

**To:** Randy Moes, President of IACA

**From:** Sarah Steinbeck, BOS Chair

**Date:** 14 March 2010

**Subject:** Report following NCCUSL drafting meeting on the Harmonization of Business Entity Acts

### **Executive Summary**

The meeting was held to continue the process of harmonizing the National Conference of Commissioners on Uniform State Laws' (NCCUSL) unincorporated business entity acts. This meeting was dedicated to reviewing the changes made to the Revised Uniform Limited Liability Company Act (2006) (RULLCA) to begin the process of harmonization. Provisions of the Business Organization Act were inserted where appropriate. A chart comparing provisions of RULLCA to the Uniform Statutory Trust Entity Act (2009) (USTEA) was reviewed to determine where additional changes to USTEAs would be necessary. The remainder of the meeting was spent reviewing the Revised Uniform Partnership Act (1997), which is the most widely-adopted uniform act of the business entity acts, for other changes that would be necessary. Several questions were raised regarding the filing offices' perspectives on proposed changes. These questions will be posted to the BOS list serve or will be discussed at the 2010 IACA Conference in May, as appropriate.

### **Background**

The Harmonization of Unincorporated Business Entity Acts drafting committee (Committee) of the National Conference of Commissioners on Uniform State Laws (NCCUSL) met March 11-14, 2010, to continue the Committee's work on harmonization of the unincorporated business entity acts. The acts covered by the committee's work are the:

- Revised Uniform Partnership Act (1997) (RUPA);
- Uniform Limited Partnership Act (2001) (ULPA);
- Revised Uniform Limited Liability Company Act (2006) (RULLCA);
- Uniform Limited Cooperative Act (2007) (ULCAA);
- Revised Unincorporated Nonprofit Association Act (2008) (RUUNAA); and
- Uniform Statutory Trust Entity Act (2009) (USTEA).

According to the May 3, 2006 report<sup>1</sup> of the Study Committee on an Omnibus Business Organization Code, the harmonization of the common language in the business entity acts is intended to focus on "(1) limited liability shield; (2) limitations on distributions and liability for unlawful distributions; (3) indemnification and limitations on liability of entity mergers; (4) dissolution and winding up; and (5) fiduciary duties." A separate committee drafted the "hub" (Hub) provisions of the Business Organization Act, which are generally viewed as the common filing provisions and those that cover the duties of the filing office. The Hub provisions have been reviewed by IACA at several conferences and can be found in the latest draft of the Business Organizations Act<sup>2</sup>.

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<sup>1</sup> The Report can be found at: [http://www.law.upenn.edu/bll/archives/ulc/oboc/committee\\_report3may2006.pdf](http://www.law.upenn.edu/bll/archives/ulc/oboc/committee_report3may2006.pdf)

<sup>2</sup> See [http://www.law.upenn.edu/bll/archives/ulc/oboc/2009\\_amdraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/oboc/2009_amdraft.pdf)

The meeting began by reviewing the changes that had been drafted to RULLCA. The Committee had previously decided that RULLCA would be used as the template for harmonizing the other unincorporated entity acts; therefore, changes to RULLCA will be incorporated into the other acts to the extent that such changes are feasible. The definitions (section 1-101) of “designated office”, “distribution”, and “transfer” were carefully considered. Provisions related to the following RULLCA sections were amended by using language from the Hub:

- name (section 1-108);
- reservation of name (section 1-109);
- filing requirements (section 1-205);
- effective time and date (section 1-205A);
- withdrawal of filed record before effectiveness (section 1-205B);
- correcting a filed record (section 1-206);
- duty to file (section 1-206A);
- certificates of good standing (section 1-208);
- annual reports (section 1-209);
- administrative dissolution (section 1-705);
- reinstatement (section 1-706);
- judicial review of denial of reinstatement (section 1-707); and
- foreign LLCs (section 1-801, 1-802, 1-802A, 1-806, 1-807, 1-809).

See below for specific topics of discussion related to role and duty of the filing office.

After the in-depth discussion of RULLCA, the Committee focused on comparing RULLCA to USTEА. USTEА is NCCUSL’s most recently approved business entity act; therefore, the Committee reviewed USTEА to determine if any provisions of USTEА should be used in the harmonization of the other unincorporated entity acts and whether USTEА contained provisions which could not be harmonized. See below for questions regarding USTEА that affect the filing office.

Following the comparison of USTEА and RULLCA, the Committee reviewed RUPA. RUPA has been adopted in more states than any other uniform business entity act. The initial question posed was whether the Committee wanted to include RUPA in the harmonization project. Consideration was given to the fact that RUPA has been widely adopted and changes to RUPA could potentially lead to different substantive partnership laws in the states that had adopted RUPA if not all of the states adopted the harmonizing changes. The Committee decided that RUPA should not be excluded from the harmonization project. Changes that had been made to RULLCA as a result of the prior day’s discussion were incorporated into the harmonization of RUPA. See below for questions regarding RUPA that affect the filing office.

## **RULLCA Discussions and Questions Related to the Filing Office**

### *Designated Office*

The first item of discussion related to the filing office involved the concept of “designated office”. RULLCA, as currently drafted, allows for a limited liability company (LLC) to provide the filing office with up to three different addresses: the principal address, the registered address, and the designated address. However, the Hub consolidated the possible addresses to only the principal address and the registered address. The Committee questioned how many states would be affected if the concept of “designated office” was removed. This question will either be

posted to the list serve or raised during the Day-to-Day Filing Issues session at the 2010 conference. Since the Hub and the Model Registered Agents Act (MoRAA) both removed the concept of “designated office”, the Committee decided to replace “designated office” with “registered office”.

### *Registered Agent*

The Committee discussed the incorporation of MoRAA and the Hub into provisions related to registered agents. Language from MoRAA was used to draft the sections of the Hub related to registered agents. There was some discussion regarding whether it was judicious to include the MoRAA language. The Committee questioned whether a state would adopt the harmonized RULLCA (or other act) but not the Hub or MoRAA. However, since the purpose of the Committee is to standardize language, the Committee decided to use MoRAA’s language as a template for registered agent provisions throughout the unincorporated entity acts. The committee determined that it would not be appropriate to include the commercial registered agent provisions in harmonized business entity acts.

### *Shelf LLCs and Half-Shelf LLCs*

Questions were raised regarding whether RULLCA should provide for shelf or half-shelf LLCs. A shelf LLC is an LLC that does not have members at the time the certificate of organization is filed with the filing office and does not have a time restriction on when the LLC must have one or more members. A half-shelf LLC is an LLC that does not have members at the time the certificate of organization is filed with the filing office, but which must have one or members within a certain time period (e.g., 90 days). Failure to deliver notice to the filing office that the LLC has one or more members by the end of the time period results in the certificate of organization lapsing and becoming void. RULLCA currently provides for half-shelf LLCs, and these provisions remained unchanged. The shelf concept affects the filing offices because the filing office must be able to provide the date of formation as part of the certificate of good standing. A shelf LLC is not formed until the date that the LLC provides notice to the filing office that the LLC has at least one member.

### *Withdrawal of Filed Record Before Effectiveness*

The draft of RULLCA that was submitted for review used the same language as the Hub for provisions related to withdrawing a filed record that had not yet become effective. The Committee discussed subsection (a), which stated, “The parties to a filed record may withdraw the record before it takes effect.” A concern was raised about how a record could be withdrawn if a party to the record died or was incapacitated and whether it was necessary to use the “parties to” language. The Committee decided to change subsection (a) to “A filed record may be withdrawn before it takes effect” and to recommend a corresponding change to the Hub.

### *Certificate of Good Standing*

After significant discussion, the Committee chose to remove one section and amend one section that were required in a certificate of good standing (for domestic LLCs) or certificate of registration (for foreign LLCs). The requirement that the certificate state “that there are no facts of record in the office of the [Secretary of State] to indicate that the entity has been dissolved” was amended. The next draft of the harmonized RULLCA will contain amended language which will require the certificate to state that no statement of dissolution is on file and that the

entity is not administratively dissolved. The Committee recommended that a similar change be made to the Hub. The Hub contained a requirement that the certificate include “other facts of record pertaining to the entity with the [Secretary of State] which the person requesting the certificate reasonably requests.” The Committee removed this requirement from RULLCA and recommended that it be removed from the Hub. The Committee had questions about what the states provide in a certificate of good standing, and I informed them that the states are not consistent, but the information contained in the Hub covers the most common items<sup>3</sup>. The Committee was very interested in the standardization of certificates of good standing. I encouraged them to join our discussion at the 2010 Austin Conference, and let them know that we had been working with our international members on the concept of certificates of good standing harmonization.

#### *Dissolution upon Expiration of a Period of Duration*

The Committee questioned whether filing offices would want the ability to administratively dissolve an entity upon the expiration of a period of duration stated in the entity’s statement of authority or other document filed on behalf of the entity. Discussion ranged from whether the filing office should have this authority, to how the filing office would determine if a period of duration had expired if the event triggering the expiration was anything other than a set calendar date. For example, if the entity’s period of duration expired on “the sale of X”, the filing office would, in most cases, be unable to determine if the entity’s period of duration had expired

#### *Filing Office’s Duty to “Serve” a Company and “Deliver” Notice*

The Committee questioned the use of the phrase “the [Secretary of State] shall . . . serve a copy on the company”. (Emphasis added.) They questioned whether the filing office should be required to comply with requirements regarding proper service of process, or if it would be more appropriate for the filing office to “deliver” notice. (Compare Hub section 1-511(b), “The [Secretary of State] may terminate the registration of a foreign filing entity . . . by filing a notice of termination . . . and by *delivering* a copy of the notice . . .” to Hub section 1-602(a), “If the [Secretary of State] determines that one or more grounds exist . . . for dissolving a domestic filing entity, the [Secretary of State] shall *serve* the entity . . . with notice in a record of the [Secretary of State’s] determination.”) (Emphasis added.) The Committee decided to change “delivering” to “sending” in section 806(b) of RULLCA. The use of the word “sending” clarifies that the filing office must send the notice, but failure to receive the notice does not prohibit the termination of authority.

#### *Incorporation of Hub Section 701*

The Committee voted to include section 701 of the Hub in the harmonized version of RULLCA.

### **USTEA/RULLCA Comparisons and Questions Related to the Filing Office**

#### *Designated Office*

As with RULLCA, references to “designated office” will be removed from USTEА.

#### *Renewal of Reserved Name*

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<sup>3</sup> Tim Poulin provided me with a document that contained an example of a certificate of good standing from each state. I think that the document may be useful to our membership, but it will be difficult to share until we have an area of the website that is restricted to members only.

USTEA is the only unincorporated entity act that contains a provision to renew a reservation of name. The other acts require the name reservation to be re-filed at the end of the name reservation's period of effectiveness. The Committee discussed whether to remove the renewal provision from the harmonized USTEAs, or whether to add a renewal provision to the other acts. The idea of adding a renewal provision elsewhere was not accepted, and no final determination was made regarding the elimination of the renewal provision from USTEAs.

## **RUPA Discussions and Questions Related to the Filing Office**

### *Designated Office*

As with RULLCA, references to "designated office" will be removed from RUPA.

### *Miscellaneous Partnership Filings*

The Committee questioned how the filing offices index miscellaneous partnership filings. These filings include statements of partnership authority, statements of denial, statements of dissociation, and statements of dissolution. A question was raised regarding the creation of a standard for indexing such filings. The Committee decided to not create a standard for the miscellaneous filings.

### *Chief Executive Office*

Similar to the discussion regarding "designated office", the Committee determined that references to "chief executive office" should be changed to "principal office".

### *Annual Report*

Language was added that states that information contained in an annual report that differs from the information on record with the filing office prior to filing the annual report will update the record and will serve the same purpose as a statement of change. Without this language, an entity would have to file an annual report that includes the updated registered agent information, but then would also have to file a statement of change to change the registered agent in order to properly update the entity's record. The Committee determined that this language should be added to the Hub.

### *Time Period for Reinstatement*

The Committee noted that the unincorporated acts differ on the time period for reinstatement following dissolution or revocation. The acts generally have either a two-year or five-year period during which the entity can reinstate. The Committee discussed the choice between a two-year and five-year period and the merits of an unlimited period for reinstatement. The final decision was to bracket the period for reinstatement (e.g., [within two year]).