

ALVIN A. JAEGER
SECRETARY OF STATE

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PHONE (701) 328-2900
FAX (701) 328-2992

E-MAIL sos@nd.gov

SECRETARY OF STATE
STATE OF NORTH DAKOTA
600 EAST BOULEVARD AVENUE DEPT 108
BISMARCK ND 58505-0500

July 26, 2011

TO: Senator Dave Nething, Chairman, and Members of the Judiciary Committee

FR: Al Jaeger, Secretary of State

RE: Revised Uniform Limited Liability Company (LLC) Act

During its meeting on May 10, 2010, I provided the committee with testimony related to the research that had been done related to the implementation of the Uniform LLC act in the various states. To it, I added the recommendations of William L. Guy III, representing the State Bar Association, and ours from the Secretary of State's office. I have attached a copy of that testimony and a copy of the minutes from that meeting. It was recommended by the committee in that meeting that the study be continued into the next biennium (2011/2013) and that was accomplished with the adoption of HCR 3011 by the 2011 Legislative Assembly.

In some respects, not much has changed. Some of the same concerns about the Act cited in 2010 still exist. Because of those concerns being raised in several states, it was our understanding last year that they would be addressed by the Uniform Law Commission. However, we could not find any evidence that the Act has been revisited by them. That is, unless the legislators on this committee who are members of the Uniform Law Commission know differently.

To date, the Act has been adopted in six states albeit with considerable amendments being made to the Act from the version recommended by the Uniform Law Commission. Those states are Iowa, Idaho, Nebraska, District of Columbia, Utah, and Wyoming.

Colorado and Hawaii decided not to introduce the Act. It was defeated in Indiana and Montana. During 2011, the Act was introduced in California, Kansas, New Jersey, and Minnesota. It has not been passed in any of those states.

In Minnesota, the Act did not make it out of committee because of concerns that had been raised about it. Mr. Guy recently learned from the chair of the Minnesota Uniform LLC Act Drafting Task Force that they are working on changes to the Act with the goal of having an acceptable bill draft ready for introduction early in the 2012 Minnesota legislative session.

Our state's Limited Liability Company Act was adopted in 1993. In each session since then, the law has been updated as part of the comprehensive business bill introduced in each session and co-sponsored by the respective chairman of the Senate and House Judiciary Committees. The updates have followed action taken in the State of Minnesota. Therefore, our recommendation is to wait to see the results of the efforts of the Minnesota drafting task force. They should be known before North Dakota's 2013 legislative session.

As it is, what currently exists in North Dakota law appears to be working very well for the state's business community. As of July 25, 2011, the Secretary of State's office had 10,222 active domestic limited liability companies on record and 5,424 foreign limited liability companies authorized to do business in North Dakota.

This particular business structure has been a very popular selection by businesses outnumbering new corporation charters by two to one. Therefore, the same counsel provided by Mr. Guy on May 6, 2010, still appears to be appropriate. That is, "This legislation is simply too important to be enacted without careful consideration."

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

JUDICIARY COMMITTEE

Monday, May 10, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Chris Griffin, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Chris Griffin, Lois Delmore, Edmund Gruchalla, Patrick R. Hatlestad, Kathy Hogan, Robert Kilichowski, Joyce M. Kingsbury, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, Lisa Wolf, Steven L. Zaiser; Senators Jim Dotzenrod, Stanley W. Lyson, Dave Nething, Curtis Olafson, Mac Schneider

Others present: See Appendix A

It was moved by Representative Delmore, seconded by Representative Wolf, and carried on a voice vote that the minutes of the February 11, 2010, meeting be approved.

REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

Chairman Griffin called on Mr. Alvin A. Jaeger, Secretary of State, for testimony regarding the Revised Uniform Limited Liability Company Act. Mr. Jaeger provided information (Appendix B) regarding the concerns that he and others, including Mr. William L. Guy III and Ms. Clara Jenkins, have with the Revised Uniform Limited Liability Company Act. He said Mr. Guy believes this legislation is too important to be enacted without careful consideration. He said one of the controversial elements of the revised Act is the allowance for a date of creation, which is not the date when the documents were filed with the Secretary of State or on a later specified date. He said there are concerns that this date could actually be a date before the filing with the Secretary of State, which could cause a concern for those individuals who rely on the public record and for the filing offices that certify the information. Another concern, he said, is that the revised Act enables the creation of a limited liability company for any purpose whether it is for profit or nonprofit reasons. He said this proposal conflicts with the state's current statutory structure. He said because of the concerns that the revised Act has raised in various states, the National Conference of Commissioners on Uniform State Laws is considering revisions to the revised Act during its summer 2010 meeting, with final approval of those revisions scheduled for the summer of 2011. He said the revised Act has been adopted in Iowa, Idaho, Nebraska, and Wyoming.

In response to a question from Senator Dotzenrod, Mr. Jaeger said having separate chapters in the North

Dakota Century Code for for-profit and nonprofit limited liability companies has been helpful to the Secretary of State's office. He said he recommended the separation, and the Legislative Assembly approved the concept.

In response to a question from Representative Delmore, Mr. Jaeger said he is hopeful that the uniform law commissioners will take the states' concerns into account when making revisions. He said the filing procedures in the revised Act would be very different than the state's current procedures.

It was moved by Representative Klemin, seconded by Senator Nething, and carried on a voice vote that the Judiciary Committee recommend to the Legislative Management to continue the study of the Revised Uniform Limited Liability Company Act during the 2011-12 interim.

UNIFORM DEBT-MANAGEMENT SERVICES ACT STUDY

Chairman Griffin called on Mr. Timothy Karsky, Commissioner, Department of Financial Institutions, for the presentation of information regarding debt-management services and a bill draft based upon the Uniform Debt-Management Services Act. Mr. Karsky said as per the request of the Judiciary Committee at the last meeting, his office prepared draft legislation for the committee to review. He said he used the Uniform Debt-Management Services Act as a starting point but made revisions to the uniform Act using laws and bills of several other states. He said the draft legislation is a very rough draft, and if the committee decides to go ahead with this legislation, additional changes will be necessary. He reviewed the draft legislation (Appendix C). He said because it is unclear as to the number of full-time equivalent (FTE) positions that will be necessary to implement this legislation, his department's budget to the Governor will not include the funding for those FTE positions. He submitted written testimony (Appendix D).

In response to a question from Senator Olafson, Mr. Karsky said because only nonprofit debt services companies are currently regulated in the state and because those companies only are required to be registered rather than licensed, there has not been a regulation on the fees charged by these companies. He said the 15 percent settlement fee contained on page 24 of the bill draft is based upon the fee allowed in Illinois' pending legislation.

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May 10, 2010

TO: Representative Chris Griffin, Chairman, and Members of the Judiciary Committee

FR: Al Jaeger, Secretary of State

RE: Revised Uniform Limited Liability Company (LLC) Act

During the February 11, 2010, meeting of this committee, it was requested that the committee be provided with detailed information as to some of the concerns with this Act and its status in other states.

This research was conducted by William L Guy III, representing the State Bar Association, and Clara Jenkins of the Secretary of State's office. Based on their review, our collective recommendation is that the committee should not introduce this Uniform Act in the upcoming session.

As part of his review, Mr. Guy stated that he still stands by everything in his February 2, 2010, e-mail message (copy attached), which was also part of the testimony provided by Mr. Bill Neumann to the committee on February 11, 2010, and made a part of the minutes of that meeting. In an e-mail copied to me on May 6, 2010, Mr. Guy states, "This legislation is simply too important to be enacted without careful consideration."

Some of the controversial elements of the proposed revised Uniform Act include:

1. Allowing for a date of creation, which is not the date when the documents were filed with the Secretary of State or on a later specified date. The date of creation proposed in the Uniform Act occurs when the LLC notifies the Secretary of State that it has one or more members and the date on which the membership occurred. Some persons reviewing the Act have concluded that this creation date could actually be a date prior to the filing with the Secretary of State causing a significant concern for those individuals who rely on the public record and for the filing offices certifying such information. If the organizer fails to deliver such notice, the filing lapses and is void. While in this "holding pattern", these types of LLC's are referred to as shelf LLC's. The United States Treasury Department is taking exception with the shelf provision since they view it as a mechanism for money laundering and terrorism activities.
2. The Uniform Act enables the creation of a LLC for any purpose whether it is for profit or non-profit reasons. Under existing North Dakota law and because of the subtle differences in the respective LLC business structures, the Century Code contains specific separate chapters for a profit LLC (N.D.C.C., Chapter 10-32, a nonprofit LLC (N.D.C.C., Chapter 10-36) and a professional LLC (N.D.C.C., Chapter 10-31).
3. The standard for name availability is distinguishable on the record. All other business entities filed with the North Dakota Secretary of State have name availability based on the "deceptively similar" standard.
4. The name reservation period is 120 days while North Dakota's current statute allows one year.
5. The service of process provisions differ from the current provisions of the Model Registered Agent Act which was adopted by the 2007 Legislative Assembly (2007 Session Laws, Chapter 99 – sponsors Senators Nething and Nelson, Representatives Dahl, DeKrey and Kerzman)

6. The administrative procedures for filing an LLC with the Secretary of State under this Act are not consistent with the filing procedures for other entities filed with the Secretary of State's office. As a result, the Act would be expensive to administer, as written, because of the need to modify existing computer applications to accommodate all of the variations of the Act. Because the Uniform Act's provisions are substantially different, it would create challenges for businesses and practitioners to discern its requirements from existing LLC provisions already in the Century Code.

In North Dakota, the Secretary of State has always advocated that the filing procedures for all business entities be similar. The legislature has agreed and the state's laws reflect this approach. Therefore, whenever any Uniform Act is introduced, it is drafted to be consistent with the filing procedures existing in the Century Code for the other business entities.

Because of the concerns that this Act has raised in the various states, the Uniform Law Commission is considering revisions to it during their summer 2010 meeting, with final approval of those revisions scheduled for the summer of 2011. As it is, the Act has only been adopted in four states. They are Iowa, Idaho, Nebraska, and Wyoming.

Iowa was the first state to adopt the Act. The Director of the Iowa Secretary of State's Business Division informed us that it has been an administrative nightmare. The procedural provisions for the filings under this Act were dramatically different from their other business entities. Without an appropriation to modify their computer programs, they have been trying to manage the work manually. As a result, amendments are being considered in Iowa's current session to harmonize the Act with the administrative practices of the office.

While the State of Wyoming adopted the Act, they made significant changes. For example, they did not embrace the concept of the "shelf" Limited Liability Company and made changes to the administrative portions of the bill.

Likewise, when the State of Nebraska adopted the Act in March 2010, they made many changes to the Act and did not include the "shelf" Limited Liability Company concept.

The State of Minnesota's task force assigned to review the Act is currently on a time line in which their review process will not be completed until the end of the year.

The states of Colorado, Utah, and Hawaii have made a decision to not introduce the Act.

The state of Indiana recently defeated the bill and the State of Montana defeated it in late 2009.

North Dakota's LLC laws were first adopted in 1993 and have been updated every session since then, as part of the comprehensive business bill introduced in each session. This bill has been traditionally co-sponsored by the respective chairman of the Senate and House Judiciary Committees.

Currently, the number of domestic Limited Liability Companies chartered by the Secretary of State is 8,518 and the number of foreign Limited Liability Companies is 4,612. This business structure has been a very popular selection by businesses outnumbering new corporation charters by two to one.

History clearly demonstrates that the current North Dakota LLC laws have been and are currently working very well for businesses.

In conclusion, to compromise the current laws that are not broken with the introduction of this Act at this time would be detrimental to current and proposed LLC businesses in North Dakota and to the state's economic growth.

From: William L. Guy III [mailto:wguy@vogellaw.com]
Sent: Tuesday, February 02, 2010 1:53 PM
To: Jaeger, Al A.; Larry Klemin; William A. Neumann; Jenkins, Clara M.
Cc: Amy S. Bush; William L. Guy III
Subject: FW: Contact Information

Al, Larry and Bill...Bill Klein (see the preceding email) chairs the MN ULLCA Drafting Task Force. He anticipates that their work will be complete in November 2010 and that their legislation will be presented to the 2011 MN legislature.

If I understood him correctly, MN will be retaining its current LLC statute (MN Statutes Chapter 322B) largely intact and will be adopting some or all of the ULLCA as an alternative (possibly in a separate MN Statutes chapter).

I believe that the MN Task Force feels that the current MN LLC statute works extremely well for the average closely held LCC in that its governance structure and operating provisions parallel (as much as possible) those of the MN Business Corporation Act (MN Chapter 302A). On the other hand they recognize the need for the ULLCA ... primarily with regard to entities that will operate on a national level (and that might otherwise use the Delaware LLC Act). I expect that the current MN LLC statute will be amended to include some key elements of the ULLCA.

As you know, since 1985 ND has largely patterned its Business Corporation Act and (since 1993) its LLC Act (as well as our other corporate and partnership statutes) after their MN counterparts...and I believe that this approach has served our state very well. MN spends a great deal of time and money on these statutes that ND has been able to utilize to great advantage.

As you can see in the attached email string, only Iowa and Idaho have adopted the ULLCA at this point (although others are in the "study and drafting" phase). In a telephone conference yesterday morning Clara Jenkins indicated:

That Iowa's adoption has not gone well and that significant amendments will be necessary in their next legislative session; and,
That she has not been able to get much information regarding the Idaho experience to date.

It is my recommendation to the Interim Judiciary Committee that we hold up work on this project until we see the approach that MN takes and then see if it would be the best alternative for ND as well. Thus, my recommendation will result in holding off on our ND legislation until the 2013 session.

While I know that we would all like to resolve this matter more quickly than that, our situation with respect to the LLC statute in ND is quite different for that which we faced with our 2007 adoption of the Uniform Trust Code. In that case the existing trust law had been enacted in 1943 with little revision over the intervening 64 years. In contrast our LLC Act was adopted in 1993 and has been up dated in each subsequent legislative session. By all accounts (from citizens who have formed LLCs, accountants, legislators, the ND Secretary of State Office and other attorneys) our current statute works very well.

While I am in favor of the ULLCA if it either can be offered as an alternative to our current statute or carefully integrated into our current statute, I believe that we would be making a serious mistake to either replace our current statute with the ULLCA or to attempt our own integration with only the experience of two other states for guidance. When ND adopted the Uniform Trust Act in 2007, the drafting task force had the benefit of the modifications made by 15 other states (many of which were included in the final ND legislation).

If any of you have any questions, please give me a call (or an email). Unless the Interim Committee wants me to be present at their upcoming meeting, I will be unable to attend due to prior commitments. If they want me to attend, then I will rearrange my schedule.

Bill