Mississippi Secretary of State
2008 Business Reform Committees
Minutes of Corporations Laws Study Group Meeting # 1
June 25, 2008

The first meeting of the Corporations Laws Study Group was called to order on Tuesday, June 25, 2008 at 11:00 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi. The attendees are listed in Exhibit A.

Introductory Remarks

After thanking everyone for attending, Assistant Secretary of State Cheryn Baker gave a brief background of the six different business reform committees established by Secretary of State Delbert Hosemann. Particularly, she mentioned the work of the Business Court Committee in determining whether the establishment of a business court system was in the best interest of the state and noted that cases involving Mississippi's corporate law would most likely be within the jurisdiction of the Business Court if it was established. She noted that Secretary Hosemann's vision was that each committee would examine its respective area of law and make recommendations of changes that would make Mississippi more business-friendly in order to attract new business and allow the state to retain its existing businesses. Next, Baker introduced the Co-Chairmen of the Corporations Committee, Bill Mendenhall and Tommy Shepherd.

Next, Co-Chair Mendenhall noted that he and Shepherd were invited by Hosemann to be Co-chairs in part based on their prior participation in the state's Business Law Advisory Group ("BLAG"). He noted that BLAG's mission was somewhat narrower than the charge of the Corporations Committee and that he was excited to be participating in the Committee.

Presentation on Business Services Division by Assistant Secretary of State Tom Riley

Next, Assistant Secretary of State, Business Services Tom Riley explained that Business Services serviced not only corporations but a variety of other business purposes. He noted that the agency processed between 2,000 and 3,000 UCC filings every week and between 1,000 and 2,000 corporate filings (both mailed and electronic) each week. He stated that, for corporate documents, the only payments the agency accepted electronically were for electronic filings of annual reports. All UCC documents can be paid for electronically. He added that Business Services was in the process of changing computer systems to allow the agency to accept other kinds of payments and speed up processing.

Riley next explained the filing process and that the agency intended to make changes allowing the expediting of certain filings allowing for quicker turn-around time. Riley noted that some of the cosmetic changes could be made internally, but that many of the desired changes would require legislation. Riley also noted repeated requests for the capability of expedited filings. These, he noted, would require an additional fee and would also require legislation to enact.

Presentation by Herbert S. Wander

Next, Baker introduced Herbert S. Wander, participating by teleconference. Wander's biographical sketch is included with the minutes as Exhibit B. Wander addressed two areas of focus in his presentation: the function and mission of the American Bar Association's Committee on Corporate Laws ("CCL") and issues on CCL's current agenda that the group may consider for its recommendation to the Mississippi legislature. A summary of Wander's presentation is included as Exhibit C.

Presentation by Bryn Vaaler

Next, Co-Chair Mendenhall introduced Bryn Vaaler who compared the present Mississippi Business Corporation Act to the most recent changes of the Model Business Corporation Act and offered insight into potential innovations in corporate laws available to the group. Vaaler's biographical sketch is included in Exhibit B. A summary of Vaaler's presentation is included as Exhibit D. Also included in Exhibit D are questions posed to Vaaler and his responses.

Discussion of Other Issues

Model Registered Agent Act. Cheryn Baker discussed the Model Registered Agent Act ("MoRAA"). She stated that adoption of MoRAA would provide one set of registered agent provisions in one place applicable to all the various business entities. She commented that the agency's intention was to form a joint subcommittee comprised of members of Corporations, Nonprofits, and LLCs and Partnerships groups to study at the issue for consistency among the committees. The subcommittee members could then report to their respective committees on the issue.

Conversion Statutes. Baker commented that another item for consideration was the adoption of conversion statutes as the Mississippi act did not currently contain conversion provisions. She noted that the agency had recently experienced problems with entities converting in their state of domestication and then desiring to convert in Mississippi as well and the agency not being able to facilitate the conversion.

Reinstatement of Administratively Dissolved Corporations. Baker discussed the process to reinstate administratively-dissolved corporations through the Hinds County Chancery Court. Tom Riley suggested that there were a couple of remedies for the problem, one being to allow application for reinstatement to be filed in any chancery court in the state. Members of the group agreed that this issue should be examined. This also led to a discussion of the inconsistency caused by corporations having to file an annual report while other entities such as LLCs and LLPs did not. One member was concerned that this was an incentive for small businesses to organize as an entity type that didn't require annual reports. Tom Riley stated that the annual report gave the agency a means to purge the system of inactive corporations. One member, a CPA commented that the annual filing fee was the same amount as the annual franchise fee and that he thought maybe it confused the entities thinking the fee had been paid.

Closing Remarks

Baker reminded the group to continue adding issues and informed them that they would be divided into sub-groups to further study these issues. She noted the upcoming meetings in the agenda and the target date of September 8, 2008 for the group's recommendation.

With no further business, the meeting was adjourned at 12:32 P.M.

Respectfully submitted by,

Cheryn Baker

Cheryn Baker
Assistant Secretary of State
Policy and Research Division

Exhibit A
to the Minutes of Corporations Laws Study Group Meeting # 1

Members in Attendance:
Bill Mendenhall, Co-Chair
Tommy Shepherd, Co-Chair
Jill Beneke
Cecil Harper
Russell Hawkins
Robert Hutchinson
Gina Jacobs
Walter Jones
James Lowe
James McNamara
William Morehead
Warren Rogers
James Simpson
Van White
Stephen Wilson
Henry Chatham

Attending by Teleconference:
Jay Carney
Henry Dick
Mike Bush
William Brown
Herbert Wander
William Brown

Secretary of State Staff in Attendance:
Cheryn Baker, Assistant Secretary of State, Policy and Research
Tom Riley, Assistant Secretary of State, Business Services
Doug Jennings, Senior Attorney, Policy and Research
Phillips Strickland, Division Coordinator
Brian Bledsoe, Intern
Jeff Lee, Intern

Exhibit C
to the Minutes of Corporations Laws Study Group Meeting # 1

Presentation of Herbert S. Wander

Wander addressed two areas of focus in his presentation: the function and mission of the American Bar Association's Committee on Corporate Laws ("CCL") and issues on CCL's current agenda that the Corporations Committee may consider for its recommendation to the Mississippi legislature.

Explanation of CCL and its Duties. Wander explained the selection of the twenty-four CCL members and the participation in the Committee of former members and foreign liaisons. He noted that CCL was comprised of a cross section of in-house counsel, practitioners, academics, and public interest lawyers so that the Committee could address the concerns of all that were interested in corporate law and not be beholden to any one group. He noted that the group's primary responsibility was to monitor and revise the Model Business Corporations Act ("MBCA") and that the heavy drafting load explained the small, select, committee. He stated that, in addition to the Committee members, CCL had a secretary and a reporter, Professor Mike Dooley of the University of Virginia. Wander explained that changes to the MBCA had to be approved three times: a first reading in the Committee, a second reading requiring publication in the Business Lawyer to illicit comments and feedback from interested parties, and after comments are received and reviewed, the proposed amendments are either rejected or approved in a third reading within the Committee. He noted that CCL had liaisons in the states to assist the Committee in revising the MBCA and keeping up with developments within each state.

Next, Wander stated that CCL published an annotated version of the MBCA with the fourth edition having come out in 2008, and that CCL supplemented the annotated version yearly so that interested parties could keep up with changes around the country. He noted that a paperback version of the MBCA was also available with comments, but without annotation. Wander explained that CCL also had other publications including the Corporate Directors Guidebook, the most recent being the fifth edition and that CCL had a program at the Section of Business Laws spring meeting. He noted that CCL met four times a year: September, December, at the Section of Business Laws spring meeting and in June.

CCL's Current Agenda. Next, Wander turned to CCL's current agenda, highlighting CCL's General Review Taskforce, a subcommittee charged with keeping abreast of changes in corporate law or in various states' court decisions to determine whether CCL should revise and improve the MBCA. He noted that the taskforce functioned nearly year round, meeting by teleconference many times in addition to the four meetings of CCL.

Authority of Board to Submit Un-Recommended Matters for Shareholder Approval. Wander stated that in the 2008 June meeting, led by the General Review Taskforce, CCL approved changes to MBCA chapters eight, nine, ten, eleven, twelve, and fourteen, clarifying the authority of the board of directors to agree to submit a matter for shareholder approval even if the board later determined that it could no longer recommend to the shareholders to approve the proposed

matter. He noted that the adopted amendment to the MBCA was the exact amendment published in the Business Lawyer for the second reading.

UETA and E-sign Legislation Conforming Changes. Wander noted a CCL project to bring the MBCA into sync with the federal Uniform Electronic Transactions Act ("UETA") and E-sign legislation. He stated that both the states and the federal government had adopted electronic transmission signature validation statutes. While the MBCA and the Mississippi Business Corporations Act both include recognition of electronic transmissions, Wander noted that neither was in sync with the federal legislation. He stated that the legislation was complicated, employing language that general corporate practitioners were not familiar with, but noted that the federal legislation raised issues of federal preemption if the state business laws were not exactly right. CCL was in the midst of an almost two year project to bring the MBCA into compliance with UETA and the E-sign legislation. This required amendments to the definitions in § 1.40 of the MBCA and to concepts of notice in § 1.41, but Wander felt that CCL had updated the MBCA language sufficiently to service both cyberspace lawyers and general corporate practitioners. CCL ensured that all the types of current electronic communication were included in the MBCA.

Wander noted that a second step in ensuring that the MBCA was in sync with UETA and E-sign required an examination of each substantive section of the MBCA to see if any "tweaks" are necessary. For example, shareholder agreements that occur frequently between shareholders and small companies are required to be "in writing." Wander queried what "in writing" means in light of e-commerce. Wander noted that several states had already attempted to update corporate laws to accommodate electronic transmission, but that CCL was concerned that those attempts did not meet the federal preemption standards. He expressed his hope that the Corporations Committee would add to its agenda to monitor the developments arising in this area and he offered to forward to Baker CCL's changes to §§ 1.40 and 1.41 for the Committee's purpose.

Remote/Teleconference Shareholder Meetings. Next, Wander stated that the Review Taskforce was examining the feasibility of holding remote shareholder meetings by teleconference and by virtual meeting with no set location only electronic participation. He noted that the Review Taskforce had just begun to examine this, but thought the group's inclination was not to go as far as allowing participation in virtual shareholder meetings, but to stop at permitting remote shareholder meetings by telephone.

Board Delegation of Equity Compensation Awards. Next, Wander spoke about another subcommittee of CCL, the Emerging Issue Taskforce, and noted that the Emerging Issue Taskforce had recently proposed revisions to § 6.24(c) of the MBCA, which permits a board to delegate to officers some or all of the board's rights with respect to awards of options, warrants and other forms of equity compensation. Wander noted that after publication in the Business Lawyer, and a second and third reading, the proposed revisions had been approved. He explained that the boards of many corporations were already delegating to officers the right to grant options and that CCL wanted to clarify that while this was permissible, it was limited. For example, officers to whom the right had been delegated could not name themselves as the recipient of the options. Wander noted that this revision had been adopted at CCL's June 2008 meeting.

Various Voting Rights Issues. Next, Wander discussed another issue soon to be encountered by the Emerging Issues Taskforce, issues regarding voting: who gets to vote, record date establishment, over-voting, use of derivatives, empty voting (those with voting rights but no beneficial ownership of the shares), and vote buying. He noted that all of those issues were under heavy scrutiny and shared a present example: the CSX proxy fight in which two hedge funds had built a substantial equity position in CSX without actually owning the shares they were entitled to vote. Wander stated that the issue was one that CCL would soon be attempting to give some guidance on.

Federal Incorporation Transparency and Law Enforcement Assistance Act. Next, Wander discussed the Incorporation Transparency and Law Enforcement Assistance Act, sponsored by Senators Levin, Coleman, and Obama that would require nonpublic corporations and LLCs upon establishment to provide to the Secretary of State the names of all the beneficial owners. Wander characterized the proposed bill as far-reaching and requiring enormous amounts of work on formation agencies, secretaries of state, and the lawyers who set up corporations and noted that for any beneficial owner who was not a United States citizen, the formation agency would be charged with getting information on the foreign entity that owns the corporation or LLC. Wander opined that despite the burden on formation agencies, secretaries of state, and attorneys, the bill would provide no real benefit to the public in preventing money laundering. He stated that CCL was working with state secretaries of state and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in an attempt to direct the legislation in a manner that would provide the federal and state governments the information they needed to combat money laundering and tax evasion, but also would do so within boundaries that were not so costly and impractical. One possible strategy, he noted, was to disallow nominee directors. Directors should know for whom they act and what the corporation's business is. A second idea was to attempt to redraft the legislation and get Senator Levin, the Treasury Department and Justice Department to agree to the revised legislation. Wander concluded his remarks by noting that Bryn Vaaler would address other important issues on CCL's agenda.

Exhibit D
to the Minutes of Corporations Laws Study Group Meeting # 1

Presentation of Bryn Vaaler

Overview of Director Protection. Vaaler introduced the subject of director protection and noted that the Mississippi statute was primarily in good shape concerning the subject. He noted that developments in corporate statutory law could be likened to a pendulum swinging back and forth with the law often reacting to events. He noted that much of the innovation and development in the area of protecting directors from liability dated back about twenty years to *Smith v. Van Gorkum* and some takeover cases from the same period and resulted in legislators reacting to the potential for director liability for breach of the duty of care. He noted that more recently, legislative reaction following the Enron scandal was focused less on protecting directors and more on making sure the neglected duties leading to the Enron scandal were properly articulated: duty of disclosure was one example. He noted that much of the reaction was not in the form of statute, but rather reaction from the federal government in the Sarbanes-Oxley Act and in some more aggressive case law from Delaware and the federal Courts.

Mississippi History of Adopting MBCA Changes. Vaaler noted that the Mississippi legislature along with BLAG had wisely chosen to adopt the MBCA, like many other states, but that Mississippi had gone a step further in choosing to consider and act on all the innovations developed by CCL. He noted that this was exceptional and that many other states had stopped with simply adopting the MBCA. He then turned the discussion to some principal provisions of the Mississippi Business Corporations Act that were germane to director protection. He expressed his desire to leave the Committee with directions it may choose if it wished to innovate.

General Standard of Care for Directors. He began with § 8.30, the section that articulated the general standard of care for directors. He noted that the Mississippi provision followed verbatim the MBCA. He noted that the provision was worded in subjective terms, that directors had the duty to "act in good faith in what the director believed to be in the best interest of the corporation." He stated that what was missing, properly so, were notions of "ordinary prudent person" language, old language contained in many state statutes, that posed an invitation to courts to impose their notion of what an ordinarily prudent person would think, instead of asking, "is the director trying his best to do the right thing for the corporation?" Vaaler opined that Mississippi's was a more protective standard, as opposed to allowing the courts to delve inappropriately into trustee law. He noted two differences between Mississippi's and the MBCA. One, he noted, was that post-Enron, the MBCA included a new articulation of the director's duty to make disclosures to other directors of material issues. He expressed his opinion that if Mississippi courts examined an instance involving this duty, that the courts would find the duty existed, but that Mississippi had not yet adopted the articulation of the duty. He noted that adoption would not necessarily be seen as protection of directors, but thought it something for the Committee to consider. Next, he noted that Mississippi had a provision that some other states had that the MBCA did not have, an "other constituencies" provision that rose out of the takeover years of the late eighties in which boards facing hostile acquirers had desired

to consider employees, even though the per share offer was high to the shareholders. The shareholders often would say that the board could not consider the effect on the employees, creditors or other constituents, only the interest of the shareholders. Half of the states, Mississippi being one, had adopted provisions that said while directors must consider the interest of the shareholders, they may also consider the best interest of other constituencies including employees, creditors, labor, and the societal considerations such as the good of the state and country. Vaaler viewed such provisions as protective, broadening the scope of considerations for directors.

Director Standards of Liability. Next, he noted that Mississippi had followed the MBCA in adopting § 8.31, a very protective provision that made clear that the overarching standard was more of an exhortation to directors to act than a "trip-line" for incurring liability. Section 8.31 outlined in great specificity the actual "trip-line" for liability, building in elements of the business judgment rule. He felt that the standard bridged the gap for states like Mississippi lacking in a wealth of corporate case law by keeping the courts in check from becoming too creative about the standards applied to directors.

Next, Vaaler noted that Mississippi had a provision making directors liable for unlawful dividends or share repurchases, but that Mississippi's provision was no more or less onerous than its counterpart in any other state's statute.

Director Exculpation/Indemnification. Next, Vaaler discussed exculpation and indemnification more innovations of the eighties. He stated that exculpation provisions permitted the shareholders and the board to put provisions in the corporation's articles or charter that said directors shall not be liable to the corporation or its shareholders for money damages, with certain "carve-outs." These became known as "charter option provisions" in that they were not forced on corporations, but could be added to the articles. He opined that the MBCA provisions on this issue were superior to the Delaware version in that the Delaware version did not permit a shield against director liability if there were violations of good faith or duty of loyalty, the Delaware version only providing the shield for duty of care violations. He saw this as problematic, in recent years as the duties of good faith and loyalty had become very "slippery" in the Delaware Courts. For examples, he noted the Disney case and *Stone v. Ritter*, cases in which the duty of loyalty were violated even though the board was not self dealing. Usually, he noted, duty of loyalty was considered violated only if directors were cheating the company, but in these cases such was not necessary for a finding of breach of the duty of loyalty. In Mississippi, he noted, the only carve-outs from exculpation involved cases where the director derived an improper benefit or cheated the company or if directors intentionally harmed the company. These were the only instances where a director could not exculpate. He opined that this was an extremely protective provision protecting directors but not officers. Although it only existed if included in the articles, he noted that most formers would include it.

Next, Vaaler noted that indemnification was different from exculpation, exculpation meaning no liability and indemnification meaning that the director had liability but could seek indemnity for that exposure from the corporation. He stated that the Mississippi indemnification provisions were as liberal as any in the country, following the MBCA verbatim. A director must be indemnified any time they are successful on the merits of the case, and the director may be

indemnified so long as they are acting in good faith and in what they believe to be the best interests of the corporation. He then noted that a revision to the MBCA allowed corporations to include in their articles a provision that basically said, "forget about good faith and the best interest of the corporation," and allowed the articles to indemnify to the extent of exculpation, essentially eliminating the "slippery" idea of good faith and agreeing to indemnify a director for any liability or expense he incurred as a result of being a director, so long as the director did not cheat the company, or he did not intentionally harm the company.

Vaaler noted that Mississippi had a provision allowing Directors and Officers insurance, and had also adopted the latest version of director conflict of interest to cover any transaction having disinterested director approval or disinterested shareholder approval, providing the strongest possible protection of such transactions.

Possible Innovations.

Next, having taken inventory of the present state of the Mississippi Act, Vaaler turned to possible innovations. He noted that only so much could be accomplished in a statute, that much was dependent on case law and that while sparse in Mississippi, the existing case law was good. He noted that Mississippi in *Omnibank of Mantee*, had adopted the business judgment rule, Justice Robertson establishing a rule of judicial deference to business judgment.

Director Exculpation. Next, Vaaler mentioned some things that the Committee may want to consider concerning director protection. Returning to the issue of exculpation, he noted that six states had taken a different approach, instituting self-effectuating statutes. Rather than giving corporations options of including exculpatory provisions in the articles, the states adopted a statutory provision specifying the line of director liability. Virginia, he noted, took the approach that directors could not be liable for more than $100,000 each, a money-cap that could be lowered in the articles, but could not be raised. These provisions are in the statute and do not have to be included in the charter. He noted that a couple of states, Louisiana and Utah, had a "belt-and-suspenders" approach, having the self-effectuating provisions in the statute and allowing charter option provisions that would allow the liability to be reduced to none. He noted that Mississippi was in the mainstream regarding this issue, but offered it for consideration.

A member asked about Virginia's monetary cap on director liability. Vaaler responded that Virginia stood alone in capping damages, but that the idea had merit. He noted that he felt Mississippi's position was at the forefront. The member cautioned that since Mississippi had the exculpatory language in its current provision, if legislation was introduced providing for a monetary cap, those unhappy with exculpatory language may see an opportunity to exclude it. Vaaler agreed, going further to say even adding a self-effectuating provision may lead to the same result. He noted that presently Mississippi had the protection of the business judgment rule in Mississippi case law, signifying that courts would not even consider the substance of a disinterested decision by a board, only the board's process for arriving at the decision. Vaaler felt that absent some adverse case law precipitating the institution of a self-effectuating statute, the current state of the law was best.

Officer Exculpation. A member asked Vaaler about exculpatory provisions for officers. Vaaler noted that a couple of states had extended exculpation to officers and commented that the decisions were policy driven. Many see officers as full-time employees, fully compensated that should not benefit from exculpation, while others would argue that officers were making business judgments every day just as directors and that courts should not be a substitute for people making business decisions. He opined that the issue showed a point of real philosophical difference. Wander cautioned against adopting very expansive indemnification provisions, noting that frequently statutes indemnify officers, directors, and agents and that corporations could not be sure what agents were doing. These comments ended the discussion.

Disclosure of Material Issues Provision. He suggested looking at the issue and recommended looking at the post-Enron case law concerning directors' duty of disclosure and amendments to §8.42 concerning officer duties of disclosure. Professor Wander clarified what was meant by the duty of disclosure using Enron as an example. He noted that an Enron board member had prior knowledge of but never disclosed entities used to hide losses and debt. Subsequent changes were made to the MBCA to impose a duty of disclosure on board members who have material knowledge.

Education and Awareness. Next, Vaaler mentioned education, proposing that the Secretary of State may sponsor new articles reflecting that the state was in pretty good shape regarding its corporate laws and also promulgating model articles that contain exculpation provisions included. He advised that Mississippi continue its policy of monitoring and adopting the innovations of CCL regarding the MBCA and commended the state for having done so in the past.

Pro-Management and Pro-Institutional Shareholder Provisions. Next, Vaaler noted that a couple of states had attempted innovation but not from the angle of director protection. He mentioned Pennsylvania adopting statutes that were pro-management in the takeover setting. He thought Pennsylvania anticipated that a lot of big corporations would migrate to the state, but opined that he the migration had happened. He referenced North Dakota adopting provisions that were pro-institutional shareholder, with the angle that the institutions would exert pressure on large companies to relocate to North Dakota to take advantage of the pro-shareholder provisions. He noted that the anticipated outcome had not materialized in North Dakota either.

Rationalization Movement/Junction Box Statutes. Finally, Vaaler turned to a discussion of the rationalization movement. He explained the movement as a response to the proliferation of new business entities such as LLCs, LPs, and LLPs. He noted that each of these entities had existed historically within separate statutes, even though many aspects of the various entities were the same from a statutory perspective. Two principal groups, the CCL and NCCUSL, he noted, had come together to form a joint taskforce to address some of the issues. This joint effort resulted in Model Entity Transactions Act ("META"), a "junction box" statute.

Vaaler noted that each corporation statute had merger provisions, share exchange provisions, conversion provisions, domestication provisions, re-domestication provisions and that the corresponding acts for other entities had similar provisions. Different states, he noted, faced the task of making certain that the provisions within each act meshed with the provisions

of other entity acts so that mergers or conversions could be accomplished in a single step. He noted that in most states, all of this "plumbing" was not in sync within the state, and there were more problems in moving from state to state. For example, he posed the issue of a Minnesota LLC trying to do a one-step conversion to become a Delaware corporation. Even though Delaware may be prepared for such a conversion, Minnesota was not, and the conversion would require many steps. META offered states a uniform set of merger, conversion, domestication and ownership unit exchange provisions through cross-entities. Once adopted, the provisions for merger, conversion and so on could be stripped from the statutes governing the various entities and META would serve as a "junction box" to facilitate these changes. He characterized META as very flexible, and noted that Idaho had already adopted it. He opined that the time was right if this was something the Committee wanted to consider.

Vaaler noted that other portions of the various entity acts such as filing requirements, signature requirements, even the liability shield in the LLC Act should be employing the same language from statute to statute to avoid courts from seeing ambiguity in the difference in the language from act to act. One solution would be an omnibus statute, a sort of "hub and spokes" statute, where all the commonalities of the various acts would be placed in the "hub" and the unique characteristics of each entity act would be the "spokes." Instead of having seven different statutes, and being faced with the task of changing all whenever a change is made in one, much of the substance would be in one place. Vaaler noted that a couple of states had already employed this type of statute and cited Texas and Pennsylvania as a couple of states that had done so. In response to a question from a member as to whether META would provide these possibilities, Vaaler noted that META was only a sort of "halfway house" for such legislation but noted that META was part of the hub—that much of the work for a hub and spokes statute was already done by META.

Vaaler concluded his portion of the presentation.