

**UNIFORM UNINCORPORATED NONPROFIT  
ASSOCIATION ACT (2008)**  
*(Last Amended 2011)*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-TWENTIETH YEAR  
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*WITH PREFATORY NOTE AND COMMENTS*

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE ON  
REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in revising this Act consisted of the following individuals:

MARILYN E. PHELAN, Texas Tech University, School of Law, 1802 Hartford, Lubbock, TX 79409, *Chair*  
DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712  
DAVID C. MCBRIDE, 1000 West St., P.O. Box 391, Wilmington, DE 19899  
ROBERT L. MCCURLEY, JR., Alabama Law Institute, P.O. Box 861425, Tuscaloosa, AL 35486  
JUSTIN L. VIGDOR, 2400 Chase Square, Rochester, NY 14604  
HARRY J. HAYNSWORTH, IV, 2200 IDS Center, 80 S. 8th St., Minneapolis, MN 55402, *National Conference Reporter*

**CANADIAN MEMBERS**

ARTHUR L. CLOSE, 234 4th Ave., New Westminster, British Columbia, Canada V3L 1N7  
MICHELLE CUMYN, Pavillon Charles-De Koninck, local 1109, Universite Laval, Quebec, Canada G1K 7P4  
JAKE HARMS, Manitoba Justice, 410-405 Broadway, Winnipeg, Manitoba, Canada R3C 3L6  
THOMAS TELFER, University of Western Ontario, Faculty of Law, London, Ontario, Canada N6A 3K7  
KEVIN ZAKRESKI, University of British Columbia, 1822 East Mall, Vancouver, British Columbia, Canada V6T 1Z1

**MEXICAN MEMBERS**

EDGAR ELIAS AZAR, Rio de la Plata No. 48, Piso 8, Col. Cuauhtemoc, Mexico 06600  
CLAUDIA E. DE BUEN UNNA, Mariano Escobedo 353-A Desp. 1402, Polanco, Mexico 11560  
ELIAS MANSUR, Socrates 207, Polanco 11560, Mexico City, Mexico  
JORGE SANCHEZ CORDERO, Arquimedes 36, Polanco 11560, Mexico City, Mexico 11560

**EX OFFICIO**

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563, *President*  
JAMES A. WYNN, JR., NC Court of Appeals, One West Morgan St., P.O. Box 888, Raleigh, NC 27602, *Division Chair*

**AMERICAN BAR ASSOCIATION ADVISORS**

LISA A. RUNQUIST, 17554 Community St., Northridge, CA 91325-3922, *ABA Advisor*  
LEON E. IRISH, 304 Kyle Road, Crownsville, MD 21032, *ABA International Law Section Advisor*  
KARLA W. SIMON, 620 Michigan Ave. NE, Washington, DC 20064-0001, *ABA International Law Section Advisor*  
JOHN H. SMALL, 1310 King St., Wilmington, DE 19801, *ABA Business Law Section Advisor*

## **DRAFTING COMMITTEE ON HARMONIZATION OF BUSINESS ENTITY ACTS**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing the harmonized uniform unincorporated entity acts consists of the following individuals:

HARRY J. HAYNSWORTH, 108 Addingtons, Williamsburg, VA 23188, *Chair*  
WILLIAM H. CLARK, JR., One Logan Square, 18th and Cherry Sts., Philadelphia, PA 19103-6996, *Vice-Chair*  
ANN E. CONAWAY, 302 High Ridge Rd., Wilmington, DE 19807  
THOMAS E. GEU, University of South Dakota School of Law, 414 Clark St., Suite 214, Vermillion, SD 57069-2390  
DALE G. HIGER, 1302 Warm Springs Ave., Boise, ID 83712  
JAMES C. MCKAY, JR., Office of the Attorney General for the District of Columbia, 441 Fourth St. NW, 6th Floor S., Washington, DC 20001  
MARILYN E. PHELAN, 306 Peninsula Ct., Granbury, TX 76048  
WILLIAM J. QUINLAN, Two First National Plaza, 20 S. Clark St., Suite 2900, Chicago, IL 60603  
KEVIN P.H. SUMIDA, 735 Bishop St., Suite 411, Honolulu, HI 96813  
JUSTIN L. VIGDOR, 350 Linden Oaks, Suite 310, Rochester, NY 14625-2825  
DAVID S. WALKER, Drake University Law School, 2507 University Ave., Des Moines, IA 50311  
CARTER G. BISHOP, Suffolk University Law School, 120 Tremont St., Boston, MA 02108-4977, *Co-Reporter*  
DANIEL S. KLEINBERGER, 1818 Twin Circle Dr., Mendota Heights, MN 55118-4140, *Co-Reporter*

## **EX OFFICIO**

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. S., Minneapolis, MN 55455, *President*  
MARILYN E. PHELAN, 306 Peninsula Ct., Granbury, TX 76048, *Division Chair*

## **AMERICAN BAR ASSOCIATION ADVISORS**

ROBERT R. KEATINGE, 555 17th St., Suite 3200, Denver, CO 80202-3979, *ABA Advisor*  
WILLIAM J. CALLISON, 3200 Wells Fargo Center, 1700 Lincoln St., Denver, CO 80203, *ABA Section Advisor*  
ALLAN G. DONN, Wells Fargo Center, 440 Monticello Ave., Suite 2200, Norfolk, VA 23510-2243, *ABA Section Advisor*  
WILLIAM S. FORSBERG, 150 S. Fifth St., Suite 2300, Minneapolis, MN 55402-4238, *ABA Section Advisor*  
BARRY B. NEKRITZ, 311 S. Wacker Dr., Suite 4400, Chicago, IL 60606, *ABA Section Advisor*  
JAMES J. WHEATON, 1716 Corporate Landing Pkwy., Virginia Beach, VA 23454, *ABA Section Advisor*

**EXECUTIVE DIRECTOR**

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
111 N. Wabash Ave., Suite 1010  
Chicago, Illinois 60602  
312/450-6600  
[www.uniformlaws.org](http://www.uniformlaws.org)

**REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008)**  
**(Last Amended 2011)**

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**UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008)**  
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**PREFATORY NOTE**

An unincorporated nonprofit association (nonprofit association) is a nonprofit organization that is not a charitable trust or a nonprofit corporation or any other type of association organized under statutory law that is authorized to engage in nonprofit activities. A nonprofit association is, thus, a default organization. As such, it is the nonprofit equivalent of a general partnership, which is the default for-profit organization.

In the United States nonprofit associations are governed by a hodgepodge of common law principles and statutes governing some of their legal aspects. Many of the existing statutes are designed to ameliorate some of the legal problems that arise from the basic common law concept that nonprofit associations are merely aggregates of individuals and not legal entities. Under the traditional common law aggregate theory, for example, a nonprofit association could not hold or convey property in its own name or sue or be sued in its own name. These statutes are for the most part (California is a notable exception) not comprehensive or integrated.

NCCUSL promulgated the original Uniform Unincorporated Nonprofit Association Act (1996 UUNAA) in 1996. 1996 UUNAA, which has been adopted in 12 states, deals with only a limited number of issues—tort and contract liability of members, owning and conveying of property and suits by and against a nonprofit association.

In 2005, NCCUSL decided that the 1996 UUNAA needed to be updated and made more comprehensive and entered into a joint project with the Uniform Law Conference of Canada and the Mexican Center on Uniform Laws to create a harmonized legal framework for nonprofit associations in the United States, Canada and Mexico. The Drafting Committee for this project developed a Statement of Principles that each participating country has used as the basis for its nonprofit association statute. The Uniform Unincorporated Nonprofit Association Act (2008) (2008 UUNAA) is the American version of this harmonization project.

2008 UUNAA governs all nonprofit associations that are formed or operate in a state that adopts the act. Nonprofit associations are often classified as public benefit, mutual benefit, or religious organizations and may or may not be tax-exempt. There are probably hundreds of thousands of nonprofit associations in the United States including unincorporated nonprofit philanthropic, educational, scientific and literary clubs, sporting organizations, unions, trade associations, political organizations, churches, hospitals, and condominium and neighborhood associations. Their members may be individuals, corporations, other legal entities, or a mix.

2008 UUNAA deals with the following basic issues: (1) definition of the types of organizations covered; (2) the relation of the act to other existing laws; (3) the recognition that a nonprofit association is a legal entity and the legal implications flowing from this status, including the ability of a nonprofit association to own and dispose of property and to sue and be sued in its own name; (4) the contract and tort liability of a nonprofit association and its members and managers; (5) internal governance, fiduciary duties, and agency authority; and (6)



dissolution and merger.

2008 UUNAA is not nearly as comprehensive as the American Bar Association Model Nonprofit Corporation Act (ABA Model Act) promulgated in 1952 and most recently revised in 2008, some version of which has been adopted in most states. 2008 UUNAA merely provides a basic legal framework for nonprofit associations and is not intended to be a substitute for organizing a nonprofit association as a nonprofit corporation under state law.

2008 UUNAA was drafted with small informal associations in mind. These informal organizations are likely to have no legal advice and so fail to consider legal and organizational questions, including whether to incorporate. The act provides better answers than the common law for a limited number of legal problems. Its answers are more in accord with the expectations of those participating in the work of a nonprofit association and third parties dealing with a nonprofit association than the common law.

To the extent an enacting jurisdiction decides to retain statutes dealing with specific kinds of nonprofit associations, this act will supplement existing legislation. Many states have statutes on special kinds of unincorporated nonprofit associations, such as churches, mutual benefit societies, social clubs, and veteran's organizations. A state electing to adopt this act will need to examine carefully its existing statutes to determine which it wants to repeal, which to amend, and which to retain.

It should be noted, too, that many of the provisions are intended to be supplemented by a jurisdiction's existing law. For example, Section 7 which provides for the filing of a statement of authority, does not provide details concerning the filing process. It leaves to other law such details as whether the filing office returns a copy marked "filed" and stamps the hour and date thereof, and the amount of the filing fee.

Finally, most jurisdictions regulate solicitations and other activities of charitable organizations regardless of their organization form and allow for exemption from most state and local taxes. These statutes will be applicable to all nonprofit associations formed or operating in a state that adopts 2008 UUNAA. It may be necessary in some states to modify the language of these existing statutes to be certain that they apply to nonprofit associations after 2008 UUNAA is enacted.

2008 UUNAA was amended in 2011 and 2013 to harmonize the language of its provisions with similar provisions in the other uniform unincorporated entity acts as part of the Harmonization of Business Entity Acts Project. The amendments, all of which are technical and non-substantive, include: three new definitions in Section 2 (property, sign, and transfer); a restatement of Section 8, which deals with the liability of a nonprofit association and its members and managers; the addition of a non-exclusive list of procedures that can be included in a nonprofit association's governing principles for member and manager meetings in Sections 16 and 23; and several minor amendments in the merger provisions in Section 29. In addition, the registered agent provisions in Section 31 were redrafted to be consistent with similar provisions in the other uniform unincorporated entity acts.

2008 UUNAA is Article 7 of the Uniform Business Organizations Code (2011). If a jurisdiction enacts 2008 UUNAA and subsequently enacts the Uniform Business Organizations Code, the state's existing 2008 UUNAA statute should be repealed and reenacted to integrate it into the Code.

The Drafting Committee on Harmonization of Business Entity Acts was greatly assisted in its work by the very substantial and knowledgeable contributions of the following Observers who diligently attended and actively participated in its meetings:

ELIZABETH K. BABSON, One Logan Square, 18<sup>th</sup> & Cherry Sts., Philadelphia, PA 19103  
LISA R. JACOBS, One Liberty Place, 1650 Market St., Philadelphia, PA 19103  
GARTH JACOBSON, 520 Pike St., Seattle, WA 98101  
JULIE M. KARAVAS, 1248 O St., Lincoln, NE 68508  
DAVID MARTIN, 333W. Wyoming, St. Paul, MN 55107  
SANDRA K. MILLER, One University Place, Chester, PA 19013  
JOHN A. SINGER, Federal Trade Commission, Washington, D.C.  
ROBERT H. SITKOFF, 1575 Massachusetts Ave., Cambridge, MA 02138  
SARAH STEINBECK, Colorado Secretary of State, Denver, CO  
KEVIN P. WALSH, One Logan Square, 18<sup>th</sup> & Cherry Sts., Philadelphia, PA 19103  
HOWARD P. WALTHALL, Cumberland School of Law, Birmingham, AL 35229

**UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008)**  
**(Last Amended 2011)**

**SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Unincorporated Nonprofit Association Act.

**SECTION 2. DEFINITIONS.** In this [act]:

(1) “Established practices” means the practices used by an unincorporated nonprofit association without material change during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence.

(2) “Governing principles” means the agreements, whether oral, in a record, or implied from its established practices, or in any combination thereof, which govern the purpose or operation of an unincorporated nonprofit association and the rights and obligations of its members and managers. The term includes any amendment or restatement of the agreements constituting the governing principles.

(3) “Manager” means a person that is responsible, alone or in concert with others, for the management of an unincorporated nonprofit association.

(4) “Member” means a person that, under the governing principles, may participate in the selection of persons authorized to manage the affairs of the unincorporated nonprofit association or in the development of the policies and activities of the association.

(5) “Person” means an individual, business corporation, nonprofit corporation, partnership, limited partnership, limited liability company, [general cooperative association,] limited cooperative association, unincorporated nonprofit association, statutory trust, business trust, common-law business trust, estate, trust, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(6) “Property” means all property, whether real, personal, or mixed or tangible or intangible, or any right or interest therein.

(7) “Record”, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(8) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(9) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(10) “Transfer” includes:

(A) an assignment;

(B) a conveyance;

(C) a sale;

(D) a lease;

(E) an encumbrance, including a mortgage or security interest;

(F) a gift; and

(G) a transfer by operation of law.

(11) “Unincorporated nonprofit association” means an unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes. The term does not include:

(A) a trust;

(B) a marriage, domestic partnership, common law domestic relationship, civil union, or other domestic living arrangement;

(C) an organization formed under any other statute that governs the organization and operation of unincorporated associations;

(D) a joint tenancy, tenancy in common, or tenancy by the entireties even if the co-owners share use of the property for a nonprofit purpose; or

(E) a relationship under an agreement in a record that expressly provides that the relationship between the parties does not create an unincorporated nonprofit association.

### **Comment**

**“Established practices” [1]** – The “established practices” are essentially equivalent to the commercial law concepts of course of performance and course of dealing. *See* UCC §1-303. Many nonprofit associations operate on a very informal basis. Often there are no written procedures or bylaws – or what writings they have are very incomplete. Nevertheless, over time they develop and follow various practices. These practices, if followed consistently for at least five years (or during the entire existence of the nonprofit association if it has been in existence less than five years), become established practices and therefore can qualify as part of the nonprofit associations “governing principles.” An example would be an unincorporated church that has no written bylaws covering the issue of notice of meetings that for the past five years has printed notice of the annual meeting of its members in the church bulletin for the three weeks preceding the annual meeting. This established practice would be part of the church’s governing principles and if followed in the sixth and subsequent years would be determinative of whether reasonable notice of an annual meeting had been given.

**“Governing principles” [2]** – The “governing principles are the equivalent of the articles of incorporation, bylaws and other documents, and established practices that govern the internal affairs of a nonprofit association, sometimes referred to as an entity’s private organic rules. *See* Model Entity Transactions Act (2007) (Last Amended 2013) § 102(33). The “governing principles” of a nonprofit association do not have to be in a written form. This is consistent with partnership law, the for-profit equivalent of a nonprofit association. *See* Uniform Partnership Act (1997) (Last Amended 2013) § 101(12); Uniform Limited Partnership Act (2001) (Last Amended 2013) § 102(14); Uniform Limited Liability Act (2006) (Last Amended 2013) § 102(13). Where there is no clear oral agreement or record, the governing principles would come from the nonprofit association’s established practices (subsection (1)).

**“Manager” [3]** – A person is a “manager” of a nonprofit association if the person fits the definition even if that person’s designation might usually be associated with another type of organization. Many nonprofit associations refer to members of their governing boards as

“directors” or “trustees.” These designations do not disqualify the organization from being a nonprofit association even though the term “director” is commonly associated with corporations and the term “trustee” is commonly associated with trusts. A manager may, but need not be, a member of the nonprofit association (*see* Section 21(2)); and may, and, in fact in most cases will be, an individual, but various types of entities can also be managers of a nonprofit association (*see* subsection (5)—definition of person).

**“Member” [4]** – The definition of “member” may reach somewhat beyond decisions of some courts. Either participation in the selection of the management or in the development of policies and activities of the nonprofit association is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person simply because the person was a member.

Persons who do not have the right to select a nonprofit association’s manager or to approve its governing policies are not members of the nonprofit association for purposes of this act even though the nonprofit association may call or refer to them as members. A fund-raising device commonly used by many nonprofit organizations is a membership drive. In most cases the contributors are not members for purposes of this act. They are not authorized to “participate in the selection of persons authorized to manage the affairs of the unincorporated nonprofit association or in the development of policies and activities of the association.” Simply because an association calls a person a member does not make the person a member under this act.

The role of a member in the affairs of a nonprofit association is described as “may participate in the selection” instead of “may select or elect” the governing board and officers and “may participate . . . in the development of policies and activities” instead of “may determine” policies and activities. This accommodates the act to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated *ex officio* members of the governing board. Similarly, the role in determination of policy is described in general terms. “Persons authorized to manage the affairs of the association” is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational structures of nonprofit associations to which this act applies and the informality of many of them, the more generic term is more appropriate.

**“Person” [5]** – “Person” instead of individual is used to make it clear that associations covered by this act may have individuals, corporations, and other legal entities as members and managers. Unincorporated nonprofit trade associations, for example, commonly have corporations as members. Some national and regional associations of local government officials and agencies have governmental units or agencies as members.

**“Property” [6]** – The definition of “property” in subsection (6) is the standard definition of this term in uniform acts at the time this act was promulgated.

**“Record” [7]** – The definition of “record” is the standard definition of this term in

uniform acts at the time this act was promulgated. It makes clear that emails and other forms of electronic communication qualify as writings.

**“Sign” [8]** – The definition of “sign” is the standard definition of this term in uniform acts at the time this act was promulgated.

**“State” [9]** – The definition of “state” is the standard definition of this term in uniform acts at the time this act was promulgated.

**“Transfer” [10]** – The definition of “transfer” is the standard definition of this term in uniform unincorporated entity acts at the time this act was promulgated.

**“Unincorporate nonprofit association” [11]** – An organization cannot be a nonprofit association if it is organized as a corporation or is a for-profit unincorporated entity, e.g., a partnership. On the other hand, not every form of unincorporated nonprofit organization should automatically become a nonprofit association and therefore be able to have limited liability and the other benefits of this statute. That is the reason for the language excluding trusts, domestic living arrangements including marriages and domestic partnerships, and agreements merely to hold title to property as co-owners. The laws governing the rights of creditors, trustees, and beneficiaries of trusts are well developed and therefore the legal principles in this act are unnecessary. Domestic relations law provides property rights for adults co-habiting together after a legal marriage or in a long-term unmarried status such as what is frequently referred to as a “common law marriage” or in domestic partnership and civil union statutes. Living together in any of these domestic living arrangements can probably qualify as an association having a nonprofit purpose, but for public policy reasons these arrangements should not be able to qualify as a nonprofit association and therefore avoid individual liability for taxes and other liabilities. For similar reasons, mere co-ownership of property, even if for nonprofit purposes, should not automatically result in the applicability of this act. An enacting jurisdiction can choose to expand or reduce the number of types of exclusions consistent with the concept that a nonprofit association is a default form of organization for unincorporated nonprofit entities.

“Agreement” rather than “contract” is the appropriate term because the legal requirements for an agreement are less stringent and less formal than for a contract. For example, mutual consent must be present in both but the contractual concept of consideration is not necessary for an agreement. The agreement to form a nonprofit association can be in a “record” (see subsection (7)), or oral, or implied from conduct (*e.g.*, course of performance or course of dealing). The agreement to form a nonprofit association becomes part of the nonprofit association’s overall “governing principles.” “Implied from conduct” rather than “implied from its established practices” (*see* subsection (2)) is used as the standard because the agreement to form a nonprofit association precedes or is contemporaneous with its existence, and established practices can only exist after the nonprofit association is in existence.

Although it is always preferable to have written agreements, most existing nonprofit associations are quite informal and have few, if any, writings setting forth the agreements governing the purpose and operation of the organization. Moreover, most nonprofit associations are formed and operate without independent legal advice. Imposing a statute of frauds or similar

writing requirement would, therefore, have the effect of excluding most existing nonprofit associations from being able to qualify under the act. The enacting jurisdiction's general rules governing the proof and effect of oral agreements and the priority of written provisions over subsequent inconsistent oral provisions apply to nonprofit association governing principles. *See* section 3.

Although the agreement to form a nonprofit association can be quite informal and sketchy, there must be some tangible, objective data such as the use of the organization's name in communications to its members or third parties, or the existence of a bank account or of a mailing (or internet) address in the name of the nonprofit association or similar "conduct" indicating that, in fact, there is an actual agreement.

An express provision in a record stating that the parties to a contract do not intend to create an unincorporated nonprofit association, on the other hand, would negate any conclusion that there was an agreement to have a nonprofit association. *See* subsection 11(E). An example is a contractual relationship between two nonprofit organizations where the parties do not want the contract to be subject to this act. An express provision in a record to that effect in the contract should be upheld.

The members must be joined together for a common purpose. Several states provide that they be "joined together for a *stated* common purpose" (emphasis added). Because of the informality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be "stated." Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this act.

The best reference point for what constitutes a nonprofit purpose is probably the enacting state's Nonprofit Corporation Act. The nonprofit purpose requirement carries with it the implicit understanding that the purpose is not a criminal activity and is otherwise lawful. Each enacting jurisdiction needs to determine whether these limitations need to be set forth explicitly in the act.

The two-person requirement for forming a nonprofit association is quite minimal, assuming the standard broad definition of person (subsection (5)) incorporated into the act. At least two persons are required because that is the minimum number necessary to have an agreement under general legal principles. If one person wants to create a nonprofit organization, it is possible to do so by means of a trust, a nonprofit corporation, or in many states, a single member limited liability company. A few states currently require more than two members at the time of formation. New Jersey, for example, requires seven or more.

Nonprofit corporation statutes typically allow a nonprofit corporation to be formed by one or more incorporators but to operate without members and therefore to be governed by a self-perpetuating board of directors. *See* Model Nonprofit Corporation Act-Third Edition (2008) §§ 2.02(4), 6.01. A nonprofit association, however, must always have at least two members. The definition of a nonprofit association states that it is an organization "consisting of [two] or more members...."

The act applies to all nonprofit associations, whether they are classified as religious,



public benefit, or mutual benefit, or whether they are classified as tax-exempt under the laws of the enacting jurisdiction. Therefore, the act will cover unincorporated philanthropic, educational, scientific, social and literary clubs, unions, trade associations, political organizations, such as political parties, churches, hospitals, neighborhood and property owner associations, and sports organizations such as Little League baseball teams. If the enacting jurisdiction decides to exempt one or more types of nonprofit associations from the act, it needs to draft specific provisions listing the exemptions.

### **SECTION 3. RELATION TO OTHER LAW.**

(a) A statute governing a specific type of unincorporated nonprofit association prevails over an inconsistent provision in this [act], to the extent of the inconsistency.

(b) This [act] supplements the law of this state that applies to nonprofit associations operating in this state. If a conflict exists, that law applies.

(c) Unless displaced by particular provisions of this [act], the principles of law and equity supplement this [act].

***Legislative Note:** A thorough review of all these other laws should be conducted to be sure they do not need to be amended in order to continue to apply to nonprofit associations after the act is effective. If amendments to these other laws are necessary, they should be included as trailing amendments in the legislation containing this act.*

### **Comment**

**Subsection (a)** – Many jurisdictions have existing statutes governing particular types of nonprofit associations, *e.g.*, churches. Subsection (a) establishes the rule that in the event of an inconsistency between this act and the statute governing a specific type of nonprofit association, the latter will control. Under generally accepted statutory interpretation principles, there is a strong presumption against inconsistency, *i.e.*, the presumption is that the provisions of the two acts are not inconsistent.

**Subsection (b)** – Most jurisdictions have statutory provisions giving the chief legal officer of the jurisdiction oversight supervisory powers over nonprofit organizations, including the power to enjoin or prohibit various activities. Most jurisdictions also have statutes that require registration, permits, or advance notice to engage in certain activities, *e.g.*, fundraising from the public, and the filing of reports, *e.g.*, assumed name filings, tax forms, and the like. All of these existing and future statutes, rules, and regulations are applicable to nonprofit associations. Whether specific provisions stating this principle need to be included in the act depends on the enacting jurisdiction's statutory drafting conventions.

**Subsection (c)** – Examples of other laws that apply to nonprofit associations are general

principles of contracts, agency, fraud, estoppel, the priority of written provisions of an agreement over prior inconsistent oral provisions, civil and criminal procedural rules, and rules for enforcing judgments,

Drafting conventions as to whether these general principles of law should be set forth in separate provisions in an act like this vary greatly. Uniform acts, as a general rule, do not have provisions other than what is stated in subsection (c).

#### **SECTION 4. GOVERNING LAW.**

(a) Except as otherwise provided in subsection (b), the law of this state governs the operation in this state of an unincorporated nonprofit association formed or operating in this state.

(b) Unless the governing principles specify a different jurisdiction, the law of the jurisdiction in which an unincorporated nonprofit association has its main place of activities governs the internal affairs of the association.

#### **Comment**

This act applies to pre-existing nonprofit associations formed in the enacting state, as well as to all nonprofit associations formed in the state after the effective date of the act. This is a standard approach in statutes governing organizational entities. Exempting various types of existing organizations from the new law is not a desirable practice. Because the existing laws governing nonprofit associations are, for the most part, incomplete and the act may change some of the common understanding of what the law is, an enacting jurisdiction whose standard rule is to have a new statute effective when signed or at the beginning of the next fiscal year after signing may want to have a delayed effective date of 6 or 12 months to provide time to educate the affected organizations and their advisors about the changes. *See* Section 37.

This act's applicability to nonprofit associations formed in other jurisdictions that are operating in this state is necessary because in all other types of entities the internal affairs rules of the jurisdiction of the entity's formation (*e.g.*, the governance rules and duties and responsibilities of the owners and managers to each other and the entity) control; but it is difficult to determine the jurisdiction of a nonprofit association's formation since it does not, in most jurisdictions, file any public document upon its formation. Some mechanism for choosing the internal affairs jurisdiction is therefore necessary. The default rule in this act is the jurisdiction in which the nonprofit association has its main place of activities. A nonprofit association can, however, designate the internal affairs jurisdiction in its governing principles, subject to applicable conflicts of laws substantial contact rules. *See* Restatement (Second) of Conflict of Laws § 187(2) (1971).

The term “main place of activities” is not defined but should not be difficult to determine in most cases. Most nonprofit associations are quite informal and probably do not have what are commonly thought of as “executive offices” (*cf.* UCC § 9-103(3)(d)—a debtor’s “chief executive office”, an undefined term, determines the proper place to file a financing statement) or even a “principal office” (*cf.* the Uniform Partnership Act (1997) (Last Amended 2013) § 104(2) – default rule is the state where a partnership has its principal office governs its internal affairs). In any case, most nonprofit associations conduct operations in only one state and a nonprofit association that has operations in more than one state can designate the state that will govern its internal affairs so it will be a rare case when it will be necessary to determine which of two or more states’ laws govern a nonprofit association’s internal affairs.

Since the laws governing nonprofit associations in the enacting jurisdiction govern nonprofit associations formed in other jurisdictions that are conducting activities (except for internal affairs issues in the enacting jurisdiction), a foreign-formed nonprofit association could not conduct activities in the enacting jurisdiction that a nonprofit association formed in this jurisdiction could not conduct, even if the activity were legal in the foreign jurisdiction in which the nonprofit association was formed or has its main place of activities.

## **SECTION 5. ENTITY; PERPETUAL EXISTENCE; POWERS.**

(a) An unincorporated nonprofit association is an entity distinct from its members and managers.

(b) An unincorporated nonprofit association has perpetual duration unless the governing principles specify otherwise.

(c) An unincorporated nonprofit association has the same powers as an individual to do all things necessary or convenient to carry on its purposes.

(d) An unincorporated nonprofit association may engage in profit-making activities but profits from any activities must be used or set aside for the association’s nonprofit purposes.

### **Comment**

**Subsection (a)** – The separate legal status of a nonprofit association is a fundamental concept that undergirds all the principles that allow a nonprofit association to hold and dispose of property in its own name and to sue and be sued in its own name and that insulate the assets of the members from claims against the nonprofit association. This is a reversal of traditional common law principles that treat partnerships and other unincorporated entities under an aggregate theory.

**Subsection (b)** – Providing for perpetual existence of a nonprofit association is one of the

key aspects of its separate entity status. Under the traditional common law aggregate theory, a nonprofit association's existence would end with any change in the membership and if the nonprofit association continued in operation it was deemed to be a new nonprofit association.

The members can agree to a limited term and a nonprofit association can, of course, terminate by being dissolved and winding up. *See* Sections 27 and 28.

**Subsection (c)** – This is a standard general powers clause. *See e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 109.

**Subsection (d)** – Many existing unincorporated nonprofit organizations engage in activities that are intended to produce a profit, *e.g.*, a bingo parlor operated by a church where the profits are used to buy food for a homeless shelter. This type of profit-making endeavor should not disqualify the organization from being a nonprofit association if it otherwise qualifies. A for-profit activity might endanger the tax-exempt status of the organization or may generate taxable income, but these are separate issues and should not affect the organizational status of a nonprofit association or the rights and liabilities of its members and managers.

The fact that some or all of the members receive some direct or indirect benefit from a nonprofit association's profit-making activities will not disqualify an unincorporated nonprofit organization from being a nonprofit association under this act so long as the benefit is in furtherance of the nonprofit association's nonprofit purposes. The distribution of any profits to the members for the members' own use, *e.g.*, a dividend distribution to members, would, however, disqualify the organization from being a nonprofit association because the distribution is not made in furtherance of the nonprofit association's nonprofit purposes. *See* section 25. The organization would be a general partnership, the default organizational form for a for-profit organization. An unincorporated investment club that distributes its profits to its members, for example, would be a general partnership and not a nonprofit association even though its stated purpose is to educate its members about investments.

## **SECTION 6. OWNERSHIP AND TRANSFER OF PROPERTY.**

(a) An unincorporated nonprofit association may acquire, hold, or transfer in its name an interest in property.

(b) An unincorporated nonprofit association may be a beneficiary of a trust or contract, a legatee, or a devisee.

### **Comment**

**Subsection (a)** – Subsection (a) is based on Section 3-102(8) of the Uniform Common Interest Ownership Act. It reverses the common law rule. Inasmuch as an unincorporated nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, *Unincorporated Non-Profit Associations*, 1-45 (Oxford

Univ. Press (1959); Warburton, The Holding of Property by Unincorporated Associations, Conveyancer 318 (September-October 1985).

This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members of the association. *Matter of Anderson's Estate*, 571 P. 2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, § 3-1.3 (1981).

As is the case with many of the problems created by the view that an unincorporated association is not an entity, the statutory solutions are often partial – limited to special circumstances and associations. Subsection (a) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

Section 30 deals with attempted transfers of real and personal property to a nonprofit association that were made before the effective date of this act where under the current law title did not vest in the nonprofit association.

**Subsection (b)** – Subsection (b) is a necessary corollary of subsection (a) and, thus, it may be unnecessary. However, several states currently have statutes which expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. *See*, for example, Md. Estates & Trusts Code Ann. § 4-301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (b) applies to both trusts and contracts. Not all existing state statutes apply expressly to both.

## **SECTION 7. STATEMENT OF AUTHORITY AS TO REAL PROPERTY.**

(a) In this section, “statement of authority” means a statement authorizing a person to transfer an interest in real property held in the name of an unincorporated nonprofit association.

(b) An interest in real property held in the name of an unincorporated nonprofit association may be transferred by a person authorized to do so in a statement of authority [filed] [recorded] by the association in the office in the [county] in which a transfer of the property would be [filed] [recorded].

(c) A statement of authority must state:

(1) the name of the unincorporated nonprofit association;

(2) the address in this state, including the street address, if any, of the association or, if the association does not have an address in this state, its out-of-state address;

(3) that the association is an unincorporated nonprofit association; and

(4) the name, title, or position of a person authorized to transfer an interest in real property held in the name of the association.

(d) A statement of authority must be executed in the same manner as [a deed] [an affidavit] by a person other than the person authorized in the statement to transfer the interest.

(e) A filing officer may collect a fee for [filing] [recording] a statement of authority in the amount authorized for [filing] [recording] a transfer of real property.

(f) A record amending, revoking, or canceling a statement of authority or stating that the statement is unauthorized or erroneous must meet the requirements for executing and [filing] [recording] an original statement.

(g) Unless canceled earlier, a [filed] [recorded] statement of authority and its most recent amendment expire [five] years after the date of the most recent [filing] [recording].

(h) If the record title to real property is in the name of an unincorporated nonprofit association and the statement of authority is [filed] [recorded] in the office of the [county] in which a transfer of the property would be [filed] [recorded], the authority of the person named under subsection (c)(4) is conclusive in favor of a person that gives value without notice that the person lacks authority.

### **Comment**

This section is based on Uniform Partnership Act (1997) (Last Amended 2013) § 303.

A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing, however, provides important documentation. As a general rule a statement of authority will only be filed

at the time of a conveyance of an interest in real estate as a means of establishing in the title records who has authority to execute a deed or other instrument conveying an interest in real estate.

Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the office where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. Uniform Partnership Act (1997) (Last Amended 2013) § 303 also provides for central filing, such as with the Secretary of State, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

“Filed” and “recorded” are bracketed to direct an enacting state to choose. In most jurisdictions “recorded” will be the appropriate choice.

**Subsection (c)(2)** – Subsection (c)(2) may present a problem for small, ad-hoc nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address of some kind, *e.g.*, the mailing address of a member or manager.

**Subsection (c)(3)** – Subsection (c)(3) informs those relying on the statement of the precise character of the organization. Knowing that the organization is an unincorporated nonprofit association may cause the person dealing with the organization to act differently.

**Subsection (c)(4)** – Subsection (c)(4) permits the statement to identify as the person who can act for the association someone who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices, the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

**Subsection (d)** – Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association. Whether the formalities of execution must conform to those of a deed or an affidavit is left for each state to determine.

**Subsection (g)** – Subsection (g) makes a statement inoperative five years after its most recent recording or filing. A new statement of authority can be filed before or after the expiration of the five year limitation.

**Subsection (h)** – The purpose of subsection (h) is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. If the required signatures on the statement, deed, or both are forgeries, the effect of them is not governed by Section 7(h). Instead, Section 3 applies and would invoke the other law of the state. In many states the deed would be a nullity. *See Boyer, Hovenkamp, and*

Kurtz, THE LAW OF PROPERTY, AN INTRODUCTORY SURVEY (West Pub. Co. 4th ed. 1991).

## **SECTION 8. LIABILITY.**

(a) A debt, obligation, or other liability of an unincorporated nonprofit association is solely the debt, obligation, or other liability of the association. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise for a debt, obligation, or other liability of the association solely by reason of being or acting as a member or manager. This subsection applies regardless of the dissolution of the association.

(b) A person's status as a member or manager does not prevent or restrict law other than this [act] from imposing liability on the person or the association because of the person's conduct.

(c) The failure of an unincorporated nonprofit association to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a member or manager of the association for a debt, obligation, or other liability of the association.

### **Comment**

The effect of Section 8 is to provide members and managers of a nonprofit association with the same protection against vicarious liability for the debts and obligations of the nonprofit association and tort liability imposed on the nonprofit association as the members and managers of a nonprofit corporation would have under the enacting jurisdiction's laws. These principles, taken together, constitute what is known as the limited liability doctrine under which a member or manager is personally liable for his or her own tortious conduct under all circumstances and is personally liable for contract liabilities incurred on behalf of the nonprofit association if the member or manager guarantees or otherwise assumes personal liability for the contract or fails to disclose that he or she is acting as the agent for the nonprofit association. A member or manager is not otherwise personally liable for the tort or contract liabilities imposed upon the nonprofit association. A creditor with a judgment against the nonprofit association must seek to satisfy the judgment out of the nonprofit association's assets but cannot levy execution against the assets of a member or manager.

The one exception is the alter ego doctrine (also known as the veil piercing doctrine). Courts have pierced the corporate veil of nonprofit corporations. *See Comment, Piercing the*



*Nonprofit Corporate Veil*, 66 Marq. L. Rev. 134 (1984); *Macaluso v. Jenkins*, 95 Ill.App.3d 461, 420 N.E.2d 251 (1981) (President of nonprofit corporation who commingled funds of the nonprofit corporation with funds of a corporation he controlled held personally liable for unpaid debts of the nonprofit corporation under the veil piercing doctrine). In that connection, disregard for corporate formalities is often cited as a key factor in corporate veil piercing cases. That factor is inappropriate with respect to nonprofit associations because informality of organization and operation is both common and desired. This concept is encapsulated in subsection (c). The fact that members of nonprofit corporations for the most part do not have an expectation of financial gain, as compared to shareholders of a for-profit corporation, should mean that there will be fewer types of cases than those involving for-profit corporations where the veil piercing doctrine will be held to be applicable to nonprofit corporations. The same criteria that are applied to pierce the veil of nonprofit corporations should be applied in nonprofit association veil piercing cases.

If the alter ego doctrine is found to be applicable, the separate entity status of a nonprofit association would be disregarded and the assets of the nonprofit association and its members and managers would be aggregated and subject to a nonprofit association creditor's claims in the same manner that a judgment creditor collects a judgment against the assets of a general partner in a general partnership.

In recent years all states have enacted laws providing unpaid officers, board members, and other volunteers some protection from liability for their own negligence (but generally not for conduct that is determined to constitute gross negligence or willful or reckless misconduct). The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. *State Liability Laws for Charitable Organizations and Volunteers* (Nonprofit Risk Management & Insurance Institute, 1990); *Developments, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1685-1696 (1992). This means that members and volunteers involved with unincorporated nonprofit associations do not obtain protection under those state statutes. Others may cover the managers of nonprofit associations but only if the nonprofit association qualifies as a tax-exempt entity under federal or state law. See N.Y. Not For Profit Corporation Law §§ 720-a and 721 (federal income tax); Minn. Stat. Ann. § 317A.257 (state income tax). Some states have statutes that premise the insulation of liability upon the organizations having specified amounts of liability insurance.

In 1997 Congress enacted the Volunteer Protection Act, 42 U.S.C. §§ 14501-14505. This statute, which preempts state laws to the extent of any inconsistency with the Volunteer Protection Act except to the extent the state law provides additional protections from liability, insulates directors, officers, trustees, and direct service volunteers of nonprofit organizations who receive no compensation (other than reasonable reimbursement of expenses) from liability for harm that "was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious or flagrant indifference to the rights or safety of the individual harmed by the volunteer." 42 U.S.C. § 14503(a)(3). Damages caused by operation of "a motor vehicle, vessel, aircraft, or other vehicle" for which a license or insurance is required to be maintained, are not covered. 42 U.S.C. § 14503(4).

The interplay between the Federal Volunteer Protection Act and the existing state statutes that provide liability protection to volunteers of nonprofit associations is a complex matter and must be determined on a state-by-state basis. *See* subsection (b).

Finally, the liability of the managers of a nonprofit association for breach of the duties of due care, good faith, and loyalty to the nonprofit association and the ability of the governing principles of a nonprofit association to limit or eliminate this liability as far as monetary damages are concerned is a separate subject which is dealt with in Section 22.

“Solely” as used in Section 8 is intended to make it clear that a member or manager is not vicariously liable for the liabilities of the nonprofit association or the liabilities of another member or manager merely because of that person’s status as a member or manager. A member or manager may, however, have personal liability as a result of his or her own actions. A member or manager will be personally liable, for example, for his or her own tortious acts, or for breach of a contract binding on the nonprofit association which the member or manager is a party to or has guaranteed. This personal liability is imposed by other law (*see* Section 8(b) and Section 3(c)) and not because of his or her status as a member or manager.

## **SECTION 9. ASSERTION AND DEFENSE OF CLAIMS.**

(a) An unincorporated nonprofit association may sue or be sued in its own name.

(b) A member or manager may assert a claim the member or manager has against the unincorporated nonprofit association. An association may assert a claim it has against a member or manager.

### **Comment**

**Subsection (a)** – Under traditional common law doctrine, a nonprofit association was considered to be an aggregate of members and therefore it could not sue or be sued in its own name. Only the members could sue or be sued and some state court cases held that all of the members had to be named plaintiffs in a suit brought on behalf of the nonprofit association and that all the members had to be named and served with the summons and complaint in a suit against a nonprofit association. Most states have enacted statutes in recent years granting a nonprofit association entity status for the purpose of suits by and against the nonprofit association. Section 9 follows the modern rule and is consistent with the concept built into this act that a nonprofit association is a separate entity for many more purposes than existed under traditional common law principles.

This section is intended to apply to all types of judicial, administrative, and governmental proceedings and all types of alternative dispute resolution proceedings such as arbitration and mediation. An enacting state may want to modify this section to make it clear that this is the case if that is not clear under its current civil procedure law.

The enacting state's general civil procedure law will be applicable to nonprofit associations. *See* Section 3(c). These statutes and court rules will deal with issues such as standing of a nonprofit association to sue on behalf of its members, joinder, counterclaims, and the like. Most will also cover issues such as pleadings, service of pleadings, and venue. That is why Sections 11 and 13 are bracketed and should not be enacted in a state if the existing statutes and court rules are sufficient. Sections 9, 10, and 12 should be enacted as part of this act, however, because there is a body of inconsistent case law or gaps in the existing statutes or rules on the issues dealt with in these sections.

**Subsection (b)** – Subsection (b) is another aspect of a nonprofit association under the act being a separate legal entity. Under the common law aggregate theory, since a nonprofit association was not an entity separate from its members, a member could not assert a claim against the nonprofit association since there is technically no legal entity, and the member would be both a claimant and the defendant and personally liable for any judgment obtained in the action. For the same reason, a nonprofit association could not assert a claim against a member (*e.g.*, for unpaid dues) because the nonprofit association technically does not exist. This subsection only allows a member to assert that member's claim against the nonprofit association. It does not authorize a member to file a derivative action. The enacting jurisdiction's civil procedure law may, however, authorize derivative actions.

**SECTION 10. EFFECT OF JUDGMENT OR ORDER.** A judgment or order against an unincorporated nonprofit association is not by itself a judgment or order against a member or manager.

### **Comment**

This section is consistent with Restatement (Second) of Judgments, § 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation . . . ."

Section 10 applies not only to judgments but also to orders, such as an award rendered in arbitration or an injunction.

This section reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-principals, were individually liable for obligations of the association.

That a judgment against a nonprofit association is not also a judgment against one authorized to manage the affairs of the nonprofit association recognizes fully the entity status of a nonprofit association. An obvious corollary of this section is that a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member. The one exception to this rule would be an injunction issued against a nonprofit association. Federal Rule of Civil Procedure 65(d) provides that every injunction and

restraining order is binding not only on the named parties but also on “the parties’ officers, agents, servants, employees, and attorneys . . . who receive actual notice of it by personal notice or otherwise.”

**[SECTION 11. SERVICE OF PROCESS.** In an action or proceeding against an unincorporated nonprofit association, process may be served on an agent authorized by appointment to receive service of process, on a manager of the association, or in any other manner authorized by the law of this state.]

#### **Comment**

Some states have expressly addressed service of process on a nonprofit association in court rules or by statute. Those states may wish to continue their rules and so should not adopt this section. For this reason this section is bracketed.

By rule or statute all jurisdictions have extensive law on service of process. The real question for nonprofit associations is which set of these rules should apply. This act treats a nonprofit association as a legal entity. Thus, the rules applicable to another legal entity, a corporation, seem most appropriate.

“Manager” is a defined term. *See* Section 2(3). Service on a member of a nonprofit association (also a defined term – *see* Section 2(4)) would not be effective under this section unless the member was also a manager of the nonprofit association.

**SECTION 12. ACTION OR PROCEEDING NOT ABATED BY CHANGE.** An action or proceeding against an unincorporated nonprofit association does not abate merely because of a change in its members or managers.

#### **Comment**

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated nonprofit associations. Uniform Partnership Act (1914) §§ 29 and 31(4). This Act’s entity approach requires this change to the old common law rule. *See* Uniform Partnership Act (1997) (Last Amended 2013) §§ 603(a), 701, and 801.

**[SECTION 13. VENUE.** Unless otherwise provided by law other than this [act], venue of an action against an unincorporated nonprofit association brought in this state is determined under the statutes applicable to an action brought in this state against a corporation.]

## Comment

This section is bracketed because many states have already satisfactorily solved this issue. A criterion used by all states for fixing venue is the county of residence of the defendant. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. *See* Wright, Miller, & Cooper, 15 FEDERAL PROCEDURE & PRACTICE 3812 (1986). Conforming to the entity view of an association, section 13 rejects the common law view. Many states have by statute modified the common law rule. Illinois, for example, provides that “a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can be found, in which any officer resides.” Ill. Code Civ. Prac. § 2-102(c). In many cases, however, a nonprofit association will not have an office or an officer in the state.

Most states specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated nonprofit association.

**SECTION 14. MEMBER NOT AGENT.** A member is not an agent of the association solely by reason of being a member.

## Comment

The purpose of this section is to make it clear that a person’s status as a member does not by itself make that person an agent of the nonprofit association. This is contrary to partnership law where the general partners are considered to be general agents of the partnership and can bind the partnership for acts in the ordinary course of business. Agency and the power to bind in a nonprofit association are determined under the enacting state’s agency law. *See* Section 3(c). Under agency law the managers of a nonprofit association would in most cases be considered as having apparent authority to bind the nonprofit association for acts in the ordinary course of the nonprofit association’s business. Therefore a member who is also a manager would be considered to be an agent of the nonprofit association but this is because that person is a manager as well as a member of the nonprofit association, and therefore the agency authority is not “solely by reason of being a member.” Under agency law, a member might have actual authority to bind the nonprofit association or might have apparent authority to bind the nonprofit association because of the member’s established course of dealing with third parties or under an estoppel theory. Again, the member’s agency authority to bind is not solely because of the member’s status as a member.

A nonprofit association might be directly or vicariously liable for actions of a member under general law other than agency law. For example, under the doctrine of respondeat superior, a nonprofit association might be liable for the tortious conduct of a member who is found to be acting as a servant of the nonprofit association at the time of the tortious conduct or for negligently supervising a member who is acting on behalf of the nonprofit association. *See* Section 8.

## **SECTION 15. APPROVAL BY MEMBERS.**

(a) Except as otherwise provided in the governing principles, an unincorporated nonprofit association must have the approval of its members to:

- (1) admit, suspend, dismiss, or expel a member;
- (2) select or dismiss a manager;
- (3) adopt, amend, or repeal the governing principles;
- (4) sell, lease, exchange, or otherwise dispose of all, or substantially all, of the association's property, with or without the association's goodwill, outside the ordinary course of its activities;

- (5) dissolve under Section 27(a)(2) or merge under Section 31;
- (6) undertake any other act outside the ordinary course of the association's activities; or

- (7) determine the policy and purposes of the association.

(b) An unincorporated nonprofit association must have the approval of the members to do any other act or exercise a right that the governing principles require to be approved by members.

### **Comment**

Sections 15 through 26 deal with governance issues and are often referred to as internal affairs rules. They establish the rules governing the relation of the members and managers to each other and to the nonprofit association. Many but not all of these provisions are default rules that can be varied by the nonprofit association's governing principles. Liability to third parties is covered by other provisions of this act. *See* Section 8. The internal affairs rules in Sections 15 through 26 apply to nonprofit associations formed in the enacting state. The internal rules of nonprofit associations formed in other jurisdictions are determined under Section 4(b).

## **SECTION 16. MEMBER MEETINGS; PROCEDURAL REQUIREMENTS.**

(a) Unless the governing principles provide otherwise:

(1) approval of a matter by the members requires the affirmative vote of at least a majority of the votes cast at a meeting of members; and

(2) each member is entitled to one vote on each matter that is submitted for approval by the members.

(b) The governing principles may provide for the:

(1) calling, location, and timing of member meetings;

(2) notice and quorum requirements for member meetings;

(3) conduct of member meetings;

(4) taking of action by the members by consent without a meeting or casting ballots; and

(5) participation by members in a member meeting by telephone or other means of electronic communication.

(c) If the governing principles do not provide for a matter described in subsection (b), customary usages and principles of parliamentary law and procedure apply.

### **Comment**

**Subsection (a)** – The principles set forth in subsection (a) – members vote on a per capita basis, notice of meetings and majority vote for approval actions – are all default rules. They apply unless there are different rules in the nonprofit association’s governing principles. Thus, if a nonprofit association’s bylaws specified that only some members have voting rights, then only those so designated would have voting rights. Similarly, if the bylaws specified that all members are entitled to vote on specific actions (*e.g.*, election of a board of directors), but a subset of members is the approving authority for all other matters, the bylaws would trump the default rules. In addition, bylaw provisions that provided for a higher (or lower) voting percentage rather than the majority vote required by the statutory default rule would control.

An enacting state may decide to require supermajority voting (*e.g.*, two-thirds majority) for transactions that are not in the ordinary course of business such as dissolution, merger, or amendment of the nonprofit association’s governing principles. The default voting requirements for similar transactions under the enacting jurisdiction’s nonprofit corporation law might be an appropriate model for structuring the voting requirements for a nonprofit association. Because it is often quite difficult to locate and to get a majority of all members together for voting purposes

in a nonprofit association, the requirement of a supermajority vote for any issue may not be appropriate.

There is one limitation on the authority to modify member approval rights. A nonprofit association must always have at least two members. *See* Section 2(11). Therefore, the governing principles cannot specify that a nonprofit association have one or no members.

**Subsection (b)** – Subsection (b) contains a non-exclusive list of member meeting procedural requirements that can be included in a nonprofit association’s governing principles. A nonprofit association will undoubtedly have some kind of notice and quorum requirements and meeting procedures in its governing principles, which include its established practices. If it does not have any such requirements (*e.g.*, it is newly formed and is holding its initial meeting), it can create them at that meeting, using as a reference customary usages and principles of parliamentary law and procedures (*see* subsection (c)), and these requirements, even if oral, become over time the nonprofit association’s established practices and therefore part of the nonprofit association’s governing principles. If the appropriate notice has been given and a quorum is present, the member meeting would be properly called and convened under subsection (a)(1).

## **SECTION 17. DUTIES OF MEMBER.**

(a) A member does not have any fiduciary duty to an unincorporated nonprofit association or to another member solely by reason of being a member.

(b) A member shall discharge the duties to the unincorporated nonprofit association and the other members and exercise any rights under this [act] consistent with the governing principles and the contractual obligation of good faith and fair dealing.

### **Comment**

**Subsection (a)** – Members of a nonprofit association, like members of a limited liability company in a manager managed LLC (*see* Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 409(i)(6)) and limited partners in a limited partnership (*see* Uniform Limited Partnership Act (2001) (Last Amended 2013) § 305(b)), do not have fiduciary duties (generally defined as a duty of loyalty and good faith) to the nonprofit association or the other members by virtue of their status as members. A member who undertakes managerial duties, however, would have the fiduciary duties of a manager (*see* Section 22).

**Subsection (b)** – While they have no fiduciary duties, members do have the obligation stated in subsection (b) to discharge any duties and any rights they exercise pursuant to this act or pursuant to the nonprofit association’s governing principles consistent with the obligation of good faith and fair dealing. A member cannot, for example, disclose confidential information obtained from the nonprofit association to third parties. The obligation of good faith and fair



dealing is not strictly speaking a fiduciary duty but rather is a duty that is derived from the consensual or contract nature of a nonprofit association. *See* Restatement (Second) of Contracts (1981) § 205. The duty of good faith and fair dealing of a member in a nonprofit association cannot be altered or varied. In this respect, it differs from the similar rule in partnerships and limited liability companies. *See* Uniform Partnership Act (1997) (Last Amended 2013) §§ 105(c)(6), 409(d); Uniform Limited Liability Company Act (2006) (Last Amended 2013) §§ 105(c)(6), 409(d).

## **SECTION 18. ADMISSION, SUSPENSION, DISMISSAL, OR EXPULSION OF MEMBERS.**

(a) A person becomes a member and may be suspended, dismissed, or expelled in accordance with the governing principles of the unincorporated nonprofit association. If there are no applicable governing principles, a person may become a member or be suspended, dismissed, or expelled from an association only by a vote of its members. A person may not be admitted as a member without the person's consent.

(b) Unless the governing principles provide otherwise, the suspension, dismissal, or expulsion of a member does not relieve the member from any unpaid capital contribution, dues, assessments, fees, or other obligation incurred or commitment made by the member before the suspension, dismissal, or expulsion.

### **Comment**

Section 18 sets forth the default rules for admission, suspension, dismissal, or expulsion of members as a majority vote of members. If the nonprofit association's governing principles provide otherwise, the governing principles would be applicable.

Subsection (b) makes it clear that suspension, dismissal, or expulsion do not relieve a member of any obligations it owes the nonprofit association.

## **SECTION 19. MEMBER'S RESIGNATION.**

(a) A member may resign as a member in accordance with the governing principles. In the absence of applicable governing principles, a member may resign at any time.

(b) Unless the governing principles provide otherwise, resignation of a member does not

relieve the member from any unpaid capital contribution, dues, assessments, fees, or other obligation incurred or commitment made by the member before resignation.

#### **Comment**

Preventing a member from voluntarily withdrawing from a nonprofit association would be unconstitutional and void on public policy grounds. A nonprofit association should, however, be able to impose reasonable restrictions on withdrawal, for example, requiring 30 days' advance notice. Moreover, as subsection (b) states, a member who resigns remains liable for obligations and commitments made before the resignation.

**SECTION 20. MEMBERSHIP INTEREST NOT TRANSFERABLE.** Except as otherwise provided in the governing principles, a member's interest or any right under the governing principles is not transferable.

#### **Comment**

This is a basic common sense rule. A member of a church that is a nonprofit association, for example, should not be able to transfer his or her membership to a third party. There may be situations where a nonprofit association might be willing to allow transfers. In those situations, the transfer could be made in accordance with the nonprofit association's governing principles. Condominium homeowners association bylaws, for example, frequently authorize automatic transfer of membership in the association upon transfer of title in the condominium.

**SECTION 21. SELECTION OF MANAGERS; MANAGEMENT RIGHTS OF MANAGERS.** Except as otherwise provided in this [act] or the governing principles:

- (1) only the members may select a manager or managers;
- (2) a manager may be a member or a nonmember;
- (3) if a manager is not selected, all members are managers;
- (4) each manager has equal rights in the management and conduct of the activities of the unincorporated nonprofit association;
- (5) all matters relating to the association's activities are decided by its managers except for matters reserved for approval by members in Section 15; and
- (6) a difference among managers is decided by a majority of the managers.

## Comment

“Manager” is a defined term. *See* Section 2(3).

The default rule is all members are managers. In nonprofit associations such as churches with large numbers of members, this default rule will rarely be applicable because the governing principles will in most situations provide a selection process for managers.

Paragraphs (4) (each manager has equal management rights), (5) (managers manage the nonprofit association’s activities), and (6) (differences among the managers are resolved by majority vote) are consistent with the rights of general partners in a partnership and the managers of a limited liability company. *See* Uniform Partnership Act (1997) (Last Amended 2013) § 401; Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 407.

The rules in this section are default rules that can be varied by a nonprofit association’s governing principles. The intent is to allow maximum flexibility. The nonprofit association’s governing principles can provide for any type of managerial structure the nonprofit association wants to have. Choices range from a traditional board of directors or board of trustees, to third parties who manage the nonprofit association under a contract. The managerial responsibilities can be split between the various managers (*e.g.*, one manager in charge of finances, another in charge of programs). Members who are also managers will have a dual status and their duties and liabilities will be based on the capacity in which they are acting at the time an action (or omission) takes place.

### **SECTION 22. DUTIES OF MANAGERS.**

(a) A manager owes to the unincorporated nonprofit association and to its members the duties of loyalty and care.

(b) A manager shall manage the unincorporated nonprofit association in good faith, in a manner the manager reasonably believes to be in the best interests of the association, and with such care, including reasonable inquiry, as a prudent person would reasonably exercise in a similar position and under similar circumstances. A manager may rely in good faith on any opinion, report, statement, or other information provided by another person that the manager reasonably believes is a competent and reliable source for the information.

(c) After full disclosure of all material facts, a specific act or transaction that would otherwise violate the fiduciary duty of loyalty by a manager may be authorized or ratified by a

majority of the members that are not interested directly or indirectly in the act or transaction.

(d) A manager that makes a business judgment in good faith satisfies the duties specified in subsection (a) if the manager:

(1) is not interested, directly or indirectly, in the subject of the business judgment and is otherwise able to exercise independent judgment;

(2) is informed with respect to the subject of the business judgment to the extent the manager reasonably believes to be appropriate under the circumstances; and

(3) believes that the business judgment is in the best interests of the unincorporated nonprofit association and in accordance with its purposes.

(e) The governing principles in a record may limit or eliminate the liability of a manager to the unincorporated nonprofit association or its members for damages for any action taken, or for failure to take any action, as a manager, except liability for:

(1) the amount of financial benefit improperly received by a manager;

(2) an intentional infliction of harm on the association or one or more of its members;

(3) an intentional violation of criminal law;

(4) breach of the fiduciary duty of loyalty; or

(5) improper distributions.

### **Comment**

This section deals with what are generally referred to as fiduciary duties. Only individuals exercising managerial authority in a nonprofit association have fiduciary duties. This is consistent with U.S. business entity laws. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 409; Revised Model Business Corporation Act §§ 8.30 and 8.31. Thus, members of a nonprofit association do not have any fiduciary duties to the other members or to the managers or to the nonprofit association, unless the member is also a manager. *See* Section 17. In this event that member, in his or her capacity as a manager, would have the fiduciary duties that the other managers of the nonprofit association have.

The fundamental fiduciary duty is loyalty. The duty of care is often, but not always, characterized as a fiduciary duty. Good faith is sometimes characterized as a fiduciary duty but with respect to unincorporated business entities is designated as a contract based obligation. *See*, the comments to Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 409(c) and (d).

**Subsection (b)** – Subsection (b) describes how a manager exercises care and good faith in making decisions. Subsection (d) describes what is known as the business judgment rule, which in effect is a defense to a breach of care claim.

**Subsection (c)** – Under subsection (c) a potential breach of loyalty claim (*e.g.*, conflict of interest transaction or appropriation of something that falls within what is commonly called the “corporate opportunity” or “enterprise opportunity” doctrine or engaging in competing activities) can be avoided by advance approval or ratification after full disclosure of the facts. Note also that under subsection (d)(1) having a conflict of interest precludes the application of the business judgment rule.

**Subsection (e)** – Subsection (e) states that the governing principles of a nonprofit association can limit or eliminate the monetary liability of a manager who is found to have breached a fiduciary duty except for the five exceptions listed in the subsection. Even if the manager is exempt from monetary damages, he or she could still be bound by an injunction or other equitable remedy granted by a court. This limitation, unlike most governing principles, must be in a record, which means that it must be in some kind of writing.

This section only deals with the liability of a nonprofit association manager to the nonprofit association and its members. Liability of a manager to third parties is dealt with in other sections of this act. *See* Section 8 and the comment to Section 8 dealing with limitations on liability to third parties under state and federal volunteer protection acts.

## **SECTION 23. PROCEDURAL REQUIREMENTS FOR MANAGER MEETINGS.**

(a) The governing principles may provide for the:

- (1) calling, location, and timing of manager meetings;
- (2) notice and quorum requirements for manager meetings;
- (3) conduct of manager meetings;
- (4) taking of action by the managers by consent without a meeting; and
- (5) participation by managers in a manager meeting by telephone or other means

of electronic communication.

(b) If the governing principles do not provide for a matter described in subsection (a),

customary usages and principles of parliamentary law and procedure apply.

### **Comment**

**Subsection (a)** – Subsection (a) contains a non-exclusive list of manager meeting procedural requirements that can be included in the governing principles of a nonprofit association. A nonprofit association will undoubtedly have some kind of notice and meeting procedures in its governing principles which include its established practices. If a nonprofit association does not have any such requirements (*e.g.*, it is newly formed and is holding its initial meeting), it can create them at that meeting using as references customary usages and principles of parliamentary law and procedures (*see* subsection (b)). and those requirements, even if oral, become the established practices and therefore part of the nonprofit association's governing principles.

The use of proxies in manager meetings will be determined by other applicable law. *See* Section 3(c). As a general rule, directors or other persons performing managerial responsibilities may, consistent with a nonprofit association's governing principles, delegate one or more duties to another person, but they are not authorized to give another person a proxy to vote on a matter.

### **SECTION 24. RIGHT OF MEMBER OR MANAGER TO INFORMATION.**

(a) On reasonable notice, a member or manager of an unincorporated nonprofit association may inspect and copy during the association's regular operating hours, at a reasonable location specified by the association, any record maintained by the association regarding its activities, financial condition, and other circumstances, to the extent the information is material to the member's or manager's rights and duties under the governing principles.

(b) An unincorporated nonprofit association may impose reasonable restrictions on access to and use of information to be furnished under this section, including designating the information confidential and imposing obligations of nondisclosure and safeguarding on the recipient.

(c) An unincorporated nonprofit association may charge a person that makes a demand under this section reasonable copying costs, limited to the costs of labor and materials.

(d) A former member or manager is entitled to information to which the member or manager was entitled while a member or manager if the information pertains to the period during

which the person was a member or manager, the former member or manager seeks the information in good faith, and the former member or manager satisfies subsections (a) through (c).

### **Comment**

The act does not require a nonprofit association to keep any books and records, but if it does have them, they must be made available to the members and managers pursuant to this section. The term books and records is intended to cover all types and forms of data, including electronic data. An enacting jurisdiction may want to include a definition of books and records in the act if there is any uncertainty about what is included in this term in the state's existing laws.

## **SECTION 25. DISTRIBUTIONS PROHIBITED; COMPENSATION AND OTHER PERMITTED PAYMENTS.**

(a) Except as otherwise provided in subsection (b), an unincorporated nonprofit association may not pay dividends or make distributions to a member or manager.

(b) An unincorporated nonprofit association may:

(1) pay reasonable compensation or reimburse reasonable expenses to a member or manager for services rendered;

(2) confer benefits on a member or manager in conformity with its nonprofit purposes;

(3) repurchase a membership and repay a capital contribution made by a member to the extent authorized by its governing principles; or

(4) make distributions of property to members upon winding up and termination to the extent permitted by Section 28.

### **Comment**

A distribution by a nonprofit association to members in violation of this section would disqualify it from continuing to be a nonprofit association. *See* Section 2(11) and the comment to Section 2.

The permitted distributions authorized by subsection (b) are derived from Sections 6.40 and 6.41 of the Model Nonprofit Corporation Act-Third Edition (2008).

An action to recover improper distributions could be brought by the nonprofit association or by a member as a derivative action, if authorized by state law. The Attorney General may also have authority under state law to bring a disgorgement action.

**SECTION 26. REIMBURSEMENT; INDEMNIFICATION; ADVANCEMENT;  
AND INSURANCE.**

(a) Except as otherwise provided in the governing principles, an unincorporated nonprofit association shall reimburse a member or manager for authorized expenses reasonably incurred in the course of the member's or manager's activities on behalf of the association.

(b) An unincorporated nonprofit association may indemnify a member or manager for any debt, obligation, or other liability incurred in the course of the member's or manager's activities on behalf of the association if the person seeking indemnification has complied with Sections 17 and 22. Governing principles in a record may broaden or limit indemnification.

(c) If a person is made or threatened to be made a party in an action or proceeding based on that person's activities on behalf of an unincorporated nonprofit association and the person makes a request in a record to the association, a majority of the disinterested managers may approve in a record advance payment, or reimbursement, by the association, of all or a part of the reasonable expenses, including attorney's fees and costs, incurred by the person before the final disposition of the proceeding. To be entitled to an advance payment or reimbursement, the person must state in a record that the person has a good faith belief that the criteria for indemnification in subsection (b) have been satisfied and that the person will repay the amounts advanced or reimbursed if the criteria for payment have not been satisfied. The governing principles in a record may broaden or limit the advance payments or reimbursements.

(d) An unincorporated nonprofit association may purchase and maintain insurance on



behalf of a member or manager against liability asserted against or incurred by the member or manager in that capacity or arising from that status, whether or not the association has authority under this [act] to reimburse, indemnify, or advance expenses to the member or manager against the liability.

(e) The rights of reimbursement, indemnification, and advancement of expenses under this section apply to a former member or manager for an activity undertaken on behalf of the unincorporated nonprofit association while a member or manager.

### **Comment**

The rights to reimbursement of expenses (subsection (a)), indemnification (subsection (b)) and advancement of litigation expenses and attorneys' fees (subsection (c)) in business entity statutes vary greatly from jurisdiction to jurisdiction. The rights of reimbursement of expenses and indemnification in subsections (a) and (b) are similar to those found in other business entity statutes. *See* Uniform Partnership Act (1997) (Last Amended 2013) § 401; Model Nonprofit Corporation Act §§ 8.50-8.58 (3d. Ed. 2008). Many existing state business entity statutes only allow reimbursement of litigation expenses after the conclusion of the litigation and a finding of nonliability. Given the fact that most members and managers of nonprofit associations are unpaid volunteers, the advancement of litigation expenses on a discretionary basis authorized by subsection (c) seems appropriate.

The right to reimbursement under subsection (a) is mandatory, unless the governing principles otherwise provide. The right to indemnification under subsection (b) is discretionary; however, a nonprofit association in a record (*i.e.*, a writing of some kind, *see* Section (2)(7)), can broaden (*e.g.*, make the right mandatory) or limit (*e.g.*, impose conditions beyond compliance with Sections 17 and 22) the right to indemnification. Advancement of litigation expenses under subsection (c) is also discretionary but in addition the request for an advancement, the commitment to repay the amounts advanced if the criteria for payment have not been satisfied, and the approval of an advancement must be in a record. As is the case with indemnification under subsection (b) the governing principles of the nonprofit association in a record may broaden or further limit the advancement right. The discretionary nature of both the rights of indemnification and advancement and the record requirements for these rights are appropriate as default rules in order to focus attention on the importance of these decisions. After all many nonprofit associations have very limited financial resources and the first priority for their resources is to fulfill their nonprofit purposes.

Directors and officers insurance and errors and omissions insurance for managers of nonprofit associations is expensive but because of potential liability, directors and other managers of nonprofit associations are increasingly demanding that it be maintained on their behalf. Subsection (d) makes it clear that the purchase of such insurance is authorized.

Both current and former members and managers are eligible for these rights of reimbursement, indemnification, and advancement of expenses.

## **SECTION 27. DISSOLUTION.**

(a) An unincorporated nonprofit association may be dissolved as follows:

(1) if the governing principles provide a time or method for dissolution, at that time or by that method;

(2) if the governing principles do not provide a time or method for dissolution, upon approval by the members;

(3) if no member can be located and the association's operations have been discontinued for at least three years, by the managers or, if the association has no current manager, by its last manager;

(4) by court order; or

(5) under law other than this [act].

(b) After dissolution, an unincorporated nonprofit association continues in existence until its activities have been wound up and it is terminated pursuant to Section 28.

### **Comment**

The vote required for dissolution under subsection (a)(2) would be a majority vote of the members and under subsection (a)(3) would be a majority of the managers, unless the governing principles require a higher vote. *See* Sections 15(5) and 21(6).

As a general rule, a court order dissolving a nonprofit association would be appropriate if subsection (a)(1)-(3) are inapplicable. It should also be appropriate if it is impossible or impracticable to continue the nonprofit association, for example because of a deadlock or in other circumstances where the doctrine of *cy pres* is deemed to be applicable.

A nonprofit association that is totally inactive and has no assets is *de facto* dissolved, even though it is not *de jure* dissolved. Formal dissolution (and winding up and termination under Section 28) is only necessary if the nonprofit association has assets.

**SECTION 28. WINDING UP AND TERMINATION.** Winding up and termination of an unincorporated nonprofit association must proceed in accordance with the following rules:

- (1) All known debts and liabilities must be paid or adequately provided for.
- (2) Any property subject to a condition requiring return to the person designated by the donor must be transferred to that person.
- (3) Any property subject to a trust must be distributed in accordance with the trust agreement.
- (4) Any remaining property must be distributed as follows:
  - (A) as required by law other than this [act] that requires assets of an association to be distributed to another person with similar nonprofit purposes;
  - (B) in accordance with the association's governing principles or in the absence of applicable governing principles, to the members of the association per capita or as the members direct; or
  - (C) if neither subparagraph (A) nor (B) applies, under [cite the unclaimed property law in this state].

#### **Comment**

This section sets out the rules for distribution of a nonprofit association's assets after its affairs have been wound up. It is derived from the California Unincorporated Nonprofit Association statute. *See* Calif. Corp. Code § 18410.

The state's statutes of limitations will determine when an action by a creditor to recover any assets distributed by a nonprofit association upon liquidation will be barred. Many business organization statutes, however, have provisions that shorten the normal statutes of limitations for known and unknown creditor claims when the organization is liquidated. *See* Model Business Corporation Act, §§ 14.06 and 14.07; Uniform Limited Liability Company Act, (2006) (Last Amended 2013) §§ 704 and 705.

#### **SECTION 29. APPOINTMENT OF REGISTERED AGENT.**

- (a) An unincorporated nonprofit association may deliver to the [Secretary of State] for

filing a statement appointing an agent authorized to receive service of process.

(b) A statement appointing a registered agent must state:

(1) the name of the unincorporated nonprofit association; and

(2) the name and street and mailing addresses in this state of the registered agent.

(c) A statement appointing a registered agent must be signed by a person authorized to manage the affairs of the unincorporated nonprofit association. The signing of the statement is an affirmation of fact that the person is authorized to manage the affairs of the unincorporated nonprofit association and that the agent has consented to serve.

(d) An amendment to or cancellation of a statement appointing a registered agent must meet the requirements for signing an original statement. An agent may resign by delivering a resignation to the office of the [Secretary of State] for filing and giving notice to the unincorporated nonprofit association at the address most recently supplied to the agent by the association.

(e) The [Secretary of State] may collect a fee for filing a statement appointing a registered agent, an amendment, a cancellation, or a resignation in the amount charged for filing similar documents.

(f) A statement appointing a registered agent takes effect on filing by the [Secretary of State] and is effective for five years after the date of filing unless canceled or terminated earlier.

(g) A statement appointing a registered agent may not be rejected for filing because the name of the unincorporated nonprofit association signing the statement is not distinguishable on the records of the [Secretary of State] from the name of another entity appearing in those records. The filing of such a statement does not make the name of the association signing the statement unavailable for use by another entity.

(h) The only duty under this [act] of a registered agent is to forward to the unincorporated nonprofit association at the address most recently supplied to the agent by the association any process, notice, or demand pertaining to the association which is served on or received by the agent.

### **Comment**

This section authorizes but does not require, a nonprofit association to file a statement appointing a registered agent. Compare Uniform Business Organizations Code (2011) (Last Amended 2013) § 1-402 (all business entities whose formation requires the filing of a public document such as articles of incorporation must have a registered agent). It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's management gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and its address.

**Subsection (g)** – Subsection (g) has two purposes: (1) it prohibits the filing office (the Secretary of State is the filing office in most states) from refusing to file a registered agent statement by a nonprofit association on the grounds that the name of the nonprofit association conflicts with the name of another entity that has filed formation documents with the filing office; and (2) the filing of the statement by the nonprofit association does not prohibit another entity formed after the nonprofit association has filed from using the same name as the nonprofit association. Both derive from the non-mandatory nature of the appointment of a registered agent by a nonprofit association. The name of entities that are required to file formation documents with the filing office must be distinguishable on the records of the filing office from the name of other mandatory filing entities. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 112.

## **[SECTION 30. TRANSITION CONCERNING REAL AND PERSONAL PROPERTY.]**

(a) If, before [the effective date of this [act]], an interest in property was by terms of a transfer purportedly transferred to an unincorporated nonprofit association but under the law of this state the interest did not vest in the association, or in one or more persons on behalf of the association under subsection (b), on [the effective date of this [act]] the interest vests in the association, unless the parties to the transfer have treated the transfer as ineffective.

(b) If, before [the effective date of this [act]], an interest in property was by terms of a

transfer purportedly transferred to an unincorporated nonprofit association but the interest was vested in one or more persons to hold the interest for members of the association, on or after [the effective date of this [act]] the persons, or their successors in interest, may transfer the interest to the association in its name, or the association may require that the interest be transferred to it in its name.]

**Legislative Note:** *This is an optional section and it may not be necessary to adopt it (or any one of the subsections) in a particular state. The initial common law rule was that a purported transfer of property to an unincorporated nonprofit association totally failed as the association was not a legal entity. If a state currently has that rule, it should adopt subsection (a). If, on the other hand, its rule is that title does not pass to the association in its name but passes instead to a fiduciary, such as its officers, to hold the property for the benefit of the members, a state should adopt subsection (b).*

*If a state has by statute made transfers effective to some classes of nonprofit associations but not all, it should probably adopt both subsections (a) and (b). On the other hand, if a state has made all transfers to all unincorporated nonprofit associations effective, it does not need section 30.*

### Comment

Section 30 brings to fruition the parties' expectations that previous law frustrated. Inasmuch as the common law did not consider a nonprofit association to be a legal entity, it could not acquire property. A gift of real or personal property thus failed. Reference to the transfer as "purportedly" made identifies the document of transfer as one not effective under the law. Subsection (a) gives effect to the gift. However, if parties were informed about the common law they may have treated the gift as ineffective. In that case, the final clause of subsection (a) provides that the gift does not become effective when this act takes effect. The unless clause would apply, for example, if the residual beneficiaries of the donor's will, knowing that the devise of Blackacre to the nonprofit association was ineffective under the law, continued to use Blackacre as their summer home with the approval and acquiescence of members and representatives of the nonprofit association.

**Subsection (a)** – Section 30 is not a retroactive rule. It applies to the facts existing when this act takes effect. At that time subsection (a) applies to a purported transfer of property that under the law of the jurisdiction could not be given effect at the time it was made. The first alternative belatedly makes it effective – when this act takes effect and not when made. The practical result is that when the purported transfer is effective, the transfer is subject to interests in the property that came into being in the interim. The nonprofit association's interest is subject, for example, to a tax or judgment lien that became effective in the interim. An intervening transfer by the initial transferor may simply be evidence that the "parties had treated the transfer as ineffective." If so, the purported transfer does not vest ownership in the nonprofit

association.

**Subsection (b)** – Some courts gave effect to a gift of property to a nonprofit association by determining that the gift lodged title in someone, often officers of the association, to hold the property in trust for the benefit of the nonprofit association’s members. Subsection (b) addresses this situation. When the act takes effect it authorizes the fiduciary to transfer the property to the nonprofit association. If the fiduciary is unwilling or reluctant, the nonprofit association may require the fiduciary to transfer the property to the nonprofit association. In either case, the nonprofit association will get a deed transferring the property to it which, in the case of real property, the nonprofit association may record.

Jurisdictions that have a statute like New York’s concerning grants of property by will have a problem that needs special attention. The New York statute provides that a grant by will of real or personal property to an unincorporated association is effective only if the association incorporates within three years after probate of the will. McKinney’s N.Y. Estates, Powers & Trust Law § 3-1.3 (1991). The grants by will that need attention are those that have not become effective by incorporation of the association and have not become ineffective by the running of the three year period. These grants seem entitled to the benefits of Section 30. If so, some modification of Section 30 may be required.

## **SECTION 31. MERGERS.**

(a) In this section:

(1) “Entity”:

(A) means a person that has:

(i) a legal existence separate from any person that has a right to vote or consent with respect to any of the entity’s internal affairs; 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 predominantly donative purpose or a charitable trust;

(iii) an association or relationship that is not described in

subparagraph (A) and is not a partnership solely by reason of [Section 202(c) of the Uniform Partnership Act (1997) (Last Amended 2013)] [Section 7 of the Uniform Partnership Act (1914)] or a similar provision of the law of another jurisdiction;

(iv) a decedent's estate; or

(v) a government or a governmental subdivision, agency, or instrumentality.

(2) "Merging entity" means an entity that is a party to a merger and exists immediately before the merger becomes effective.

(3) "Organic rules" means the public organic record and private organic rules of an entity.

(4) "Private organic rules" means the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all its equity owners or persons with the right to vote or consent with respect to any of its internal affairs, and are not part of its public organic record, if any.

(5) "Public organic record" means the record the filing of which by the [Secretary of State] forms an entity and any amendment to or restatement of that record.

(6) "Surviving entity" means the entity that continues in existence after or is created by a merger.

(b) An unincorporated nonprofit association may be a merging entity or surviving entity in a merger with any entity that is authorized by law to merge with an unincorporated nonprofit association.

(c) A merger involving an unincorporated nonprofit association is subject to the following rules:



(1) Each constituent entity shall comply with its governing law.

(2) Each party to the merger shall approve a plan of merger. The plan, which must be in a record, must include the following provisions:

(A) the name and form of each entity that is a party to the merger;

(B) the name and form of the surviving entity and, if the surviving entity is to be created by the merger, a statement to that effect;

(C) if the surviving entity is to be created by the merger, the surviving entity's organic rules that are proposed to be in a record;

(D) if the surviving entity is not to be created by the merger, any amendments to be made by the merger to the surviving entity's organic rules that are, or are proposed to be, in a record; and

(E) the terms and conditions of the merger, including the manner and basis for converting the interests in each merging entity into any combination of money, interests in the surviving entity, and other consideration except that the plan of merger may not permit members of an unincorporated nonprofit association to receive merger consideration if a distribution of such consideration would not be permitted in the absence of a merger under Sections 25 and 28.

(3) The plan of merger must be approved by the members of each unincorporated nonprofit association that is a merging entity. If a plan of merger would impose personal liability for an obligation of an entity on a member of an association that is a merging entity, the plan may not take effect unless it is approved in a record by the member.

(4) Subject to the contractual rights of third parties, after a plan of merger is approved and at any time before the merger is effective, a merging entity may amend the plan or

abandon the merger as provided in the plan, or except as otherwise prohibited in the plan, with the same consent as was required to approve the plan.

(5) Following approval of the plan, a merger under this section is effective:

(A) if a merging entity is required to give notice to or obtain the approval of a governmental agency or officer in order to be a party to a merger, when the notice has been given and the approval has been obtained; and

(B) if the surviving entity:

(i) is an unincorporated nonprofit association, as specified in the plan of merger and upon compliance by any merging entity that is not an association with any requirements, including any required filings in the [office of the Secretary of State], of the entity's governing statute; or

(ii) is not an unincorporated nonprofit association, as provided by the statute governing the surviving entity.

(d) When a merger becomes effective:

(1) the surviving entity continues or comes into existence;

(2) each merging entity that is not the surviving entity ceases to exist;

(3) all property of each merging entity vests in the surviving entity without transfer, reversion, or impairment;

(4) all debts, obligations, or other liabilities of each merging entity continue as debts, obligations, or other liabilities of the surviving entity;

(5) the name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(6) except as otherwise provided by law other than this [act], all the rights,

privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

(7) except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect;

(8) the merger does not affect the personal liability, if any, of a member or manager of a merging entity for a debt, obligation, or other liability incurred before the merger is effective; and

(9) a surviving entity that is not organized in this state is subject to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by a merging entity, if before the merger the merging entity was subject to suit in this state for the debt, obligation, or other liability.

(e) Property held for a charitable purpose under the law of this state by a merging entity immediately before a merger under this section becomes effective may not, as a result of the merger, be diverted from the objects for which it was donated, granted, or devised, unless, to the extent required by or pursuant to 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.

(f) A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance inures to the surviving entity if it:

(1) is made to a merging entity that is not the surviving entity; and

(2) takes effect or remains payable after the merger.

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

## **Comment**

This section authorizes a nonprofit association to merge into another nonprofit association or into another organization, assuming the law governing the other organization authorizes a merger with a nonprofit association; and then sets forth the requirements for the merger – the plan of merger (subsection (c)(2)); approval of the merger (subsections (c)(3) and (4)); compliance with all applicable laws (subsections (c)(1) and (5)); and the legal effect of the merger (subsection (d)). The requirements in this section are consistent with merger provisions of other business entity laws. The Uniform Limited Liability Act (2006) (Last Amended 2013) §§ 1021 through 1026 were used as a guide with the following modifications: (1) majority vs. unanimous vote for approval, and (2) no filing required if all the entities involved are unincorporated nonprofit associations.

Subsection (e) prevents property held in trust or for charitable purposes before the merger from being diverted from purposes as a result of the merger. Subsections (f) and (g) clarify the legal effect of a merger on bequests, etc. that were originally made to an entity that does not survive the merger. *Cf.* Model Entity Transactions Act (2007) (Last Amended 2013) § 104.

**SECTION 32. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 33. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

## **Comment**

This section responds to specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

**SECTION 34. SAVINGS CLAUSE.** This [act] does not affect an action commenced, proceeding brought, or right accrued before [the effective date of this [act]].

## Comment

Section 34 is adapted from Uniform Partnership Act (1997) (Last Amended 2013) § 1203. It continues the prior law after the effective date of this act with respect to (i) an “action commenced”; (ii) “proceeding brought”; and (iii) “right accrued.” But for this section the new law of this act would displace the old in some circumstances. The power of a new act to displace the old statute with respect to conduct occurring before the new act’s enactment is substantial. Millard H. Ruud, *The Savings Clause – Some Problems in Construction and Drafting*, 33 Tex. L. Rev. 285, 286-293 (1955). A court generally applies the law that exists at the time it acts.

Almost all states have general savings statutes, usually as a part of their statutory construction acts. These are often very broad. *See, e.g.*, Model Statutory Construction Act, Section 53. As this act is remedial, the more limited savings provisions in Section 34 are more appropriate than the broad savings provisions of the usual general savings clause. Section 34, and not a jurisdiction’s general savings clause, applies to the act.

**“Right accrued.”** It is not always clear whether an alleged right has “accrued.” Some courts have interpreted the phrase to mean that a “matured cause of action or legal authority to demand redress” exists. *Estates of Hoover v. Iowa Dept. of Social Services*, 299 Iowa 702, 251 N.W. 2d 529 (1977). In *Nielsen v. State of Wisconsin*, 258 Wis. 1110, 141 N.W. 2d 194 (1966), a landowner brought suit after the repeal of an act granting a landowner the right to recover from the state for damages to her land caused by the state’s failure to install necessary culverts and the like to prevent flooding. Before the act’s repeal the landowner’s land had been damaged by flooding caused by the state’s failures. The court held that the statutory saving of “rights of action accrued” saved her cause of action. In both of these cases, conduct that gave rise to a cause of action had occurred before the act was repealed. It is said that it is not enough that there is an inchoate right.

Apparently, there is no “accrued right” under a contract until there is a breach.

**“Action commenced” or “proceeding pending.”** The principal question is what is an “action” or “proceeding” for this purpose. “Action” refers to a judicial proceeding. “Proceeding” alone, especially when used with “action,” is broader and so includes administrative and other governmental proceedings. It has been given the broader meaning. For example, in *State ex rel. Carmean v. Board of Education of Hardin County*, 170 Ohio 2d 415, 165 N.E. 2d 918 (1960) a petition to transfer certain land from one school district to another filed before a change in the law was a “pending proceeding” to be decided under the old law. Similarly, a request for permission to petition for an election to consolidate school districts was held to be a “proceeding commenced” so that the substance and procedure of the old law, which was materially different from the new, was preserved. *Grant v. Norris*, 249 Iowa 236, 85 N.W. 2d 261 (1957).

**[SECTION 35. SEVERABILITY CLAUSE.]** If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other

provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

**Legislative Note:** *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

**SECTION 36. REPEALS.** The following are repealed:

(1) . . . .

(2) . . . .

(3) . . . .

#### **Comment**

Many states have a patchwork of law relating to nonprofit associations. Some laws apply to a specific kind of association, such as a denominational church or medical society. *See, e.g.*, California Corporations Code, Title 3, Unincorporated Associations, § 21200 (West 1991) (County and Regional Medical Societies); Minn. Stat. Ann. § 315.01 et seq. (West 1992) (religion societies). Other law deals with a very specific subjects, such as legal protection of an association's insignia. Some go beyond a subject's treatment in this act, such as the recently enacted charitable immunity and liability acts that relieve individuals acting for an association from liability for simple negligence.

In preparing a bill for the enactment of this act, careful attention should be given to determining the appropriate relationship of this act to existing statutes. It may be wise to repeal expressly certain laws and to specify that certain others are not repealed. While it is unusual to include a provision that certain statutes are not repealed, doing so in this situation will relieve courts of difficult questions of repeal by implication.

This act supersedes the Uniform Unincorporated Nonprofit Association Act (1996). A state that enacted the 1996 uniform act should, therefore, include its version of the 1996 uniform act in the list of statutes to be repealed.

**SECTION 37. EFFECTIVE DATE.** This [act] takes effect . . .

#### **Comment**

Unless a jurisdiction's usual effective date rule provides little time for affected parties to learn of a new law, a delayed effective date is probably not necessary.

This act provides a nonprofit association and its members with a legal structure that conforms to the expectations of many of them. Therefore, the need by nonprofit associations for additional time to revise procedures and forms to conform to a significant change in the law is

not necessary. However, this act materially changes the common law rules regarding third parties, particularly creditors of nonprofit associations. Anecdotal evidence suggests that many creditors place little reliance on their rights against members in extending credit. If they have any reservations about the creditworthiness of a nonprofit association they obtain guarantees from creditworthy members or insist on cash. To the extent that this is true, no change in credit policies is needed and so no extra planning time is needed.