

## **BUSINESS ORGANIZATIONS ACT**

### **Introduction**

On October 31, 2008, the National Conference of Commissioners on Uniform State Laws (NCCUSL) held a drafting committee meeting on the Business Organizations Act (the “Act”) to discuss the most recent draft. Beth Laliberte, Chair of the BOS Section, attended on behalf of IACA and this document summarizes the changes/issues arising from the NCCUSL meeting that are of interest to the IACA membership.

The Business Organizations Act is intended to be a “hub” that includes entity formation provisions common to the various entity types (e.g., fees, annual or biennial reporting requirements, registered agent requirements, etc.). The “hub” will be linked to entity specific laws or “spokes” that include provisions not common to the various entity types (e.g., the Model Business Corporation Act). A draft of the Act was reviewed and discussed during IACA’s annual conference in Salt Lake City. IACA members made suggestions and commented on various provisions in the Act, and the draft discussed at the NCCUSL meeting included revised language reflecting some of IACA’s comments and suggestions.

### **Summary of Changes/Issues of Interest to IACA**

#### **Article I; Part I**

##### **A. Definitions – Section 1-102**

1. The definition of “distribution” (section 1-102(4)) was deleted because the term is not used in the Act.
2. The existing definition of “electronic transmission or electronically transmitted” (section 1-102(7)) was deleted because the definition was initially deemed unnecessary and confusing. For example, the definition would include mailing a CD, which was not necessarily considered by the committee to constitute an “electronic transmission.” The discussion made it clear that some definition of these terms was desirable because it is important to establish what constitutes an electronic transmission to the filing office and when that transmission is considered delivered and/or received. The committee will review the language of the Uniform Electronic Transmissions Act and Article 9 (UCC) to determine a more suitable definition for the Act.
3. A new definition for “common law business trusts” was added.
4. The definition of “Entity” (section 1-102(8)) was revised to include a new subsection that would broadly include entities formed under other types of entity acts.
5. The term “quasi-governmental instrumentality” (section 1-102(8)(J)(vi)) was deleted because of its uncertain nature.

6. The language “meeting the requirements of Section 1-201” was deleted from the definition of “Entity Filing” (section 1-102(9)) because that definition was intended to include filings made with the filing office, but not necessarily satisfying the filing requirements.

7. The term “individual” (section 1-102(16)(J)) was changed to “person” and there was agreement that “person” should be used throughout the Act.

8. The term “organization” (section 1-102(20)) was changed to “formation” and there was agreement that “formation” should be used throughout the Act.

9. The term “creates” in the definition of “public organic record” (section 1-102(34)) was changed to “forms.” It was noted that because an LLP filing does not “form” the partnership, that the LLP filing does not constitute a public organic record.

10. It was agreed that the term “authorized” in the definition of “qualified foreign entity” (section 1-102(35)) should be changed to “registered” and that the term “registered” should be used throughout the Act.

11. A suggestion was made to include a definition for the terms “property” and “transfer” in the Act. A motion was made and passed to include a definition of “property.” A motion was made and passed to include the definition of “transfer” currently set forth in the Revised Uniform Limited Liability Company Act (“RULLCA”).

#### B. Delivery of Record – Section 1-104

1. The committee had a lengthy discussion regarding when an “electronic transmission” is actually “sent” to the filing office. It was decided that a definition of the term “electronic transmission,” which addresses when such a transmission is sent and received, is needed in the Act and that the reporter would examine UETA and Revised Article 9 (UCC) to draft a proposed definition.

The last sentence (the mailbox rule) was requested by IACA during its annual conference in Salt Lake City and will remain in the Act. The word “actually” was deleted from the sentence.

#### C. Powers of [Secretary of State] – Section 1-105

1. The language in this section was added in response to comments made during the IACA annual conference in Salt Lake City. The committee discussed the powers of the filing offices with respect to administering the Act. Several committee members raised concerns regarding the breadth of the language and felt that it granted the filing office more authority than necessary to administer the Act. Other committee members stated that they did not feel the language was necessary.

Beth Laliberte, on behalf of IACA, stated that IACA members requested this provision because statutory authority is required (in at least some jurisdictions) to adopt administrative rules. She also stated that rules are adopted by many states not just for fees but for other functions such as expedite service procedures, etc. The committee generally agreed that because IACA requested the language some variation of it should be included in the Act and the following language was agreed upon:

“The [Secretary of State] has the power to adopt rules and procedures reasonably necessary to perform the duties required of the [Secretary of State] by this Act.”

## **Article I; Part II**

### **D. Entity Filing Requirements – Section 1-201**

1. The language “in the office of the [Secretary of State]” was deleted from section 1-201(a)(1) as unnecessary because an entity filing is defined to include a filing submitted to the filing office.

2. Beth Laliberte, on behalf of IACA, suggested that some state laws may dictate a different method for handling the treatment of sensitive personal information contained in entity filings and that the requirement of section 1-201(b) may require action not permitted by state privacy laws. (For example, the Ohio Secretary of State is permitted to reject filings and is not required to redact sensitive information before filing the document unless it chooses to do so.) The committee was reluctant to bracket the language in this subsection but agreed to draft a legislative note suggesting that filing offices make sure this provision is consistent with existing privacy laws.

**Note: If your jurisdiction has a privacy law(s) in place that dictates the handling of filings containing sensitive personal information, that law should be considered before this section of the Act is adopted as currently drafted.**

3. Section 1-201(d) was deleted in its entirety as unnecessary. The committee felt that signature requirements are provided in the entity specific provisions (“spokes”).

### **E. Forms – Section 1-203**

1. The committee agreed to add language that clarifies that a cover sheet may be required for all filings, not just biennial/annual reports, as provided in 1-203(b).

2. There was a lengthy discussion regarding Section 1-203, which prohibits the filing offices from prescribing forms except for annual and biennial reports. Beth Laliberte, on behalf of IACA, stated that many of the filing offices prescribe forms (1) to make the processing of complex filings easier for employees; (2) to allow for the efficient processing of the high volume of filings we receive; and (3) to permit us to request information that assists with the filing process (such as the organization’s

registration/charter number). The committee declined to remove the prohibition on prescribed forms.

**Note: Filing offices that wish to use prescribed forms (or whose laws require that filings be made on prescribed forms) should revise this section to provide that filings shall be made on prescribed forms. Corresponding changes to Section 1-207 should be made to reflect that the filing office may reject a filing not made on a prescribed form.**

F. Withdrawal of Filing Before Effectiveness – Section 1-205

1. As a result of comments made during the IACA annual conference in Salt Lake City, the term “entity filing” (which means a record submitted for filing) was replaced with “filed record” (which means a record accepted for filing) throughout this section. The section heading was changed to insert the word “Entity” prior to “Filing.”

G. Duty of [Secretary of State] to File;  
Remedy For [Secretary of State Refusal to File] – Section 1-207

1. There was a discussion regarding the time of recording in the filing office as set forth in 1-207(b). At the IACA conference in Salt Lake City, BOS members suggested that the filing is recorded by the filing office at the date and time of its “filing” by the filing office (i.e., processing) rather than the date and time of its “delivery” to the filing office. The membership felt that the time of delivery is not something that is tracked by the filing offices, and that a filing may not be recorded by the filing office for several days following the date of delivery (e.g., rejected filings would not be deemed recorded because they were never filed even though they were delivered).

There was disagreement among the committee members regarding the use of “filing” or “delivery” in this section. Some committee members felt that the date and time of “delivery” is the date a filing should receive but others disagreed and felt that only when a filing is actually accepted and processed by the filing office should it be deemed recorded. Garth Jacobson pointed out that the use of the term “delivery” is problematic when expedite services are considered. (For example, if a filing is delivered on Monday for regular processing (with a processing time of three days) and an expedited filing is made on Tuesday (for same day filing) using the same name, the expedited filing will be processed first and receive the name even though the Monday filing was “delivered” and therefore deemed “recorded” on Monday. (**Note:** this example is not how expedite service works in all jurisdictions).

Several meeting attendees raised the issue of electronic filing and wanted to be sure it is clear when an electronic filing is deemed to be delivered to the filing office. It was agreed that UETA and Article 9 would be examined to provide a definition of electronic transmission that would address this issue.

The committee took a vote on the use of “filing” versus “delivery” in Section 1-207 and the use of “delivery” was approved.

**Note: As stated during the drafting committee meeting and summarized above, the use of the term delivery in this section is potentially problematic for filing offices.**

2. Several committee members and attendees raised concerns regarding the remedy provided in section 1-207(c) that would allow a filer to re-submit a rejected filing with an attorney’s opinion. Given the number of objections to the provision, a motion was made and passed to remove all but the first sentence of the section with little discussion.

**Note: It is suggested that you consider expanding the number of days the filing office has to reject a filing from the five business days provided in this draft (in brackets) to meet your filing office needs.**

#### H. Delivery by [Secretary of State] – Section 1-211

1. During the IACA annual conference in Salt Lake City it was suggested that section 1-211 be changed to provide for delivery via web posting for those jurisdictions that wish to deliver notices or other information via the web rather than mail. The definition of “delivery” will include electronic transmission and that definition is expected to cover things such as web posting.

#### I. Fees – Section 1-213

1. Section 1-213(c) was changed to read as follows:

“The withdrawal of an entity filing before effectiveness under section 1-205 or the correction of an entity filing under section 1-206 does not entitle the person delivering the filing to a refund of previously paid filing fees.”

### **Article I; Part III**

#### J. Permitted Names – Section 1-301

1. Subsection (f) was deleted from section 1-301 after some discussion that filing offices may not want to be in the business of deciding when filings contain “obscene or scandalous” language or misrepresent a government affiliation. In response to a suggestion that filing offices would have no authority to reject an otherwise valid filing without this provision, the words “insert prohibited or limited words” were reinserted in brackets in subsection (e).

**Note: Filing offices should include any and all prohibited words or other name limitations in subsection (e). Without such language, section 1-207 will require filing offices to accept filings even if the language is considered obscene.**

K. Reservation of Name – Section 1-303

1. The committee considered and made a conscious decision to leave out a name reservation renewal procedure.

**Note: If the filing office currently permits and wishes to accept the renewal of name reservations, this provision should be revised to include the renewal procedure.**

L. Registration of Name – Section 1-304

1. IACA's suggestion to revise the language in section 1-304(c) was accepted and is reflected in the draft.

**Article I; Part V**

M. Governing Law – Section 1-501

1. Language will be drafted and inserted into section 1-501 to ensure the protection of liability shields for series LLCs.

N. Effect of Failure to Register to do Business in this State – Section 1-502

1. There was a lengthy discussion regarding whether the Act should require a foreign entity to register prior to doing business in a jurisdiction. It was suggested that the jurisdictions need this requirement for business regulation, service of process and so that the state tax departments may enforce the tax laws. The committee added the requirement in light of other additions made to the Act to protect foreign entities (see new subsection (e)).

A new subsection (a) was added that reads: "A foreign filing entity or foreign limited liability partnership may not do business in this state until it registers with the [secretary of state]."

Subsection (b) was changed to read as follows: "A foreign filing entity or foreign limited liability partnership doing business in this state may not maintain an action or proceeding in this state unless it has registered to do business in this state.

2. A new subsection (e) will be drafted to make it clear that the protections afforded by 1-501 (in a section yet to be drafted) for series LLCs will apply even if a foreign entity fails to register as required.

3. A new subsection (f) will be drafted to state that conducting business without registering will not preclude a foreign entity from later registering with the state.

O. Amendment of Foreign Registration Statement – Section 1-504

1. Per Garth Jacobson’s suggestion and IACA’s comments during the Salt Lake City annual conference, subsection (a) will be revised to delete the itemized list and provide that an amendment is required if anything contained in the original statement changes.

P. Termination of Registration – Section 1-511

1. The words “due to or collected by” were changed to “required to be paid to” in Subsection (a)(1) to ensure that only those payments the filing office would be aware of were included.

2. Subsection (a)(2) was changed to read as follows: “deliver, within no later than [60 days] after the due date, its [annual] [biennial] report, required by section \_\_\_\_\_; or”

Q. Cancellation of Registration Statement – Section 1-512

1. This section was deleted in its entirety as duplicative of the withdrawal and termination sections.

R. Action by [Attorney General] – Section 1-513

**Note: This section was not changed during the committee meeting. It should be noted that many jurisdictions provide for much broader power on the part of the attorney general. For example, in some states, the attorney general’s office may seek disgorgement of profits from a foreign corporation that fails to properly register with the secretary of state’s office. It did not seem appropriate to address the potential authority of jurisdictions’ attorneys general on behalf of the filing offices. Filing offices should consider what powers their attorney general (or other enforcement authority) may currently have (or wish to have) and make sure to include those powers in this section if desired.**

**Article I; Part VI**

S. Reinstatement – Section 1-603

1. The committee agreed to add language to section 1-603(a) requiring the entity to pay all fees due to the filing office (including any fees accruing during the dissolution) in order to be reinstated.

**Note: The committee was reluctant to discuss the addition of an interest penalty on any past due fees. If your office does (or wishes to) impose an interest penalty on past due fees that must be paid for reinstatement, that penalty should be added to this section.**

## **Conclusion**

Most of the suggestions and comments made by IACA during the annual meeting in Salt Lake City, Utah regarding the Act were addressed/included in the draft discussed during the October 31st meeting. A few areas of concern remain, as noted above.