



To: New Project Selection Project Work Group
From: Helen Hecht – MTC General Counsel
Subject: The ULC Project Selection Process
Date: March 31, 2020

BACKGROUND

The work group had its first call March 25, 2020. It decided to begin by looking at how other, similar organizations, particularly the Uniform Law Commission (ULC), select new projects.

This memo sets out the ULC criteria and project proposal information below and adds staff comments for the work group to consider. Note that the ULC's policies are fairly formal and it is not clear to what extent the uniformity committee will need or desire the same level of formality.

ULC CRITERIA AND PROJECT PROPOSAL INFORMATION – WITH COMMENTS

New Project Criteria

STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF UNIFORM AND MODEL ACTS

The Uniform Law Commission (“ULC”) and its committees shall conform to the following criteria and procedures in proposing or considering uniform and model acts:

1. Criteria

(a) The subject matter must be appropriate for state legislation in view of the powers granted by the Constitution of the United States to Congress. If the subject matter falls within the exclusive jurisdiction of Congress, it is obviously not appropriate for legislation by the several states. However, if the subject matter is within the concurrent jurisdiction of the federal and state governments and Congress has not preempted the field, it may be appropriate for action by the states and, hence, by the ULC.

Commented [HH1]: This is the form that the work group's recommendations might take.



(b) The subject matter must be such that approval of the act by the ULC would be consistent with the objectives of the ULC, as stated in Article 1.2 of its Constitution, “to promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable.”

Commented [HH2]: The uniformity committee may want to consider a similar type of criteria.

(c) Every act drafted by the ULC should be guided by the following considerations:

(1) Whether there a need for an act on the subject.

Commented [HH3]: This seems obvious and not that helpful.

(2) Whether there is a reasonable probability that an act, when approved, either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly. In other words, the act’s preparation is likely to be a practical step toward uniformity of state law or at least toward minimizing the diversity of state law.

Commented [HH4]: I think this is useful and reflects the two benefits of the uniformity process.

(3) Whether the subject of the act must be such that uniformity of law among states will produce significant benefits to the public through improvements in the law. Such public benefits include (i) facilitating interstate economic, social, or political relations; (ii) responding to a need common to many states as to which uniform legislation may be more effective, more efficient, and more widely and easily understood; and (iii) avoiding significant disadvantages likely to arise from diversity of state law (for example, the tendency of diverse laws to mislead, prejudice, inconvenience, or otherwise adversely affect the citizens of the states in their activities or dealings in other states or with citizens of other states or in moving from state to state).

Commented [HH5]: This would be consistent with the MTC’s idea of uniformity as well. However, I don’t think the committee would necessarily exclude projects that might only affect a minority of states.

(4) Whether the act will maintain the integrity of well-balanced and well-settled law in areas traditionally governed by the states.

(d) When considering proposals to revise or amend existing acts, the ULC should be guided by the following considerations:

(1) Whether the act advances the law on a subject that the ULC has already addressed;

Commented [HH6]: I think this is important. We often get comments from states and from the public that some of our models may need to be updated.

(2) Whether the act addresses matters that have been the subject of successful enactment in the past.

Commented [HH7]: This also seems like a useful thing to consider.

(3) Whether the act is an area of the law where the ULC has significant presence.

(e) Experience demonstrates that acts to accomplish the following purposes have met with the widest acceptance by state legislatures:

Commented [HH8]: This follows on the idea put forward by our task force that looked into the success of our uniformity models and is probably a helpful idea generally.



(1) *Acts to facilitate the flow of commercial transactions across state lines*, such as the Uniform Commercial Code, Uniform Electronic Transactions Act, Revised Uniform Partnership Act, and Revised Uniform Limited Liability Company Act;

(2) *Acts to avoid conflict of laws when the laws of more than one state may apply*, such as the Uniform Enforcement of Foreign Judgments Act, Uniform Interstate Depositions and Discovery Act, Uniform Interstate Family Support Act, and Uniform Child Custody Jurisdiction and Enforcement Act;

(3) *Acts without substantial interstate implications but conceived and drafted for one of the following purposes:*

(A) *to fill emergent needs*, such as the Revised Uniform Anatomical Gift Act, Uniform Environmental Covenants Act, Uniform Athlete Agents Act, Uniform Mediation Act, and Revised Uniform Arbitration Act;

(B) *to modernize antiquated concepts*, such as the Uniform Fraudulent Transfer Act, Uniform Prudent Management of Institutional Funds Act, and Model Registered Agents Act;

(C) *to codify the common law*, such as the Uniform Trust Code, Uniform Probate Code, Uniform Principal and Income Act, and Uniform Conservation Easement Act; or

(D) *to meet needs in an area of the law where the ULC has acted*, or an area of the law where the ULC has significant presence.

(f) As a general rule, the ULC should consider past experience in determining future projects and should avoid consideration of subjects that are:

(1) entirely novel and with regard to which neither legislative nor administrative experience is available;

(2) controversial because of disparities in social, economic, or political policies or philosophies among the states; and

(3) of purely state or local concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts.

(g) As a general rule, the ULC should consider past experience in determining whether to draft an act and the following factors affect whether an act will be enacted in a substantial number of states:

(1) Whether there is a proponent other than the ULC that supports drafting and enactment and that may be committed to achieving enactment;

Commented [HH9]: This is especially important as recent projects demonstrate.

Commented [HH10]: Ditto

Commented [HH11]: A similar idea might be to codify the majority interpretation of UDITPA provisions.

Commented [HH12]: To me, this speaks to the expectation that the organization is the one to look to for certain models. For us, this would be in the area of UDITPA.

Commented [HH13]: This idea may be helpful as well—that is, the kind of projects that the committee may want to avoid.

Commented [HH14]: This sometimes comes up in considering why past projects were not as successful as hoped.

Commented [HH15]: Obviously, we would also not want to prioritize projects that have only intrastate effects.

Commented [HH16]: This may or may not be something the committee wishes to consider—or it may be a minor factor in project selection.



- (2) Whether there is opposition to drafting or enactment particularly from well-organized and well-funded organizations;
- (3) The length and complexity of the proposed act;
- (4) The degree to which states have already acted;
- (5) Whether Congress is likely to act on the issue;
- (6) The length of time the proposal has been under study;
- (7) The potential fiscal impact that an act may impose on the states.
- (8) Whether the proposal requires changes in federal law or regulations.

2. Designation of an Act as a Uniform or Model Act

The above criteria are equally applicable to uniform acts and model acts. In determining whether an act should be designated as a uniform act or a model act, the following procedures and criteria should be applied:

- (a) The Executive Committee, in appointing a drafting committee for the consideration of an act, may do so without indicating whether the product will be a uniform act or model act. The committee may be designated initially as the "Drafting Committee on [subject matter] Act" and any drafts circulated as "[subject matter] Act."
- (b) Before the final reading of an act, the drafting committee, after considering the criteria for designation, shall make a recommendation to the Executive Committee as to whether the act should be circulated as a uniform act or model act.
- (c) The Executive Committee shall review the recommendation of the drafting committee and decide whether the act should be circulated as a uniform act or model act.
- (d) The ULC, acting as a committee of the whole, may change the designation assigned by the Executive Committee.
- (e) Criteria for designation:
 - (1) An act is designated as a uniform act if:
 - (A) there is a substantial reason to anticipate enactment in a large number of states; and
 - (B) uniformity of the provisions of the proposed enactment among the states is a principal objective.

Commented [HH17]: Ditto.

Commented [HH18]: This should certainly be a consideration when prioritizing projects and committing resources.

Commented [HH19]: This is a concern for us as well, based on the task force report.

Commented [HH20]: This may be an important distinction that we have not focused on in the past.

Commented [HH21]: Most of our work is probably on "uniform" acts for these reasons.



(2) An act is designated as a model act if:

(A) uniformity is a desirable objective, although not a principal objective;

(B) the act may promote uniformity and minimize diversity, even though a significant number of states do not enact the act in its entirety; or

(C) the purposes of the act can be substantially achieved even though it is not adopted in its entirety by every state.

3. Acts Recommended by Outside Organizations.

When an affiliated or responsible unaffiliated organization recommends a subject for an act or requests the ULC to draft an act, the organization should be informed of the criteria to which the act proposed for action by the ULC must conform and should be requested to demonstrate such conformity as well as to submit recommendations as to the substance of the act.

4. Procedure in Considering Proposed Subjects of Acts.

(a) Committee on Scope and Program.

(1) Whenever a subject for an act is proposed to the ULC, the proposal must first be submitted to the Committee on Scope and Program, which has the responsibility to determine whether the subject merits consideration by the ULC.

(2) If the Committee on Scope and Program determines that the subject merits consideration by the ULC, it shall report that determination to the Executive Committee, together with its reasons.

(b) Executive Committee.

(1) The Executive Committee shall review the recommendations of the Committee on Scope and Program as to any subject for a proposed act and either approve or disapprove its recommendations. If the Executive Committee determines that a subject for a proposed act merits consideration by the ULC, the President of the ULC shall assign the subject, as the Executive Committee directs, either to a study committee for further study and recommendations or, to a drafting committee to proceed with the drafting of an act on the subject.

(2) Before proceeding with the drafting of an act, the Executive Committee must find that a proposed act:

(A) comports with the criteria of the ULC;

Commented [HH22]: This is something we should anticipate as well and attempt to make more transparent in our drafting and in the information we provide to the states—so that if they need to modify the act, they can do so intelligently.

Commented [HH23]: We should consider some criteria in this area as well.

Commented [HH24]: It is not clear to me whether it would be best for the committee as a whole to consider new projects or to have a standing new project subcommittee.

Commented [HH25]: For us, this would be the same as if the uniformity committee were to review the work of a standing subcommittee.



(B) has the potential, in comparison with other pending proposals, of substantially contributing to the objectives of the ULC; and

(C) will have adequate agenda time for its consideration.

(c) Study Committee.

(1) Unless otherwise directed by the Executive Committee, the study committee to which the president assigns the subject will be charged with the responsibility not of drafting an act, but of studying the subject and of conducting research to determine whether, in the opinion of that committee, the subject is one on which an act should be drafted. If the study committee recommends commencing drafting, it also may recommend whether the act should be designated as a uniform act or model act. The study committee shall address the criteria and report by a given date its recommendations, based on those criteria, to the Committee on Scope and Program.

(2) If the study committee recommends to the Committee on Scope and Program that an act on the subject be drafted by the ULC, the Committee on Scope and Program, after addressing the criteria of the ULC for establishing drafting projects, shall report its recommendations to the Executive Committee for further action.

(d) Identifying Outside Resources. If consideration of the proposal will require outside resources in addition to the work of members and staff of the ULC, reasonably promising prospects for obtaining the required resources must be identifiable.

(e) Reference of Adverse Report to Executive Committee. If the study committee recommends that an act should not be drafted on the subject and if the Committee on Scope and Program adopts that recommendation, it shall report its recommendation to the Executive Committee for further action.

(f) Procedure for Reexamination of Pending Subjects. Each drafting committee shall report semiannually, in accordance with Section 28.3 of the Bylaws, and at any intervening time, if so requested by the Executive Committee, on the progress of its work and its current views about:

(1) whether the subject of its work meets the criteria of the ULC for considering uniform and model acts and, if so,

(2) whether the act should be recommended as a uniform act or, instead, as a model act.

5. Obligation of Commissioners.

Commented [HH26]: This is important, obviously, but it may go more to scheduling of work than to selecting projects.

Commented [HH27]: I think these are the equivalent of our work groups.

Commented [HH28]: This is interesting. We may want to consider this step at least in some projects (and we have done something like this in the past).

Commented [HH29]: This may be a useful step and something we tend to do informally.

Commented [HH30]: This is something else we do informally—but should think about especially in the early stages of projects.



Approval of an act as a uniform act carries with it the obligation of the commissioners from each state to endeavor to procure consideration by the legislature of the state, unless the commissioners consider the act inappropriate for enactment in their state. (See Section 6.1 of the Constitution.)

Uniform acts should be proposed and supported for adoption as promulgated to achieve necessary and desirable uniformity. Model acts should be proposed and supported to minimize diversity and improve the law, but without the same emphasis on adhering to the verbatim text.

New Project Proposals

Twice each year the Committee on Scope and Program of the Uniform Law Commission (“ULC”) solicits proposals for new study and drafting projects. While many of our project proposals come from uniform law commissioners, we also encourage outside groups and individuals to submit proposals. The following guidelines are derived from the ULC’s “Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts” and are intended to assist those submitting proposals to better anticipate the kinds of questions that typically arise when the Committee on Scope and Program is considering a proposed new project. To the extent possible, in addition to submitting a description of the proposed project, address the following questions:

Is uniformity of state law for the proposed subject matter desirable and realistic?

While not every ULC act is uniformly adopted verbatim by all states of the United States (including the District of Columbia, Puerto Rico, and the United States Virgin Islands), we do focus on acts that (directly or indirectly) will promote uniformity among the states in their respective subject matter areas. The ULC generally avoids subjects that are of purely local concern or which are unlikely to be widely enacted because of political differences among the states.

Please address whether widespread enactment of the proposal would produce significant benefits to the public. Acts that reduce uncertainty or compliance costs because the law is made uniform among the states or which respond to a need common to a number of states generally produce such results. Legislation drafted by the ULC avoids the need for each state to develop its own solution. Consider whether the proposed project will:

(a) Facilitate the flow of commercial and other transactions across state lines?

Commented [HH31]: I’m imagining a form, checklist, or something similar that a person proposing a project would do and that the committee could also have staff work on.

Commented [HH32]: We may want to suggest to the committee that it build this step into our meetings.

Commented [HH33]: We should continue to do this.



(b) Reduce or eliminate conflicts of law arising when the law of more than one state might apply?

(c) Fill an emergent need, modernize an antiquated concept, or codify the common law?

What have the states already done with regard to this subject?

Information about existing state statutes and ongoing trends is very helpful. Conversely, the ULC tends to avoid subjects that are entirely novel in character.

Does the proposed project require changes in federal laws or regulations?

This is an important question because the ULC works exclusively in subject matter areas that are appropriate for state legislation.

What organizations or interest groups are likely to have an interest in the subject matter of the proposed project and are they likely to support or oppose a uniform or model act in this area?

The ULC strives to produce balanced, enactable legislation. Therefore, it is important to identify the appropriate stakeholders and assess whether they are willing to participate in the development of a proposed project.

Are there resources available to support the development of the proposed project?

The development of a uniform or model act generally requires a minimum of one year of study and two years of drafting meetings. The identification of an existing source of expertise with regard to a particular subject and/or the availability of outcome-neutral financial support (from a government or foundation source) is helpful information.

(Revised August 2010)