

## Memorandum

**To: Harmonization Drafting Committee**

**From: Harry Haynsworth**

**Date: April 10, 2013**

**Re: April 29 Conference Call**

Strike and score copies of the UPA and ULPA showing the proposed changes from the 2011 Annual Meeting drafts of these two acts are attached. I have scheduled a conference call for Monday, April 29<sup>th</sup> 3:30-5:00 pm EDT to discuss 4 issues that were not fully resolved in our discussion of ULLCA and the changes in the UPA and ULPA that are highlighted below.

**A. ULLCA Carryover Issues.**

1. The use of the word “vote” in the acts. My notes from the February conference call indicate that “vote” should be eliminated from all the unincorporated acts because it is a corporate concept. I am exercising the Chair’s prerogative to request that this issue be reconsidered for the reasons set forth in the attached memo.
2. Section 105(c)(7). My notes indicate that several members of the Drafting Committee wanted to think about the phrase “relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law.” I think we agreed that “conduct involving” bad faith was correct. The unresolved concerns were with adding “or intentional” before misconduct, and substituting “knowing violation of law” for recklessness.
3. Section 105(c)(5). In his February 10<sup>th</sup> email to the Drafting Committee Bob Keatinge stated: “ULLCA (2011) §105(b)(sic)(5 ) demonstrates the problems created by the paternalistic approach to the act. The reporters and chairs are so interested in limiting contractual freedom that they have created a monster. It will be malpractice to try to organize an LLC under this act. We don’t know what the duty of loyalty is (409(b) simply says that it includes the duties listed therein, so there may be others which have not been defined) but we do know you can’t alter or eliminate any of those duties. I suppose ULLCA (2011) § 105(b)(5) also means that you cannot increase the duties, but I am not sure whether it means you can’t define the duties. This should keep the litigators busy. “ I think Bob wants us to restructure Section 105 to be more like the waiver of fiduciary duties provisions in the Delaware and Prototype LLC acts.”
4. Section 602(6)(B). This is another issue raised in Bob Keatinge’s February 10<sup>th</sup> email to the Committee: “If I understand the “sensible” change to Section 602(6)(B), one member can directly bring an expulsion action against another for conduct that will affect the :company’s affairs or a duty under 409 (which, while not encompassing all the duties that may exist, does list the duties of loyalty to accounting to the company, dealing with the company, refrain from competing with the company and speaks to the duty of care as arising in the conduct of the company’s activities). Even if there were to be an action by one member against another for something for which 801 provides, I don’t see the sense in including

unilateral expulsion (i.e., terminating the relationship between the allegedly wronging member and the company) as a direct action.” I think what Bob is suggesting is that the phrase on p.54, line 11 “or a member in a direct action under Section 801” should not have been added. This phrase has also been added to the equivalent sections of the UPA and ULPA; so any changes in Section 602(6) will also have to be made in those acts (and maybe in USTEPA and ULCAA, but I have not had a chance to review those acts).

**B. UPA and ULPA.** The following is a list of proposed changes in the UPA and ULPA that (1) were not previously discussed in the review of the Hub, META, ULLCA and UUNAA; (2) are harmonization changes that were discovered after the 2011 Annual Meeting; and (3) are true glitches that need to be corrected.

1. UPA Section 105(c)(7). This is a harmonization change from ULLCA Section 105 that was inadvertently omitted from the 2011 Annual Meeting draft. It is included in the list because it was already in ULLCA and was not one of the changes read at the 2011 Annual Meeting.
2. UPA Section 105(c)(12). This is a glitch that was only recently discovered.
3. UPA Section 111 (b). This, like paragraph 1, is an ULLCA harmonization change that was not read at the 2011 Annual Meeting.
4. UPA Section 401(k). The deletion of the phrase “and the approval of a transaction under [Article] 11” is really only a style change that harmonizes this subsection with the language in the equivalent sections of ULLCA and the ULPA.
5. UPA Section 407(b). This is another ULLCA harmonization change that was inadvertently omitted from the 2011 Annual Meeting draft. This subsection was in ULLCA and was not one of the provisions read at the 2011 Annual Meeting.
6. UPA Section 503(c). This is an additional harmonization change that is included in the list for the same reason as the changes in paragraphs 1, 3, and 5. It could be viewed as a substantive change because it changes the date of the accounting.
7. UPA Sections 1126(d)(4), 1136(d)(3), 1146(d)(3) and 1156(d)(3). This is yet another group of harmonization omission that should have been in the 2011 Annual Meeting draft of the UPA.
8. ULPA Section 404(c). The change in (1) is simply a style change. The change in (2) is new. It parallels Section 306(c) of the UPA. It was in the 2011 Annual Meeting Draft of the UPA but was inadvertently left out of the 2011 Annual Meeting draft of the ULPA.
9. ULPA Section 1101. This change was made because of the decision to recognize the series liability limitation of foreign unincorporated entities See Hub Section 1-501(3). The language here parallels ULLCA 1001(a)(3). Similar language is not made in Section 1001 of

the UPA because there are no existing state UPA statutes authorizing general partnership series.

If any member of the Drafting committee wants to add sections to this list, please get in touch with me before the April 29<sup>th</sup> conference call so I can communicate the additions to the full Committee.

I did not include clean drafts with comments of the UPA and ULPA for 2 reasons. The first is that the revised comments to the UPA have not yet been completed. The second reason is that getting through this list of changes will probably take the full 1 ½ hours of our conference call.

I will schedule a third conference call to discuss USTEA and ULCAA and carryover issues from the April 29<sup>th</sup> conference call. I propose to have your suggested changes in the revised comments, all of which will be sent to you when they are completed, processed by exchanges of letters or email.

Harry Haynsworth