

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Uniform TOD Security Registration Act

December 1989

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JANUARY 25, 1990.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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This tentative recommendation proposes the enactment of the Uniform TOD Security Registration Act. This new uniform act allows the owner of securities to register the title in transfer-on-death form. This recommendation is made pursuant to 1980 Cal. Stat. res. ch. 37.

RECOMMENDATION

The Law Revision Commission recommends that the Uniform TOD Security Registration Act¹ be enacted in California. This uniform act allows the owner of securities to register the title in transfer-on-death (TOD) form. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered by the uniform act.

The uniform act enables an issuer, transfer agent, broker, or other such intermediary to transfer securities directly to the designated TOD transferee on the owner's death. Thus, TOD registration achieves parity for securities with existing pay-on-death (POD) provisions for bank deposits, individual retirement accounts, pension plans, and other assets passing at death outside the probate process.

The TOD registration is designed to give the owner of securities who wishes to arrange for a non-probate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only so long as the co-owners cooperate. Difficulties arise when the co-owners fall into disagreement or when one of the co-owners becomes unable to manage his or her affairs or becomes insolvent. Joint tenancy registration in order to arrange for a non-probate transfer at death may also create estate planning problems²

1. The new Uniform TOD Security Registration Act was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1989. The new uniform act was approved as an addition to the Uniform Probate Code as a part of a revised Article VI (non-probate transfers) and as a separate free standing act.

2. If the owner of a security takes title in joint tenancy with a nonowner, there is a present transfer of a share of the owner's interest. This transfer may create problems for the estate planner who is consulted after the security has been registered in joint tenancy. The estate planner has more flexibility if a TOD beneficiary is designated, since the TOD beneficiary designation can easily be changed.

and have undesired tax consequences.³

Use of the TOD registration form encouraged by the uniform act has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred or whenever the owner otherwise complies with issuer's conditions for changing the title form of the investment. The uniform act recognizes that co-owners with right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as he or she sees fit after the other's death.

Implementation of the uniform act is wholly optional with issuers. The drafting committee that prepared the uniform act received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that the uniform act takes full account of the practical requirements for efficient transfer within the securities industry.

A provision of the uniform act⁴ invites application of the uniform act to locally owned securities even though the uniform act may not have been locally enacted, so long as the uniform act or similar legislation is in force in a jurisdiction of the issuer or transfer agent. Thus, if the principal jurisdictions

3. The TOD beneficiary may have a more favorable basis for income tax purposes since there is no transfer to the TOD beneficiary until the death of the owner of the security. In addition, creation of a joint tenancy may create a gift tax liability at the time the interest is created.

4. Section 6-303 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989) (proposed to be enacted as Probate Code Section 5503 by the recommended legislation).

in which securities issuers and transfer agents are sited enact the uniform act, its benefits will become generally available to persons domiciled in states that do not at once enact the uniform act. Nevertheless, it is important that the uniform act be enacted at once in California so that California registering entities can participate in the development of the terms and conditions that the registering entities will use nationally as guidelines to govern the registration of securities in TOD form.⁵

For a comprehensive discussion of the issues entailed in the uniform act, see Wellman, *Transfer-On-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789 (1987).

PROPOSED LEGISLATION

This recommendation would be effectuated by enactment of the following provisions.

PART 3. UNIFORM TOD SECURITY REGISTRATION ACT

(proposed to be added to Division 5 of the Probate Code)

§ 5500. Short title; purposes; rules of construction

5500. (a) This part shall be known as and may be cited as the Uniform TOD Security Registration Act.

(b) This part shall be liberally construed and applied to promote its underlying purposes and policy.

(c) The underlying purposes and policy of this act are to (1) encourage development of a title form for use by individuals that is effective, without probate and estate administration, for transferring property at death in accordance with directions of a deceased owner of a security as included in the title form in which the security is held and (2) protect issuers offering and implementing the new title form.

5. See Section 6-310 of the Uniform Probate Code (Uniform TOD Securities Registration Act) (1989) (proposed to be enacted as Probate Code Section 5510 by the recommended legislation).

(d) Unless displaced by the particular provisions of this part, the principles of law and equity supplement its provisions.

Comment. Subdivisions (a), (b), and (d) of Section 5500 are the same in substance as Section 1 of the free standing Uniform TOD Security Registration Act (1989). Subdivision (b) is drawn from Section 1-102(a) of the Uniform Probate Code (1987). Subdivision (d) is drawn from Section 1-103 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2(b). Subdivision (c) is not found in the uniform act but is included as a useful statement of the underlying purposes and policy of this part. For a severability provision, see Section 11.

§ 5501. Definitions

5501. In this part:

(a) "Beneficiary form" means a registration of a security that indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(b) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(c) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(d) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(e) "Security account" means (1) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (2) a cash balance or other property held for or due to the owner of a

security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

Comment. Section 5501 is the same in substance as Section 6-301 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989).

"Security" is defined as provided in Section 8-102 of the Uniform Commercial Code (1977) and includes shares of mutual funds and other investment companies. The defined term "security account" is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

"Survive" is not defined. No effort is made in this part to define survival as it is for purposes of intestate succession in Section 6403 which requires survival by an heir of the ancestor for 120 hours. For purposes of this part, survive is used in its common law sense of outliving another for any time interval no matter how brief. The drafters of the uniform act sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.

§ 5502. Ownership requirement to obtain registration in beneficiary form

5502. Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

Comment. Section 5502 is the same as Section 6-302 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989).

Section 5502 is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of *all* co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Nothing in Section 5502

authorizes a California married couple to register a security as "tenants by the entireties," since California does not recognize that form of ownership. However, a California corporation may register a security to be held as tenants by the entireties if the shareholders are residents of another state which recognizes that form of ownership.

Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holding into separate registrations of the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term "individual," as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict an individual using this ownership form as to the choice of death beneficiary. The definition of "beneficiary form" in Section 5501 indicates that any "person" may be designated beneficiary in a registration in beneficiary form. "Person" is defined in Section 56 so that a church, trust company, family corporation, or other entity, as well as an individual, may be designated as a beneficiary.

§ 5503. Law authorizing registration in beneficiary form

5503. A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

Comment. Section 5503 is the same as Section 6-303 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989). The section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form

of X Company shares might rely on the enactment of the uniform act in X Company's state of incorporation, or in the state of incorporation of X Company's transfer agent. Or, an enactment by the state of the issuer's principal office, the transfer agent's principal office, or of the issuer's office making the registration also would validate the registration. An enactment of the state of the registering owner's address at time of registration also might be used for validation purposes. The last sentence of Section 5503 is designed to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this part.

§ 5504. Origination of registration in beneficiary form

5504. A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

Comment. Section 5504 is the same as Section 6-304 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989). As noted in the Comment to Section 5502, this part places no restriction on who may be designated beneficiary in a registration in beneficiary form. Any legal entity may be designated beneficiary in a registration in beneficiary form.

§ 5505. Form of registration in beneficiary form

5505. Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD," or by the words "pay on death" or the abbreviation "POD," after the name of the registered owner and before the name of a beneficiary.

Comment. Section 5505 is the same as Section 6-305 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989). The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner's death so that the sums realized may be "paid" to the death beneficiary. Rather, only a

transfer on death, not a liquidation on death, is indicated. The drafters of the uniform act would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid non-probate death benefit or transfer on death.

§ 5506. Effect of registration in beneficiary form

5506. The designation of a beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

Comment. Section 5506 is the same as Section 6-306 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989). The section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant. See Section 5510. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

§ 5507. Ownership on death of owner

5507. On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

Comment. Section 5507 is the same as Section 6-307 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989). Even though multiple owners of a security registered in beneficiary form hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 5508 deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; Section 5510 enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any anti-lapse statute that might direct a non-probate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative.

See the Comment to Section 5501 regarding the meaning of "survive" for purposes of this part.

§ 5508. Protection of registering entity

5508. (a) A registering entity is not obliged to offer or to accept requests for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented as provided in this part.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with Section 5507 and does so in good faith reliance (1) on the registration, (2) on this part, and (3) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity shall affect its right to protection under this part.

(d) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

Comment. Section 5508 is the same as Section 6-308 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989). It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. This part does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subdivision (c) would qualify as a notice under Section 8403 of the Uniform Commercial Code.

"Good faith" as used in subdivision (c) is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," as specified in Section 2103(1)(b) of the Uniform Commercial Code.

The protections described in this section are designed to meet any questions regarding registering entity protection that may not be foreclosed by issuer protections provided in the Uniform Commercial Code. For a discussion of the relevant Uniform Commercial Code

provisions, see Wellman, *Transfer-On-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 823 n.90 (1987).

§ 5509. Nontestamentary transfer on death; rights of creditors

5509. (a) Any transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part and is not testamentary and is not invalid because the registration does not comply with the requirements for execution of a will, and this code does not invalidate the registration.

(b) This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

Comment. Section 5509 is the same as Section 6-309 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989) with the addition of the last portion of subdivision (a) which is drawn from Section 160 [Section 5000 of the new Probate Code].

§ 5510. Terms, conditions, and forms for registration

5510. (a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive and implement requests for registration in that form, including requests for cancellation of previously registered beneficiary designations and requests for reregistration to effect a change of beneficiary.

(b) The terms and conditions established pursuant to subdivision (a) may provide for (1) proving death, (2) avoiding or resolving any problems concerning fractional shares, (3) designating primary and contingent beneficiaries, and (4) substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This

designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(c) The following are illustrations of registrations in beneficiary form which a registering entity may authorize::

(1) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(2) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(3) Multiple owners-primary and secondary (substituted) beneficiaries:

John S Brown Mary B Brown, JT TEN TOD John S
Brown Jr SUB BENE Peter Q Brown

or

John S Brown Mary B Brown JT TEN TOD John S
Brown Jr LDPS.

Comment. Section 5510 is the same in substance as Section 6-310 of the Uniform Probate Code (Uniform TOD Security Registration Act) (1989).

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under this part and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; i.e., that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. If no descendant of a pre-deceased

primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 5507.

§ 5511. Application of part

5511. This part applies to registrations of securities in beneficiary form made before, on, or after January 1, 1991, by decedents dying on or after January 1, 1991.

CONFORMING REVISIONS

Commercial Code § 8308 (amended). Indorsements; instructions

8308. (1) An indorsement of a certificated security in registered form is made when an appropriate person signs on it or on a separate document an assignment or transfer of the security or a power to assign or transfer it or his or her signature is written without more upon the back of the security.

(2) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom the security is to be transferred, or who has power to transfer it. A holder may convert a blank indorsement into a special indorsement.

(3) An indorsement purporting to be only a part of a certificated security representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(4) An "instruction" is an order to the issuer of an uncertificated security requesting that the transfer, pledge, or release from pledge of the uncertificated security specified therein be registered.

(5) An instruction originated by an appropriate person is any of the following:

(a) A writing signed by an appropriate person.

(b) A communication to the issuer in any form agreed upon in a writing signed by the issuer and an appropriate person.

If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed even though it has been completed incorrectly.

(6) "An appropriate person" in subdivision (1) means the person specified by the certificated security or by special indorsement to be entitled to the security.

(7) "An appropriate person" in subdivision (5) means:

(a) For an instruction to transfer or pledge an uncertificated security which is then not subject to a registered pledge, the registered owner.

(b) For an instruction to transfer or release an uncertificated security which is then subject to a registered pledge, the registered pledgee.

(8) In addition to the persons designated in subdivisions (6) and (7), "an appropriate person" in subdivisions (1) and (5) includes all of the following:

(a) If the person designated is described as a fiduciary but is no longer serving in the described capacity, either that person or his or her successor.

(b) *The beneficiary of a security registered in beneficiary form (as defined in subdivision (a) of Section 5501 of the Probate Code) if the beneficiary has survived the death of the registered owner or all registered owners.*

(c) If the person designated is an individual and is without capacity to act by virtue of death, incompetence, infancy, or otherwise, his or her executor, administrator, guardian, or like fiduciary.

(d) If the persons designated are described as more than one person as tenants by the entirety or with right of survivorship and by reason by death all cannot sign, the survivor or survivors.

(e) A person having power to sign under applicable law or controlling instrument.

(f) To the extent that the person designated or any of the foregoing persons may act through an agent, his or her authorized agent.

(9) Unless otherwise agreed, the indorser of a certificated security by his or her indorsement or the originator of an instruction by his or her origination assumes no obligation that the security will be honored by the issuer but only the obligations provided in Section 8306.

(10) Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him or her does not become unauthorized for the purposes of this division by virtue of any subsequent change of circumstances.

(11) Failure of a fiduciary to comply with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer, pledge, or release, does not render his or her indorsement or an instruction originated by him or her unauthorized for the purposes of this division.

Comment. Section 8308 is amended to add paragraph (b) to subdivision (8). This is a technical amendment to make clear that a TOD beneficiary is an "appropriate person" when the beneficiary has survived the registered sole owner or all the registered owners of a security registered in beneficiary form under the Uniform TOD Security Registration Act (1989). See Probate Code §§ 5500-5511.

