

MEMORANDUM

TO: UUOA Drafting Committee
FROM: William H. Clark, Jr.
DATE: February 26, 2022
RE: MBCA Comments for Consideration by ULC

The Corporate Laws Committee (“CLC”) has prepared a draft of a spoke version of the Model Business Corporation Act for inclusion in the Uniform Business Organizations Code (“UBOC” or “Code”). In the course of that exercise, the CLC noted a number of issues that the ULC may want to consider for possible amendments to the Code and the various uniform unincorporated entity laws. Those issues are discussed below, along with proposed drafting fixes should the UUOA Drafting Committee wish to address some or all of the issues.

Issue 1

This issue is the simple correction of a typographical error in the Comment to § 1-701.

SECTION 1-701. RESERVATION OF POWER TO AMEND OR REPEAL. The [legislature of this state] has power to amend or repeal all or part of this [act] at any time, and all domestic and foreign entities subject to this [act] are governed by the amendment or repeal.

Comment

Provisions similar to this section have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to this section. This section is a generalized form of the type of provision found in many entity organic laws, the purpose of which is to avoid any possible argument that an entity has contractual or vested rights in any specific statutory provision of its organic law and to ensure that the state may in the future modify its entity statutes as it deems appropriate and require existing entities to comply with the statutes as modified.

All public organic ~~documents~~ **records** of domestic entities organized under the Code and the registration of foreign entities under Part 5 of Article 1 of the Code are subject to the reservation of power set forth in this section. Further, entities formed or registered under earlier statutes superseded by the Code that contained a reservation of power are also subject to the reservation of power in this section and bound by subsequent amendments to the Code.

Issue 2

UBOC § 1-201 sets forth the requirements that must be met by a record delivered to the Secretary of State for filing. It requires all records to be

signed. Section 1-210 provides an exception, however, for records that a court orders to be filed without a signature.

SECTION 1-201. ENTITY FILING REQUIREMENTS.

(a) To be filed by the [Secretary of State] pursuant to this [act], an entity filing must be received by the [Secretary of State], comply with this [act], and satisfy the following:

(1) The entity filing must be required or permitted by this [act].

(2) The entity filing must be physically delivered in written form unless and to the extent the [Secretary of State] permits electronic delivery of entity filings.

(3) The words in the entity filing must be in English, and numbers must be in Arabic or Roman numerals, but the name of the entity need not be in English if written in English letters or Arabic or Roman numerals.

(4) **The Except as provided in Section 1-210,¹ the** entity filing must be signed by or on behalf of a person authorized or required under this [act] to sign the filing.

(5) The entity filing must state the name and capacity, if any, of each individual who signed it, either on behalf of the individual or the person authorized or required to sign the filing, but need not contain a seal, attestation, acknowledgment, or verification.

* * *

Issue 3

MBCA § 1.20(k) permits the terms of a plan or the articles of incorporation to refer to facts outside of the document. META § 107 similarly permits a plan to refer to external facts. The CLC has raised two issues: (i) should the more detailed provisions of MBCA § 1.20(k) be added to META § 107, and (ii)

¹ Section 1-210 provides:

SECTION 1-210. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.

(a) If a person required by this [Code] to sign or deliver a record to the [Secretary of State] for filing under this [Code] does not do so, any other person that is aggrieved may petition [the appropriate court] to order:

(1) the person to sign the record;

(2) the person to deliver the record to the [Secretary of State] for filing; or

(3) the [Secretary of State] to file the record unsigned.

(b) If the petitioner under subsection (a) is not the entity to which the record pertains, the petitioner shall make the entity a party to the action.

(c) A record filed under subsection (a)(3) is effective without being signed.

should the terms of the public organic record of an unincorporated entity be permitted to refer to external facts. If we were to decide to permit the public organic document of unincorporated entities to refer to external facts, we would need to add a new section to the Code that would read along the lines set forth below. We would also need to add a similar provision to each of the unincorporated entity laws. If we decide not to deal with the public organic records of unincorporated entities, we should nonetheless decide whether to amend META § 107 to pick up the more detailed provision in the MBCA which is set forth in subsection (b) below.

SECTION 1-107. REFERENCE TO EXTERNAL FACTS.

(a) A plan as defined in Section 2-107 or an entity filing may refer to facts ascertainable outside the plan or entity filing if the manner in which the facts will operate on the plan or entity filing is specified in the plan or entity filing. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a party to the transaction or the entity to which the filing relates.²

(b) The following provisions of a plan as defined in Section 2-107 or an entity filing may not be made dependent on facts outside the plan or entity filing:

- (1) the name and address of any person required in an entity filing;**
- (2) the registered office of any entity required in an entity filing;**
- (3) the registered agent of any entity required in an entity filing;**
- (4) the number of authorized interests and designation of each class or series of interests;**
- (5) the effective date of an entity filing; and**
- (6) any required statement in an entity filing of the date on which the underlying transaction was approved or the manner in which that approval was given.³**

Issue 4

² Subsection (a) is patterned after META § 2-107.

³ Subsection (b) is patterned after MBCA § 1.20(k).

There are two separate issues relating to UBOC § 1-206.

The first issue relates to a proceeding to challenge the failure of the Secretary of State to file a document and involves what the court may order. This issue is addressed in the change below to UBOC § 1-206(d).

The second issue relates to a presumption in MBCA § 1.25(d) that when the Secretary of State files or refuses to file a document that action does not create a presumption that the document does or does not conform to the MBCA. This issue is addressed in the change below to UBOC § 1-206(d). If we decide to address either of these issues, similar changes will be needed in the unincorporated entity laws.

SECTION 1-206. DUTY OF [SECRETARY OF STATE] TO FILE; REVIEW OF REFUSAL TO FILE

* * *

(d) If the [Secretary of State] refuses to file an entity filing, the person that submitted the filing may petition [the appropriate court] to compel its filing. The filing and the explanation of the [Secretary of State] of the refusal to file must be attached to the petition. The court may decide the matter in a summary proceeding **and may order the [Secretary of State] to file the entity filing or take other action the court considers appropriate. The court's final decision may be appealed as in other civil proceedings.**

(e) The filing of or refusal to file an entity filing does not:

(1) affect the validity or invalidity of the filing in whole or in part; or

(2) create a presumption that:

(A) the information contained in the filing is correct or incorrect; or

(B) the entity filing does or does not conform to the requirements of this [act].

Issue 5

The CLC has pointed out that the Code is not clear as to whether a protected series is an entity. Possible clarifications of the definition of "entity" in UBOC § 1-102 are set forth below.

SECTION 1-102. DEFINITIONS. In this [act], except as otherwise provided in definitions of the same terms in other articles of this [act]:

* * *

(10) "Entity":

(A) means:

- (i) a business corporation;
- (ii) a nonprofit corporation;
- (iii) a general partnership, including a limited liability partnership;
- (iv) a limited partnership, including a limited liability limited partnership;
- (v) a limited liability company, **including a series limited liability**

company;

- [(vi) a general cooperative association;]
- (vii) a limited cooperative association;
- (viii) an unincorporated nonprofit association;
- (ix) a statutory trust, **statutory trust entity**, business trust, or common-

law business trust; or

(x) any other person that has:

(I) a legal existence separate from any interest holder of that

person; or

(II) the power to acquire an interest in real property in its own

name; and

(B) does not include:

- (i) an individual;
- (ii) a trust with a predominately donative purpose or a charitable trust;
- (iii) an association or relationship that is not listed in subparagraph (A)

and is not a partnership under the rules stated in Section 1-202(c) or a similar provision of the law of another jurisdiction;

(iv) a decedent's estate;

(v) **a protected series of a series limited liability company;** or

(vi) a government or a governmental subdivision, agency, or

instrumentality.

* * *

Issue 6

The CLC points out that the definition of “approve” in META § 102(3) is inconsistent with the way the term is used elsewhere in META. META defines “approve” as follows:

“Approve” means, in the case of an entity, for its governors and interest holders to take whatever steps are necessary under the entity’s organic rules, organic law, and other law to:

(A) propose a transaction subject to this [act];

(B) adopt and approve the terms and conditions of the transaction;

and

(C) conduct any required proceedings or otherwise obtain any required votes or consents of the governors or interest holders.

A possible fix is set forth below for one of the META transactions. If we make a fix, it will need to appear in all of the Articles of META and in all of the unincorporated entity laws.

SECTION 403. APPROVAL OF CONVERSION.

(a) A plan of conversion is not effective unless it has been approved. **Approval**

requires:

(1) ~~by~~ **in the case of** a domestic converting entity:

(A) ~~in accordance~~ **compliance** with the requirements, if any, in its organic rules **and organic law** for approval of a conversion;

(B) if its organic rules **or organic law** do not provide for approval of a conversion, ~~in accordance~~ **compliance** with the requirements, if any, in its organic law and organic rules for approval of:

(i) in the case of an entity that is not a business corporation or limited cooperative association, a merger, as if the conversion were a merger;

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the conversion were that type of merger; or

(iii) in the case of a limited cooperative association, a transaction under this [article]; or

(C) **an affirmative vote or consent** by all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) in the case of any entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of a conversion or a merger; or

(ii) in the case of a limited cooperative association, neither its organic law nor organic rules provide for approval of a conversion or a transaction under this [article]; and

(2) **consent or other action** in a record, by each interest holder of a domestic converting entity which will have interest holder liability for debts, obligations, and other liabilities that are incurred after the conversion becomes effective, unless, in the case of an entity that is not a business or nonprofit corporation:

(A) the organic rules of the entity provide in a record for the approval of a conversion or a merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all the interest holders; and

(B) the interest holder voted for or consented in a record to that provision of the organic rules or became an interest holder after the adoption of that provision.

Issue 7

The CLC points out that the provisions in META on protection of charitable assets could be improved. The following suggested changes track the recently completed revision of the Model Nonprofit Corporation Act. If we make these changes, they will need to appear in all of the unincorporated entity laws.

SECTION 104. REQUIRED NOTICE OR APPROVAL.

(a) ~~A~~ If a domestic or foreign entity ~~that~~ is required to give notice to, or obtain the approval of, a governmental agency or officer of this state to be a party to a merger, and the applicable statutes or regulations do not specifically deal with an interest exchange, conversion, or domestication, the entity must give the notice or obtain the approval to be a party to an interest exchange, conversion, or domestication.

(b) Property held in trust or for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this [act] becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise transferred ~~unless, to the extent required by or pursuant to~~ except in compliance with the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, ~~the entity obtains an appropriate order of [the appropriate court] [the Attorney General] specifying the disposition of the property.~~

(c) A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance, in trust or otherwise, made before or after a transaction under this [act], to or for a charitable corporation or unincorporated entity with a charitable purpose that is the subject of the transaction, which is made to a merging entity that is not the surviving entity; and which takes effect or remains payable after the merger inures to the surviving entity if it is a charitable corporation or unincorporated entity with a chartibable purpose, subject to the express terms of the will or other instrument.

(d) A trust obligation that would govern property if transferred to a nonsurviving entity applies to property that is transferred to the surviving entity under this section.

Issue 8

The CLC points out that META § 201 does not correctly described the types of mergers in which foreign associations may participate. When read literally,

META § 201(a)(1) and (a)(2) describe the same transaction. What META § 201(a)(2) actually intends to describe is a merger between two foreign entities in which the survivor is a domestic entity created in the merger. If we make this change, it will need to appear in all of the unincorporated entity laws.

SECTION 201. MERGER AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [article]:

(1) one or more domestic entities may merge with one or more domestic or foreign entities into a domestic or foreign surviving entity; and

(2) two or more foreign entities may merge into a domestic **surviving** entity.

* * *

Issue 9

The CLC points out that META § 202(a)(2) only requires a clear identification of the surviving entity in a merger if the survivor is created in the merger. The CLC suggests we fix that. If we make these changes, they will need to appear in all of the unincorporated entity laws.

SECTION 202. PLAN OF MERGER.

(a) A domestic entity may become a party to a merger under this [article] by approving a plan of merger. The plan must be in a record and contain:

(1) as to each merging entity, its name, jurisdiction of formation, and type of entity;

(2) **as to the surviving entity, its name, jurisdiction of formation, and type of entity, and,** if the surviving entity is to be created in the merger, a statement to that effect **and the entity's name, jurisdiction of formation, and type of entity;**

(3) the manner of converting the interests in each party to the merger into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) if the surviving entity exists before the merger, any proposed amendments to:

(A) its public organic record, if any; and

(B) its private organic rules that are, or are proposed to be, in a record;

(5) if the surviving entity is to be created in the merger:

(A) its proposed public organic record, if any; and

(B) the full text of its private organic rules that are proposed to be in a record;

(6) the other terms and conditions of the merger; and

(7) any other provision required by the law of a merging entity's jurisdiction of formation or the organic rules of a merging entity.

* * *

Issue 10

The CLC notes that META requires approval of a "plan of merger," but in one provision (META § 204(b)(2)) META speaks of approval of a "merger." Correcting that inappropriate usage is an easy fix, but it raises a second issue. META § 203 requires approval of the plan of merger, but that section is titled "approval of merger." We should consider changing the title of META § 203 if we change META § 204(b)(2). These issues also appear in other chapters of META, and presumably in the unincorporated entity acts.

SECTION 203. APPROVAL OF MERGER.

(a) A plan of merger is not effective unless it has been approved:

* * *

SECTION 204. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER.

(a) A plan of merger may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic merging entity may approve an amendment of a plan of merger:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the **plan of** merger is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by the interest holders of any party to the plan;

(B) the public organic record, if any, or private organic rules of the surviving entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

* * *

Issue 11

The CLC points out that the required contents of a statement of merger in META § 205 are not as clear as they could be with respect to a surviving entity that exists before the merger. The unclarity arises because META only requires the identification of parties to a merger that are not the survivor. This change will probably need to be made in the unincorporated entity acts.

SECTION 205. STATEMENT OF MERGER; EFFECTIVE DATE OF MERGER.

(a) A statement of merger must be signed by each merging entity and delivered to the [Secretary of State] for filing.

(b) A statement of merger must contain:

(1) the name, jurisdiction of formation, and type of entity of each merging entity **that is not the surviving entity;**

(2) the name, jurisdiction of formation, and type of entity of the surviving entity;

* * *

Issue 12

The CLC points out that “proceeding” is defined in Hub § 1-102 to include “a civil action, arbitration, mediation, administrative proceeding, criminal prosecution, and investigatory action.” The result is that an unregistered entity doing business in the state is precluded from maintaining an arbitration,

mediation, or investigation in the state. The MBCA in contrast limits the penalty for not registering to a bar on bringing a court proceeding.

SECTION 1-502. REGISTRATION TO DO BUSINESS IN THIS STATE.

(a) A foreign filing entity or foreign limited liability partnership may not do business in this state until it registers with the [Secretary of State] under this [article].

(b) A foreign filing entity or foreign limited liability partnership doing business in this state may not maintain an action or proceeding in **any court of** this state unless it is registered to do business in this state.

* * *

Issue 13

Now that the CTA is law, we should consider what the Code requires in an annual report. The MBCA requires the names and business addresses of the directors and officers of a corporation, which is more than Code § 1-213 requires. The MBCA also requires a brief description of the corporation's business – which the reporter personally would not include.

SECTION 1-213. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF STATE].

(a) A domestic filing entity, domestic limited liability partnership, or registered foreign entity shall deliver to the [Secretary of State] for filing [an annual] [a biennial] report that states:

(1) the name of the entity and its jurisdiction of formation;

(2) the name and street and mailing addresses of the entity's registered agent in this state;

(3) the street and mailing addresses of the entity's principal office; and

(4) the name of at least one governor.

* * *

Issue 14

The CLC points out that there is no way for a foreign entity that registers under an alternate name to change that name.

SECTION 1-504. AMENDMENT OF FOREIGN REGISTRATION STATEMENT. A registered foreign entity shall sign and deliver to the [Secretary of State] for filing an amendment to its foreign registration statement if there is a change in:

(1) the name of the entity or the alternate name adopted pursuant to Section 1-506(a);

* * *

Issue 15

The CLC suggests the following clarification.

SECTION 1-506. NONCOMPLYING NAME OF FOREIGN ENTITY.

(a) A foreign filing entity or foreign limited liability partnership whose name does not comply with Section 1-301 for an entity of its type may not register to do business in this state until it adopts, for the purpose of doing business in this state, an alternate name that complies with Section 1-301. A foreign entity that registers under an alternate name under this subsection need not comply with [this state's assumed or fictitious name statute] **with respect to the alternate name**. After registering to do business in this state with an alternate name, a foreign entity shall do business in this state under:

* * *

Issue 16:

The CLC notes that the META definitions of "conversion" and "domestication" do not apply to the UBOC, but those terms (or cognate terms) are used in the UBOC. In some ways, this is a variation on the issue of how different states may use those terms with different meanings. The following changes rewrite provisions of the Hub to avoid using those terms. Another approach could be to include the META definitions in the Hub.

Also marked below is a separate change proposed by the CLC to UBOC § 1-510(a)(5) which makes for a clearer set of information in the records of the Secretary of State.

SECTION 1-508. WITHDRAWAL DEEMED ON ~~CONVERSION~~ **CHANGE** TO DOMESTIC FILING ENTITY OR DOMESTIC LIMITED LIABILITY PARTNERSHIP. A registered foreign entity that ~~converts to any~~ **becomes another** type of domestic filing entity or

~~to~~ a domestic limited liability partnership is deemed to have withdrawn its registration on the effective date of the ~~conversion~~ change.

SECTION 1-509. WITHDRAWAL ON DISSOLUTION OR CONVERSION TO
NONFILING ENTITY OTHER THAN LIMITED LIABILITY PARTNERSHIP.

(a) A registered foreign entity that has dissolved and completed winding up or has ~~converted to a~~ become a type of domestic or foreign nonfiling entity other than a limited liability partnership shall deliver a statement of withdrawal to the [Secretary of State] for filing. The statement must be signed by the ~~dissolved or converted~~ entity and state:

(1) in the case of a foreign entity that has completed winding up:

(A) its name and jurisdiction of formation; and

(B) that the foreign entity surrenders its registration to do business in this state; and

(2) in the case of a foreign entity that has ~~converted to a~~ become a type of domestic or foreign nonfiling entity other than a limited liability partnership:

(A) the name of the ~~converting~~ foreign entity and its jurisdiction of formation;

(B) the type of nonfiling entity ~~to which it has converted~~ it has become and its jurisdiction of formation;

(C) that it withdraws its registration to do business in this state and revokes the authority of its registered agent to accept service on its behalf; and

(D) a mailing address to which service of process may be made under subsection (b).

(b) After a withdrawal under this section is effective, service of process in any action or proceeding based on a cause of action arising during the time the foreign filing entity was registered to do business in this state may be made pursuant to Section 1-412.

SECTION 1-510. TRANSFER OF REGISTRATION.

(a) If a registered foreign entity merges into a nonregistered foreign entity or ~~converts to~~ **a becomes another type of** foreign entity required to register with the [Secretary of State] to do business in this state, the foreign entity shall deliver to the [Secretary of State] for filing an application for transfer of registration. The application must be signed by the ~~surviving or converted~~ entity and state:

(1) the name of the registered foreign entity before the merger or ~~conversion~~ **change**;

(2) the type of entity it was before the merger or ~~conversion~~ **change**;

(3) the name of the applicant entity and, if the name does not comply with Section 1-301, an alternate name adopted pursuant to Section 1-506(a);

(4) the type of entity of the applicant entity and its jurisdiction of formation; and

(5) the following information regarding the applicant entity, ~~if different than the information for the foreign entity before the merger or conversion~~:⁴

(A) the street and mailing addresses of the principal office of the entity and, if the law of the entity's jurisdiction of formation requires it to maintain an office in that jurisdiction, the street and mailing addresses of that office; and

(B) the information required pursuant to Section 1-404(a).

(b) When an application for transfer of registration takes effect, the registration of the registered foreign entity to do business in this state is transferred without interruption to the entity into which it has merged or to ~~which it has been converted~~ **the entity into which it has changed**.

⁴ This deletion avoids the need to consult the records of the Secretary of State with respect to the formerly registered entity because all of the needed information will appear in the new filing.