).

41. *Id.* § 8-308(7)-(8). Whether a person is appropriate is determined as of the date of the signing of the instruction. *Id.* § 8-308(10).

originate an instruction⁴² to the issuer⁴³ describing the proposed transfer and requesting that the issuer register the transfer on its books. The issuer is under no duty to register the transfer until the requirements of section 8-401 are met.⁴⁴ The section 8-401 requirements are the same as the preamendment requirements for certificated securities. The requirements include origination by an appropriate person, reasonable assurances that signatures are genuine and effective, discharge by the issuer of any duties as to adverse claims, compliance with applicable tax laws, and rightfulness of the transfer. The transfer is deemed complete upon registration of the transfer by the issuer.⁴⁵ Upon completion of a transfer, the issuer must send a notice or statement to the transferor⁴⁶ and transferee that describes the transfer. The transferee receives notice of its newly transferred rights by means of an "initial transaction statement."⁴⁷ Although the initial transaction statement may resemble a certificate and performs the information function of a certificate, it serves only to notify the transferee of its rights in the security as of the time that the statement is issued. It does not, of itself, represent the transferee's ownership rights in the uncertificated security.⁴⁸

1. Initiation of Transfer: Instructions

Indorsement is a concept that is essential to transfers of certifi-

42. See *infra* part II(B)(2).

43. U.C.C. § 8-201 (1977).

44. *Id.* § 8-401(1). The criteria provided in section 8-401 are as follows:

(a) the security is indorsed or the instruction was originated by the appropriate person or persons (Section 8-308);

(b) reasonable assurance is given that those indorsements or instructions are genuine and effective (Section 8-402);

(c) the issuer has no duty as to adverse claims or has discharged the duty (Section 8-403) [discussed in Part II(B)(4)(c)];

(d) any applicable law relating to the collection of taxes has been complied with; and

(e) the transfer . . . is in fact rightful or is to a bona fide purchaser.

Id. For a detailed discussion of these requirements, see *infra* part II(B)(4).

45. U.C.C. § 8-313(1)(b) (1977).

46. *Id.* § 8-408(5).

47. *Id.* § 8-408(4).

48. All statements sent by the issuer pursuant to § 8-408:

must bear a conspicuous legend reading substantially as follows: "This statement is merely a record of the rights of the addressee as of the time of its issuance. Delivery of this statement, of itself, confers no rights on the recipient. This statement is neither a negotiable instrument nor a security."

Id. § 8-408(9).

cated securities, and it has been preserved in section 8-308.⁴⁹ As amended, section 8-308 establishes for uncertificated securities the concept of a transfer instruction⁵⁰ that is parallel to the indorsement concept and similarly essential to transfers of uncertificated securities. Amended section 8-308 is designed to permit, as far as possible, reliance on similar documentation and evidence under both systems.

Instructions may be given in any manner agreed in writing by the parties.⁵¹ They may be used by the owner of an interest in an uncertificated security to order the issuer to register any transfer that complies with section 8-313, including the creation or release of a pledge.⁵²

2. *Transferors' Warranties*

Under preamendment section 8-306 the transferor of a security, including a transferor who presented the security for payment or exchange, was deemed to have made certain essential warranties upon making the transfer request. The extent of these warranties, and to whom they ran, varied according to the identity of the transferor and the nature of the request.⁵³ The preamendment law has been preserved in subsections 8-306(1) through (4). No substantive change was intended in the law relating to certificated securities.⁵⁴

However, the Uniform Amendments make substantial changes to section 8-306 in order to treat, so far as possible, the request for transfer of an interest in an uncertificated security as analogous to the delivery of a certificate.⁵⁵ The amendments are intended to ensure that the positions of interested parties, including issuers and purchasers for value without notice of adverse claims, do not vary depending upon whether a transfer relates to a certificated or uncertificated security.

a. *Warranties of the Originator of an Instruction*

Under new subsection 8-306(5) the originator of an instruction

49. See *id.* § 8-308.

50. "An 'instruction' is an order to the issuer of an uncertificated security requesting that the transfer . . . of the uncertificated security specified therein be registered" on the issuer's books. *Id.* § 8-308(4).

51. An instruction may be in writing or in any other form agreed upon by the issuer and owner. *Id.* § 8-308(5). As with previous versions of Article Eight, the issuer of the security and the purchaser may agree upon and enforce contractual terms that differ from the statute. U.C.C. § 8-101 official cmt., 2C U.L.A. 280 (1991).

52. U.C.C. § 8-308(4) (1977).

53. See U.C.C. § 8-306 (1962).

54. See U.C.C. § 8-306 official reasons for 1977 change, 2C U.L.A. 377 (1991).

55. *Id.*

warrants to the issuer that the originator is an appropriate person to originate the instruction⁵⁶ and that at the time which the instruction is presented to the issuer the originator will be entitled to the action required by the instruction. The warranty of entitlement is analogous to that made by a person presenting a certificate to the issuer for registration of transfer, payment, or exchange.⁵⁷ The additional warranty that the originator is an appropriate person is required to account for the perceived problem that an instruction, as compared to a certificate, would more likely be forged or otherwise wrongfully originated.⁵⁸ These warranties place upon the originator the burden of establishing entitlement to a transfer just as, in the case of certificated securities, the burden rests upon the one presenting the certificate. In each case the burden is placed on the person who is in the best position to have knowledge of, or to be able to ascertain, the accuracy of the facts being warranted. The issuer is able to rely on the originator's warranty and has recourse for breach of the warranty.

b. Warranties by Purchasers for Value

Purchasers for value without notice of adverse claims who either receive a certificate upon registration of transfer or who receive an initial transaction statement are exceptions to the general rules of subsections (1) and (5). Upon presentation for transfer, payment, or exchange or upon origination of a transfer instruction, a purchaser for value without notice of adverse claims warrants to the issuer only that the purchaser has no knowledge of any unauthorized signature in an indorsement that is necessary for the action which the purchaser is requesting from the issuer. By treating the origination of a transfer instruction as the functional equivalent of the presentation of a certificate, the section gives to purchasers of uncertificated securities the same protection against former owners or pledgees as it does to purchasers of certificated securities.

c. Warranties of Secured-Party Transferors

Under preamendment law, which has been carried over into subsection 8-306(4), a person who takes possession of a certificated security to perfect a security interest in that security and who subsequently transfers the security by delivering the certificate to a transferee warrants only the person's own good faith and authority. Similarly, new

56. See U.C.C. § 8-308(6)-(8) (1977).

57. See *id.* § 8-306(1).

58. See U.C.C. § 8-306 official reasons for 1977 change, 2C U.L.A. 377 (1991).

subsection 8-306(8) provides that when the originator of an instruction is a registered pledgee or a registered owner who holds for security⁵⁹ and the instruction that the owner or pledgee originates is intended to release the security either by releasing the pledge, by reconveying the security to the debtor, or by reconveying the security to a third party on the debtor's order, the originator warrants only that the originator is an appropriate person and that the originator is entitled to the transfer. These warranties run to the debtor or the third person, as the case may be. They are intended to be analogous to the limited warranties of subsection (4).⁶⁰ Originators of instructions also make warranties to instruction guarantors⁶¹ and to purchasers for value.⁶²

3. Guarantees

The preceding section discussed warranties imposed by statute on transferors in connection with transfer requests. Under preamendment law transferees, issuers, and other interested parties obtained additional warranties from third party guarantors.⁶³ No changes of substance have been made in the preamendment rules relating to certificated securities⁶⁴; these rules are now found in subsections (1), (4), (5), (7), and (8) of section 8-312. Section 8-312 has been substantially amended to establish an analogous set of rules relating to uncertificated securities.⁶⁵

a. Indorsement and Signature Guarantees

The most familiar of the third-party guarantees is the guarantee of the signature of the person indorsing a certificate, found in section 8-312(1). No changes have been made in the warranties of a signature guarantor.⁶⁶ Two categories of guarantees of signatures on instructions

59. Security interests in securities may be created by transfer of the ownership interest as security or by registration of a pledge. Only one pledge may be registered at a time. See U.C.C. § 8-108 (1977).

60. See U.C.C. § 8-306 official reasons for 1977 change, 2C U.L.A. 377 (1991). Subsection (4) provides: "A pledgee or other holder for security who redelivers a certificated security received, or after payment and on order of the debtor delivers that security to a third person, makes only the warranties of an intermediary under subsection (3)." U.C.C. § 8-306(4) (1977). An intermediary's warranties are limited to warranties of good faith and authority. *Id.* § 8-306(3).

61. See *infra* part II(B)(3)(c).

62. See U.C.C. § 8-306(7) (1977).

63. U.C.C. § 8-312 (1962).

64. See U.C.C. § 8-312 official reasons for 1977 change, 2C U.L.A. 398 (1991).

65. See U.C.C. § 8-312(2)-(4), (6)-(7) (1977).

66. See *id.* § 8-312(1) (1977).

were required to establish an analogous set of warranties relating to uncertificated securities: A guarantee of the signature of an originator of an instruction and a special guarantee of the signature of an originator of an instruction.⁶⁷

The guarantor of the signature of the originator of an instruction warrants four things: The genuineness of the signature, the appropriateness of the signatory, the legal capacity of the signatory to sign, and the correctness of any taxpayer identification number appearing on the instruction that purports to be that of the registered owner or pledgee.⁶⁸ Of these four warranties, the first three are analogous to those of guarantors of indorsements on certificates with one substantial exception. Subsection 8-312(2)(b) conditions the warranty of appropriateness on identity-in-fact between the originator and the registered owner or pledgee.⁶⁹ Accordingly, if the signing originator purports to be the registered owner or pledgee, the signature guarantor warrants the signer's identity but not the purported status; if the signer is not the registered owner or pledgee, the guarantor's warranty does not apply.⁷⁰ Similarly, if the signer is acting as the representative of the purported owner or pledgee, the guarantor warrants only the signer's identity and authority to act for the purported owner or pledgee.⁷¹ This condition derives from the unavailability to the instruction guarantor of a certificate by which the registered owner or pledgee can be identified. It saves the guarantor from warranting facts for which supporting evidence of the usual nature is not at hand.⁷²

The fourth warranty, of the correctness of any taxpayer identification number appearing on the instruction, is new and has no analogue in the warranties relating to certificated securities. The need for this warranty arises out of issuers' entitlement under section 8-402⁷³ to demand, among other assurances, a taxpayer identification number or other appropriate identification to lessen the chances of fraud or mistake among similarly-named accounts.⁷⁴ Whether to retain this new requirement in South Carolina's 1991 Amendments was subject to substantial debate in the UCC-8 Study Committee.⁷⁵ Some members of

67. *Id.* § 8-312(2)-(3).

68. *Id.* § 8-312(2).

69. *Id.* § 8-312(2)(b).

70. *Id.*

71. U.C.C. § 8-312 official reasons for 1977 change, 2C U.L.A. 398 (1991).

72. See S.C. CODE ANN. § 36-8-312 S.C. reporter's cmts. to the 1991 amendment (Law. Co-op. Supp. 1991).

73. Section 8-402 deals with the issuer's ability to demand assurances relating to indorsements and instructions. See U.C.C. § 8-402 (1977).

74. See U.C.C. § 8-312 official reasons for 1977 change, 2C U.L.A. 472 (1991).

75. The UCC-8 Study Committee was established by the South Carolina Law Insti-

the Committee strongly felt that this requirement encumbered the process and unnecessarily and perhaps unfairly exposed signature guarantors, who usually are banks. The provision was retained in the 1991 Amendments for two reasons: First, the signature guarantor would be in a better position than the issuer, who would not necessarily have any direct contact with or knowledge of the registered owner or pledgee, to confirm the number, and second, to retain national uniformity.

The guarantor of the indorsement on a certificate warrants the appropriateness of the indorsement and that the security is free from undisclosed defects of record. The indorsement guarantor relies for these propositions on a clean certificate issued in the name of the indorser that is either indorsed to the indorser or indorsed in blank. These warranties cannot be made to the purchaser for value of an interest in an uncertificated security because there is no certificate on which to rely. Subsection (3) addresses this by establishing a second category of warranties that apply to uncertificated securities.⁷⁶ These are the warranties made by the special guarantor of the signature of an originator of an instruction. The special guarantor warrants everything that a signature guarantor warrants,⁷⁷ plus the registered ownership of or registered pledge to the instruction signatory,⁷⁸ and the freedom from defects or liens not disclosed in the instruction so that, upon receipt of the instruction, the issuer will register the transfer, pledge, or release free from all defects not specified in the instruction.⁷⁹

The special guarantee is contemplated for use in brokerage transactions.⁸⁰ A broker who specially guarantees an instruction originated by a customer will be in a position analogous to that of a broker who executes the sale of a certificated security without absolute assurance that the customer will deliver a clean certificate.⁸¹

Preamendment section 8-312 included a statutory disclaimer of any warranty of rightfulness by an indorsement signature guarantor.⁸² This disclaimer has been carried over in current subsection (4) and extended to guarantors and special guarantors of signatures on instructions.⁸³

tute to review and prepare commentary to the 1991 Amendments prior to their introduction in the South Carolina General Assembly.

76. U.C.C. § 8-312(3) (1977).

77. *Id.* § 8-312(3).

78. *Id.* § 8-312(3)(a).

79. *Id.* § 8-312(3)(b).

80. U.C.C. § 8-312 official reasons for 1977 change, 2C U.L.A. 398 (1991).

81. *See id.*

82. U.C.C. § 8-312(1) (1962).

83. *See* U.C.C. § 8-312(4) (1977).

b. Indorsement and Instruction Guarantees

In addition to the signature guarantee, preamendment law provided for indorsement guarantees.⁸⁴ The indorsement guarantor made the warranties of the signature guarantee plus a warranty of the rightfulness of the transfer.⁸⁵ This guarantee has been carried over in subsection (5).⁸⁶

An instruction guarantee, analogous to the indorsement guarantee, has been introduced by amendment in subsection (6).⁸⁷ As does the indorsement guarantor, the instruction guarantor warrants the signature of the originator of an instruction and the rightfulness of the transfer.⁸⁸ In addition, the instruction guarantor makes the warranties of a special guarantor of an instruction under subsection (3), which are warranties of the identity of the person specified in the instruction as the registered owner and the absence of hidden encumbrances.⁸⁹

Issuers are not permitted to require special signature guarantees, indorsement guarantees, or instruction guarantees as conditions of transfer,⁹⁰ but the transferor could volunteer these guarantees to the issuer to save time and expense.⁹¹

c. Transferors' Warranties to Guarantors

New subsections (6) and (7) of section 8-306 establish warranties that run from the originators of instructions to guarantors. There are no similar statutory warranties for certificated securities. These new warranties are designed to protect guarantors who must make warranties under section 8-312(2) and (3) but have no certificates on which to rely.⁹²

Subsection (6) of section 8-306 provides that an originator warrants to a special signature guarantor that the originator is an appropriate person and that, at the time of presentation of the instruction to the issuer, the originator will be entitled to the action requested in the instruction and the requested transfer will be made free of hidden encumbrances.⁹³ Originators of instructions make to instruction guaran-

84. U.C.C. § 8-312(2) (1962).

85. *Id.*

86. U.C.C. § 8-312(5) (1977).

87. *Id.* § 8-312(6).

88. *Id.*

89. *See id.* § 8-312(3).

90. *Id.* § 8-312(7).

91. U.C.C. § 8-312 official cmt. 6, 2C U.L.A. 399 (1991).

92. *See supra* part II(B)(3)(b).

93. U.C.C. § 8-306(6) (1977).

tors the warranties found in new subsection (7). These include the warranties of appropriateness and entitlement found in subsections 8-306(5) and (6), a warranty that there are no claims not specified in the instruction, a warranty that the action requested in the instruction is rightful, and a warranty that the security is valid.⁹⁴ The warranty of validity of certificated securities is limited by the knowledge of the warranting party.⁹⁵ With respect to uncertificated securities, there is no limit on the transferor's warranty. Should the issuer dispute the validity of a security upon receipt of an instruction, the transferor would bear the burden of proving its validity. This is appropriate in light of the transferor's superior access to information concerning the status of an uncertificated security, as opposed to a certificated one. Further, it is anticipated that transferees, by means of escrow accounts or similar devices, will not part with their money until after receiving an initial transfer statement from the issuer.⁹⁶

4. *Preconditions to an Issuer's Duty to Register*

An issuer's receipt of a transfer request, either accompanied by a certificate or in the form of an instruction, does not of itself raise in the issuer a duty to effect registration of the requested transfer.⁹⁷ As was the case in preamendment law, section 8-401 contains five condi-

94. *Id.* § 8-306(7).

95. *See id.* § 8-306(2)(c).

96. *See* U.C.C. § 8-306 official reasons for 1977 change, 2C U.L.A. 377 (1991).

97. The term "issuer" is defined in § 8-201. An issuer is the creator of the property interest that the security, whether certificated or uncertificated, represents, but the issuer is also the person who must perform the obligations imposed on issuers by Article Eight. *See* U.C.C. § 8-201 official cmt. 1, 2C U.L.A. 313 (1991). The Uniform Amendments broadened § 8-201 to include those who create uncertificated securities. *See* U.C.C. § 8-201(1)(b) (1977).

The Official Comments to § 8-201 have been amended to clarify that certificated securities must bear the authorized name of the creator of the property interest in order to invoke the obligations of an issuer for statutory purposes. *See* U.C.C. § 8-201 official cmt. 2, 2C U.L.A. 313 (1991). This requirement is not new in South Carolina law. *See, e.g.,* S.C. CODE ANN. § 33-6-250 (Law. Co-op. 1990) (requiring an issuer's proper name to appear on share certificates). If the name on the certificated security is unauthorized, the person is not an issuer and the security is not a certificated security within the meaning of § 8-102. U.C.C. § 8-201 official cmt. 2, 2C U.L.A. 313 (1991). However, a bona fide purchaser without notice of the defect would have rights against the issuer regardless of the correctness of the name. *See id.*

The parallel rule for uncertificated securities is that to invoke the obligations of an issuer under Article Eight, the person must create the interests allowed by § 8-102 and maintain books for registration of ownership. *See* U.C.C. § 8-201 official cmt. 3, 2C U.L.A. 313 (1991). Of course, the issuer may employ an agent to maintain the books.

tions precedent to such a duty, which are discussed below.⁹⁸ As they relate to certificated securities, these conditions are unchanged. As to uncertificated securities, parallel conditions, or conditions as nearly parallel as practicable, have been added.

a. Signatures of Appropriate Persons

Under preamendment Article Eight an issuer was under no duty to register the transfer of a certificate submitted for transfer unless the certificate was indorsed by "appropriate persons."⁹⁹ This precondition has been preserved,¹⁰⁰ and the Uniform Amendments have introduced a similar precondition that an instruction be originated and signed by an "appropriate person."¹⁰¹ The issuer may rely upon an instruction originated by an appropriate person, even if the originator left blanks in the instruction that were filled in by another, even if incorrectly¹⁰² and, according to the Official Comments, "regardless of whether the person completing the instruction had authority to complete it."¹⁰³

The requirement for an appropriate person for purposes of making indorsements is unchanged from preamendment law.¹⁰⁴ Section 8-308 has been substantially amended to add a parallel concept for uncertificated securities¹⁰⁵ that differs in some respects to reflect the differences between indorsed certificates and instructions. For uncertificated securities, an appropriate person will normally be the registered owner of the security or, for uncertificated securities subject to registered pledges, the registered pledgee.¹⁰⁶ Alternative appropriate persons, who are, generally speaking, various kinds of fiduciaries, are defined in section 8-308(8). The concept of alternative appropriate persons is carried over from preamendment law and applies to uncertificated as well as to certificated securities. The provisions of subsection (8) are unchanged, except for having been broadened to apply to uncertificated securities.

New words have been added to the end of subsection (9) to make clear that the transferor of an interest in securities, whether certificated or uncertificated, is not, as a matter of law, a guarantor of the

98. Compare U.C.C. § 8-401 (1962) with U.C.C. § 8-401 (1977).

99. U.C.C. § 8-308(1), (3) (1962).

100. U.C.C. § 8-308(1), (6), (8) (1977); see U.C.C. § 8-308 official reasons for 1977 change, 2C U.L.A. 385 (1991).

101. U.C.C. § 8-401(1)(a) (1977).

102. *Id.* § 8-308(5).

103. U.C.C. § 8-308 official cmt. 5, 2C U.L.A. 386 (1991).

104. U.C.C. § 8-308(1), (6), (8) (1977); see U.C.C. § 8-308 official reasons for 1977 change, 2C U.L.A. 385 (1991).

105. U.C.C. § 8-308(7) (1977).

106. There can be only one registered pledgee. See *id.* § 8-108.

issuer's duties either to register the transfer or to perform such other duties as payment of dividends, interest, or principal.¹⁰⁷ Subsections (9), (10), and (11) are otherwise unchanged except for being broadened to apply to uncertificated securities.

b. Assurances of the Effectiveness of Indorsements and Instructions

Preamendment Article Eight gave issuers, as a condition of performing a transfer, rights to obtain assurances that certificate indorsements were genuine and effective.¹⁰⁸ These rights of issuers of certificated securities are unchanged.¹⁰⁹ The applicable sections, 8-401(1)(b) and 8-402, have been broadened to apply to signatures on instructions, thus giving to issuers of uncertificated securities similar rights. These rights fall into two main categories: The right to demand signature guarantees and the right to establish the authority of third-party signatories.¹¹⁰

Issuers may demand guarantees of signatures of endorsement on certificates as a condition to transfer pursuant to preamendment subsection 8-402(1)(a).¹¹¹ This provision has been preserved and extended by amendment to apply to signatures on instructions¹¹² relating to uncertificated securities. The effects of such guarantees are found at section 8-312(1) and (2).¹¹³ Of the guarantees established by section 8-312, an issuer may demand only the signature guarantee as a condition to transfer.¹¹⁴

Preamendment law also gave the issuer the right to demand evidence of the authority of an agent, fiduciary, or other to indorse a certificate on behalf of a principal. This right is preserved in section 8-402(1)(b) through (e) and extended to agents' executions of instructions.

Issuers of uncertificated securities, who are unable to establish ownership by possession of a certificate, are exposed to increased possibilities of error, and even fraud, that stem from registrations in similar names.¹¹⁵ To permit issuers to minimize confusion, issuers of uncertificated securities who demand signature guarantees under subsection

107. *See id.* § 8-308(9).

108. *See* U.C.C. §§ 8-401(1)(b), 8-402 (1962).

109. *See* U.C.C. §§ 8-401(1)(b), 8-402 (1977).

110. *Id.*

111. U.C.C. § 8-402(1)(a) (1962).

112. *See* U.C.C. § 8-308 (1977).

113. *See supra* part II(B)(3)(b).

114. *See* U.C.C. § 8-312(7) (1977).

115. U.C.C. § 8-312(2)(d) official reasons for 1977 change, 2C U.L.A. 398 (1991).

8-402(1)(a) also get a warranty of a taxpayer identification number¹¹⁶ or, for that rare person who has no such number, some other reasonable assurance of identity.¹¹⁷

c. Issuer's Duties Relating to Adverse Claims

The third precondition to the issuer's duty to transfer is either that the issuer has no duty in relation to an adverse claim, or that the issuer has satisfied that duty.¹¹⁸ The issuer's duties relating to adverse claims are established in section 8-403. Under preamendment law an issuer in receipt of a transfer request was required to inquire into adverse claims upon a timely and appropriate written notification of such a claim.¹¹⁹ For certificated securities, this requirement and associated provisions have been preserved in subsections 8-403(1) through (3). Changes in wording have been made for clarity and to indicate that these subsections relate only to certificated securities, but no change was intended to be made in the substance of subsections (1) through (3).¹²⁰

New subsections (4) through (7) have been added to section 8-403 to provide for issuers' duties that arise from claims relating to uncertificated securities. These duties are different than those relating to certificated securities, mainly because at the time that an issuer is asked to register a certificated security, an effective transfer already has taken place by delivery of the certificate. The parties' relative rights are therefore already established, and notice of an infirmity usually results only in a delay of registration. In the case of an uncertificated security, however, a transfer cannot take place until the issuer registers the transfer, and the issuer's delay in making the registration can seriously impair the rights of the transferor and transferee. In order to protect these rights, the issuer's duties of inquiry relating to uncertificated securities are quite particularized. Although an issuer who is asked to register the transfer of a certificated security may be put on notice by a simple writing, which thereby raises a duty of inquiry, an issuer who is asked to register the transfer of an uncertificated security is under no duty of inquiry except in the four circumstances that are described in subsection 8-403(4).¹²¹ Most significantly,

116. U.C.C. § 8-312(2)(d) (1977).

117. *Id.* § 8-402(1)(a).

118. *Id.* § 8-401(1)(c).

119. *See* U.C.C. § 8-403 (1962).

120. *See* U.C.C. § 8-403 (1977).

121. Section 8-403(4) provides:

An issuer is under no duty as to adverse claims with respect to an uncertificated security except:

notices of adverse claims of third parties must be supported by legal process. The triggers of subsections (1)(a)¹²² and (b)¹²³ are echoed in subsections (4)(b) and (d) respectively, except that subsection (4)(b) is limited to written notices that originate from the registered owner or pledgee.¹²⁴

The means of discharging the duty of inquiry are also more particularized with respect to uncertificated securities. Although a simple notice to an adverse claimant is sufficient for certificated securities,¹²⁵ the issuer of an uncertificated security must note the claim on any statements that it issues relating to the security in question¹²⁶ and must refuse to register the transfer if the claim is of a nature that precludes transfer.¹²⁷ The latter action, in particular, could expose an issuer to liability under section 8-401(2)¹²⁸ and fully justifies the narrow circumstances under which an issuer of uncertificated securities is put on notice of a duty of inquiry.

Under subsection (7) those persons who become registered pledgees before the issuer receives notice of adverse claims are given special rights to reflect the possibility of their status as bona fide purchasers

(a) claims embodied in a restraining order, injunction, or other legal process served upon the issuer if the process was served at a time and in a manner affording the issuer a reasonable opportunity to act on it in accordance with the requirements of subsection (5);

(b) claims of which the issuer has received a written notification from the registered owner or the registered pledgee if the notification was received at a time and in a manner affording the issuer a reasonable opportunity to act on it in accordance with the requirements of subsection (5);

(c) claims (including restrictions on transfer not imposed by the issuer) to which the registration of transfer to the present registered owner was subject and were so noted in the initial transaction statement sent to him; and

(d) claims as to which an issuer is charged with notice from a controlling instrument it has elected to require under Section 8-402(4).

Id. § 8-403(4).

122. Subsection (1)(a) addresses situations in which an issuer of a certificated security received written notice of an adverse claim. *Id.* § 8-403(1)(a).

123. Subsection (1)(b) addresses situations in which the issuer has elected to require a controlling instrument as a further assurance that an indorsement is effective. The issuer is charged with notice of all claims from the controlling instrument. *Id.* § 8-403(1)(b).

124. *See id.* § 8-403(4)(b).

125. *Id.* § 8-403(2).

126. *Id.* § 8-403(5)(b).

127. *Id.* § 8-403(6).

128. Section 8-401(2) creates liability for an issuer who wrongfully refuses to register or delays in registering a security. *Id.* § 8-401(2). Section 8-404 discusses liability for issuers who wrongfully register a security. *Id.* § 8-404.

with a right to transfer free of any adverse claims. Such a pledgee's right to transfer cannot be affected by any third-party claim except for a claim embodied in legal process that deals with the pledgee's interest¹²⁹ or one reflected in a controlling instrument.¹³⁰ However, this right does not survive a pledgee's admission of that pledgee's own claim.¹³¹ If a registered pledgee seeks to transfer the pledgee's interest in the security back to the registered owner, the pledgee needs no further protection.¹³²

d. Compliance with Tax Law

Issuers are under no duty to register transfers before compliance with all applicable laws relating to collection of taxes.¹³³ This condition, which is unchanged for certificated securities, also applies to uncertificated securities.¹³⁴

e. Wrongful Transfers

Issuers are under no duty to register transfers unless they are either "in fact rightful" or are to bona fide purchasers.¹³⁵ This condition is unchanged as it relates to certificated securities, and it has been applied by amendment to uncertificated securities as well.¹³⁶ The condition that the transfer be rightful is for the protection of issuers. This protection is perhaps more generous in the case of uncertificated securities than certificated ones because it permits the issuer to delay effectuation of the exchange of rights between transferor and transferee while assuring its own protection.¹³⁷ The issuer's protection may be

129. See *id.* § 8-403(7)(a); see also U.C.C. § 8-403 official reasons for 1977 change, 2C U.L.A. 478 (1991).

130. See U.C.C. § 8-403(7)(c) (1977).

131. *Id.* § 8-403(7)(b); see also U.C.C. § 8-403 official reasons for 1977 change, 2C U.L.A. 478 (1991) ("There is obviously no curtailment of the pledgee's right when the claim is asserted by the pledgee himself.").

132. See U.C.C. § 8-403(7)(d) (1977). In this situation, however, the issuer is under a duty as to the adverse claim because the pledgee's transfer is the analytical equivalent of a release of the pledge. See U.C.C. § 8-403 official reasons for 1977 change, 2C U.L.A. 478 (1991).

133. U.C.C. § 8-401(1)(d) (1977).

134. *Id.*; see S.C. CODE ANN. § 36-8-401 S.C. reporter's cmts. to the 1991 amendment (Law. Co-op. Supp. 1991).

135. U.C.C. § 8-401(1)(e) (1977).

136. *Id.*

137. If all of the preconditions of § 8-401(1) are not met, the issuer is not under a duty to register the transfer, pledge, or release. U.C.C. § 8-401 official cmt. 3, 2C U.L.A. 465 (1991). Further, the issuer is entitled to certain reasonable assurances under § 8-402. U.C.C. § 8-402 (1977). The ability of the issuer to demand assurances and to require all

limited, however, if the transferee is a bona fide purchaser.¹³⁸

f. Satisfaction of Duty with Either Form of Security

As under preamendment Article Eight, one obligated to deliver a security could satisfy the obligation using any security of the appropriate issue.¹³⁹ This concept has been broadened to provide that, in the case of mixed issues, the obligation to deliver a security may be satisfied using either a certificated or an uncertificated security.¹⁴⁰ The concept of delivery in preamendment law has been broadened to include transfer, thus accommodating transfers of uncertificated securities.¹⁴¹

5. Issuers' Liabilities Relating to Registration and Actions for Wrongful Transfer

a. Issuers' Liabilities

Under preamendment law section 8-404(1) freed a transferring issuer from liability to "any . . . person suffering loss as a result of the registration of a transfer, pledge or release" so long as the certificate was properly indorsed and the issuer had no duty, or had discharged its duty, as to adverse claims.¹⁴² The Uniform Amendments extend this provision to issuers of uncertificated securities.¹⁴³ In subsection (1)(a) protection is extended to issuers who receive instructions originated by appropriate persons,¹⁴⁴ which is analogous to properly indorsed certificates.

Section 8-404(2), which establishes the liability of issuers who have registered transfers to persons not thereto entitled, is unchanged. It continues to relate only to certificated securities.¹⁴⁵ New section 8-404(3) is the analogue to subsection (2) for uncertificated securities. The remedy is registration in favor of the injured party,¹⁴⁶ which is analogous to delivery of a certificate to the injured party under section

of the preconditions is grounded in the notion that, in the case of an uncertificated security, it is the issuer, and not the transferor and transferee, who is transferring the rights.

138. For a discussion of bona fide purchaser status in connection with § 8-302, see *infra* part VI(B).

139. Compare U.C.C. § 8-107(1) (1962) with U.C.C. § 8-107(1) (1977).

140. U.C.C. § 8-107(1) (1977).

141. See *id.*

142. U.C.C. § 8-404(1) (1962).

143. See U.C.C. § 8-404(1)(a) (1977).

144. For the definition of the term "appropriate person," see *id.* § 8-308.

145. *Id.* § 8-404(2).

146. *Id.* § 8-404(3).

8-404(2). The exceptions in subsections (3)(a)¹⁴⁷ and (b)¹⁴⁸ to the requirement of the remedy are identical to the exceptions relating to certificated securities found in subsections (2)(a) and (c). The exception for certificated securities found in subsection (2)(b), which relates to lost, stolen, and destroyed certificates,¹⁴⁹ has no analogue in subsection (3).

In addition to liability for wrongful transfer, an issuer can incur liability for the wrongful failure to register a transfer or for unreasonable delay in registering the transfer.¹⁵⁰ The Uniform Amendments extend this liability to registration of transfers, pledges, or releases of uncertificated securities.¹⁵¹ An issuer who incurs liability under this section is liable for any loss, including money damages, caused by the delay or failure to register.¹⁵²

b. Actions for Wrongful Transfer

The Uniform Amendments preserve the preamendment law relating to actions against transferees for wrongful transfers of certificated securities.¹⁵³ However, the Uniform Amendments broaden the scope of section 8-315 to include uncertificated securities. Under the Uniform Amendments any person whose interest is harmed by the wrongful transfer of an uncertificated security may bring an action against the transferee to force the origination of a transfer instruction, and thus force registration of transfer.¹⁵⁴ This remedy serves as the analogue to the remedy for certificated securities, which is to force redelivery of the certificate to its rightful possessor.¹⁵⁵

147. Subsection (3)(a) denies the injured party a remedy if the registration was pursuant to § 8-404(1). *Id.* § 8-404(3)(a).

148. Subsection (3)(b) denies the injured party the subsection (3) remedy if registration would result in overissue. When delivery of a certificate under section 8-404(2) or registration under § 8-404(3) would result in overissue, the situation is controlled by § 8-104. Generally speaking, the issuer is required to buy the requisite security in the market or, if none is available, to furnish the purchase price with interest from the date of demand. *Id.* § 8-104(1)(a)-(b).

149. *See id.* § 8-405 (special provision for lost, stolen, or destroyed securities).

150. *Id.* § 8-401(2).

151. *See id.*; *see also* U.C.C. § 8-401(2) official reasons for 1977 change, 2C U.L.A. 464 (1991) (noting that the Uniform Amendments also extended the duty to transfer under subsection (1)).

152. *See* U.C.C. § 8-401 official cmt. 4, 2C U.L.A. 465 (1991).

153. *Compare* U.C.C. § 8-315 (1962) *with* U.C.C. § 8-315 (1977).

154. U.C.C. § 8-315(1)(c) (1977).

155. *Id.* § 8-315(1)(a)-(b).

C. Time at Which Transfer Occurs; Methods of Transfer

Preamendment section 8-313(1) clarified the time at which delivery of a certificate occurred under certain circumstances. The Uniform Amendments change the key concept from delivery to transfer in order to accommodate uncertificated securities.¹⁵⁶ The mechanics of deliveries under preamendment section 8-313 are preserved as transfers under amended section 8-313(1) and, with one exception, have been modified in only minor ways from preamendment Article Eight.¹⁵⁷ The provisions that have been carried over are found in subsections (1)(a), (c), (d)(i), (e), and (g). Generally speaking, the preamendment provisions have been broadened to apply to uncertificated securities. In addition, three new subsections, 8-313(1)(h) through (j), have been added that relate only to security interests. The Uniform Amendments also make subsection 8-313(1) an exclusive list of enforceable transfers to purchasers of securities.¹⁵⁸

Article Eight treats transfers as falling into four statutory categories: Transfers by purchase,¹⁵⁹ transfers of securities held by third persons, transfers within a central depository system, and transfers of security interests. The first three are discussed below. Transfers of security interests are discussed in Part IV.

1. Transfers by Purchase

Sections 8-313(1)(a) and (b) state the general rules for transfers of certificated and uncertificated securities respectively.¹⁶⁰ Subsection (1)(a) preserves the preamendment rule for transfers of certificated securities by purchase: transfer occurs when the purchaser acquires possession of the certificate.¹⁶¹ Subsection (b), the parallel provision for uncertificated securities, provides that transfer occurs upon the issuer's registration of the transfer.¹⁶²

156. Cf. *id.* § 1-201(14) (providing that the general definition of delivery is limited to certificated securities).

157. The exception is found in subsections 8-313(1)(d)(ii) and (iii). For a discussion of the exception, see *infra* notes 167-72 and accompanying text.

158. "Transfer of a security or a limited interest (including a security interest) therein to a purchaser occurs *only*" U.C.C. § 8-313(1) (1977) (emphasis added).

159. The concept of transfer by purchase includes gifts and any other direct transfer of a security between two parties. See *id.* § 1-201 (definition of purchase).

160. See U.C.C. § 8-313 official cmt. 3, 2C U.L.A. 406 (1991).

161. U.C.C. § 8-313(1)(a) (1977).

162. *Id.* § 8-313(1)(b). For a discussion of the issuer's duty to transfer and discharge of that duty, see *supra* part II(B)(4).

2. *Transfers of Securities Held by Third Persons*

Subsections 8-313(1)(c) through (g) provide for electronic transfers of securities and transfers through third parties. The application of these subsections has been broadened by substitution of the concept of financial intermediary¹⁶³ in new subsections (1)(c) and (d)(1) for the more narrow concept of broker. The mechanics of transfers under these sections are unchanged from preamendment law. The new concept is that the third party will appear on the issuer's books as the registered owner of securities. This system permits, in effect, fully effective transfers to take place on the books of the financial intermediary.¹⁶⁴

The basic rule for certificated securities that are issued or indorsed to the purchaser appears in subsection (1)(c) and is unchanged from its preamendment form, except that the term "financial intermediary" is substituted for the term "broker."¹⁶⁵ No analogue to subsection (1)(c) is needed for uncertificated securities because its concept is subsumed in the case of uncertificated securities by subsection (1)(b).¹⁶⁶

Subsection (1)(d) provides the rule for transfers of certificated and uncertificated securities on the books of financial intermediaries other than clearing corporations.¹⁶⁷ Subsection (1)(d)(i)—former subsection

163. The term "financial intermediary" is defined as "a bank, broker, clearing corporation, or other person (or the nominee of any of them) which in the ordinary course of its business maintains security accounts for its customers and is acting in that capacity." U.C.C. § 8-313(4) (1977). The substitution of terms was made to take account of the increasing number of institutions that play the custodial role that once was taken mainly by brokers. Commercial banks now are financial intermediaries when they hold securities in customer accounts. *Id.* A financial intermediary is not precluded from having a security interest in securities it holds in account for its customers. *See id.*

164. *See id.* § 8-313(1)(d).

165. *See id.* § 8-313(1)(c).

166. Subsection (1)(b) specifically allows for registration in the name of the purchaser's designee. *Id.* § 8-313(1)(b).

167. A "clearing corporation" is a corporation registered as a "clearing agency" under the federal securities laws or a corporation:

(a) at least 90 percent of whose capital stock is held by or for one or more organizations, none of which, other than a national securities exchange or association, holds in excess of 20 percent of the capital stock of the corporation, and each of which is

(i) subject to supervision or regulation pursuant to the provisions of federal or state banking laws or state insurance laws,

(ii) a broker or dealer or investment company registered under the federal securities laws, or

(iii) a national securities exchange or association registered under the federal securities laws; and

(b) any remaining capital stock of which is held by individuals who have purchased it at or prior to the time of their taking office as directors of

(1)(c) broadened from the former concept of broker—relates to certificated securities in the financial intermediary's accounts that are identified as belonging to the purchaser. Its rule that transfer occurs upon book entry plus sending of a confirmation¹⁶⁸ is extended in subsections (1)(d)(ii) and (iii) to portions of fungible bulks of securities, whether certificated or uncertificated.¹⁶⁹ This change is in the nature of a clarification and conforms to general understanding and practice under the preamendment section.¹⁷⁰

The requirement of confirmation in addition to book entry protects the customer against creditors of the intermediary in the case of its insolvency. The confirmation serves as evidence that the described securities are held by the intermediary for the customer, not for its own account.¹⁷¹

Subsections (1)(d)(ii) and (iii) make no distinction, for purposes of effectiveness of a transfer, between securities held in a customer account that are certificated and those that are uncertificated. However, the form in which securities are held is important for purposes of determining whether a purchaser can be a bona fide purchaser.¹⁷²

Subsection (1)(e)¹⁷³ has been narrowed to apply only to third persons who are not financial intermediaries; as before its amendment, the subsection's operation is limited to transfers of identified certificated securities held by third persons. Under subsection (1)(e) acknowledgement by the third person that the third person holds for the transferee constitutes transfer. The acknowledgement requirement serves two functions: First, it establishes an identifiable time on which the concept of transfer can be fixed, and second, it avoids confusion about the ownership of the security by requiring a public expression of the arrangement.¹⁷⁴

An arrangement of the same type is possible for uncertificated securities as well.¹⁷⁵ Acknowledgement is also the key concept under new subsection (1)(f), which is the analogue of subsection (e).

the corporation and who have purchased only so much of the capital stock as is necessary to permit them to qualify as directors.

Id. § 8-102(3). The only change from the preamendment definition is the reference to federally-registered clearing agencies. See U.C.C. § 8-102(3) (1962).

168. See U.C.C. § 8-313(1)(d)(i) (1977).

169. See *id.* § 8-313(1)(d)(ii)-(iii).

170. See U.C.C. § 8-313 official reasons for 1977 change, 2C U.L.A. 404 (1991).

171. See *id.*

172. For a discussion of §§ 8-313(2) and 8-302(1)(c), see *infra* notes 467-72 and accompanying text.

173. Subsection (1)(e) was subsection (1)(d) under the former act. See U.C.C. § 8-313(1)(d) (1962).

174. See U.C.C. § 8-313 official cmt. 3, 2C U.L.A. 406 (1991).

175. See U.C.C. § 8-313 (1)(f) (1977).

Transferors of securities held by third parties may discharge their duty to deliver the security by complying with the requirements of section 8-314. In the case of a sale made on an exchange or otherwise through brokers, preamendment Article Eight provided four methods of satisfaction of the transferor's duty to deliver a security: By delivery of the certificate either to the transferee's broker, by delivery to one designated by the broker, by causing a third-party holder to acknowledge to the purchaser that the security is held for the purchaser, or by effecting clearance according to exchange rules.¹⁷⁶ These methods are preserved, for certificated securities, in postamendment subsections 8-314(1)(a)(i), (1)(b)(i), (2)(a), (1)(a)(iii), (2)(c), and (1)(b)(iv). As to these provisions, no substantive change was made by the Uniform Amendments.

With respect to transfers of uncertificated securities, in subsections 8-314(1)(a)(ii), (1)(b)(ii), and (2)(b) the Uniform Amendments establish methods of satisfying the duty to transfer parallel to those for certificated securities. The duty also may be satisfied through acknowledgment¹⁷⁷ and clearance in accordance with exchange rules,¹⁷⁸ as with certificated securities, or by causing the registration of transfer of the uncertificated security to the transferee or the transferee's designee. In the case of brokerage transactions, a transferor may conditionally satisfy the duty of transfer by delivery of an appropriate instruction to the transferee broker.¹⁷⁹ Because performance is not complete until the issuer executes the instructions, transferor brokers may specially guarantee the signatures of originators of instructions as provided in section 8-312(3).¹⁸⁰ It is not intended that these instructions will circulate by indorsement as if they were certificates.¹⁸¹

3. *Transfers Within a Central Depository System*

Section 8-320 brings within the statutory framework the concept of the clearing corporation, which is a financial intermediary that holds securities on deposit from financial institutions and clears trades in deposited securities among its depositor institutions by book entry.¹⁸² Such entries, when done according to the rules of section 8-320, constitute a transfer under section 8-313(1)(g).¹⁸³

176. See U.C.C. § 8-314 (1962).

177. U.C.C. § 8-314(1)(a)(iii), (2)(c) (1977).

178. *Id.* § 8-314(1)(b)(iv).

179. *Id.* § 8-314(1)(a)(iv), (b)(iii).

180. *Id.* § 8-312(3).

181. See U.C.C. § 8-314 official reasons for 1977 change, 2C U.L.A. 415 (1991).

182. For the statutory definition of clearing corporation, see *supra* note 167.

183. See U.C.C. § 8-313(1)(g) (1977); *id.* § 8-320(3). The rights of parties that effect

Preamendment section 8-320 permitted, within the four walls of the clearing corporation, paperless transactions in certificated securities.¹⁸⁴ The Uniform Amendments preserve preamendment law relating to certificated securities with minor changes and broaden the section to apply it to uncertificated securities. Use of uncertificated securities in clearing corporation accounts obviates the requirements of delivery of certificates upon adding to or withdrawing from accounts, of performing custody functions, and of maintaining inventories of certificates.¹⁸⁵ Accordingly, the clearing of trades is greatly simplified.

The simplification extends, however, well beyond the confines of the clearing corporation. The amendment to subsection (1) of section 8-320 extends the simplified methods outlined above to apply to securities that one clearing corporation may hold on account in a second—so-called interfacing depositories.¹⁸⁶ This clarification reflects current securities practices.¹⁸⁷

Under section 8-313(1)(g) transfers within a central depository system are deemed effective when the appropriate entries are made on the books of the clearing corporation.¹⁸⁸ No confirmation is required by this subsection because it is thought that clearing corporations, which hold securities only for customers, are less likely than other financial intermediaries to confuse a customer's securities with securities held by the institution in other capacities. The physical double-check of the confirmation is accordingly less important.¹⁸⁹ A similar distinction was made between brokerage transactions and clearing corporation transactions in subsections (1)(c) and (e) of preamendment section 8-313.¹⁹⁰

4. Transfers of Security Interests

The transfer concept is particularly significant in the context of security interests because, under the Uniform Amendments, security

transactions under § 8-313(1)(g) are governed by § 8-320(3).

184. See U.C.C. § 8-320 (1962).

185. See U.C.C. § 8-320 official reasons for 1977 change, 2C U.L.A. 455 (1991).

186. *Id.*

187. *Id.*

188. U.C.C. § 8-313(1)(g) (1977). For the statutory definition of clearing corporation, see *supra* note 167.

189. The difference results from the fact that clearing corporations will normally control only securities belonging to their customers while other financial intermediaries may themselves be the beneficial owners or pledgees of securities not held in account for their customers. In the event of the insolvency of either the financial intermediary or the customer, it appears desirable to have some objective evidence of a transfer in addition to an internal book entry.

U.C.C. § 8-313 official reasons for 1977 change, 2C U.L.A. 404 (1991).

190. See U.C.C. § 8-313(1)(c), (e) (1962).

interests in securities cannot be created outside of a section 8-313 transfer.¹⁹¹ Such transfers as they relate to creation, perfection, transfer, and satisfaction of security interests are discussed in Part IV.

III. THE ISSUER'S OBLIGATION TO PROVIDE STATEMENTS

The Uniform Amendments establish the concept of statements for uncertificated securities to supply the information and notice functions that certificates supply for certificated securities. New section 8-408 deals with these statements and designates events upon which issuers are required to transmit transaction statements,¹⁹² which inform parties to a transfer of the details of the transfer. Section 8-408 also designates events upon which issuers are required to transmit periodic statements,¹⁹³ which inform those who own interests in uncertificated securities of the details of their interest at given points in time.

As will be seen in the following discussion, section 8-408 statements perform so many of the functions of a certificate that they might well be mistaken to perform the ownership function as well. This is emphatically not the case¹⁹⁴ and, accordingly, all categories of section 8-408 statements must bear "a conspicuous legend reading substantially as follows: This statement is merely a record of the rights of the addressee as of the time of its issuance. Delivery of this statement, of itself, confers no rights on the recipient. This statement is neither a negotiable instrument nor a security."¹⁹⁵

Except for this legend, and for the contents of the several varieties of statement prescribed by section 8-408, the statute is silent as to the form of statements. In precatory language the drafters observed that "[p]erhaps the forms now used by the transfer agents of mutual funds to confirm acquisitions, dispositions, reinvestment of dividends, periodic liquidations and statements of position will serve as a model."¹⁹⁶

Section 8-408 statements can be divided into three categories: Initial transaction statements, transaction statements, and periodic statements. These categories are discussed in order below.

A. Initial Transaction Statements

Within two days of the registration of transfer of an uncertificated

191. U.C.C. § 8-321(1) (1977).

192. *See id.* § 8-408(1)-(3), (5).

193. *See id.* § 8-408(6)-(7).

194. *See, e.g.,* U.C.C. § 8-105 official reasons for 1977 change, 2C U.L.A. 299 (1991).

195. U.C.C. § 8-408(9) (1977).

196. U.C.C. § 8-408 official cmt. 4, 2C U.L.A. 500 (1991).

security to a new registered owner, of a registered pledge, or of the release of a registered pledge, issuers must send statements to specified parties interested in the transaction.¹⁹⁷ These statements are called "initial transaction statements."¹⁹⁸ They must be identified as initial transaction statements and signed by the issuer.¹⁹⁹

When the transfer of the ownership interest is registered, the initial transaction statement must be sent to the new registered owner.²⁰⁰ When ownership is transferred subject to a registered pledge, an initial transaction statement also must be sent to the registered pledgee.²⁰¹ When a pledge is registered or released, the issuer must send initial transaction statements to the registered owner and to the registered pledgee, and in the case of a release, to the former registered pledgee.²⁰² When the pledge itself is transferred, initial transaction statements must be sent to the registered owner, the transferor pledgee, and the new registered pledgees.²⁰³

Generally speaking, initial transaction statements must include a description of the liens and conditions of the issuer and of any adverse claims, or an express statement that the transferred interest is free of adverse claims.²⁰⁴ Accordingly, initial transaction statements serve the same purpose as certificates in giving notice of defects in title as of the time of transfer. The transferee receiving an initial transaction statement is charged with notice of only those defects that are noted on the statement.²⁰⁵ Issuers are required to sign²⁰⁶ the copy of each initial transfer statement sent to a transferee²⁰⁷; this serves to establish the transferee's rights against the issuer.²⁰⁸

197. U.C.C. § 8-408(1)-(3) (1977). For a discussion of which parties must receive statements, see *infra* notes 200-03 and accompanying text.

198. *Id.* § 8-408(4). The issuer also must send the former owner or pledgee a transaction statement. See *infra* part III(B).

199. U.C.C. § 8-408(4) (1977). The signature need not be manual. See *id.* § 1-201(39).

200. *Id.* § 8-408(4)(a).

201. *Id.*

202. *Id.* § 8-408(2)-(3).

203. U.C.C. § 8-408 official cmt. 2, 2C U.L.A. 500 (1991).

204. See U.C.C. § 8-408(1)(d), (2)(d), (3)(d) (1977).

205. *Id.* § 8-304(2). For example, the issuer's lien of § 8-103 is not effective unless noted on the transferee's initial transaction statement or, if the transferee's interest is acquired by some means other than registration, on the initial transaction statement sent to the transferor. See *id.*

206. The UCC does not require a manual signature. See *id.* § 1-201(39).

207. *Id.* § 8-408(4).

208. Establishing the validity of the issuer's signature on an initial transaction statement creates a presumption that the facts stated in the statement were true as of the statement's date. *Id.* § 8-105(3)(d). The purpose of this subsection, which is new, is to "give the same evidentiary value to a genuine initial transaction statement that para-

Those who purchase interests in uncertificated securities in ways other than by some form of registration, so that they do not receive an initial transaction statement, are permitted to rely upon the initial transaction statement sent to the transferring registered owner or pledgee.²⁰⁹ The other side of this coin is that these transferees are charged with knowledge of the contents of the initial transaction statement of their transferor, just as a transferee of an interest in a certificated security is charged with knowledge of the contents of the relevant certificate, regardless of whether it is delivered to the transferee.²¹⁰ It is anticipated, therefore, that transferees who purchase interests in uncertificated securities in ways other than by some form of registration will demand delivery of transaction statements from their transferors.

Because of the significance of the initial transaction statement in notifying the transferee of the quality of what has been transferred, the drafters of the Uniform Amendments observe that transferees may not wish to part with consideration until receiving an initial transaction statement.²¹¹ This is especially true because an initial transaction statement reflects only those claims and restrictions in effect on the date of its issuance.²¹² The mechanism between the parties presumably would be an escrow arrangement.

1. *Unauthorized or Altered Initial Transaction Statements*

Under preamendment law an unauthorized signature on a certificate was ineffective except that, when the signature was that of one entrusted by the issuer with "signing of the security or of similar securities," or "with responsible handling of the security," it was effective in

graph (3)(c) accords to a genuine certificated security," limited by the fact that "the initial transaction statement speaks only as of the time of its issuance." U.C.C. § 8-105 official reasons for 1977 change, 2C U.L.A. 299 (1991).

209. U.C.C. § 8-304(2) (1977).

210. *See id.* § 8-202(1)(b); *see also* U.C.C. § 8-103 official cmt. 2, 2C U.L.A. 294 (1991) (discussing the parallel provisions for charging a transferee with notice in the context of issuers' liens). Restrictions on transfers of uncertificated securities are not effective unless noted on the initial transfer statement, but a restriction that is noted is effective against the person to whom the statement is sent and against any transferee who does not register the transfer. U.C.C. § 8-204(b) (1977).

211. "It is contemplated that transferees will and should be able to rely on these statements and, in many cases, will not part with their consideration until they receive them." U.C.C. § 8-408 official cmt. 1, 2C U.L.A. 500 (1991). "[A] prudent purchaser may not pay until he receives a clean initial transaction statement . . ." U.C.C. § 8-403 official reasons for 1977 change, 2C U.L.A. 477 (1991).

212. *See, e.g.,* U.C.C. § 8-105 official reasons for 1977 change, 2C U.L.A. 299 (1991).

favor of a purchaser for value without notice of the lack of authority.²¹³ The point of the exception was to put upon the issuer the burden of policing its own employees and fiduciaries. This concept has been preserved in amended section 8-205 and extended to apply to unauthorized signatures on initial transaction statements.²¹⁴

Similarly, under preamendment law a certificate bearing the necessary signatures could be completed by anyone, and a purchaser without notice could enforce the security as completed.²¹⁵ An improperly altered certificate could be enforced only according to its original terms.²¹⁶ These concepts also have been retained in section 8-206 and extended, by new subsections 8-206(3) and (4), to apply to initial transaction statements.²¹⁷

The provisions of sections 8-205 and 8-206 apply only to initial transaction statements and not to other kinds of statements that an issuer of uncertificated securities must send. This further evidences the Uniform Amendments' treatment of the initial transaction statement as the device that serves, for uncertificated securities, the legal notice function of the certificate.

2. *Unauthorized Instructions*

Under preamendment section 8-311 owners or pledgees could assert unauthorized endorsements of signatures on certificates against the issuer and against any purchaser except a purchaser who had received a clean certificate from the issuer.²¹⁸ This rule has been preserved in section 8-311(a).²¹⁹ It has been extended by analogy to uncertificated securities in the following way: Transfers of interests in uncertificated securities are initiated by instructions signed by statutorily-prescribed appropriate persons.²²⁰ An unauthorized instruction is analogous to a certificate with an unauthorized endorsement. Owners and pledgees of uncertificated securities may assert the unauthorized status of an instruction against the issuer or any purchaser except a purchaser who has received an initial transaction statement that confirms the transfer, pledge, or release of the security to that pur-

213. U.C.C. § 8-205 (1962).

214. See U.C.C. § 8-205 (1977).

215. U.C.C. § 8-206(1) (1962).

216. *Id.* § 8-206(2).

217. See U.C.C. § 8-206(3)-(4) (1977).

218. U.C.C. § 8-311(a) (1962).

219. See U.C.C. § 8-311(a) (1977).

220. See *id.* § 8-207(4). For the definition of who are appropriate persons, see *id.* § 8-308(7)-(8).

chaser.²²¹ Again, the analogy to the existing rules that govern certificated securities is clear.

This rule protects the good faith purchaser who receives either a clean certificate or an initial transaction statement and who has no notice²²² of the infirmity that caused the issuance of a clean security. The original interest holder is also protected, as under preamendment law, by an action against the issuer.²²³ The issuer, in turn, is protected by an action against the forger and by the ability to require signature and other guarantees under section 8-402.²²⁴

3. *Warranties of Authenticating Agents*

Under preamendment section 8-208, by their acts of signing certificates, authenticating agents warranted the genuineness of the security, their own authority to act, and that they had "reasonable grounds to believe . . . the security [to be] in the form and within the amount the issuer is authorized to issue."²²⁵ Authenticating agents did not warrant the validity of the security in other respects.²²⁶ These rules have been preserved as they apply to certificated securities,²²⁷ and they have been extended by amendment to apply to authenticating agents who sign initial transaction statements.²²⁸ Once again, the role of the initial transaction statement is analogous to the role of a certificate.

4. *Effect on the Statute of Frauds*

The familiar statute of frauds of section 8-319 has been retained and extended to apply to uncertificated securities. Amendment was required only to extend the performance exceptions found in section 8-319(b) by analogy to uncertificated securities.²²⁹ As usual, the analogy is found in the initial transaction statement. Accordingly, unwritten contracts for sales of securities are enforceable when the transfer of an uncertificated security has been registered and the transferee has failed

221. *See id.* § 8-311(a).

222. In most cases a purchaser will not, as a practical matter, have any means of obtaining notice.

223. U.C.C. §§ 8-311(b), 8-404 (1977).

224. *See* U.C.C. § 8-311 official cmt. 2, 2C U.L.A. 395 (1991).

225. U.C.C. § 8-208(1)(c) (1962).

226. *Id.* § 8-208(2).

227. *See* U.C.C. § 8-208 (1977).

228. *See id.*

229. *See id.* § 8-319(b); *see also* U.C.C. § 8-319 official reasons for 1977 change, 2C U.L.A. 437 (1991) (explaining the performance exceptions in the context of uncertificated securities).

to send a written objection to the issuer within ten days after receipt of the initial transaction statement.²³⁰

B. Transaction Statements

Transaction statements are required to be prepared in connection with the registration²³¹ of a transfer of ownership, a pledge, or a release,²³² and to be sent within two days after registration to the former owner and former registered pledgee, if any.²³³ A transaction statement must include, generally speaking, a description of the interest being transferred, the date of registration, and the identity, including taxpayer identification number, of the transferee.²³⁴ The statement is intended to serve as notice to the transferor of the change in the interest, to provide the transferor with information relevant to the transfer, and to serve as a check—timely, it is hoped—against fraud.²³⁵

C. Periodic Statements

Periodic statements must be sent to registered interest holders—owners and pledgees—at least annually, and at any time “upon the reasonable written request” of an interest holder.²³⁶ The Official Comments observe that this requirement applies to all issuers of uncertificated securities, including closely held corporations.²³⁷ Issuers that choose to issue statements at least quarterly are relieved of the burden of furnishing statements on request unless the requesting party bears the cost.²³⁸

IV. SECURITY INTERESTS

Generally speaking, the Uniform Amendments do not change the respective rights of secured parties and debtors who pledge certificated

230. U.C.C. § 8-319(b) (1977).

231. According to the Official Comments, “it is contemplated that such statements will be prepared virtually simultaneously with the actual registration and sent immediately thereafter.” U.C.C. § 8-408 official cmt. 1, 2C U.L.A. 499 (1991).

232. The creation and release of pledges are treated as transfers of ownership interests in securities. See U.C.C. § 8-313(1) (1977).

233. U.C.C. § 8-408(5) (1977).

234. *Id.* § 8-408(5).

235. U.C.C. § 8-408 official cmt. 1, 2C U.L.A. 499 (1991).

236. U.C.C. § 8-408(6)-(7) (1977).

237. U.C.C. § 8-408 official cmt. 3, 2C U.L.A. 500 (1991). The requirement no doubt includes close corporations organized under South Carolina's Statutory Close Corporation Supplement, S.C. CODE ANN. §§ 33-18-101 to -500 (Law. Co-op. 1990).

238. U.C.C. § 4-408(8) (1977).

securities. The means of creation, attachment, perfection, and termination of security interests in certificated securities have been changed, however, and moved from Article Nine of the UCC to new section 8-321, which also governs security interests in uncertificated securities.²³⁹ The most significant change from preamendment law is the new requirement of an effective section 8-313 transfer as a condition to the attachment and perfection of every enforceable security interest in securities.²⁴⁰

With the exception of the provisions relating to creation, attachment, perfection, and termination, security interests in securities continue to be governed by Article Nine.²⁴¹ This means that secured parties will continue to be subject to the familiar preservation-of-collateral requirements of section 9-207.²⁴² These matters are discussed further in Parts IV(A) and IV(B), below.

A. Attachment and Perfection

Prior to the Uniform Amendments, enforceability and attachment of security interests in securities were controlled by section 9-203, which required either that the collateral be in possession of the secured party pursuant to an agreement²⁴³ or that the debtor sign a written security agreement describing the collateral, that value be given, and that the debtor have rights in the collateral.²⁴⁴ Accordingly, it was possible to create enforceable unperfected security interests in securities with nothing more than a written agreement. Perfection was by possession only, except in circumstances that warranted temporary perfection.²⁴⁵ Although the Uniform Amendments retained the basic pattern of preamendment law, significant changes were made. In addition, the means of attachment and perfection of security interests in securities, both certificated and uncertificated, were moved from Article Nine to Article Eight,²⁴⁶ where they are now controlled by new section 8-321.

239. The Uniform Amendments contain conforming amendments to Article Nine. See Appendix.

240. U.C.C. § 8-321(1) (1977).

241. *Id.* § 8-321(3); see U.C.C. § 8-321 official cmt. 3, 2C U.L.A. 461 (1991).

242. See U.C.C. § 8-321 official cmt. 3, 2C U.L.A. 461 (1991).

243. The agreement did not have to be written. See U.C.C. §§ 1-201(39), 9-302(1)(a) (1972).

244. *Id.* § 9-203.

245. See *id.* § 9-304(1), (4), (5).

246. Compare *id.* § 9-203(1) with U.C.C. § 8-321 (1977).

1. Creation and Attachment

Although the Official Comments observe that section 8-321 "is intended to govern the creation, perfection and termination of security interests,"²⁴⁷ the section itself does not address creation. The section provides that security interests, however created, are "enforceable and can attach only if . . . transferred to the secured party . . . pursuant to a provision of Section 8-313(1)."²⁴⁸

The other prerequisites to attachment and enforceability are found in subsection 8-321(2), and they are familiar. First, the transfer must be "pursuant to agreement,"²⁴⁹ a concept brought over from section 9-203. Under section 9-203 evidence of an intention to pledge a security was required in the form either of the pledgee's possession of the certificate or of a written security agreement. In other words, when the pledgee was in possession of the certificate, the agreement pursuant to which the pledgee had possession was not required to be in writing.²⁵⁰ Similarly, under section 8-321 attachment must be pursuant to an agreement, but the agreement need not be written if the secured party takes possession of a certificated security.²⁵¹ In the case of an uncertificated security, a transfer takes place that is designed to be the functional equivalent of possession, such as registration of the pledge or registration of the pledgee as the owner.²⁵² Accordingly, transfers under sections 8-313(1)(a) through (g) do not require written security agreements because each involves either transfer of possession to the pledgee, or the equivalent.²⁵³ Transfers under section 8-313(1)(h) through (j), which do not involve transferring possession or the equivalent, all require written agreements that describe the collateral²⁵⁴ and are signed by the debtor.²⁵⁵

The remaining requirements of attachment and enforceability also are brought over from section 9-203: the debtor, who is referred to in section 8-321(2) as the transferor, must have rights in the collateral, and the secured party, who is a section 8-321 transferee, must give

247. U.C.C. § 8-321 official cmt. 1, 2C U.L.A. 461 (1991).

248. U.C.C. § 8-321(1) (1977).

249. *Id.* § 8-321(2).

250. *See* U.C.C. § 9-203(1)(a) (1972).

251. *See* U.C.C. § 8-321(3)(b) (1977). Obtaining possession is a valid means of effectuating a transfer under § 8-313. *Id.* § 8-313(1)(a).

252. *See* U.C.C. § 8-321 official cmt. 1, 2C U.L.A. 461 (1991).

253. *See id.*

254. Article Nine still controls sufficient description of the collateral. *See* U.C.C. § 9-110 (1977).

255. For a more detailed discussion of transfers under § 8-313(1)(h)-(j), see part IV(A)(2).

value.²⁵⁶ These concepts are intended to be applied just as they were under section 9-203(1).

2. *Sections 8-313(1)(h)-(j): Transfers Applying Only to Security Interests*

Three categories of section 8-313(1) transfers relate only to security interests. These do not involve delivery or the equivalent, but do require the existence of a written security agreement signed by the transferor and describing the collateral. They are found at subsections 8-313(h),²⁵⁷ (i),²⁵⁸ and (j).²⁵⁹

a. *Subsection 8-313(1)(h): Security Interests in Securities Held by Bailees*

Section 9-305, which governs perfection of security interests in things in the possession of a bailee,²⁶⁰ no longer applies to securities under the Uniform Amendments. It has been replaced by similar subsection 8-313(1)(h), which controls both creation and perfection of security interests in securities.²⁶¹

When a transferor's interest is held in an account with a financial intermediary, subsection (1)(h) puts the financial intermediary in the position of a bailee. The financial intermediary therefore is the proper person to receive notice of the transfer of a security interest, thereby creating and perfecting, or releasing, the security interest.²⁶² This is true regardless of whether the intermediary has physical possession of a certificated security, is the registered owner of an uncertificated security, or has securities in an account with some other intermediary.²⁶³ When the bailee is not a financial intermediary, the bailee is still the appropriate person to receive notice if the bailee is in possession of certificated securities.²⁶⁴ The bailee also is the appropriate person to

256. See U.C.C. § 8-321(2) (1977).

257. Subsection (h) deals with transfers of security interests that involve third-party holders. *Id.* § 8-313(h).

258. Subsection (i) deals with transfers of security interests upon giving of new value under an agreement. *Id.* § 8-313(i).

259. Subsection (j) deals with transfers of security interests when the secured party is already in possession of the collateral. *Id.* § 8-313(j).

260. *Id.* § 9-305.

261. See *id.* § 8-313(1)(h).

262. See U.C.C. § 8-313 official cmt. 3, 2C U.L.A. 406 (1991); see also U.C.C. § 8-313 official reasons for 1977 change, 2C U.L.A. 404 (1991) (explaining more fully the analogy between § 9-305 and § 8-313(1)(h)).

263. U.C.C. § 8-313 official cmt. 3, 2C U.L.A. 406 (1991).

264. U.C.C. § 8-313(1)(h)(ii) (1977).

receive notice if the bailee is the registered owner of an uncertificated security not already subject to a registered pledge²⁶⁵ or if the bailee is the registered pledgee and the security is uncertificated and subject to a registered pledge.²⁶⁶

Subsection (1)(h) requires that the security be described in a written security agreement signed by the transferring party. The transfer is then effective upon receipt of notice by the third person or the financial intermediary, as designated in the subsection. To reduce the possibility of fraud, the notice must be written and signed by the transferor, who is the debtor in the case of creation of, and the secured party in the case of a release or assignment of, a security interest.²⁶⁷ Effectiveness of the transfer does not depend upon any confirmation or acknowledgement from the controlling party. This distinguishes subsection (1)(h) from (1)(d), (e), and (f).²⁶⁸

b. Subsection 8-313(1)(i): Security Interests Created by Agreement

The drafters of revised section 8-313 observe that "it will not be possible to create a security interest in securities by mere written agreement."²⁶⁹ It is possible, however, to come quite close. Section 8-313(1)(i) permits the transfer, and therefore the creation and attachment, of a security interest "where the transferor has signed a security agreement containing a description of the security [and] new value is given by the secured party."²⁷⁰ However, security interests created and attached in this manner are discriminated against. They are perfected, as are all security interests created and attached by means of a section 8-313 transfer, but perfection lapses after twenty-one days unless the formalities of another section 8-313(1) transfer have been complied with in the meantime.²⁷¹

265. *Id.* § 8-313(1)(h)(iii).

266. *Id.*

267. *Id.* § 8-313(1)(h).

268. Subsection (d) fixes the time of transfer at the time the purchaser receives a confirmation from the financial intermediary, and subsections (e) and (f) fix the time of transfer at the time of third party's acknowledgment. *Id.* § 8-313(1)(d)-(f). Subsection (h), however, requires only that the secured party receive notice. There is no requirement that the secured party send a confirmation to the debtor. *See id.* § 8-313(1)(h).

269. U.C.C. § 8-313, official reasons for 1977 change, 2C U.L.A. 404 (1991).

270. U.C.C. § 8-313(1)(i) (1977).

271. *Id.* § 8-321(2). For a discussion of these other methods, see *infra* part IV(A)(3).

c. *Subsection 8-313(1)(j): Security Interests in Securities Held by Financial Intermediaries*

Subsection (j) relates to securities originally transferred to a financial intermediary in some holding capacity in which the intermediary subsequently takes a security interest. An example would be a broker or other lender who holds securities for a customer and who secures a margin account or other loan with a security interest in the held securities.²⁷² Transfer of the security interest occurs upon execution by the transferor of a written security agreement that describes the security and the giving of value by the intermediary.²⁷³ The written security agreement is required as protection for the customer.²⁷⁴ As with all transfers of security interests under section 8-313(1), a security interest created under subsection (1)(j) would be perfected upon transfer.²⁷⁵

3. Perfection

Under Article Eight, as amended, a security interest that attaches is also perfected.²⁷⁶ It is impossible to create an enforceable but unperfected security interest in securities.²⁷⁷

It is possible, however, for certain security interests to lose perfection while they remain attached and enforceable. Transfers of security interests pursuant solely to written agreements that describe the collateral, which are permitted by new section 8-313(1)(i), attach at the time that new value is given by the secured party. However, these interests become unperfected after twenty-one days unless the requirements of some other form of section 8-313(1) transfer have been completed. This result replaces the automatic twenty-one day perfection rule of section 9-304(4), from whose operation securities are now excluded.²⁷⁸ Sections 8-313(1)(i) and 8-321, in combination, are intended to produce exactly the same results as did preamendment section 9-304(4).²⁷⁹

272. See U.C.C. § 8-313 official reasons for 1977 change, 2C U.L.A. 404 (1991).

273. U.C.C. § 8-313(1)(j) (1977).

274. See S.C. CODE ANN. § 36-8-313 S.C. reporter's cmts. to the 1991 amendment (Law. Co-op. Supp. 1991).

275. See U.C.C. § 8-321(2) (1977).

276. *Id.*

277. U.C.C. § 8-321 official cmt. 2, 2C U.L.A. 461 (1991).

278. See U.C.C. § 9-304(4) (1977).

279. U.C.C. § 8-321 official reasons for 1977 change, 2C U.L.A. 460 (1991).

B. Parties' Rights

In general, with respect to certificated securities, the relative rights of issuers, owners, pledgees, and unsecured creditors are quite similar to those under preamendment law. Rights with respect to uncertificated securities have been made as closely analogous as possible. The most substantial departure involves the new concept of a registered pledgee of an uncertificated security, which is discussed in this section.

1. Continued Application of Article Nine

Security interests in securities remain subject to Article Nine in all ways, except with respect to creation and perfection of security interests, which are governed by section 8-321.²⁸⁰ The continued application of Article Nine means that the preservation-of-collateral rules of section 9-207²⁸¹ continue to apply to all secured parties.²⁸²

In particular, section 9-207(2)(c) permits the secured party to retain as additional collateral any increase in collateral that comes into the secured party's possession.²⁸³ Money is an exception. Money must either be applied to the obligation or be remitted to the debtor.²⁸⁴ The debtor and creditor may vary this rule.

2. Registered Pledgees, Their Rights, and the Rights of Issuers and Registered Owners

Under preamendment Article Eight secured parties who took possession of certificates put themselves into a position of substantial control over their collateral, but created a somewhat problematic three-cornered relationship among the pledgee-in-possession, the registered owner, and the issuer. Under Article Eight, as amended, pledgees of certificated securities still may take possession of the certificate and have the rights that they would have had under preamendment law.²⁸⁵

The new provisions of Article Eight that relate to pledges of uncertificated securities are designed to produce effects as closely parallel as possible to those produced by the rules for certificated securities,

280. U.C.C. § 8-321(3) (1977); U.C.C. § 8-321 official cmt. 3, 2C U.L.A. 461 (1991).

281. Section 9-207 establishes the secured party's rights and duties when the collateral is in the secured party's possession. See U.C.C. § 9-207 (1972).

282. U.C.C. § 8-321 official cmt. 3, 2C U.L.A. 461 (1991).

283. U.C.C. § 9-207(2)(c) (1972).

284. *Id.*

285. The 1977 conforming amendments to Article Nine did not affect § 9-207. Cf. Appendix (listing and discussing conforming amendments). Taking possession is still a proper means of transfer under the Uniform Amendments. U.C.C. § 8-313(1)(a) (1977).

including the pledgee's option either of holding the security as pledgee or of registering the security in the pledgee's own name as owner.²⁸⁶ In working out new rules toward this end, however, the drafters of the Uniform Amendments have put pledgees of uncertificated securities into a position that is actually somewhat superior to that enjoyed by pledgees in possession of a certificate.²⁸⁷

The pledgee of an uncertificated security may become the registered owner of the security, in which case the pledgee is treated for all purposes as the owner by the issuer.²⁸⁸ Rights between the debtor and the creditor presumably would be sorted out in a two-party contract. Alternatively, the pledgee of uncertificated securities may register the pledge with the issuer, thereby becoming a registered pledgee.²⁸⁹ The status of registered pledgee is new and was developed in connection with the Uniform Amendments as an analogue to a pledgee in possession of a certificate. For example, upon registration of a pledge, the details of the security agreement are not required to be disclosed to the issuer.²⁹⁰ Further, Article Eight contemplates only one registered pledgee at a time; although this is said to be for the convenience of the issuer,²⁹¹ it is also consonant with the analogy of a pledgee who holds a certificate.

286. U.C.C. art. 8 reporter's introductory cmt., 2C U.L.A. 270 (1991).

287. *See id.*, 2C U.L.A. at 270-71; S.C. CODE ANN. § 36-8-207 S.C. reporter's cmts. to the 1991 amendment (Law. Co-op. Supp. 1991).

288. U.C.C. § 8-207(2) (1977). The same treatment is accorded pledgees who hold duly endorsed certificates. *See id.* § 8-207(1).

289. A registered pledgee is a secured party whose interest in an uncertificated security has been registered with the issuer. There may be only one registered pledgee at any time. *Id.* § 8-108. The registered owner of the pledged security continues to be the person in whose name the ownership interest is registered with the issuer, despite the existence of the registered pledge. To whom the ownership interest is registered is significant in determining, for example, how an unsecured creditor may reach a debtor's interest under § 8-317(2), discussed in Part IV, and in determining to whom the issuer owes performances that are owed to the registered owner, *see* U.C.C. § 8-207(1) (1977). The registered pledgee's interest is terminated by a registration of release. *Id.* § 8-108.

Under Article Eight, as amended, enforceable security interests in securities must involve one of the methods of transfer described in § 8-313(1). *See id.* § 8-321(1). Registration of the pledgee as owner and registration of a pledge are two of a number of methods of transfer permitted by § 8-313(1). Security interests established by other methods will be junior to those of registered pledgees as a practical matter because of the control over the collateral that the registered pledgee is given, as described above. Nevertheless, by appropriate arrangement, other § 8-313(1) transfers may be used to create first lien interests "if, for some reason, the use of the registered pledge mechanism is inadvisable." U.C.C. § 8-108 official cmt., 2C U.L.A. 310 (1991); *accord* U.C.C. § 8-108 official reasons for 1977 change, 2C U.L.A. 309 (1991).

290. *See* U.C.C. § 8-108 official reasons for 1977 change, 2C U.L.A. 309 (1991).

291. "This limits the burden on issuers and insulates them from problems of conflicting priorities and the like." *Id.*

Section 8-207 addresses the respective rights and duties of registered pledgee, registered owner, and issuer. This was one of the simpler sections of preamendment Article Eight. It provided in subsection (1) that issuers could treat the registered owner of a security as the person exclusively entitled to exercise the rights of ownership, including the right to vote the securities, to receive securities issued in exchange, including stock splits, and to receive cash, securities, or in-kind distributions. The only other subsection, subsection (2), provided that the registered owner continued to be liable for "calls, assessments or the like" regardless of the other provisions of Article Eight.²⁹²

The Uniform Amendments retain subsection (1) unchanged, except to limit its application to certificated securities.²⁹³ The substance of subsection (2) is retained unchanged but moved to subsection (7). Accordingly, preamendment law as applied to certificated securities has not changed.²⁹⁴

Manifestly, many of the rights of a pledgee of a certificated security are determined by whether or not the pledgee is in possession of the collateral—the certificate—and whether the certificate is properly endorsed. Possession of the security puts even the unregistered pledgee of a certificated security into a strong position of dominion over the collateral. Vis-a-vis the issuer, however, the pledgee of a certificated security is required to become the registered owner in order to achieve perfect dominion, including the right to be treated as owner by the issuer for the purposes described above. In other words, the unregistered pledgee of certificated securities is in a position of exposure relating to substitution or diminution of collateral.²⁹⁵ As will be seen in the following paragraphs, it is with respect to this exposure that the registered pledgee is in a position superior to that of the pledgee who holds a certificate.²⁹⁶

To create rules that relate to uncertificated securities which, in their effect, are as similar as possible to the familiar rules that relate to certificated securities, five subsections have been added to section 8-207. These new subsections give pledgees dominion over their collateral that is quite similar to that of the holder-pledgee of a properly endorsed certificated security. All pledges of uncertificated securities must be registered, however, and this gives pledgees of those securities

292. U.C.C. § 8-207 (1962).

293. See U.C.C. § 8-207(1) (1977).

294. See S.C. CODE ANN. § 36-8-207 S.C. reporter's cmts. to the 1991 amendment (Law. Co-op. Supp. 1991).

295. See U.C.C. § 8-207 official reasons for 1977 change, 2C U.C.C. 341 (1991) (discussing the result of an unregistered pledgee's failure to register in the context of certificated securities).

296. *Id.*

a direct relationship with the issuer of their collateral and the relationship's attendant advantages.²⁹⁷

Subsection (2) states for uncertificated securities the same basic rule that subsection (1) states for certificated securities: the issuer may treat the registered owner of securities as the person entitled to exercise "all the rights and powers"²⁹⁸ of ownership. For uncertificated securities, however, the rights of registered owners are made subject to the quite significant rights of registered pledgees, which are set out in new subsections (3), (4), and (6).²⁹⁹

Under subsection 8-207(3) a registered owner whose security is subject to a registered pledge may not obtain registration of a transfer until the issuer has received a release instruction from the registered pledgee.³⁰⁰ This effectively gives the registered pledgee power over transfers that is similar to that of a pledgee in possession of a properly endorsed certificate.³⁰¹

Subsection (4) requires the issuer to comply with transfer instructions of the registered pledgee.³⁰² Again, this gives the registered pledgee dominion over the security that is similar to that of a pledgee in possession of a properly endorsed certificate. The registered pledgee may require the issuer to transfer registration of ownership to a new registered owner, either subject to or free from the pledgee's interest, or to transfer registration of the pledgee's own interest to another pledgee.³⁰³ As the originator of a transfer instruction, such a pledgee would make the warranties of section 8-306(5)-(8).³⁰⁴

Subsections 8-207(3) and (6) deal with things exchanged for pledged securities, and it is in these provisions that the advantages to the pledgee which derive from the pledgee-issuer relationship are most distinctly manifested. Under subsection (3) convertible uncertificated securities that are subject to a registered pledge may not be converted without a release instruction from the pledgee.³⁰⁵ This requirement arises because conversions of convertible securities are deemed to be transfers for these purposes.³⁰⁶ This effectively gives the registered pledgee the conversion right.³⁰⁷ Any proceeds of the conversion either

297. *Id.*

298. U.C.C. § 8-207(2) (1977).

299. *Id.*

300. *Id.* § 8-207(3).

301. *See* U.C.C. § 8-207 official reasons for 1977 change, 2C U.L.A. 340 (1991).

302. *Id.*

303. U.C.C. § 8-807(4) (1977).

304. For a discussion of these warranties, see *supra* part II(B)(2)(a).

305. U.C.C. § 8-207(3) (1977).

306. *Id.*

307. *See* U.C.C. § 8-207 official reasons for 1977 change, 2C U.L.A. 340 (1991).

are subject to the interest of the registered pledgee or are to be delivered to the registered pledgee.³⁰⁸

Under subsection (6) any uncertificated securities that are issued in exchange for, or distributed with respect to, an uncertificated security subject to a pledge are registered to the pledgee.³⁰⁹ Similarly, any certificated securities issued in exchange for, or distributed with respect to, an uncertificated security subject to a pledge are delivered to the registered pledgee.³¹⁰ This has the effect, on the one hand, of preserving the pledgee's collateral in the case of stock splits, and on the other hand, of turning the proceeds of stock dividends into additional collateral.³¹¹

Under subsection (6) any money exchanged for all or part of an uncertificated security is paid to the registered pledgee.³¹² This preserves the pledgee's collateral in case of redemptions.

The net effect of these provisions is to place the pledgee of an uncertificated security in control of changes in the security's title. The provisions also ensure that the pledgee is benefitted by increases in collateral and protected from reduction in or substitution of collateral. These are substantial advantages over unregistered pledgees who hold endorsed certificates; in the case of the latter, exchanged or additional securities or cash payments go to the registered holder.³¹³

Another effect of the provisions of subsections (3) and (6) is that they leave only the "rights and powers of an owner" to vote and to receive cash dividends to registered owners of uncertificated securities. Section 8-207 is not intended, however, to control who has voting rights or to whom the issuer must pay cash dividends.³¹⁴ As subsection (2) is written, the issuer "may treat"³¹⁵ the registered owner as entitled to these residual rights.³¹⁶ The Official Comments emphasize that issuers are not required to "deal exclusively with the registered owner" and

308. U.C.C. § 8-207(6) (1977).

309. *Id.* § 8-207(6)(a).

310. *Id.* § 8-207(6)(b).

311. U.C.C. § 8-207 official reasons for 1977 change, 2C U.L.A. 341 (1991).

312. U.C.C. § 8-207(6)(c) (1977). By contrast, money received as "increase or profits," including, for example, cash dividends, must either be remitted to the debtor or be applied to the debt. *Id.* § 9-207(c).

313. U.C.C. § 8-207 official reasons for 1977 change, 2C U.L.A. 341 (1991). The unregistered pledgee can obtain the substitute or additional collateral only by demanding them from the pledgor, who is the registered owner. Even if the pledgee takes this step, the pledgor has an opportunity to wrongfully transfer the securities in the meantime. *Id.*

314. See U.C.C. § 8-207 official cmt. 3, 2C U.L.A. 342 (1991).

315. U.C.C. § 8-207(2) (1977) (emphasis added).

316. Subsection (1) is similarly permissive. It permits but does not require the issuer of certificated securities to treat the registered owner as entitled to exercise "all the rights and powers of an owner." *Id.* § 8-207(1).

they may require proof of ownership before making payments.³¹⁷

Article Nine will continue to govern issues between debtors and secured parties. Section 8-321(3) provides that security interests in securities are governed by Article Nine, with the exception of the subject matter of section 8-321—the creation, perfection, and termination of security interests.³¹⁸ Accordingly, pledgees of certificated securities in possession of the certificate and, according to the Official Comments, pledgees of uncertificated securities who become registered owners or registered pledgees³¹⁹ are subject to section 9-207(c). Section 9-207(c) requires that all increases in collateral that come into the hands of the secured party may be retained except money that represents “increase or profits,” such as cash dividends.³²⁰ This money must either be remitted to the debtor or be applied against the debt.³²¹

The new provisions of section 8-207 are so favorable to registered pledgees of uncertificated securities and so clear in their directives to issuers that issuers should be able to comply with the section in fair confidence that they will avoid liability for wrongful dealings with the owner of an uncertificated security. In contrast, at least two cases that the Permanent Editorial Board cited in its commentary indicate the potential for confusion when registered owners and unregistered pledgees of the same certificated securities have contested the issuer's conclusion that the other was entitled to a distribution.³²² Because of the impracticability of implementing a system for certificated securities which provides the assurance that section 8-207 provides for uncertificated securities and to mitigate future confusion, the Permanent Editorial Board has suggested the following guidelines for interpreting section 8-207:

- (1) A distribution to the registered owner of a security is protected under § 8-207(1) only if it is distributable to the owners of all securities of the same issue.
- (2) If the terms of a security require its surrender as a condition of payment or exchange, a distribution to the registered owner in pay-

317. U.C.C. § 8-207 official cmt. 2, 2C U.L.A. 342 (1991).

318. U.C.C. § 8-321(3) (1977); *see* U.C.C. § 3-321 official cmt. 3, 2C U.L.A. 461 (1991).

319. U.C.C. § 8-321 official cmt 3, 2C U.L.A. 461 (1991).

320. U.C.C. § 9-207(c) (1977). Payments of money dividends are distinguished from payments of money as exchanges for securities. *See supra* note 312 and accompanying text.

321. *Id.*; *see id.* § 8-207(6)(d) (providing that money paid in partial or full redemption for securities held as collateral may be retained by the secured party).

322. Permanent Editorial Board, PEB COMMENTARY No. 4 (Mar. 10, 1990), *reprinted in* 3A U.L.A. 311, 312 (Supp. 1992). The cases noted are *New England Merchants National Bank v. Old Colony Trust Co.*, 417 N.E.2d 471 (Mass. Ct. App. 1981), *aff'd*, 429 N.E.2d 1143 (Mass. 1982), and *In re Hawaii Corp.*, 829 F.2d 813 (9th Cir. 1987).

ment or exchange is not protected under § 8-207(1) unless the security is surrendered.

(3) Distributions to all the registered owners of a security, the terms of which do not require the surrender thereof, are protected under § 8-207(a), regardless of the regularity, amount, or nature of such distributions.

(4) A distribution to the registered owner that is protected under § 8-207(a) constitutes a defense against a claim to such distribution by a person in possession of the security, even if such person is a bona fide purchaser.³²³

C. Termination

New section 8-321, which controls the creation, attachment, perfection, and termination of security interests, addresses termination in subsection (4). As with the rest of section 8-321, the termination rules apply equally to certificated and uncertificated securities.

The general rule is that termination may be by any means or at any time agreed by the parties.³²⁴ If the parties have not otherwise agreed, then termination occurs upon retransfer of the security interest to the debtor, or to the debtor's designee, in a section 8-313(1) transfer.³²⁵

The debtor and the secured party are free, of course, to agree that the security interest is not terminated by a section 8-313(1) transfer from the secured party to the debtor. In this case the security interest will continue, but it will be unperfected unless the security is certificated and has been delivered to the debtor "for the purpose of ultimate sale or exchange or presentation, collection, renewal, or registration of transfer."³²⁶ In those circumstances perfection will continue for twenty-one days after the transfer, after which it will lapse.³²⁷ Reconveyance before the lapse to the secured party, or to a designee, will maintain continuity of perfection.³²⁸ These provisions preserve the essence of sections 9-304(5) and (6), which no longer apply to investment securities. According to the Official Comments, these provisions are intended "to produce the same result as . . . Section 9-304(5)."³²⁹

323. Permanent Editorial Board, *supra* note 322, at 313.

324. U.C.C. § 8-321(4) (1977).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*; see U.C.C. § 8-321 official cmt. 4, 2C U.L.A. 461 (1991).

329. U.C.C. § 8-321 official reasons for 1977 change, 2C U.L.A. 460 (1991).

V. CREDITORS' RIGHTS

New section 8-317 is intended to clarify the situation of creditors whose debtors' securities are controlled by third parties. Preamendment section 8-317 simply provided that no attachment was valid unless the certificate actually was seized and, in effect, that creditors could resort to equitable remedies such as injunction to effect the seizure.³³⁰ Preamendment Article Eight took this point of view because, in the words of the Official Comments, "[i]n dealing with investment securities the instrument itself is the vital thing."³³¹

The rule of section 8-317 was of increasingly little help to lenders in a world in which the preponderance of securities are not in the possession of their beneficial owners, and when lenders are unhappy, the wheels of commerce turn more slowly. The necessity of creating a system of creditors' rights for uncertificated securities gave the drafters of Article Eight an opportunity to rethink generally the issue of creditors' rights in securities.³³² The result is much-modified section 8-317.

A. Certificated Securities

The basic rule of preamendment section 8-317 is retained in subsection (1): an outstanding certificated security cannot be attached or levied upon until physically seized. This rule is for the protection of those who purchase from the debtor.³³³

The preamendment proviso to subsection (1) to the effect that securities which had been "surrendered to the issuer [could] be attached or levied upon at the source"³³⁴ has been retained and clarified to provide that securities which are "surrendered to the issuer may be reached by a creditor by legal process at the issuer's chief executive office in the United States."³³⁵ The effect of the proviso is limited to certificated securities.³³⁶

When certificated securities are not in the debtor's possession, the rule of subsection (1) does not apply; in such circumstances, the rule "has no function."³³⁷ For the applicable rules, one looks to new subsec-

330. U.C.C. § 8-317 (1962).

331. U.C.C. § 8-317 official cmt. 1, 2C U.L.A. 561 (1991).

332. Cf. U.C.C. art. 8 reporter's introductory cmt., 2C U.L.A. 276 (1991) (noting that the 1962 rule "has become wholly inadequate even with respect to certificated securities").

333. U.C.C. § 8-317 official reasons for 1977 change, 2C U.L.A. 427 (1991).

334. U.C.C. § 8-317(1) (1962).

335. U.C.C. § 8-317(1) (1977).

336. *See id.*

337. U.C.C. § 8-317 official reasons for 1977 change, 2C U.L.A. 427 (1991).

tions (3) through (6).

Subsection (3) effectively is an exception to the basic rule of subsection (1) that applies when a debtor's certificated securities are controlled by a secured party other than a financial intermediary. Subsection (3) permits a creditor to establish a lien on the securities by service of process on the secured party, who then remains in possession.³³⁸

Subsection (4) establishes another parallel exception that applies when a debtor's certificated securities are controlled by a financial intermediary. Securities that are held in street name are one example.³³⁹ A creditor may obtain a lien on the securities by serving legal process upon the financial intermediary on whose books the interests of the debtor appear. In effect, the lien would attach to the debtor's account with the financial intermediary.³⁴⁰

B. Uncertificated Securities

The basic rule for uncertificated securities, which is found in subsection (2), is analogous to that of subsection (1). An uncertificated security cannot physically be seized, of course. Questions of ownership of uncertificated securities are determined on the issuer's registration books, and registration of ownership of uncertificated securities is the analogue of possession of a certificate. Accordingly, seizure of an uncertificated security can be accomplished only through legal process served on the issuer.³⁴¹ Because locating the issuer's registration books would be problematic in many cases, effective process for these purposes must be on the issuer at its chief executive office in the United States.³⁴²

Uncertificated securities that are not registered in the debtor's name may be reached by process in the same way and pursuant to the same statutory sections as certificated securities that are not in the possession of the debtor. If the uncertificated security is held by a secured party who is not a financial intermediary, the security may be reached by serving process on the secured party.³⁴³ If the security is held by a financial intermediary, in street name, for example, it may be reached by serving process on the financial intermediary on whose books the debtor's account appears.³⁴⁴

338. U.C.C. § 8-317(3) (1977).

339. See U.C.C. § 8-317 official cmt. 4, 2C U.L.A. 428 (1991).

340. U.C.C. § 8-317(3) (1977).

341. *Id.* § 8-317(2).

342. See U.C.C. § 8-317 official reasons for 1977 change, 2C U.L.A. 427 (1991).

343. U.C.C. § 8-317(3) (1977).

344. *Id.* § 8-317(4).

C. Section 8-317 Liens

Under subsections (3) and (4) creditors' liens are created by legal process and are not limited by the provisions of section 8-313(1).³⁴⁵ A creditor's lien therefore would not be subject to the provisions of section 8-321, which require a section 8-313 transfer as a prerequisite.³⁴⁶ Instead, section 8-317 provides rules that relate to the creation and attachment of the lien, which arises upon the completion of the procedures outlined in section 8-317.³⁴⁷ Section 8-317 also provides rules that govern the effect of transfer on the lien.³⁴⁸ However, like section 8-321, section 8-317 does not answer all questions that relate to the lien. Instead, questions regarding priority and similar matters are governed by Article Nine and the related state law.³⁴⁹

When a security subject to a section 8-317 lien is transferred for new value to a third party, the section 8-317 lien does not follow the security, but attaches to the proceeds.³⁵⁰ This means that such liens will not impede transfer, but it also means that the creditor may be foreclosed from benefitting from increases in the object of the lien.³⁵¹

As under former law, the procedures for obtaining liens and the consequences of obtaining one are not addressed in Article Eight. These issues are left to the general law of the state.³⁵²

D. Other Remedies

The Uniform Amendments preserve unchanged the preamendment provision that creditors are entitled to the equitable and other assistance of courts in reaching debtors' securities unreachable by "ordinary legal process."³⁵³

345. See U.C.C. § 8-313 official cmt. 1, 2C U.L.A. 405 (1991). The Official Comments expressly except transfers by operation of law from § 8-313. See *id.*

346. See U.C.C. § 8-321(1) (1977).

347. See *id.* § 8-317. A creditor must look to state law to determine what procedures that create liens are available to the creditor. Upon complying with the state law procedures and serving the appropriate § 8-317 party, the lien attaches to the security.

348. See *id.*

349. See *id.* § 8-321(3); see also U.C.C. § 8-317 official cmt. 4, 2C U.L.A. 428 (1991) (stating that § 8-317 does not provide for rights between the secured party and the creditor and that the provisions of § 8-317 are subject to state procedural law).

350. U.C.C. § 8-317(5) (1977).

351. This result contrasts with the advantages that accrue to the registered pledgee of an uncertificated security. See *supra* notes 297-313 and accompanying text.

352. See *supra* note 347.

353. U.C.C. § 8-317(6) (1977).

VI. RIGHTS OF PURCHASERS AND BONA FIDE PURCHASERS

The Uniform Amendments retain preamendment Article Eight's division of purchasers' rights into two categories: Rights of purchasers, described in section 8-301, and rights of bona fide purchasers (BFPs), described in section 8-302. The distinction between the two has not changed from preamendment law:

Any purchaser for value of a security without notice of a particular defect may take free of the issuer's defense based on that defect, but only a purchaser taking by a formally perfect transfer, for value and without notice of any adverse claim, may take free of all adverse claims. The 'bona fide purchaser' here dealt with is the person taking free of adverse claims.³⁵⁴

The Uniform Amendments make a number of changes that affect both categories. One such change is not intended to be substantive, but organizational³⁵⁵: former subsection 8-301(2), which deals with bona fide purchasers, and the part of subsection 8-301(1) that relates to bona fide purchasers have been moved to section 8-302. Section 8-302 is "intended to deal completely with the concept of bona fide purchase."³⁵⁶

In a change of considerable substance, the Uniform Amendments have substituted the word "transfer" for the word "delivery" in sections 8-301 and 8-302. This accommodates the application of the section to uncertificated securities,³⁵⁷ but it has an additional substantive effect. As noted previously in this Article, section 8-313(1) describes a number of methods of transfer. These are the exclusive methods of a valid transfer under Article Eight.³⁵⁸ Further, the Official Comments state that "transfer is defined only by example (Section 8-313)."³⁵⁹ The authors therefore conclude that the methods of transfer listed in section 8-313(1) are the only ones by which the substance of sections 8-301 and 8-302 are invoked.³⁶⁰

354. U.C.C. § 8-302 official cmt. 1, 2C U.L.A. 356-57 (1991).

355. See U.C.C. § 8-302 official reasons for 1977 change, 2C U.L.A. 356 (1991).

356. U.C.C. § 8-301 official reasons for 1977 change, 2C U.L.A. 349 (1991).

357. See U.C.C. § 8-301 official reasons for 1977 change, 2C U.L.A. 349 (1991). Compare U.C.C. § 8-301(1) (1962) with U.C.C. § 8-301(1) (1977). Correspondingly, the title of Part 3 of Article Eight has been changed from "Purchase" to "Transfer."

358. See U.C.C. § 8-313(1) (1977) (providing that "[t]ransfer of a security or a limited interest . . . therein to a purchaser occurs *only*" upon one of the listed methods of transfer) (emphasis added); U.C.C. § 8-313 official cmt. 1, 2C U.L.A. 405 (1991) ("The word 'only' in the first sentence is intended to provide that the methods of transfer listed are exclusive and that compliance with one of them is essential to a valid transfer.").

359. U.C.C. § 8-301 official cmt. 1, 2C U.L.A. 349 (1991).

360. See U.C.C. § 8-302(1) (1977); U.C.C. § 8-301 official cmt. 1, 2C U.L.A. 349 (1991);

The new last sentence of section 8-301(2) is intended to clarify existing law to reflect that the creation or release of a security interest in a security is a transfer³⁶¹; accordingly, the transferee of a security interest is a purchaser for purposes of the statute.

Finally, as is discussed in the following paragraphs, the Uniform Amendments extend to uncertificated securities the rules that govern purchasers and BFPs.

A. *Rights of Purchasers*

Under preamendment Article Eight a purchaser of securities took the rights that the transferor possessed,³⁶² and a purchaser for value took free of any further encumbrance of which the purchaser did not have notice.³⁶³ Even a purchaser for value without notice, however, took subject to whatever appeared upon a certificate delivered to the purchaser or the purchaser's designee.³⁶⁴ The Uniform Amendments have preserved this rule for certificated securities³⁶⁵ and have extended the concept of purchaser to uncertificated securities. Pursuant to the now-familiar analogy, the purchaser of uncertificated securities for value who is without notice is charged with the contents of the initial transaction statement³⁶⁶ sent by the issuer in connection with the purchaser's acquisition.³⁶⁷ As is discussed below, the Uniform Amendments carry the analogy sufficiently far that, in most respects, one can make the assumption that the new purchaser rules that relate to uncertificated securities are parallel to the familiar rules that relate to certificated ones. The analogy is not perfect, however, because unlike certificates, initial transaction statements are not available for inspection by

see also U.C.C. § 8-301 official cmt. 2, 2C U.L.A. 349 (1991) (noting that transfers by operation of law are not subject to Article Eight's coverage).

361. See U.C.C. § 8-301 official reasons for 1977 change, 2C U.L.A. 349 (1991).

362. U.C.C. § 8-301(1) (1962) ("[T]he purchaser acquires the rights in the security which his transferor had or had actual authority to convey . . ."). This is the so-called shelter principle.

363. *Id.* § 8-202(1).

364. *Id.* As was the case under preamendment Article Eight, notice that defeats purchaser and BFP status may be from any source. See U.C.C. § 8-202 official reasons for 1977 change, 2C U.L.A. 315-16 (1991). The rule stated in § 8-202(1) is one of constructive notice.

365. See U.C.C. § 2-202 official reasons for 1977 change, 2C U.L.A. 315 (1991). Section 8-301 as amended retains the principle that a transferor can transfer rights no greater than those held by the transferor—the shelter principle—subject to the provisions of § 8-302, which concerns bona fide purchasers. See U.C.C. § 8-302 (1977).

366. For a discussion of initial transaction statements, see *supra* part III(A).

367. See U.C.C. § 8-202(1)(b) (1977).

the transferees of uncertificated securities before transfer.³⁶⁸

1. *Certificated Securities*

The rights of a purchaser of a certificated security, for value and without notice, have not changed from preamendment Article Eight.³⁶⁹ In short, a purchaser takes the transferor's rights, no more and no less,³⁷⁰ subject to interests such as liens,³⁷¹ terms that may constitute defenses,³⁷² restrictions³⁷³ and adverse claims,³⁷⁴ in each case to the extent that they are noted on the certificate delivered to the purchaser or the purchaser's designee, or of which the purchaser has other notice.

2. *Uncertificated Securities*

The general rule of section 8-301(1) that governs the rights of purchasers of certificated securities applies equally to uncertificated securities. An analogous qualification about notice is found in section 8-202(1): even a purchaser for value without notice takes subject to adverse interests "contained in the initial transaction statement sent to such purchaser or, if his interest is transferred to him other than by registration . . . the initial transaction statement sent to the registered owner."³⁷⁵

Issuers' defenses not noted in the applicable initial transaction statement are "ineffective against a purchaser for value who has taken without notice of the particular defense,"³⁷⁶ with the exception of the defense of genuineness, which is discussed in Part VI(A)(2)(b) below.

Because issuers are not obligated to send initial transaction statements until two business days after receiving a request for transfer,³⁷⁷ purchasers of interests in uncertificated securities by means of registered transfers will not have the opportunity to assure themselves of

368. In the case of uncertificated securities, transfer usually occurs upon registration of transfer by the issuer, and initial transactions statements are sent to the purchaser after registration. See U.C.C. §§ 8-313(1)(b), 8-408(1) (1977).

369. See U.C.C. § 8-202 official reasons for 1977 change to 2C U.L.A. 315 (1991).

370. See U.C.C. § 8-301(1) (1977).

371. *Id.* § 8-103(a).

372. *Id.* § 8-202(1).

373. *Id.* § 8-103(a).

374. *Id.* § 8-304(1).

375. *Id.* § 8-202(1)(b). When the interest transferred is a security interest, and the transfer is not registered, the transferee is bound by the initial transaction statement sent to the transferor of the security interest at the time the transferor became either the registered owner or registered pledgee of the security. *Id.*

376. *Id.* § 8-202(4).

377. *Id.* § 8-408(5).

exactly what they have bought until after the transfer has taken place.³⁷⁸ The Official Comments take the view that this situation is one "of limited practical significance."³⁷⁹ That sounds encouraging, but, other than trusting the seller and relying on the seller's warranties,³⁸⁰ the purchaser of uncertificated securities is left with only two alternatives: Obtaining, and relying upon, third-party guarantees³⁸¹ or making arrangements not to release consideration until in receipt of an acceptable initial transaction statement.³⁸² Each of these alternatives requires paperwork, of course, which is ironic in light of the purposes of the Uniform Amendments to reduce paperwork in clearing securities transactions.³⁸³ A transferee of uncertificated securities might also require that the transferor request a written statement from the issuer before completing the transaction,³⁸⁴ but the statement is binding on the issuer only with respect to its addressee, and it therefore may not be relied upon conclusively by the prospective transferee.³⁸⁵

a. Issuers' Responsibilities and Defenses

Preamendment section 8-202 set out the general rule regarding the issuer-purchaser relationship. The rule was one of estoppel: although even a purchaser for value without notice took subject to terms that appeared on the certificate or that were incorporated by reference that appeared on the certificate, the issuer was estopped to raise any other defense, including defects in the certificate.³⁸⁶ The sole exception to the general rule was the defense of genuineness, which is discussed

378. Ironically, those who purchase without registration are in a somewhat better position because they may rely upon their transferor's initial transaction statement, which will be available for inspection. *See id.* § 8-202(1)(b). Purchasers in transactions that require registration may, and no doubt often will, request access to their transferors' initial transaction statements for purposes of information, but they have no right to rely on the initial transaction statements.

Valid methods of transfer under Article Eight, including those involving uncertificated securities but not requiring registration, are described in section 8-313(1), which is discussed in Part II(C).

379. U.C.C. art. 8 reporter's introductory cmt., 2C U.L.A. 275 (1991).

380. *See supra* part II(B)(2).

381. *See supra* part II(B)(3)(b).

382. "The wide-spread use of wholly certificateless systems will necessarily involve the development of escrow arrangements or other mechanisms by means of which the parties will obtain satisfactory assurances." U.C.C. art. 8 reporter's introductory cmt., 2C U.L.A. 275 (1991).

383. *Cf. id.*, 2C U.L.A. at 267 (noting that the Uniform Amendments were made "in response to the 'Paperwork Crunch'" in the 1960s).

384. *See* U.C.C. § 8-408(6)-(7) (1977).

385. *See id.* §§ 8-408(6)-(7), 8-301(1).

386. U.C.C. § 8-202 (1962).

below.³⁸⁷

The general rule of section 8-202 has been retained unchanged for certificated securities and extended to uncertificated securities by using the initial transaction statement as the analogue to the certificate.³⁸⁸ In general, a purchaser of uncertificated securities, for value and without notice, takes the rights of the transferor³⁸⁹ subject to terms appearing on, or incorporated by reference in, the initial transaction statement.³⁹⁰ In cases of transfers that do not involve registration with the issuer,³⁹¹ the purchaser takes subject to the initial transaction statement sent to the registered owner or registered pledgee.³⁹² As is the case with certificated securities, purchasers of uncertificated securities are charged with knowledge to the extent described even if their security is transferred to an intermediary or bailee on their behalf, thereby giving the purchaser no opportunity to see the initial transaction statement.³⁹³ The words "without notice" in section 8-202(1) are intended to clarify that purchasers also take subject to notice from sources other than the initial transaction statement.³⁹⁴

As a general rule, lack of genuineness of a certificated security was a complete defense under preamendment law, even against a purchaser for value without notice.³⁹⁵ This rule has been retained in amended section 8-202(3) and extended to uncertificated securities: "lack of genuineness of . . . an initial transaction statement is a complete defense, even against a purchaser for value and without notice."³⁹⁶

There is, however, an exception to this rule. The term "genuineness" in the context of the preceding paragraph refers to whether the purported issuer "took the actions that constitute issue" of certificated

387. See *id.* § 8-202(3).

388. See U.C.C. § 8-202 (1977).

389. *Id.* § 8-301(1).

390. *Id.* § 8-202(1)(b)-(c). However, notices which state that there is a possibility of defects going to validity of the security are not effective. See *id.* § 8-202(1)(c), (2).

391. The term "transfer" is used in Article Eight to refer to the transfer of any interest in a security, including partial transfers, such as the creation of a security interest. The concept of transfer is discussed in Part I(b). Article Eight § 8-313(1)(c)-(j) describes transfers that do not involve registration. Presumably, however, the rule of § 8-202 also applies to transfers that are not § 8-313 transfers, such as informal pledges or sales of uncertificated securities that are unaccompanied by registration.

392. U.C.C. § 8-202(1)(b) (1977).

393. The Official Comments give the example of a customer who buys uncertificated securities already registered in a broker's name and who does not require registration of transfer. The customer would take subject to the initial transaction statement sent to the broker following the broker's acquisition. See U.C.C. § 8-202 official cmt. 1, 2C U.L.A. 316 (1991).

394. See U.C.C. § 8-202 official reasons for 1977 change, 2C U.L.A. 315-16 (1991).

395. U.C.C. § 8-202(3) (1962).

396. U.C.C. § 8-202(3) (1977).

securities or, in the case of uncertificated securities, "sent" something qualifying under section 8-408 as an initial transaction statement.³⁹⁷ One of the definitional requirements of section 8-408 is that any writing that purports to be an initial transaction statement must be signed by or on behalf of the issuer.³⁹⁸ Genuineness therefore would require an appropriate signature. This conclusion is reinforced by section 8-205, which provides that unauthorized signatures on initial transaction statements are "ineffective."³⁹⁹ This rule is subject to exceptions, however, for the protection, albeit partial, of purchasers without notice of the unauthorized nature of a signature. These purchasers may rely on signatures, even if unauthorized, by persons entrusted by the issuer with signing initial transaction statements or by persons entrusted by the issuer with "responsible handling" of the initial transaction statement in question.⁴⁰⁰

In this respect, and as is the case with certificated securities, a transferee of an uncertificated security has no greater rights than the transferor. A transferee of an uncertificated security cannot rely directly upon the initial transaction statement sent to the transferor, but the purchaser can rely upon it indirectly, because of section 8-301(1). This means that the transferee of an uncertificated security cannot rely upon the exceptions of section 8-205(a) or (b) to a greater extent than the transferor.⁴⁰¹

Subsections 8-202(1) and (2) have been broadened to include uncertificated securities in the familiar rule that a security issued with a defect going to its validity is valid with respect to a purchaser for value without notice. The security is valid even if the initial transaction statement purports, by generalized references, to give notice of possible defects going to validity.⁴⁰²

b. Issuers' Liens and Restrictions on Transfer

Article Eight specifically addresses two special cases of notice of adverse claims: Issuers' liens and issuers' restrictions on transfer. Under preamendment Article Eight issuers' liens were valid against a purchaser only if "conspicuously noted"⁴⁰³ on the certificate.⁴⁰⁴ The

397. U.C.C. § 8-202 official cmt. 4, 2C U.L.A. 317 (1991).

398. U.C.C. § 8-408(4) (1977).

399. *Id.* § 8-205.

400. *Id.* § 8-205(a)-(b).

401. U.C.C. § 8-205 official reasons for 1977 change, 2C U.L.A. 333 (1991).

402. *See* U.C.C. § 8-202 official cmt. 3, 2C U.L.A. 317 (1991).

403. The word "noted" was used to make clear that the substance of the lien need not be set forth in full unless otherwise required. *See* U.C.C. § 8-103 official cmt., 2C U.L.A. 518 (1991).

Uniform Amendments have preserved this rule for certificated securities⁴⁰⁵ and extended it to uncertificated securities.⁴⁰⁶ New section 8-103(b) provides that issuers' liens are valid against a purchaser of uncertificated securities only if "a notation" of the lien is included in the initial transaction statement sent to the purchaser⁴⁰⁷ or the purchaser's designee, thereby binding the transferee even if the transferee never has access to the initial transaction statement.⁴⁰⁸

Conspicuousness of notice, which is required in the case of certificated securities, is not required in the case of uncertificated ones. It is not clear why this distinction should be made. Indeed, given that section 8-103 states a rule of constructive notice, it is not clear why the rule of conspicuousness has survived at all, except perhaps for a desire to alter Article Eight as little as possible. The worst result would be for the rule of conspicuousness to be extended to uncertificated securities by case law.⁴⁰⁹

Restrictions on the transfer of securities traditionally have been disfavored as restraints on alienation.⁴¹⁰ Business corporation statutes typically delineate the extent to which restrictions on transfer of shares of stock are enforceable.⁴¹¹ In this spirit, preamendment Article Eight required conspicuous notation⁴¹² on certificates of any restriction on transfer that the issuer imposed.⁴¹³ The rule of section 8-204 has been extended to apply to uncertificated securities by a new subsection (b) which requires that transfer restrictions which the issuer imposed are not effective against a person without actual knowledge unless "a notation of the restrictions is contained in the initial transaction statement."⁴¹⁴

As is the case with issuers' liens, extension of the preamendment

404. U.C.C. § 8-103 (1962).

405. U.C.C. § 8-103(a) (1977).

406. *Id.* § 8-103(b). In addition, the Official Comments have been revised to clarify that the purchaser's degree of actual knowledge is irrelevant. Compare U.C.C. § 8-103 official cmt. 1, 2C U.L.A. 294 (1991) (stating that § 8-103 differs from §§ 8-202 and 8-204 because the purchaser's knowledge is irrelevant for purposes of § 8-103) with U.C.C. § 8-103 official cmt., 2C U.L.A. 518 (1991) (stating that § 8-103 of the 1962 act corresponds with the rule of § 8-204).

407. U.C.C. § 8-103(b) (1977).

408. See U.C.C. § 8-103 official cmt. 2, 2C U.L.A. 294 (1991).

409. See *infra* note 417.

410. See, e.g., S.C. CODE ANN. § 33-6-270 reporters' cmts. (Law. Co-op. 1990).

411. See, e.g., MODEL BUSINESS CORP. ACT § 6.27 (adopted in South Carolina as S.C. CODE ANN. § 33-6-270 (Law. Co-op. 1990)).

412. The words "noted" and "notation" were and are used in § 8-202 to indicate that the restrictions need not be set forth in full. See U.C.C. § 8-202 official cmts. 1, 5, 2C U.L.A. 316-18 (1991); U.C.C. § 8-202 official cmt. 1, 2C U.L.A. 527 (1991).

413. U.C.C. § 8-204 (1962).

414. U.C.C. § 8-204(b) (1977).

rule to uncertificated securities is not complete. The requirement of conspicuousness, retained for certificated securities,⁴¹⁵ is not applied to uncertificated securities.⁴¹⁶ Because the rule of section 8-204 is primarily one of constructive notice, it is not clear, just as with issuers' liens, why the conspicuousness requirement was not dropped for certificated as well as uncertificated securities,⁴¹⁷ or at least made uniform. Again, the worst result would be for the rule of conspicuousness to be extended to uncertificated securities by case law.

Because uncertificated securities are not subject to any conspicuousness requirement under section 8-204, issuers' restrictions on transfer bind a purchaser with notice and, if noted on the initial transaction statement, a purchase without notice, just as other adverse claims under section 8-202.⁴¹⁸ The drafters of the Uniform Amendments observed that "[r]egistration of transfer by the issuer will negate the existence of restrictions on that particular transfer," presumably under principles of waiver and estoppel.⁴¹⁹ The negated restrictions could be reappplied by their notation on the initial transaction statement sent to the next registered transferee.⁴²⁰

Even when notice of restrictions is appropriately given, such notice does not save restrictions that otherwise do not comply with law.⁴²¹ In South Carolina, lawfulness of restrictions on transfer of shares of stock is governed by Code subsections 33-6-270(c) and (d).⁴²² Subsection (a) of section 33-6-270 provides that even lawful restrictions do not bind those holding shares before the restrictions were enacted, except for those holders who voted for or otherwise agreed to the restrictions.⁴²³ Subsection 270(b) restates the rule of section 8-204, but extends it to all restrictions on transfers of shares of stock, not just restrictions imposed by the issuer.⁴²⁴

415. *Id.* § 8-204(a).

416. *See id.* § 8-204(b).

417. The conspicuousness requirement has led to hair-splitting in judicial determinations of what constitutes sufficient compliance with the requirement. *See, e.g.,* *Ling & Co. v. Trinity Savs. & Loan Ass'n*, 482 S.W.2d 841 (Tex. 1972).

418. *See* U.C.C. § 8-204(b) (1977).

419. U.C.C. § 8-204 official reasons for 1977 change, 2C U.L.A. 324 (1991).

420. *Id.*

421. U.C.C. § 8-204 (1977).

422. S.C. CODE ANN. § 33-6-270(c)-(d) (Law. Co-op 1990).

423. *Id.* § 33-6-270(a).

424. A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by Section 33-6-260(b). Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction.

If transfer of an uncertificated security, or an interest in an uncertificated security, is accomplished by some method that does not involve registration, the purchaser is bound by issuers' liens or restrictions that appear in the initial transaction statement sent to the registered owner or registered pledgee.⁴²⁵ In those circumstances the transferee of an uncertificated security is in a position similar to that of a purchaser of a certificated security who does not take possession of the certificate, and must look to the one receiving the initial transaction statement for notice of defects. Warranties of transfer may be involved.⁴²⁶

3. Completion or Alteration of Initial Transaction Statements

The Uniform Amendments preserve the preamendment rules that govern incomplete or altered certificates in subsections 8-206(1) and (2).⁴²⁷ New subsections 8-206(3) and (4) extend analogous rules to initial transaction statements.⁴²⁸ An initial transaction statement that bears "the signatures necessary to its validity"⁴²⁹ but that is otherwise "incomplete in any respect"⁴³⁰ may be completed by anyone. Even if the statement is incorrectly completed, it will be effective as completed in favor of a purchaser for value without notice of the defect who is the addressee of the initial transaction statement.⁴³¹ A subsequent purchaser in a transfer that requires registration would, of course, take the security subject to that purchaser's initial transaction statement, even if differently completed. Subsequent purchasers in transactions that do not involve the issuance of an initial transaction statement take subject to the rights of their transferors and to actual notice from other sources.⁴³²

In the case of a complete initial transaction statement that has been altered without authorization, an original purchaser without notice may enforce the security, but only the original terms may be

Id. § 33-6-270(b).

425. *Id.*; U.C.C. §§ 8-103, 8-204 (1977).

426. *See id.* § 8-306; *cf.* U.C.C. § 8-103 official cmt. 2, 2C U.L.A. 294 (1991) (noting that the transferee "may have a right of action for breach of transfer warranties" if the transferor fails to notify the transferee of an issuer's lien).

427. *Compare* U.C.C. § 8-206 (1962) *with* U.C.C. § 8-206(1)-(2) (1977).

428. *See* U.C.C. § 8-206(3)-(4) (1977).

429. *Id.* § 8-206(3) (1977).

430. *Id.*

431. *Id.* § 8-206(3)(b).

432. *Id.* § 8-301(a) (1977); U.C.C. § 8-103 official cmt. 2, 2C U.L.A. 294 (1991); *see also* U.C.C. § 8-202 official cmt. 1, 2C U.L.A. 316 (1991) (discussing when a purchaser is charged with notice of the terms of the initial transaction statement when it is sent to someone other than the purchaser).

enforced.⁴³³

4. *Warranties to Purchasers for Value*

Purchasers of uncertificated securities for value are the beneficiaries of the warranties found in new subsection 8-306(7), which are made by the originators of instructions. These warranties include appropriateness, entitlement, the absence of any claims not specified in the instruction, rightfulness of the action requested in the instruction, and validity of the security.⁴³⁴ These warranties are meant to be practically identical to the warranties that transferors of certificated securities give under section 8-306(2).⁴³⁵

One difference between the warranties that attach to a certificated security and those that attach to uncertificated securities does occur with respect to the warranty of validity. Under preamendment Article Eight the warranty of validity of certificated securities was limited by the knowledge of the warranting party.⁴³⁶ This limitation has been retained in postamendment section 8-306(2)(c) for certificated securities only.⁴³⁷ For uncertificated securities the warranty is "absolute."⁴³⁸ If the issuer disputes the validity of a security upon receipt of an instruction, the transferor would bear the burden of proving validity. The Official Comments deem this appropriate because in submitting transfer instructions the transferor necessarily gives the issuer an opportunity to dispute validity, and in such circumstances "it seems proper to place the burden of proving validity upon the transferor"⁴³⁹ rather than upon the purchaser.

Under preamendment Article Eight when a security subject to a pledge was transferred to, or on order of, the debtor, the transferring pledgee's warranties to the transferee were limited to good faith and authority.⁴⁴⁰ These limited warranties have been retained for certificated securities.⁴⁴¹ With respect to uncertificated securities, however, upon transfer of a pledged security to a purchaser for value on order of the debtor, the debtor warrants the rightfulness of the transfer, the validity of the security, and the absence of hidden encumbrances.⁴⁴²

433. U.C.C. § 8-206(4) (1977).

434. *Id.* § 8-306(7).

435. *See* U.C.C. § 8-306 official reasons for 1977 change, 2C U.L.A. 377 (1991).

436. *See* U.C.C. § 8-306(2)(c) (1962).

437. *See* U.C.C. § 8-306(2)(c) (1977).

438. U.C.C. § 8-306 official cmt. 7, 2C U.L.A. 378 (1991).

439. *Id.*

440. U.C.C. § 8-306(4) (1962).

441. *See* U.C.C. § 8-306(4) (1977).

442. *Id.* § 8-306(8).

The initiator of the transfer instruction⁴⁴³ warrants to the transferee only that the initiator is the appropriate person to initiate the instruction and that at the time the issuer receives the instruction the initiator will be entitled to registration of the transfer.⁴⁴⁴

Under new subsection 8-306(9) the transferor of an uncertificated security to a purchaser for value who does not originate an instruction warrants only the rightfulness of the transfer and validity of the security.⁴⁴⁵ This section is intended to apply to transferors who are not registered owners or pledgees.⁴⁴⁶

Purchasers who do not wish to rely on their section 8-306 warranty alone may choose to make escrow or other arrangements. These purchasers would not part with their money until after receiving their initial transfer statement from the issuer.⁴⁴⁷

5. Adverse Claims

Section 8-302(2) defines an adverse claim as "a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security" being transferred.⁴⁴⁸ This definition is unchanged by the Uniform Amendments, although the Uniform Amendments move it from former section 8-301(1). The preamendment rule that adverse claims are tested at the time of delivery of a certificate is preserved for certificated securities.⁴⁴⁹

The Uniform Amendments extend the concept of adverse claim to uncertificated securities and make the time of registration the time for testing knowledge of adverse claims.⁴⁵⁰ Transferees of interests in uncertificated securities are charged with the contents of the initial transaction statement sent to them in connection with the transfer. However, these transferees will have no opportunity to inspect these statements until several days after their transfers are registered.⁴⁵¹

Preamendment section 8-304 provided that a purchaser was not put on notice of adverse claims by an endorsement on the certificate that was not related to transfer or, in the case of bearer securities, by an unambiguous statement that the certificate was the property of one

443. The transfer instruction would be initiated by either the registered pledgee or a creditor who is registered as the owner.
 444. U.C.C. § 8-306(8) (1977).
 445. *Id.* § 8-306(9).
 446. *See* U.C.C. § 8-306 official reasons for 1977 change, 2C U.L.A. 377 (1991).
 447. This suggestion is made in the Official Reasons for 1977 Change. *See id.*
 448. U.C.C. § 8-302(2) (1977).
 449. *See* U.C.C. § 8-302 official reasons for 1977 change, 2C U.L.A. 356 (1991).
 450. *Id.*; *see* U.C.C. § 8-302(1)(b), (2) (1977).
 451. *See supra* notes 377-85 and accompanying text.

other than the transferor.⁴⁵² This rule has been preserved for certificated securities.⁴⁵³ As already noted, purchasers of uncertificated securities are on notice as to everything appearing on the initial transaction statements sent to them in connection with their transfers or, if they take by transfers that do not involve registration, they are on notice of everything appearing on their transferor's initial transaction statements.⁴⁵⁴

Preamendment section 8-304(2), which provided that a purchaser's knowledge that the seller holds for a third party does not, of itself, constitute notice of an adverse claim, has been retained unchanged as section 8-403(3). It applies to both certificated and uncertificated securities.⁴⁵⁵

Purchasers take free of adverse claims of which they are notified only if they receive notice after they take delivery of a certificated security as a purchaser for value.⁴⁵⁶ This rule also applies to certificated securities delivered to a financial intermediary for a purchaser for value.⁴⁵⁷ The Uniform Amendments provide an analogous rule that protects purchasers for value of uncertificated securities and their financial intermediaries: such purchasers take free of adverse interests of which they, or their financial intermediary, receive notice after the transfer, pledge, or release of the security has been registered to them or their financial intermediary.⁴⁵⁸

B. Bona Fide Purchasers

A BFP acquires all of the rights of a purchaser described above and, in addition, acquires the interest "free of any adverse claim."⁴⁵⁹ The stated intention of the drafters was for the Uniform Amendments to retain the preamendment rule that governed certificated securities.⁴⁶⁰ Review of the relevant statutory provisions will reveal that the BFP rule is substantially unchanged for certificated securities,⁴⁶¹ with minor exceptions discussed in the immediately succeeding paragraphs. For uncertificated securities, the drafters established an analogous rule by extending the definition of bona fide purchaser to include purchas-

452. U.C.C. § 8-304 (1962).

453. See U.C.C. § 8-304(1) (1977).

454. *Id.* § 8-304(2).

455. See U.C.C. § 8-304 official reasons for 1977 change, 2C U.L.A. 366 (1991).

456. U.C.C. § 8-313(3) (1977).

457. *Id.*

458. *Id.*

459. *Id.* § 8-302(3). The term "adverse claim" is defined in § 8-302(2).

460. See U.C.C. § 8-302 official reasons for 1977 change, 2C U.L.A. 356 (1991).

461. Compare U.C.C. § 8-302 (1962) with U.C.C. § 8-302(1)(a) (1977).

ers of uncertificated securities who take their interests under conditions which are analogous to those that apply to BFPs of certificated securities.⁴⁶²

1. *Creation of BFP Status*

As discussed above, the rules for attaining BFP status with respect to certificated securities are unchanged. BFP status is extended to certain purchasers of uncertificated securities by the amendment of section 8-302 that defines BFP to include "a purchaser for value in good faith and without notice of any adverse claim: . . . to whom the transfer, pledge, or release of an uncertificated security is registered on the books of the issuer."⁴⁶³

The Uniform Amendments broaden the effect of sections 8-302(1)(c) and 8-313(2) by substituting the concept of financial intermediary for the former and narrower one of broker in subsections 8-302(c) and (d)(1)⁴⁶⁴ to accommodate modern practices and realities.⁴⁶⁵ This change has substantial effects, illustrated in the next three paragraphs.

Preamendment section 8-302 focussed solely on delivery to a purchaser as the event that gave rise to BFP status.⁴⁶⁶ It was necessary to stumble across section 8-313(2) to discover that, in certain circumstances, delivery to the purchaser's broker could confer on the purchaser the status of "holder," thereby enabling the purchaser to be a BFP.⁴⁶⁷ The Uniform Amendments attempt to shorten the steps to this conclusion by including in subsection 8-302(1)(c) the methods of transfer that will confer BFP status upon a purchaser,⁴⁶⁸ and by using the term "bona fide purchaser" instead of the term "holder" in subsection 8-313(2).⁴⁶⁹ These changes apply to certificated and uncertificated securities.

2. *Rights of Bona Fide Purchasers*

Under preamendment law once a broker attained BFP status with

462. See U.C.C. § 8-302(1)(b)-(c) (1977).

463. *Id.* § 8-302(1)(b).

464. See *id.* § 8-313(4).

465. U.C.C. § 8-313 official reasons for 1977 change, 2C U.L.A. 403 (1991).

466. See U.C.C. § 8-302 (1962).

467. See *id.* § 8-313(2) (referring to subsections 8-313(1)(b), (c), and (e)).

468. See U.C.C. § 8-302(1)(c) (1977). The references in subsection 8-302(1)(c) are to subsections 8-313(1)(c), which is analogous to preamendment subsection (b); 8-313(1)(d)(1), which is analogous to preamendment subsection (c); and 8-313(1)(g), which is analogous to preamendment subsection (e). *Id.*

469. See *id.* § 8-313(2).

respect to certain securities, notice of adverse claims to either the broker or the customer was ineffective.⁴⁷⁰ This rule has been preserved in section 8-313(3) as amended and broadened to apply to securities held by financial intermediaries.⁴⁷¹ The other rule of subsection (3), which gives the customer the right to demand a clean security, also has been broadened to apply to all financial intermediaries.⁴⁷²

Although a purchaser is the owner of any security "held for him" by another,⁴⁷³ the purchaser can become a BFP with respect to the securities only if the purchaser takes pursuant to a transfer described in subsections 8-313(1)(c), (d)(1), or (g).⁴⁷⁴ This means, as a practical matter, that a purchaser cannot be a BFP of a portion of securities held in bulk, but only of particular identifiable securities transferred to the purchaser free of all claims and defenses.⁴⁷⁵ This is to avoid the possibility of inconsistent claims between holders of bulk securities in circumstances in which the bulk proves to be insufficient to cover all claims.⁴⁷⁶ Clearing corporations, which are deemed unlikely to have such problems, are made an exception.⁴⁷⁷

Preamendment section 8-311 protected BFPs who received clean certificates against assertions of ineffectiveness of unauthorized endorsements.⁴⁷⁸ This protection has been retained unchanged as to certificated securities and extended to BFPs of uncertificated securities by the amendment of section 8-311 to refer to unauthorized instructions.⁴⁷⁹ Accordingly, a purchaser for value without notice of adverse claims, who in good faith has received an initial transaction statement that confirms registration of a transfer, pledge, or release, is protected from assertions of unauthorized indorsement.⁴⁸⁰ The protection that the amendment gives to BFPs of uncertificated securities is intended have "the same effect" as that which the old rule gave, and continues to give, to BFPs of certificated securities.⁴⁸¹

470. U.C.C. § 8-313(3) (1962).

471. U.C.C. § 8-313(3) (1977).

472. *Id.*; see U.C.C. § 8-313 official cmt. 5, 2C U.L.A. 407 (1991).

473. U.C.C. § 8-313(2) (1977).

474. *Id.*

475. See U.C.C. § 8-313 official cmt. 4, 2C U.L.A. 406 (1991).

476. *Id.*, 2C U.L.A. at 407.

477. U.C.C. § 8-313(2) (1977); see U.C.C. § 8-313 official cmt. 4, 2C U.L.A. 406-07 (1991).

478. U.C.C. § 8-311 (1962).

479. See U.C.C. § 8-311 (1977).

480. *Id.* § 8-311(a).

481. See U.C.C. § 8-311 official reasons for 1977 change, 2C U.L.A. 395 (1991).

VII. CONCLUSION

The drafters of the Uniform Amendments had two concerns in mind: How to deal with the excess paperwork in the securities markets and how to invent a solution that would be palatable to lenders, purchasers, issuers, and the securities industry. The drafters invented uncertificated securities and then attempted to create regulations for their transfer that paralleled those for traditional certificated securities.

The drafters met some of their goals at the expense of other goals. One example, discussed above, is that under revised Article Eight, a registered pledgee of an uncertificated security has much more control of the collateral than does the unregistered pledgee of a certificated security. Lenders, therefore, may well encourage the use of uncertificated securities. On the other hand, in the case of uncertificated securities buyers and lenders will have less assurance of what they are receiving because they will have no certificate to inspect in advance and will not receive an initial transaction statement until some days after registration of the transfer. Issuers of securities that are subject to issuers' liens or restrictions on transfer receive different treatment with respect to the type of notice that must be provided depending on whether they issue certificated or uncertificated securities. The usual method that the drafters employed—analogy to certificated shares—did not work when they attempted to apply it to the conspicuousness requirement. The drafters wisely omitted the requirement for uncertificated shares, but seem not to have rethought whether it should apply to certificated securities under Article Eight.

Still, the minor glitches in Article Eight's scheme do not mean that it should have been rejected in South Carolina. Rather, exactly the opposite is true: as we begin to move towards national and international securities markets that routinely engage in trades between interfacing depositories and the like, it is crucial that state law under UCC Article Eight be uniform. Article Eight is merely experiencing growing pains, as are the securities markets, and the Permanent Editorial Board's willingness to issue commentary and to concede the need for amendment when appropriate are evidence that the Permanent Editorial Board is aware of and responding to those growing pains. Those who are uneasy about the revisions of Article Eight can be comforted by the success that the Federal Reserve Banks have had in developing a transfer system for uncertificated government bonds.⁴⁸²

It is important that courts and practitioners understand the fundamental purpose of revised Article Eight, which is to move toward an

482. See U.C.C. § 8-201 official reasons for 1977 change, 2C U.L.A. 312 (1991).

internationally uniform system of securities law, whether the trades involved are the most simple or extremely complex. The creation of dual systems of securities provides options. It does not, however, necessarily mandate change. Certificated securities still may be the easiest and most convenient form of security for some issuers. Nonetheless, it is important that South Carolina issuers, lenders, purchasers, brokers, and other securities industry members have the same ease of transfer and free trading as was envisioned by the drafters of revised Article Eight.

APPENDIX

A. *Conforming Amendments to Articles One, Five, and Nine*

The Uniform Amendments made necessary a number of conforming amendments to various provisions of Articles One, Five, and Nine. These conforming amendments were adopted in South Carolina as part of the 1991 Amendments and, of themselves, made no further changes to South Carolina law. The conforming amendments are discussed briefly below.

1. *Section 1-201. General Definitions*

Changes were made to the definitions of the terms "bearer" (subsection (5)), "delivery" (subsection (14)), and "holder" (subsection (20)). Each of these concepts contemplates a physical act or writing and therefore applies only to circumstances that involve certificated securities. In each case, the purpose of the amendment was to limit the application of the definition to such circumstances.

2. *Section 5-114. Issuer's Duty and Privilege to Honor; Right to Reimbursement*

Subsection 5-114(2) relates only to documents, including certificates. The word "certificated" was added before the word "security" in two places to make clear that the subsection has no application to uncertificated securities. See section 8-102(a) and (b).

B. *Changes to Article Nine*

Generally speaking, the changes made by the Uniform Amendments to the secured transactions provisions of the Uniform Commercial Code, found in South Carolina at Chapter 9 of Title 36, reflect the movement of the perfection rules for both certificated and uncertificated securities from Article Nine to Article Eight. The rules now are found in section 8-321. The attachment rules of section 9-203 still apply to all transactions involving securities.

1. *Section 9-103. Perfection of Security Interest in Multiple-State Transactions*

Subsection (3) was amended to make clear that uncertificated securities are not general intangibles for purposes of Article 9. New subsection (6) provides that in multi-state transactions, the law of the state of organization of the issuer controls the issue of perfection of

security interests in uncertificated securities.

2. *Section 9-105. Definitions and Index of Definitions*

The word "certificated" was added to subsection (1)(i) to make clear that certificated securities are instruments. Uncertificated securities are not.

3. *Section 9-203. Attachment and Enforceability of Security Interests; Proceeds; Formal Requisites*

A reference to section 8-321 was added to subsection (1) to make clear that section 9-203 is expressly subject to the section 8-321. See S.C. CODE ANN. § 36-8-321 S.C. reporter's cmts. to the 1991 amendment (Law. Co-op. Supp. 1991).

4. *Section 9-302. When Filing is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of this Article do not Apply*

Pursuant to section 9-302, as amended, perfection of a security interest in a security requires no filing, subject to the provisions of section 8-321. The amendment to subsection (1)(f), by the addition of a reference to securities, is further intended to make clear that the provisions that govern perfection in a security have been moved to section 8-321.

5. *Section 9-304. Perfection of Security Interest in Instruments, Documents, and Goods Covered by Documents; Perfection by Permissive Filing; Temporary Perfection Without Filing or Transfer of Possession*

Subsections (1) and (5) were amended to make clear that perfection in securities, including those represented by certificates (which are instruments under section 9-105(1)(i)), is no longer addressed by this section.

6. *Section 9-305. When Possession by Secured Party Perfects Security Interest Without Filing*

The Uniform Amendments added a parenthetical to the first sentence to make clear that the rules for perfection of security interests in securities has been moved to Article Eight.

7. *Section 9-309. Protection of Purchasers of Instruments,
Documents, and Securities*

The amendment to section 9-309 reflects the movement of the definition of the term “bona fide purchaser,” as it relates to securities, to section 8-302.

8. *Section 9-312. Priorities Among Conflicting Security Interests in
the Same Collateral*

Subsection (7) was amended to reflect the movement of provisions that govern perfection of security interests in securities to section 8-321.

