

Status Report

Unincorporated Business Entity Acts Harmonization Project

1. The Project

In 2009 the Uniform Law Commission (a/k/a NCCUSL) approved a project that had two objectives: (1) to harmonize, to the extent possible, the substantive provisions and the language in similar provisions in all the uniform unincorporated entity acts; and (2) to create a Uniform Business Organizations Code (UBOC) which would have in Article 1 (the Hub) general provisions applicable to all unincorporated entities including definitions, Secretary of State filing provisions, annual reports, permitted names, registered agents, foreign entities, and administrative dissolution; in Article 2 the merger, interest exchange, conversion, and domestication provisions that are in the Model Entity Transactions Act (META); and in Articles 3-8 (the Spokes) the Uniform Partnership Act (UPA), the Uniform Limited Partnership Act (ULPA), the Uniform Limited Liability Company Act (ULLCA), the Uniform Statutory Trust Entity Act (USTEA), the Uniform Limited Cooperative Association Act (ULCAA) and the Uniform Unincorporated Nonprofit Association Act (UUNAA).

Based on the Uniform Law Commission's past experience with enacting business entity acts, the Drafting Committee determined that giving states the option of either adopting the entire UBOC or enacting META and one or more of the spokes and adopting the entire UBOC at a later time would enhance the enactability of all the Conference's business entity acts. In order to facilitate this concept, many of the provisions in the Spokes had to be renumbered and moved so that it would be a simple process to delete the provisions in any of a state's existing Spokes that are in the Hub and META when the UBOC is enacted by the state.

2. Current Status of the Project

The Uniform Law Commission approved the proposed harmonization changes at the 2011 Annual Meeting. These changes will be incorporated as amendments in all nine of the unincorporated entity acts that are included in this project (the Hub, which includes the Model Registered Agents Act (MORAA), META and the six Spokes). Additional changes recommended by the Style Committee are also being made in the various acts. A third level of changes, which has taken much more time than anticipated, has involved reordering the sections and article of the Spokes and all the cross references to the reordered sections so that it will be very easy to create the entire UBOC by adding the Spoke acts (minus their Hub and META provisions) as Articles 3-8 of the Code.

Final texts of all the acts in the project, except for ULCAA and USTEA, are now completed. Revised comments to a majority of the acts have also been completed. In order to facilitate the Drafting Committee's review of the final work products, three sets of documents will be sent to the Committee. The first set, which is attached, consists of a marked (strike and score) and a clean copy (with comments) of the Hub, META, ULLCA, and UUNAA. The second set will be the UPA and ULPA. The third set will be ULCAA and USTEA. MORAA will not be sent out separately since all the changes in it are reflected in Article 4 of the Hub.

3. Drafting Committee Review

What we need from the Drafting Committee is confirmation that the changes in the acts are consistent with the scope of the harmonization project. Section 5 contains a list of all the provisions that I think someone could reasonably believe are improper or outside the scope of what was agreed to by the Committee. These are the provisions that I encourage the Committee to review most carefully. Additional provisions will be added to this list at the request of a Committee member. A 2-hour conference call to discuss all the changes in the Hub, META, ULLCA and UUNAA will be scheduled for sometime during the week of February 4, 2013. Notice of the call will be sent out by the Chicago office in the next week or so. Additional conference calls will be scheduled, if necessary.

The same procedure will be followed with the second and third sets of acts. The timing of sending them to you will depend on how long it takes to complete the review of the first set .

After all the reviews are completed, I anticipate we will have a limited number of provisions that the Drafting committee will conclude need approval by the Executive Committee under Section 4.3 (b)(3) of the NCCUSL's Constitution (the EC "may approve an amendment...that...is desirable to remove an ambiguity, ...to correct a technical error, to meet an unanticipated objection, ...or to achieve a similar objective), or alternatively at the 2013 Annual Meeting.

Traditionally a Drafting committee only reviews changes in the text of an act. The Legislative Notes and Comments are usually only reviewed by the Chairs and Reporters. In this project, however, I think it is appropriate to have the Legislative Notes and Comments reviewed by the Committee. Although most of the Legislative Notes have not been changed, they show up as underlined in the marked versions since they were not included in the 2011 Annual Meeting drafts. The only ones that are new or substantially changed are after ULLCA Sections 110 and 118. The Comments in all the acts have been extensively expanded and revised. It was not feasible to create a strike and score version of the comments; but all the changes are reflected in the clean version of the acts. Unless any member feels that we need to discuss any of the Legislative Notes or Comments in one of our conference calls, I request that you send me your suggestions for changes (and especially any typos) in writing

4. Overview of the Text Changes

In the marked version of the acts, practically every section will appear to have changes. The baseline for each act is the official text of the act at the time it was approved. The 2011 Annual Meeting drafts showed the amendments approved at that meeting on a strike and score basis (the 2011 Annual Meeting drafts are on the NCCUSL website under the Committees Tab) The marked versions you have reflect the Style Committee changes, conforming amendments , and other changes made subsequent to the 2011 Annual Meetin on a cumulative basis. The word processing software program used for this project was not able to create a marked version that differentiated between the amendments approved at the 2011 Annual Meeting and the style and other amendments that have been made after that meeting.

Approximately 90 to 95% of the changes are merely stylistic, conforming, or technical, non-substantive changes. For example, changing "upon filing" to "on filing" (consistency of language and

conformity to Style Committee Rules were Harmonization Project objectives) necessitated amendments to approximately 50 sections; and consistently using the term “debts, obligations and other liabilities” throughout resulted in approximately a similar number of amendments. There are several other similar global changes (which it turned out could not be made consistently by computer and therefore had to be inserted manually, a very time-consuming process).

Some of the changes in the acts are more substantive. For example, all the Spoke acts, with the exception of UUNAA, which is not a filing entity, require the filing of a periodic report (annual/biennial) with the Secretary of State. The prior versions of all the entity acts had inconsistent provisions with respect to what was required in the periodic report, particularly with respect to the naming of at least one governor (e.g., a partner or manager). All the filing Spoke acts now contain parallel requirements. A provision excluding reasonable compensation from the definition of “distribution” was added to all the acts as part of the harmonization effort. Only one of the acts (ULLCA (2006) had this concept and it was located in the sections dealing with distributions. Another harmonization change that was in some but not all the Spokes is a provision stating that failure of an entity to follow procedural formalities is not grounds for piercing the entity’s limited liability veil. An additional set of changes involved harmonizing the reorganization article in the Spoke acts so that inter-and-intra- entity merger, interest exchange, conversion and domestication transactions are authorized. This was accomplished by substituting META for the existing reorganization article in the stand-alone version of the spoke acts.

A few harmonized substantive changes only affect two or three of the Spoke acts. The most important of these are the sections of the UPA, ULPA, and ULLCA dealing with duties (loyalty, due care, good faith and fair dealing, and information rights) and the ability to modify or eliminate these and the other inter se default rules. These provisions have been revised and now have virtually identical language in all three acts. For example, the standard of care and liability standard for breach of duty of a manager in an LLC is gross negligence, as has always been the case in the UPA and ULPA. ULLCA 2006 had a corporate-style simple negligence standard and the business judgment rule. Another change in all three acts is a provision that the only duty designated as a fiduciary duty in the acts is the duty of loyalty. Except as noted in the next section, all the changes mentioned in this and the preceding paragraph were included in the amendments approved at the 2011 Annual meeting.

5. Reviewing the changes in the Hub, Meta, ULLCA and UUNAA

My suggestion to members of the Drafting committee who wish to parse through all the amendments made in this first set of acts after the 2011 Annual Meeting is to start with the marked version of the Hub, then track the Hub changes in ULLCA Sections 112-21, 203-10 and 901-12. There are some differences between the Hub and the equivalent provisions in ULLCA; but for the most part, the differences are not substantive. One major difference is that ULLCA and the other Spoke filing entities do not have commercial registered agent provisions. The Drafting Committee decided that because very few states currently have this concept and the software to implement it, the inclusion of commercial registered agent provisions in the stand-alone Spokes would adversely affect their enactability. A Legislative Note to ULLCA Section 118 suggests that a state that wants to authorize a single filing for registered agents who represent multiple entities enact the applicable MORAA provisions. The next step is to review the strike and score version of META. Article 10 of ULLCA should be consistent with META except for wording differences because META deals with all

entities whereas Article 10 of ULLCA deals specifically with LLCs. The final step is to review the remaining changes in the sections of ULLCA and UUNAA other than the Hub and META changes.

The following is a list of changes other than style, technical, and conforming changes made after the 2011 Annual Meeting that I think need to be reviewed most carefully by the Drafting Committee.

(1). Hub Section 1-209(b) and (c) (Signing of Entity Filing). The changes are derived from ULLCA 203(c). This is an example of a harmonization back to an earlier act that was discovered after the 2011 Annual Meeting. I have included it (and several other similar changes) because technically the changes were not read at the 2011 Annual Meeting.

(2). Hub Section 1-210 (Signing and Filing Pursuant to Judicial Order). The section is from ULLCA Section 204. It is included for the same reason as (1).

(3). Hub Section 1-211 (Liability for Inaccurate Information in Filed Record). This is derived from ULLCA Section 205 and is included for the same reasons as (1) and (2).

(4). Hub Section 1-411(c) (Designation of Registered Agent By Nonregistered Foreign Entity or Nonfiling Domestic Entity). This Section is derived from Section 31(c) of UUNAA and is included for the same reason as (1), (2), and (3).

(5). Hub section 1-501(3), which provides for the recognition of the liability shield of a series of any foreign unincorporated entity. The 2011 Annual Meeting Draft covered only series statutory trusts and LLCs. At least one state, Delaware, has series LP provisions and NCCUSL has recently approved a series drafting committee charged with considering series provisions for all unincorporated entities.

(6). META Section 104(c). This provision, which was not previously in META, deals with the status of a bequest, etc to an entity that has disappeared as the result of a merger. This provision comes from UUNAA Section 29(f). I think this is a salutary provision and arguably is a “harmonization” provision even though like items 1-4, it was not read at the 2011 annual Meeting.

(7). META Sections 203(a), 303(a), 403(a), and 503(a), which deal with the approval of a merger, etc. The changes are intended to be merely technical and non-substantive; but are included because they were not in the 2011 Annual Meeting Draft of META.

(8). META Sections 205(f), 305(e), 405(f) and 505(f) providing for the effective date of a merger, etc, as well as the effective date of the statement of merger, etc. For some unknown reason the Official Text of META (2007) has provisions for the effective date of a merger, etc. and a separate provision for the effect of a merger etc, but no provision stating the effective date of a merger, etc. This gap was discovered in the process of revising the comments. The identical changes will have to be made in the META article of all the Spoke acts, except for UUNAA, which has only merger provisions that differ from the other Spokes.

(9). ULLCA Section 105(c)(7). The 2011 Annual Meeting draft stated: “relieve or exonerate a person from liability for conduct involving bad faith, willful misconduct, or recklessness.” Similar, but not identical terminology appears in several sections of the Spokes. For example, ULLCA Section 105(d)(3)(C) of the 2011 Annual Meeting draft provided that an operating agreement may “alter the duty of care, but may not authorize intentional misconduct or knowing violation of law.” After

researching the use of similar terminology in other statutes, including the MBCA, a decision was made to use the phrase “willful or intentional misconduct, or knowing violation of law” throughout all the Spoke acts. I consider this to be a technical or stylistic change, but members of the Drafting Committee may think that this change is substantive or that the wrong terminology was chosen.

(10). ULLCA Section 105(c)(9) which provides that an operating agreement cannot vary the power (as opposed to the right) of a member to dissociate from an LLC. This provision has always been in both the UPA and ULPA, but is not in ULCA (2006). In my opinion, this is a harmonization change that should be made unless there is an important policy reason that justified its omission from ULLCA (2006).

(11). ULLCA Section 105(c)(15). My recollection is that we thought this concept was included within Section 105(c)(3); but decided to make this a separate subsection after the Annual Meeting.

(12). ULLCA Section 105(d)(1)(B) is really merely a stylistic change in the sense that the concept has been moved from Section 405(a)(2) (see the stricken phrase “unless the operating agreement permits otherwise” in the marked version of ULLCA). The drafting rule we used was that Section 105 should contain a complete list of provisions that can and cannot be varied. A similar change has been made in the other Spoke acts.

(13). ULLCA 105(d)(3)(c). The change in this provision is explained in Paragraph 9.

(14). ULLCA Section 202(b)(3)) dealing with amendments to the certificate of organization. As you can see from the marked version of ULLCA, this subsection has been shortened. This change was made after I received an inquiry from a filing officer wanting confirmation that he or she could reject a proposed amendment because it technically dealt with an issue that was not specifically dealt with in the original certificate. If this change is approved, an identical change will be made in the other filing entity Spoke acts.

(15). ULLCA Section 409(c). The change in this subsection is explained in paragraph 9.

(16). ULLCA Sections 602(5)(C), (6) and 602(11). The changes in wording were made after the 2011 Annual Meeting . These are merely technical changes that make the provisions sensible.

(17). ULLCA Section 603(a)(2). The change corrects a glitch that has existed since the 2006 version of ULLCA. It was discovered at the time the ULLCA Comments were being revised.

Harry Haynsworth
January 16, 2013