

**Report of the Study Committee on an Omnibus
Business Organizations Code**

I. Background

The Study Committee was authorized in 2002. The Committee's charge, contained in the Executive Committee resolution approving its creation was as follows:

The Study Committee's charge is to investigate the feasibility of a Business Organization Code that would include both profit and not-for-profit, corporate and non-corporate business organizations. The study should include a survey of business organization forms, statutes, and regulations in other countries. The Committee shall file a written report with the Scope and Program Committee on or before May 31, 2004, containing recommendations with respect to the following issues:

1. Whether a drafting project of this nature should be undertaken; and if so
2. What types of organizations should be included;
3. What format and structure should this code have, e.g., an article with provisions that are common to all the covered organizations and separate articles for each type of organization;
4. Whether the number of business entity forms should be reduced, e.g., one corporate form, one non-corporate form, and if included, one non-profit form, or alternatively, one form for closely-held businesses and one form for publicly-traded businesses;
5. The impact of this Code on Model and Uniform business entity acts that are already promulgated and on existing business entities formed under these existing statutes;
6. The impact of this Code on other business organization drafting projects that are underway at the time this project begins;
7. How to organize the drafting committee in a way that several different drafting projects can be undertaken simultaneously (e.g., a subcommittee assigned the task of drafting the common provisions and separate drafting subcommittees for each type of organization included in the Code);

The Study Committee held an all-day meeting in Austin, Texas on January 21, 2006. Commissioner Harriet Lansing of Minnesota on behalf of NCCUSL and William Clark of Pennsylvania on behalf of the ABA were the co-chairs of the Study Committee and Professor Robert Hamilton of the University of Texas at Austin School of Law and Commissioner Harry Haynsworth of Minnesota were appointed as the co-reporters. Altogether 12 commissioners, 12

representatives from the American Bar Association Business Law Section, two representatives from the American Bar Association Real Property, Probate and Trust Section, and four observers, three of whom are associated with the International Association of Commercial Administrators (IACA) attended the Austin meeting. The remarks made at the meeting were recorded on audiotape and a transcript of the audiotape is available.

Materials describing the enactment history of the various uniform and model for-profit and non-profit entity statutes in the United States, entity filing statistics, and proposals to eliminate one or more entities and to consolidate existing entity laws both in the United States, the European Community countries and elsewhere were distributed to the Study Committee members prior to the meeting. A copy of these materials is included in the Appendix.

Presentations on the Texas Business Organizations Code, which is effective for all new entities formed after December 31, 2005 and for all entities as of January 1, 2010, the Pennsylvania entity law code created in 1972 and Article 90 of the Colorado Statutes Annotated which contains seven sets of harmonized provisions that apply to all Colorado entities, were made at the January 21 meeting. They are the three most fully developed efforts to consolidate and harmonize American entity laws. Detailed discussions of the Texas, Pennsylvania and Colorado Codes are also in the Appendix. Alabama has been working on a consolidation project similar in scope and format to the Texas Business Organizations Code for several years. It is called the Alabama Business and Nonprofit Entity Code. It is scheduled to be introduced in the 2007 Alabama Legislative Session. There are currently no articles or published outlines on the Alabama Code, but a draft of this Code is available through the Alabama Law Institute.

The number of different types of for-profit and non-profit entities has increased substantially in the past two decades. NCCUSL has promulgated several revisions of older uniform acts governing unincorporated associations and has also recently promulgated or has in various stages of completion uniform acts covering the newer types of unincorporated entities; and the American Bar Association Business Law Section has promulgated and periodically updated model statutes for both for-profit and non-profit corporations. The enactment record of these uniform and model acts to date has been uneven.

The Uniform Partnership Act (1997) has now been adopted in 36 jurisdictions. The remaining jurisdictions have the 1914 version of the UPA. All of the UPA (1914) states have adopted limited liability partnership provisions and many have added conversion and merger provisions. The Uniform Limited Partnership Act (2001) has been adopted in 6 states. Most of the other states have the 1985 version of the ULPA. The Uniform Limited Liability Act (1996) has been adopted in 9 states. With the exception of Delaware, which has an LLC statute that is quite distinctive, most of the other states have statutes that started out as first-generation tax bullet-proof statutes and have been amended many times as the LLC tax and entity law has developed. The ABA Prototype LLC Act has been an influential resource for the various amendments by the non-uniform act states. The Revised Uniform Limited Liability Company Act is nearing completion. Approval by NCCUSL is expected in the summer of 2006 and, assuming there are no serious objections to the Act, it will be approved by the ABA House of Delegates in February, 2007. A concentrated effort to get it widely adopted will probably begin with the 2008 state legislative session.

The Uniform Unincorporated Nonprofit Association Act (1996) has been adopted in 11 states. The statutory framework governing unincorporated nonprofit associations varies greatly across the country. Only a few states, most notably California, have enacted modern statutes for these entities. In 2005, the executive Committee of the NCCUSL decided to undertake a revisions of UUNAA as part of a joint drafting project with the Uniform Law Conference of Canada and the equivalent law reform conference in Mexico. The name of this undertaking is the Project to Create a Harmonized Legal Framework for Unincorporated Nonprofit Associations in North America. The first meeting of this joint drafting committee was held in March 2006 in Portland, Oregon. It is not possible at this time to predict when this revision will be ready for final approval.

The Model Entity Transactions Act (META) was approved by NCCUSL at the 2005 Annual Meeting. Several entities within the ABA are currently reviewing this Act. META authorizes all types of entities to engage in various types of restructuring transactions (mergers, interest exchanges, conversions, domestications and divisions). It is anticipated that it will be introduced in state legislatures beginning in 2007. The Model Registered Agents Act, which like META is intended to apply to all types of entities, will be on the agenda for final approval at the 2006 NCCUSL annual meeting.

Two other NCCUSL projects dealing with business entities are the Uniform Cooperative Associations Act (formerly known as the Uniform Agricultural and Agricultural Related Cooperatives Act) and the Uniform Statutory Trust Act (formerly known as the Uniform Business Trust Act.) These Acts will probably not be ready for final approval until 2007 or 2008. There are very few modern state statutes in either of these areas.

With respect to corporations, all or substantially all of the Model Business Corporation Act of 1984 (MBCA) has been adopted in 26 states. Another 4 have the 1969 version of the MBCA. A sampling of the corporation codes of the MBCA states indicates that, for the most part, these states enacted the MBCA (1984) with the amendments to it that had been approved at the time it was adopted, but they have not updated their corporate codes to incorporate all of the subsequent MBCA amendments. Several states, however, have adopted some of the amendments to the MBCA. South Carolina, for example, which adopted the MBCA in 1989, recently adopted the conversion provisions in Chapter 9 of the MBCA approved in 2002. It has not, however, enacted any of the other amendments approved since 1989. There have been 14 separate sets of amendments approved since 1984; eight since 1999. Only three states, Hawaii, Maine, and Massachusetts have enacted the MBCA since 1999. The ABA Corporate Laws Committee has several MBCA amendment projects in various stages of completion.

The original Model Nonprofit Corporation Act has been adopted by most states. A revised version of the MNCA promulgated in the 1980s has not been widely adopted. A major revision of the MNCA is underway and is expected to be completed in a year or so.

II. Recommendations

The Study Committee's recommendations in this Report will be organized around the 7 questions set forth in the charge to the Committee. An 8th Section addresses issues that are

raised in the NCCUSL Project Proposal Guidelines and Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts.

1. Drafting Project of This Nature Should Be Undertaken

The Study Committee recommends that the drafting project outlined in Section 3 be approved and that the drafting committee be appointed as expeditiously as possible.

2. The Types of Organization That Should Be Included?

The proposed code should include all the for-profit and non-profit entity statutes that have been adopted on a widespread basis throughout the country. The model and uniform acts that would be incorporated into the code are:

Model Business Corporation Act (MBCA)
Model Nonprofit Corporation Act (MNCA)
Revised Uniform Partnership Act (RUPA)
Uniform Limited Partnership Act (2001) (ULPA 2001)
Revised Uniform Limited Liability Company Act (Re-ULLCA)
Uniform Unincorporated Nonprofit Associations Act (UUNAA)
Uniform Cooperative Associations Act (UCAA)
Uniform Statutory Trust Act (USTA)

In addition, the Model Entity Transaction Act (META) and the Model Registered Agents Act (MRAA) should be incorporated into the proposed code.

Many states have other entity statutes. Texas and Alabama, for example, have special statutes for Real Estate Investment Trusts. Many states have separate statutes for various types of unincorporated entities, such as churches or fraternal benefit associations. Some states also have separate statutes that govern entities that practice various professions. A few states still have very antiquated statutes covering banks, insurance companies, public utilities and development companies. These statutes differ greatly from state to state. Because of the lack of uniformity and the great variance in the types of entities governed by these special entity statutes, it is impossible to include them in the list of existing acts that will be dealt with directly by the proposed Omnibus Code. Nevertheless, the Omnibus Code should be designed so that these special entity statutes can be included in the Code when it is adopted by a particular state. The co-location of these special entity statutes will be particularly important where the special entity statute is linked into one of the state's major entity statutes. A legislative note in the Omnibus Code should point out the importance of reviewing these special entity statutes and determining whether to delete those that are obsolete or to include them within the Omnibus Code. The Legislative Note should also specify what types of amendments will be necessary in those cases where the state decides to include the special statutes in the Omnibus Code.

3. The Format and Structure of the Proposed Code.

The metaphor that perhaps best describes the proposed code is what is sometimes referred to as a hub and spoke format where the hub contains provisions that are common to all of the various entities and the spokes would be the existing entity statutes. A second metaphor is

to picture the proposed code as a series of interrelated articles like the Uniform Commercial Code (UCC) containing a core article like UCC Article 1, with common definitions and other basic common concepts, and the various entity statutes, which are interrelated in a manner similar to UCC Articles 2-9. Both of these images produce the same end result: a nexus of sections that provide a basic infrastructure for all the various entities, which are, in effect, plugged into the core.

There was a strong consensus that the hub contain only essential common provisions and that most of the provisions in the existing entity statutes remain in effect, even though this will result in duplication of provisions that could theoretically be centralized. The rationale for this position is that practicing lawyers are used to looking at each separate self-contained entity statute and will find it very confusing to have to go back and forth between the spokes and the hub. This was the principal criticism of the Texas Business Organizations Code, which contains an enormous number of centralized provisions in 12 chapters of the hub that apply to all or substantially all of the entities covered by that Code. The Study Committee recommended that the hub of the Omnibus Code cover the following topics: (1) common definitions; (2) the mechanics of filings (e.g. what constitutes a filing and the legal effect of a filing); (3) names of entities, registered agents, and registered offices; (4) qualification of foreign entities; (5) administrative powers of the Secretary of State (annual reports, filing officer responsibilities and administrative dissolution); and (6) the META provisions on merger, interest exchanges, conversions, domestications and divisions. Any inconsistent provisions in the existing entity statutes would be amended or repealed at the time the Omnibus Code is adopted.¹

The Study Committee also concluded that any attempt to shorten the entire Code by applying a linkage principal should not be undertaken. Delaware, for example, has a limited number of statutory provisions that apply to cooperatives and nonprofit corporations and then, for each, has a general provision stating that except for the application of these special provisions, the Delaware Business Corporation Act applies. Until ULPA (2001) the Uniform Limited Partnership Act was linked to the UPA (1914). The problem with linkage is the uncertainty of determining which statute applies to a particular transaction. This was the reason why the decision was made in ULPA (2001) to abandon linkage with the general partnership act altogether and to make the new Uniform Limited Partnership Act completely self-contained.

The Study Committee also recommended that as part of the Omnibus Code project, an effort should be made to attempt to harmonize common language for both corporate and unincorporated entities with respect to a limited number of subjects: (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.

In determining whether harmonization is possible, the first step will be to analyze the underlying policy considerations in each of these subjects for all of the entities included in the proposed code. If the drafting committee concludes that the policies are similar, then an attempt to harmonize the language in the various entities with respect to that subject will be undertaken.

¹ Legislative Notes in the Omnibus Code would point out what sections of the applicable model and uniform acts need to be amended or repealed.

If the policies for one or more of the entities are different, it may still be possible to draft common language for those entities that have similar underlying policies and appropriate commentary could explain why the language for the other entities is different.

It may prove to be impossible to achieve complete harmonization on all of these topics. Fiduciary duties might be a good example. The fiduciary duty provisions in Re-ULLCA, for example, are quite different from UPA (1997) and ULPA (2001). Moreover, there are substantial differences between the MBCA and MNCA fiduciary duty provisions, which are conceptually quite similar, and all of the uniform unincorporated entity statutes. If analysis indicates significant policy differences between the corporate and unincorporated fiduciary duty provisions, it may, nevertheless, be possible to achieve harmonized fiduciary duty provisions in all the uniform unincorporated entity acts.

Another possibility for harmonization in the uniform unincorporated acts is the charging order provisions. This is another case where the uniform unincorporated association acts dealing with the same set of issues contain different language. Some of the differences are merely stylistic, but others represent changes that resulted from increased analysis and focus on particular problems. The charging order provisions in Re-ULLCA are significantly better than what is contained in UPA (1997) and ULPA (2001). There is no apparent policy reason why all three acts should not be identical.

Discretion to increase or decrease the list of topics for harmonization should be included as part of the charge to the Drafting Committee.

The work products of the harmonization projects would be proposed as amendments to the various entity statutes covered by the Omnibus Code. In other words, they would become part of the spokes rather than the hub and would have to be approved in the same manner as other amendments to the various uniform and model acts.

4. Whether the Number of Business Entity Forms Should Be Reduced.

The consensus (but not unanimous) position on this issue was that any attempt to do so would be impractical and would make the proposed Omnibus Code unenactable. One member of the Study Committee proposed, for example, that because of the popularity of limited liability companies, there was really no longer a need for limited partnerships. Most members of the Study Committee rejected this position for two reasons: (1) over 50,000 new limited partnerships have been formed in each of the three most recent years for which filing statistics are available (2002-2004); and (2) there are at least 850,000 existing active limited partnerships which need a governing statutory framework and to exclude such a large group of entities from the Omnibus Code would be antithetical to the basic purpose of having such a Code.

A related question addressed by the Study Committee, although not listed in the Committee's charge, was whether the Omnibus Code should create any new types of entities. The answer to this was "no." If a new type of entity is invented in the future and gains traction in the states, however, the Committee was open to the possibility that it might be brought into the Omnibus Code; but no one thought this was likely to occur in the foreseeable future. Practitioners are currently overwhelmed by the proliferations of existing types of entities, all the

different statutes that govern them, and the differences, and in many cases inconsistencies between similar concepts, in all these statutes.

5. **The Impact of the Omnibus Code on Existing Entity Acts and On Existing Business Entities.**

As was pointed out in 3 above, the proposed code would accommodate all the existing for-profit and non-profit model and uniform entity acts. The proposed code would operate as a junction box or umbrella and all of the existing entity statutes would, in effect, plug into it. The proposed Code would contain the necessary amendments and repealers so that the existing model and uniform entity statutes can "fit" into the umbrella smoothly.

Since it is contemplated that there will not be a large number of major substantive changes in the various existing model and uniform entity statutes, the effect on existing entities created before the enactment of the code should not be terribly significant. Nevertheless, to accommodate concerns about the impact on existing entities it may be desirable that the Code have a two-tiered effective date. The first, which should be a year or two after the Code's enactment, would apply the code to all entities created after that date. This would provide sufficient time for lawyers and their clients to become familiar with the new code. The second, which could be two or more years after the first, would make the Code applicable to all entities formed before the first effective date. This should provide ample time for existing entities to make whatever adjustments they may need to make. Moreover, a provision allowing entities formed before the first effective date to opt into the new code before the second effective date should also be included. The device of phased effective dates with an opt-in provision has been used in many revisions to existing uniform unincorporated association acts to minimize transition problems.

6. **The Impact of the Code on Other Pending Business Organization Drafting Projects.**

There are five uniform unincorporated entity act drafting projects that will not be completed at the time this Report is submitted to Scope and Program: Re-ULLCA, Revised UUNAA, UCAA, USTA and MRAA. Re-ULLCA and MRAA are expected to receive second reading approval at the 2006 NCCUSL Annual Meeting. The other three are expected to be completed in the next couple of years. A new edition of the MNCA is nearing completion; and the MBCA is constantly being revised. All of these acts with all approved amendments will be included in the new code.

7. **Drafting Committee Organization.**

There was consensus on two points. The first is the desirability of having this project conducted as a joint project between NCCUSL and the American Bar Association under an arrangement similar to what was done with META. NCCUSL has traditionally drafted acts governing unincorporated entities and the ABA Business Law Section has traditionally drafted corporate entity statutes (NCCUSL promulgated a uniform business corporation act in 1928, but it was not widely adopted and many years ago was removed from the list of approved acts). Since the proposed code will cover both corporate and unincorporated entities, as does META, it

is appropriate to have both organizations participate in this project on a joint venture basis. Second, the hub portion of the proposed code should be completed before the harmonization projects described in Section 3 are undertaken.

8. Additional Issues Raised by the NCCUSL Project Proposal Guidelines and Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts.

a) Changes in federal law or regulations. The proposed code would deal exclusively with existing state for-profit and non-profit entity acts. Therefore, federal law and regulations will not be impacted by the proposed code.

b) Criteria for Conference Acts. An Omnibus Code, drafted in accordance with the recommendations in 3, will conform to the criteria established by NCCUSL. It will meet a practical, perceived need for a single code that will (1) include all of the existing major for-profit and non-profit entities, and (2) modernize and harmonize, to the greatest extent feasible, the various entity statutes. Certainly such a code will promote better understanding of the various types of entities, reduce transaction and compliance costs caused by confusing and unnecessary inconsistencies between entity statutes, and enhance interstate commerce by for-profit and non-profit organizations. Several states already have enacted a consolidated code similar to that recommended in this Report and others are studying the concept. There is a reasonable probability that once promulgated, the code would be enacted into law by a substantial number of jurisdictions. The most likely enactment states will be those that have enacted all or at least most of the uniform and model acts covered by the Code at the time of its promulgation. Potential enactment will be enhanced, therefore, by a concerted effort to get more widespread adoption all the uniform and model entity acts before the Omnibus Code is completed.

Moreover, since the proposed code only covers well-established types of entities, it should not be controversial on the grounds that it is entirely a novel concept or because of serious disparities in social, economic or political policies or philosophies among the states. There may well be some resistance to the proposed code by business lawyers who view any change, especially those that require them to learn new concepts or new ways to research the law with suspicion. This resistance should not, however, be any different from that encountered with projects such as the UCC, the Uniform Probate Code or the Uniform Trust Code.

c) Designation of the Code as Uniform or Model. This is, of course, an Executive Committee decision. One possibility is to defer a decision on this issue and initially to designate the drafting committee as the "Special Committee on the Omnibus Business Organizations Code" and to have the drafts circulated as "Uniform Law Commission's Omnibus Business Organizations Code." See paragraph 2 (a) of the Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts.

d) Identity of groups interested in the subject matter, and assessment of support/opposition. The organizations that have the most direct interest in the proposed code are: the ABA Business Law section (which has numerous committees with specialized interest and expertise in business entity law), Real Property Probate and Trust Law Section and Tax

Section; IACA, the national professional association for filing officers; CT Corporation and similar organizations that deal with registered agents and qualifications of foreign entities; and state bar associations business law sections.

e) Availability of financial support. This project will be a major undertaking that will probably require several years to complete. Because of the large number of individuals that will be involved in the drafting of the proposed Code, the expenses of each drafting committee meeting will be larger than the usual NCCUSL project. Outside funding for these expenses would be very desirable. The most logical source for these funds is the American Bar Association, especially if this is a joint NCCUSL/ABA project.

NCCUSL traditionally only covers the travel expenses of commissioners. Several members of the Study Committee, including ABA representatives, pointed out that they receive no reimbursement or only limited reimbursement of their meeting expenses. Having an understanding that the ABA and all other organizations that appoint representatives to the Code drafting committee reimburse reasonable travel expenses of their representatives would be appropriate.