Limited Partnership Interests as Securities Under Revised Article 8 of the Uniform Commercial Code

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LIMITED PARTNERSHIP INTERESTS AS SECURITIES
UNDER REVISED ARTICLE 8 OF THE UNIFORM
COMMERCIAL CODE

INTRODUCTION

Several state legislatures recently enacted revisions to Article 8 of the Uniform Commercial Code (UCC).1 The most notable revision enlarges the definition of security to include “uncertificated securities”2—securities not represented by share certificates.3 The revisions create a definition of uncertificated securities under section 8-102(1)(b) that might include limited partnership interests, traditionally outside the scope of Article 8.4

Including limited partnership interests under Article 8 would create significant conflict of laws problems. The conflict is perhaps best exemplified by the problems that would arise in creating and perfecting security interests in the limited partnership interests. Article 9 has until now governed the requirements for attachment and perfection of such security interests because collateral in the form of a limited partnership inte-

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2. Section 8-102(1)(b) defines an uncertificated security as:

[A] share, participation, or other interest in property or an enterprise of the issuer or an obligation of the issuer which is
(i) not represented by an instrument and the transfer of which is registered upon books maintained for that purpose by or on behalf of the issuer;
(ii) of a type commonly dealt in on securities exchanges or markets; and
(iii) either one of a class or series or by its terms divisible into a class or series of shares, participations, interests, or obligations.


3. By the time the states began enacting the revisions to Article 8, it had become the widespread practice to record the ownership and transfer of uncertificated securities on computerized account records. See Cedarbaum, Uncertificated Securities: Revisions to Articles 8 and 9 of the Uniform Commercial Code and the Business Corporation Law of New York, 8 N.Y. St. B.A. Newsletter—Banking, Corp. & Bus. L. 1, 1 (1983). The standard transfer system, which “depends upon the manual movement of thousands of pieces of paper daily,” had proven slow and cumbersome. Id. Thus, the revisions represented an attempt to bring Article 8 into line with the modern securities trading practices which resulted from the so-called “paperwork crunch” which began in the late 1960’s, id., by helping to eliminate, or at least reduce, the use of stock certificates. See Commentary Introduction to Revised Article 8, N.Y. U.C.C. § 8-102 (McKinney’s Forms 1985 Supp.).

4. No state courts have determined whether limited partnership interests are now securities under revised Article 8. The California statute, however, specifically excludes limited partnership interests from the definition of uncertificated securities. See Cal. Com. Code § 8102(1)(b)(iv) (West Supp. 1985).
est has traditionally been considered a “general intangible” rather than a security. Under Article 9, attachment occurs when a debtor signs a security agreement, the creditor gives value in exchange for the security interest, and the debtor acquires rights in the collateral. Perfection—which gives secured creditors rights in the collateral superior to those of secured creditors with unperfected or subsequently perfected security interests—generally occurs when a financing statement is filed with the appropriate state or county office.

In contrast, section 8-321, which regulates security interests in investment securities, requires for attachment that the security interest be transferred to a secured party under some provision of section 8-313, which regulates when transfers of interests in investment securities occur. For perfection, section 8-321 requires that the transferor/debtor have rights in the security and agree to the transfer of the security interest to a transferee who has given value.

5. U.C.C. § 9-102(1)(a) (1977). “[T]his Article applies (a) to any transaction (regardless of its form) which is intended to create a security interest in . . . general intangibles . . .” Id.

Section 9-106 defines general intangibles as “any personal property . . . other than goods, accounts, chattel paper, documents, instruments, and money,” and describes instruments in section 9-105(f) as “nongurable instrument[s] . . . or a certificated security.”

6. See Grenada Bank v. Willey, 694 F.2d 85, 87 (5th Cir. 1982), cert. denied, 462 U.S. 1123 (1983) (interest in a partnership is intangible personal property); Madison Nat’l Bank v. Newrath, 261 Md. 321, 332-33, 275 A.2d 495, 501 (1971) (Article 9 applies to security assignments of a partnership interest); see also Heinicke Instruments Co. v. Republic Corp., 543 F.2d 700, 702 (9th Cir. 1976) (assignee of corporate shares had, until stock certificate was issued, an unperfected security interest in a general intangible which could be perfected only by filing); Motobecane Am., Ltd. v. Patrick Petroleum Co., 600 F. Supp. 1419, 1424 (E.D. Mich. 1985) (limited partnership interest not a security under old Article 8); E. Guttman, Modern Securities Transfers § 1.08 S.1-31 to -32 (Supp. 1984) (in most jurisdictions, perfection of security interests in uncertificated securities is governed by Article 9’s regulation of general intangibles). But see Bonin v. Chestnut Hill Towers Realty Co., 14 Mass. App. Ct. 63, 72, 436 N.E.2d 970, 975 (1982) (limited partnership interests are personal property whose sale is treated as sale of securities rather than sale of the underlying real property held by a limited partnership), aff’d, 392 Mass. 58, 466 N.E.2d 90 (1984).


8. Id. §§ 9-301(1)(a), 9-312(5); see also United States v. Gleaners & Farmers Co-op Elevator Co., 481 F.2d 104, 105-06 (7th Cir. 1973) (attachment relates to the creation of a security interest while perfection is an additional step which makes the security interest effective against third parties by the filing of a financing statement).


11. U.C.C. § 8-321(1) (1977). This section states, “[a] security interest in a security is enforceable and can attach only if it is transferred to the secured party . . . pursuant to a provision of section 8-313(1).”

12. Id. § 8-313(1)(b). This section provides that “[t]ransfer of a security or a limited interest (including a security interest) therein to a purchaser occurs only . . . at the time the transfer, pledge, or release of an uncertificated security is registered [by the issuer] to him or a person designated by him . . . .” Id.

13. See id. § 8-321(2).
The distinction between Articles 8 and 9 is also apparent in their respective choice-of-law provisions. If a limited partnership interest is deemed an Article 8 security, disputes involving issues of its validity, the effectiveness of its registration by the issuer and the sending of statements of uncertificated securities will generally be governed by the law, including the conflict of laws rules, of the issuer's jurisdiction of organization. If it remains a general intangible, however, it will still be regulated under Article 9, which provides that the law, including conflict of laws rules, of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of a security interest.

It should be noted that, although section 9-103 was amended in 1977, it does not resolve the conflicts problem. This section now provides, consistent with section 8-106, that "[t]he law (including the conflict of laws rules) of the jurisdiction of organization of the issuer governs the perfection and the effect of perfection or non-perfection of a security interest in uncertificated securities." Because this revision to Article 9 has only been adopted in ten states, and it has not been determined whether a limited partnership interest is a general intangible or an uncertificated security, new section 9-103(6) does not definitively resolve the conflict of laws problem.

Therefore, if the states that have adopted the revisions to Article 8 consider collateral in the form of a limited partnership interest an uncertificated security, while states that use old Article 8 consider such collateral a general intangible, conflicts will arise where a limited partnership is organized in one state, limited partners are domiciled in others, and their secured creditors are domiciled in still others. States using old Article 8 may apply the law of the state in which the debtor is located to disputes involving security interests in limited partnership interests, while states that have adopted the revisions to Article 8 may apply the laws of the jurisdiction of organization of the limited partnership to such disputes.

For example, if a limited partnership and its limited partner were dom-

14. Article 8 provides that the validity of a security, the effectiveness of registration of transfer, and the rights and duties of the issuer are governed by the law, including the conflict of laws rules, of the issuer's jurisdiction of organization. Id. § 8-106. In contrast, Article 9 provides that with respect to general intangibles, "[t]he law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest." Id. § 9-103(3)(b).

15. See id. § 8-106 & official comment 2.

16. See id. § 9-103(3)(b).

17. Id. § 9-103(6).

iciled in a state which has adopted the revisions to Article 8, and the limited partner’s secured creditor were domiciled in a state following old Article 8, a suit brought by the secured party in his state of residence to enforce the security interest might be governed by Article 8 and not Article 9. This is because the court might apply the law of the jurisdiction in which the debtor resides, since section 9-103(3)(b) designates the jurisdiction where the debtor is domiciled as controlling disputes involving the perfection of security interests in general intangibles such as limited partnership interests.19 Since the debtor lives in a state following revised Article 8, the court might then view the limited partnership interest as an uncertificated security and decide the issue of perfection by applying section 8-321, which governs attachment and perfection of security interests in investment securities under Article 8. Thus, the financing statements filed by the secured party to perfect his security interest might be held to be without effect, rendering the security interest unperfected under Article 8.

If, however, the limited partnership were organized in a state following old Article 8, and its limited partner and his secured creditor were domiciled in states following revised Article 8, a suit between the secured creditor and limited partner brought in their state of residence might be resolved under Article 9 and not Article 8. This is because the court might apply the law of the jurisdiction of organization of the limited partnership, since section 8-106 of revised Article 8 designates the jurisdiction where the limited partnership is organized as controlling.20 However, because the limited partnership is organized in a state which follows old Article 8, the court would probably treat the limited partnership interest as a general intangible and apply sections 9-203 and 9-302, which determine how attachment and perfection occur under Article 9. This result is likely even though the parties entered into a security agreement in a jurisdiction which has adopted the revisions to Article 8 and presumably expected the collateral to be treated as an uncertificated security governed by Article 8 and not Article 9.21

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21. While it may not be entirely unreasonable to impute to a limited partner the expectation that his interest in a limited partnership will be governed by the jurisdiction of its organization, it seems considerably less reasonable to impute to a limited partner’s secured creditors, domiciled in states following old Article 8, the expectation that conflicts involving their security interests will be governed by the laws of the state in which the limited partnership is organized.

Part I of this Note will analyze the requirements of revised section 8-102(1)(b) in relation to limited partnership interests. It concludes that while the section is ambiguous, it does not exclude the possibility that limited partnership interests are within its purview. Part II will discuss the scope and purpose of Article 8 and conclude that the drafters of the revisions to Article 8 did not intend to include limited partnership interests within its scope. Part III's discussion of the differences between the method of transferring limited partnership interests and traditional securities, and of several particularly burdensome features of revised Article 8, reveals the inapplicability of Article 8 to limited partnership interests. This Note concludes that limited partnership interests should not be treated as securities under revised Article 8.

I. **Do Limited Partnership Interests Fulfill the Requisites of Section 8-102(1)(b)?**

Section 8-102(1)(b) defines an uncertificated security as a share, participation, or other interest in property or an enterprise of the issuer or an obligation of the issuer which is (i) not represented by an instrument and the transfer of which is registered upon books maintained for that purpose by or on behalf of the issuer; (ii) of a type commonly dealt in on securities exchanges or markets; and (iii) either one of a class or series . . . of shares, participations, interests, or obligations.

A limited partnership interest is an interest in an enterprise established and run by one or more general partners. Limited partnership interests are not generally represented by instruments, and limited partnerships

22. See supra note 3.
24. A limited partnership has been defined as a partnership "formed by 2 or more persons . . . and having one or more general partners and one or more limited partners." Rev. Unif. Ltd. Partnership Act § 101(7) (1976). To sustain the privilege of limited liability, limited partners may not participate in the conduct of the partnership business. Unif. Ltd. Partnership Act § 1 official comment (1916); see also Freedman v. Philadelphia Tax Review Bd., 212 Pa. Super. 442, 446, 243 A.2d 130, 133 (1968) (limited partners only contribute capital and have no right to participate in the management or operation of the limited partnership business), aff'd, 434 Pa. 282, 258 A.2d 323 (1969).
25. There appears to be no substantive reason why limited partnership interests may not be represented by certificates. For an example of a limited partnership which issued

§ 78(c)(a)(10) (1982)); see also Bartels v. Algonquin Properties, Ltd., 471 F. Supp. 1132, 1146 (D. Vt. 1979) (sale of limited partnership interests is a sale of securities for purposes of federal securities regulation). Federal securities regulation of limited partnership interests, however, does not support subjecting these interests to the Article 8 conflicts rule. As was pointed out, Article 8 is intended to regulate securities transfers. In practice, however, the Article 8 conflicts rule would most frequently be applied not to transfers of limited partnership interests but to secured transactions where limited partnership interests were used as collateral. Article 8's requirements for creating and perfecting security interests differ from Article 9's, inasmuch as Article 9 was adapted to exclude investment securities. See Gillette & Maher, Revised Article 8: Issuers Beware!, 15 U.C.C. L.J. 146, 148 n.13 (1982).
must maintain records of their limited partners at any given time,\textsuperscript{26} thereby satisfying subdivision (i). The requirements of subdivision (iii) also are satisfied because a limited partnership interest represents a participation, interest or obligation.\textsuperscript{27} Subdivision (ii) of section 8-102(1)(b), however, requires a security to be "of a type commonly dealt in on securities exchanges or markets."\textsuperscript{28}

\textbf{A. Are Limited Partnership Interests "of a Type Commonly DEALT in on Securities Exchanges or Markets?"}

One way to analyze the applicability of section 8-102(1)(b)(ii) to limited partnership interests is to analogize them to the shares of closely held corporations, because shares of closely held corporations and most limited partnership interests are not actually traded on securities exchanges or markets. The official comment to section 8-102 indicates that stock of closely held corporations, although not actually traded on securities exchanges, is nonetheless intended to be included within the definitions of both certificated and uncertificated securities by the inclusion of interests "of a type" commonly traded on these markets.\textsuperscript{29} In addition, several cases have found stock of closely held corporations to be securities under Article 8, even though they are not actually traded on securities exchanges or markets, because they are "of a type" which are.\textsuperscript{30}

\begin{itemize}
  \item certificates of interest to its limited partners, see Matter of Estate of Girndt, 225 Kan. 352, 357, 590 P.2d 1038, 1043 (1979).
  \item See id. §§ 503-504.
  \item U.C.C. § 8-102(1)(b) (1977).
  \item See Israels, Practice Commentary, N.Y. U.C.C. § 8-102 (McKinney 1964) and cases cited infra note 30.
  \item See, e.g., Katz v. Abrams, 549 F. Supp. 668, 671 (E.D. Pa. 1982) (shares in a closely held corporation may be governed by Article 8 because they are "of a type" which are traded on securities exchanges or markets); Baker v. Gotz, 387 F. Supp. 1381, 1389-90 (D. Del.) (corporate notes are intangible investment securities "of a type commonly dealt in upon securities exchanges or markets" even though notes in question were not publicly traded) (quoting U.C.C. § 8-102(1)(a)(ii) (1977)), aff'd mem., 523 F.2d 1050 (3d Cir. 1975); E.H. Hinds, Inc. v. Coolidge Bank & Trust Co., 6 Mass. App. Ct. 5, 10, 372 N.E.2d 259, 262 (1978) (instrument can qualify as a security under UCC § 8-102(1)(b)(ii) although never traded on any securities exchange or market if "of a type" commonly recognized as a medium for investment in any area in which it is issued or dealt); Bingham v. Wells, Rich, Greene, Inc., 34 A.D.2d 924, 924-25, 311 N.Y.S.2d 508, 508-09 (1970) (employment contract involving transfer of title to shares of stock of a closely held corporation is a sale of securities for purposes of Article 8's statute of frauds); Pantel v. Becker, 89 Misc. 2d 239, 241, 391 N.Y.S.2d 325, 326 (Sup. Ct. 1977) (shares of corporation with fewer than four shareholders are "securities" for purposes of Article 8's statute of frauds even though corporation's sole asset was a two-unit professional office building); Art-Camera-Pix, Inc. v. Cinecom Corp., 64 Misc. 2d 764, 767, 315 N.Y.S.2d 991, 994 (Sup. Ct. 1970) (stock warrants in which rights had vested are securities, rather than contractual rights, within the meaning of Article 8).
  \item Whether there is a market for the particular instrument is not determinative if the instrument is "of a type commonly dealt in upon securities exchanges or markets." See E. Guttman, supra note 6, at S.1-25 (shares of a "one-man corporation" are of the same "type" as publicly traded securities); Israels, Practice Commentary, N.Y. U.C.C. § 8-102
\end{itemize}
Because it is possible for corporate securities that are not actually traded on exchanges or markets to meet the definition in section 8-102, it follows that non-publicly traded limited partnership interests are not automatically exempt from Article 8 regulation simply because they are not publicly traded. In addition, the fact that the California legislature specifically excluded limited partnership interests from the definition of uncertificated security suggests that they may in fact fall within the purview of Article 8.

The pivotal issue is whether the security in question is "of a type commonly dealt in on securities exchanges or markets." Some limited partnership interests are actually traded on securities exchanges or markets and would therefore apparently satisfy section 8-102(1)(b)'s prerequisites to Article 8 regulation. There were, however, only 445 publicly traded limited partnership offerings registered with the National Association of Securities Dealers during 1984. Because some limited partnership interests are publicly traded, however, a court may decide that those which are not are nonetheless of the same type as publicly

(31) McKinney 1964) (certificate representing 200 shares, the entire authorized capital stock of a small corporation, falls within the definition of security).

31. It should be noted that not all authority supports including stock of closely held corporations within Article 8. See Silverman v. Alcoa Plaza Assoc., 37 A.D.2d 166, 170, 323 N.Y.S.2d 39, 43 (1971) (shares of a cooperative apartment corporation not Article 8 securities because they were not "of a type" commonly dealt in on securities exchanges or markets); Gulf Mtg. & Rlty. Inv. v. Alten, 282 Pa. Super. 230, 234, 422 A.2d 1090, 1092 (1980) (stock held not to be Article 8 security where its issuance and transfer was restricted by shareholder agreement and state law); Blasingame v. American Materials, Inc., 654 S.W.2d 659, 664 (Tenn. 1983) (where corporation had consummated only one sale of stock in its history and sales were subject to certain restrictions in the corporate by-laws, such stock was found not to be within the reach of Article 8). One commentator has criticized the Blasingame decision, stating that the court "seemed to ignore that language of section 8-102 which does not require that a stock actually be dealt in on securities exchanges or actually recognized as a medium for investment, but only that it be of a type that is." Aronstein, Investment Securities, 39 Bus. Law. 1375, 1381 (1984). Notwithstanding any ambiguity on Article 8's application to shares of closely held corporations, this Note assumes that interests in privately held limited partnerships may fall within Article 8's definition of uncertificated security, and focuses on whether Article 8 regulation of this type of interest is appropriate.

33. See supra note 30 and accompanying text.
34. See Publicly Traded Limited Partnership: An Emerging Financial Alternative to the Public Corporation, 39 Bus. Law. 709, 709-10 (J.W. Slater, Jr., ed. 1983) [hereinafter cited as Publicly Traded Limited Partnership]. A publicly traded limited partnership has been defined as "an operating business or pool of assets in a partnership form registered with the SEC and traded in the public markets." Id.
35. According to National Association of Securities Dealers (NASD) statistics, the number of publicly traded limited partnership offerings registered with the NASD has remained nearly constant over the last three years. Four hundred seventy-one limited partnership offerings were registered during 1983, and 452 were registered during 1982. Telephone interview with Sheena Wilson, Senior Compliance Coordinator, Corporate Finance Department, National Association of Securities Dealers (Oct. 17, 1985). In comparison, there were 1,748 new corporate securities offerings in 1984, 2,757 such offerings in 1983, and 1,204 in 1982. Id.
traded limited partnership interests. A study of the scope and purpose of Article 8, however, demonstrates the error of this conclusion.

II. SCOPE AND PURPOSE OF ARTICLE 8

Article 8 was enacted to regulate the transfer— as opposed to the validity— of investment securities. Accordingly, the revisions were enacted to regulate transfers of uncertificated securities commonly accomplished by computer, and to thereby place purchasers of uncertificated securities on essentially the same footing as purchasers of certificated securities. Regulation of uncertificated securities was a response to modern securities trading practices that sought to eliminate, or at least reduce, the use of stock certificates. In fact, it was intended to be the negotiable instruments law (N.I.L.) for investment securities transfers, much as Article 3 was the replacement N.I.L. for commercial paper. Article 8 was not intended to invade federal securities regulation, or to set forth general rules defining property rights accruing to securities holders, or to set forth specific requirements for disclosing to the public.

36. See, e.g., N.Y. U.C.C. § 8-101 annot. (McKinney 1964) (amended by N.Y. U.C.C. § 8-101 (McKinney Supp. 1984-1985)); see also Wolf v. Sachse, 75 Wbs. 2d 147, 149, 248 N.W.2d 407, 408 (1977) (Article 8 governs transfer of securities); Briggs, Article 8: Investment Securities, 21 Mont. L. Rev. 64, 64 (1959) (Article 8 "neither a blue sky law nor a corporation code"); two major subjects dealt with in this article are negotiability and registration of title transfer); Israels, How to Handle Transfers of Stock, Bonds and Other Investment Securities, 19 Bus. Law. 90, 90 (1964) (Article 8 has been correctly characterized as a negotiable instruments law for investment securities); Malcolm, The Uniform Commercial Code as Enacted in Massachusetts, 13 Bus. Law. 490, 501 (1958) (Article 8 is "[t]he only major uniform statute purporting to prescribe rules of transfer with respect to [securities]"); Nash, Investment Securities: Article VIII, 16 Ark. L. Rev. 98, 99 (1962) (Article "neither a Blue Sky law nor a corporation code . . . rather like a negotiable instruments law dealing with securities"); Walker, Uniform Commercial Code Article 8—Investment Securities, 14 Ohio St. L.J. 57, 57 (1953) ("The Article is not intended as a substitute either for a Blue Sky Law or a corporation code. It is a negotiable instrument law dealing with investment securities."); Comment, Article 8 Investment Securities, 29 Alb. L. Rev. 54, 54 (1965) ("Article 8 of the Code provides applicable rules for the . . . transfer of investment securities"); Comment, The Status of an Investment Security Holder under Article 8, 33 Fordham L. Rev. 466, 466-67 (1965) (Code creates two broad categories, commercial paper and investment securities, to cover all instruments commonly treated as negotiable by the commercial world) [hereinafter cited as Investment Security Holder].

37. See supra note 36.
38. Cedarbaum, supra note 3, at 1.
39. See supra note 3.
41. See U.C.C. § 8-102 official comment 3 (1972).
42. Defining the property rights which accrue to securities holders is within the scope of state corporation codes. See Commentary Introduction to Revised Article 8, N.Y. U.C.C. § 8-101 (McKinney's Forms 1985 Supp.).
the nature of the property interest represented by a security.\textsuperscript{43} At present, it is not certain, in light of the history of Article 8 and the ambiguity of section 8-102(1)(b)(ii), exactly what constitutes a "security" under Article 8.\textsuperscript{44}

Although Article 8 probably did not contemplate certificateless securities before the 1977 revisions,\textsuperscript{45} the official comment to the UCC proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws provides that the definition of a security is "functional rather than formal,"\textsuperscript{46} which means that "the ... definition will change as 'securities' trading practices evolve to include or exclude new property interests."\textsuperscript{47} This suggests that inclusion or exclusion of limited partnership interests under revised Article 8 depends on the current state of the securities markets. While it is recognized that some limited partnerships now trade their interests on organized exchanges,\textsuperscript{48} and that limited partnership interests are securities for purposes of federal regulation,\textsuperscript{49} it is unlikely that the drafters of the revisions to Article 8 envisioned limited partnership interests entering and leaving the purview of Article 8 as their popularity with securities traders grows or diminishes. Thus, the official comment to the definition of security should not dispose of the issue of whether limited partnership interests are now securities for purposes of revised Article 8.\textsuperscript{50}

\textsuperscript{43} Public disclosure is regulated by state blue sky statutes, see, e.g., Blue Sky L. Rep. (CCH) ¶ 15,105 (setting forth how to register securities in Delaware); id. ¶ 33,112 (same for Minnesota); id. ¶ 40,126 (same for New Jersey). \textit{See also} id. ¶ 505 (discussing blue sky regulation of issuers of securities).


44. While there was no "express stipulation that [a security] be in writing ... it would [have been] difficult to imagine an unwritten instrument which would [have met] the terms of section 8-102." Wyatt, \textit{Investment Securities—Article 8 of the Uniform Commercial Code}, 48 Ky. L.J. 333, 338 (1960). \textit{See also} Motebecane Am., Ltd. v. Patrick Petroleum Co., 600 F. Supp. 1419, 1424 (E.D. Mich. 1985).


46. \textit{Id.}

47. \textit{See supra} note 35.


49. An example of an attempt to clarify what constitutes a security for Article 8 purposes is the annotation to § 8-102 of New York's former U.C.C. N.Y. U.C.C. § 8-102 annot. (McKinney 1964) (amended by N.Y. U.C.C. § 8-102 (McKinney Supp. 1984-1985)). The New York annotation indicates that Article 8's definition of a security is broader than N.Y. Gen. Bus. Law § 359-m(f) (McKinney 1984), which defines security as "any share of stock, bond, debenture, note, or other security issued by a corporation which is registered as to ownership on the books of the corporation," \textit{id.}, narrower than N.Y. Gen. Bus. Law § 352(l) (McKinney 1984), which defines security as "stocks, bonds, notes, \textit{evidences of interest} or indebtedness or other securities, including oil and mineral deeds or leases and any interest therein," \textit{id.} (emphasis added), and "more nearly in accord with the definition found in \textit{Matter of Waldstein}, 160 Misc. 763, 766-67, 291 N.Y.S. 697, 700 (1936)," which defines securities as "instruments for the payment of money, or evidencing title or equity, with or without some collateral obligation, and which are commonly dealt in for the purpose of financing and investment," N.Y. Gen. Bus. L. § 352(l),
By revising Article 8 to include uncertificated securities, the drafters intended Article 8 to encompass computerized securities transfers not involving the physical transfer of stock certificates.\(^5\) It is improbable that, in trying to bring computerized stock transfers under Article 8 regulation, the drafters also intended to remove limited partnership interests from Article 9 regulation.\(^5\)

Because Article 8 clearly addresses itself primarily to securities transfers,\(^5\) and limited partnership interests are normally assignable,\(^5\) it can be argued that transfers of limited partnership interests may present the same problems as transfers of corporate shares and thus warrant regulation under Article 8.\(^5\) However, analyzing the methods of transferring each type of interest reveals significant differences.\(^5\) These differences support excluding limited partnership interests from Article 8 regulation.

An analysis of limited partnership interests in relation to the Waldstein definition is also not dispositive of the issue of the status of limited partnership interests under revised Article 8. The Waldstein definition would seem to include limited partnership interests because they evidence title or equity in a limited partnership and are investments devoted to financing and promoting the limited partnership enterprise. On the other hand, the use of the word “instrument” seems to limit the applicability of the Waldstein definition to certificated securities. It is conceivable that in the future New York courts will modify the Waldstein definition in light of the broadened definition of a security contained in Article 8.

A more recent commentary proffers shares in mutual funds and dividend reinvestment plans as examples of “functionally uncertificated securities.” Aronstein, Security Interests in Securities: How Tax Code Revision Reflects Modern Security-Holding Practices, 10 U.C.C. L.J. 289, 292-93 (1978) [hereinafter cited as Modern Security-Holding Practices]. Professor Martin Aronstein, reporter for the committee responsible for the adoption of revised Article 8, suggested to the author in a telephone interview that the definition of security set forth in § 8-102(1)(b) may have been drafted broadly so that limited partnership interests fit within the definition in appropriate situations. He indicated, however, that these interests should be analyzed on a “case-by-case basis,” applying the factors set forth in § 8-102 to the particulars of each limited partnership interest. Telephone interviews with Martin Aronstein, Professor of Law, University of Pennsylvania Law School (Feb. 1, 1985 & Oct. 17, 1985).

50. See supra note 3 and accompanying text.

51. In fact, inasmuch as Article 9 was intended to encompass all types of security interests, the removal of security interests in uncertificated securities from the scope of Article 9 was resisted. See Aronstein, Modern Security-Holding Practices, supra note 49, at 307.

52. See supra note 36 and accompanying text. See Gillette & Maher, supra note 21, at 151; Investment Security Holder, supra note 36, at 466.


55. See infra notes 56-63 and accompanying text.
III. THE INAPPLICABILITY OF ARTICLE 8 TO LIMITED PARTNERSHIP INTERESTS

A. Differences in the Methods of Transfer of Corporate Shares and Limited Partnership Interests

The transfer of limited partnership interests differs from the transfer of corporate shares in several respects. When a corporation transfers certificated shares of its stock, the stock certificates are delivered to the corporation by the seller with an assignment or stock power, then cancelled, and new certificates are issued. The issuance is completed when designated corporate officers sign the share certificates. Transfers of uncertificated securities are made via computer with the selling shareholder, the purchasing shareholder, their brokers, and the corporation each making the appropriate entries in their account records.

In contrast, to transfer a limited partnership interest, a limited partner must assign the interest to an entering limited partner. In addition, the entering limited partner must agree to be bound by all terms and conditions of the limited partnership agreement. This is not so for sales of corporate shares: A shareholder can acquire shares in a corporation without undertaking to abide by either its charter or by-laws.

Furthermore, each time a limited partnership interest is transferred, the limited partnership generally must file an amendment to its certificate of limited partnership naming its partners and their contributions to the limited partnership. Corporate shares, however, can be transferred...
without amending a corporation's certificate of incorporation.63

B. General Article 8 Problems

Revised Article 8 presents other difficulties applicable to uncertificated securities in general that would therefore be applicable to limited partnership interests if they are treated as uncertificated securities.

1. Attachment and Perfection

Attachment and perfection of security interests in limited partnership interests would admittedly be simplified under Article 8, since written security agreements and financing statements64 are not required for attachment and perfection of security interests in uncertificated investment securities.65 Section 8-321, however, further states that for a security interest to attach it must be created pursuant to a provision of section 8-313(1).66 Most security interests in limited partnership interests would initially be created under section 8-313(1)(b), which is the only subsection dealing with security interests in uncertificated securities that are not traded through a financial intermediary (such as a broker or clearing corporation) where there is no third party involved other than the debtor and secured party.67 Section 8-313(1)(b) requires that the security inter-

319 F. Supp. 778, 783 (D.D.C. 1970) (provisions of Limited Partnership Act are designed primarily to protect creditors of limited partnerships); Tiburon Nat'l Bank v. Wagner, 265 Cal. App. 2d 868, 874-75, 71 Cal. Rptr. 832, 937 (1968) (purpose of recording limited partnership certificate is to give notice of limited interests of the limited partners to persons intending to extend credit to the limited partnership). Both the state and would-be creditors of the limited partnership are notified by the filing of amendments to the certificate of limited partnership when transfers of limited partnership interests take place. Thus, notice concerns would not be served by regulating limited partnership interests under Article 8. But see Del. Code Ann. tit. 6, §§ 17-201(a), 17-202 (1985), pursuant to which limited partnerships are not required to set forth limited partners' names nor their contributions in the certificate of limited partnership, and need not amend the certificate of limited partnership to admit or substitute limited partners.


65. See id.

66. U.C.C. § 8-313(1) reads, in pertinent part, as follows:

(1) Transfer of a security or a limited interest (including a security interest) therein to a purchaser occurs only...

(b) at the time the transfer, pledge, or release of an uncertificated security is registered [by the issuer] to him or a person designated by him...

67. The other subdivisions of § 8-313(1) are probably not applicable to grants of security interests in limited partnership interests because they deal, for example, with acquisition by a transferee of possession of a certificated security, U.C.C. § 8-313(1)(a) (1977), possession by a financial intermediary of a certificated security, id. § 8-313(1)(c), the sending of confirmation by a financial intermediary of the purchase of the security on behalf of the transferee, id. § 8-313(1)(d), acknowledgment by a third person other than a financial intermediary that he holds an identified certificated security on behalf of a trans-
est be "registered" to the secured party on the account records of the issuer. Thus, if the parties failed to notify the limited partnership of the security interest so that it could be registered, it would not attach. Limited partners and their secured creditors may often fail to notify the limited partnerships of the security interest because either the limited partner or the secured creditor, or both, may live in a state not requiring such notification. It is therefore likely in such cases that the parties will continue to comply only with Article 9 filing requirements. The security interest would thereby be defeated if attachment and perfection were being decided under the law of a state which has adopted revised Article 8 and does not require a written security agreement or the filing of a financing statement for a security interest in a limited partnership interest to attach and become perfected. It is unreasonable to require parties whose home states do not require limited partnerships to register security interests to comply with revised section 8-313(1)(b), or risk defeating the security interest, merely because a particular limited partnership happens to be organized in a state that has adopted the revisions to Article 8.

2. Registration

Another troublesome feature of Article 8 is section 8-207(4), under which issuers must record pledges, transfers of pledges, and releases of pledges of interests in uncertificated securities. The requirement that issuers maintain accurate account records of all the interests in their issued and outstanding securities is not merely a bookkeeping mandate; rather, the requirement affects the validity of the issuance, transfer, or release of pledges of uncertificated securities, and imposes a duty on issuers to register them within a reasonable time. Thus, existing limited

68. See id. § 8-313(1)(b).

69. Section 9-302 provides that filing is required to perfect most security interests, with certain exceptions not specifically applicable to limited partnership interests. See U.C.C. § 9-302(1)(f) (1977). Although limited partnership interests may be excepted securities within the purview of § 9-301(1)(f), filing a financing statement has been considered the proper way to perfect security interests in limited partnership interests since limited partnership interests, as "general intangibles," have traditionally been subject to Article 9. See supra notes 6, 10 and accompanying text.

70. Although arguably burdensome, the parties could fulfill the perfection requirements of both Articles 8 and 9 or include a choice of law provision in their agreement.

71. But see supra note 70.


73. See id. § 8-313(1).

74. See id. § 8-401(2).
partnerships would be responsible for validating security interests granted by limited partners. This would not only shift the responsibility for creating security interests to limited partnerships (when the most interested parties are the limited partners and their secured creditors)—it would also grant limited partnerships substantial control over the transfer and release of security interests in the property of limited partners. In addition, section 8-403 would in effect make limited partnerships the custodians of all security interests granted by their limited partners, and would impute to the limited partnership knowledge of such interests. Thus, limited partnerships could be liable to the secured creditors of limited partners for failure to record their security interests if instructed to do so.

3. Article 8's Paperwork Requirement

A particularly burdensome feature of revised Article 8 is its paperwork requirement. Section 8-408 requires an initial transaction statement

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77. Section 8-401 provides that an issuer is under a duty to register a transfer of a security as requested, id. § 8-401(1), and that an “issuer is also liable to the person presenting... an instruction for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer...” Id. § 8-401(2). See also E. Guttman, supra note 6, at §2-9 to -10, discussing issuers' obligations to register securities transfers. Because section 8-401(2) extends the issuer's liability to the principal of an agent requesting the registration, see supra note 77, a secured creditor who appoints a limited partner as his agent to register the security interest could have a cause of action against the limited partnership if it fails or refuses to do so.
78. U.C.C. § 8-408(1) (1977), which deals with sending of statements of uncertificated securities, reads:

Within 2 business days after the transfer of an uncertificated security has been registered, the issuer shall send to the new registered owner and, if the security has been transferred subject to a registered pledge, to the registered pledgee a written statement containing:
(a) a description of the issue of which the uncertificated security is a part;
(b) the number of shares or units transferred;
(c) the name and address and any taxpayer identification number of the new registered owner and, if the security has been transferred subject to a registered pledge, the name and address and any taxpayer identification number of the registered pledgee;
(d) a notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under Section 8-403(4)) to which the uncertificated security is or may be subject at the time of registration or a statement that there are none of those liens, restrictions, or adverse claims; and
(e) the date the transfer was registered.

Id.

Additionally, when an uncertificated security is transferred, the issuer must send, within two business days after such transfer, a statement containing substantially the same information to the former registered owner and former registered pledgee, if any. Id. § 8-408(2). Such statements must also be sent within two business days after a pledge or release of pledge. Id. §§ 8-408(2)-(3). Finally, this section also requires such statements to be sent, pursuant to subdivision (6) “[a]t periodic intervals no less frequent than...
(ITS) and subsequent periodic statements to be sent by issuers to registered owners and pledgees having an interest in uncertificated securities. According to section 8-408, the ITS and periodic statements should contain notations of any liens or adverse claims of which the issuer is or should be aware to which the uncertificated security is or may be subject. Otherwise, the issuer must state that there are no such liens, restrictions, or adverse claims. It seems unreasonable to require limited partnerships to maintain and disseminate detailed account records, much as a bank does, and it seems unfair to subject limited partnerships to “numerous judgment plays concerning content of the ITS and subsequent periodic statements as well as reasonableness of demands for the latter.” Finally, sending the ITS to all limited partners and their secured creditors at regular periodic intervals would be costly.

annually and at any time upon the reasonable written request of the registered owner,” id. § 8-408(6), and, pursuant to subdivision (7), “[a]t periodic intervals no less frequent than annually and at any time upon the reasonable written request of the registered pledgee,” id. § 8-408(7).

79. Id. § 8-408. Transaction statements have been said to be “analogous to debit and credit advices,” Cedarbaum, supra note 3, at 2, while periodic statements have been said to be “analogous to bank statements,” id.


81. See infra note 83.

82. Gillette & Maher, supra note 21, at 158.

83. It has been noted with respect to corporations that “a board of directors which elects to implement a certificateless system [could] be charged with waste of enterprise assets” in complying with the individual requests for the ITS and subsequent periodic statements. Id. at 160. Apart from the issue of cost, sending statements at regular intervals to all limited partners as well as their registered pledgees is a cumbersome task. Gillette and Maher state:

While many issuers pack newsy updates with dividend checks and otherwise provide at least quarterly updates, not all pay dividends or otherwise communicate beyond the bare minimum. Most assuredly, the authors are ignorant of any issuers who patronize Hallmark or otherwise communicate on anniversaries of a security holder becoming such and doubt that anyone wants such a burden save, possibly, the U.S. Postal Service and those committed to revised Article 8.”

Id. at 160-61.

While Gillette and Maher refer to corporate issuers, the comment would apply with equal force to limited partnerships, because many send no regular distributions or communications to their limited partners.

Furthermore, corporations in effect consent to Article 8 paperwork requirements by electing to adopt a system of uncertificated shares. See N.Y. Bus. Corp. Law § 508(f) (McKinney Supp. 1984-1985). They receive in exchange for the maintenance and dissemination of account records the benefits of computerized stock transfers. In contrast, limited partnerships do not consent to the paperwork requirements because their interests are, at least in practice, not represented by instruments. But see supra note 25 and accompanying text. Limited partnerships receive no benefits from the paperwork requirements since they still have to file an amended certificate of limited partnership to reflect transfers of limited partnership interests. Thus, paperwork requirements that are reasonable for a corporation electing to use a certificateless system are not reasonable if imposed on limited partnerships.
CONCLUSION

Although limited partnership interests might fulfill the requisites of revised section 8-102 and therefore be subject to Article 8 regulation, the scope and purpose of Article 8 indicate that the drafters of the revisions did not intend Article 8 to include limited partnership interests within its scope. Article 8 of the UCC has regulated the transfer and pledge of certificated investment securities, while Article 9 has regulated the granting of security interests in general intangibles, including limited partnership interests. With the advent of computerized securities trading came what is known as the “uncertificated security” and Article 8 was revised to regulate this new type of security. State legislatures, by revising Article 8, probably did not intend to reclassify limited partnership interests as “uncertificated securities” rather than “general intangibles,” and have Article 8 regulate the granting of security interests in as well as the transfer of limited partnership interests.

Article 8, concerned primarily with regulating transfers of investment securities, offers no advantage over the present method of regulating the granting of security interests in limited partnerships under Article 9.

Finally, displacing limited partnership interests from Article 9 to Article 8 regulation would impose unreasonable notification requirements on limited partners as well as burdensome recordkeeping and paperwork requirements on limited partnerships. Thus, limited partnership interests should not be treated as uncertificated securities under revised Article 8.

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