THE RISE OF THE UNCORPORATION

LARRY E. RIBSTEIN

OXFORD UNIVERSITY PRESS
CONTENTS

Acknowledgments xv

CHAPTER 1. INTRODUCTION 1

A. Why Study Incorporations? 1
   1. The Uncorporate Solution to Governance Problems 1
   2. The Uncorporation and Contracts 2
   3. The Uncorporation Today 2

B. Uncorporations in the Economy 2

C. Do Business Associations Matter? 3

D. Theories of the Uncorporation 4
   1. Structure 4
   2. Contracts 6
   3. Flexibility 7

E. Competition and Business Forms 9

F. The United States and Around the World 9

G. The Plot of the Book 10

CHAPTER 2. THEORETICAL CONSIDERATIONS 15

A. Why Firms? 15

B. Governing Firms 17
   1. Specialization of Management and Ownership 18
   2. Managers and Agency Costs 18
   3. Owners and Opportunism 19
   4. Owners vs. Creditors 20
   5. Firms and Non-firms 20
   6. Governance and Underlying Business Conditions 21

C. Why Business Associations? 21
   1. Formation 22
   2. Property Ownership 22
   3. Firm's Relationships with Creditors 22
2. The Evolution of Uncorporate Limited Liability 139
3. General Partnership: Entity Aspects of Unlimited Liability 140
4. Limited Liability Partnership 142
5. Limited Partnership 143
6. Limited Liability Company 143

B. Management 147
1. Corporation: Standardized Hierarchy 149
2. General Partnership: Direct Member Management 150
3. Limited Liability Partnerships 151
4. Limited Partnership: Uncorporate Centralized Management 152
5. Limited Liability Company: Chameleon Approach 153

C. Members' Financial Rights 156
1. Non-economic Members 156
2. One-owner Firms 158
3. No-owner and Nonprofit Firms 160
4. Contributions 161
5. Profits, Losses, and Distributions 163

D. Fiduciary Duties: General Principles 165
1. Fiduciaries vs. Non-fiduciaries 166
2. Due Care 166
3. Misappropriation 167
4. Business Opportunities 167
5. Good Faith 167
6. Opt-out 168
7. Remedy 168

E. Fiduciary Duties in Specific Business Associations 169
1. Corporation 169
2. General Partnership 171
3. Limited Partnership 174
4. Limited Liability Company 177

F. Dissociation and Dissolution 179

G. Transferring Interests 182

H. Taxes, Regulation, and Business Association Design 184
1. Securities Regulation 186
2. Employment Discrimination 189
3. General Thoughts on Tax and Regulation 192

CHAPTER 8. UNCORPORATING THE LARGE FIRM 193

A. The Troubles with Corporate Governance 195
   1. Shareholder Voting 195
   2. Board of Directors 199
   3. Fiduciary Duties 203
   4. Takeovers 205

B. Incentives and Discipline in the Large Uncorporation 207
   1. Managerial Compensation 208
   2. Distributions 209
   3. Buyout and Liquidation 212
   4. Supplementary Monitoring Mechanisms 213

C. Uncorporate Ungovernance 214
   1. Undirectors 214
   2. Undemocracy 215
   3. Takeover Proofing 217
   4. Fiduciary Unduties 219

D. Examples of Uncorporate Governance of Large Firms 222
   1. Private Equity 222
   2. Venture Capital 226
   3. Activist Hedge Funds 228
   4. Publicly Traded Partnerships 231

E. Why Uncorporate Now? 234
   1. The Demand for Capital Lock-In 234
   2. New Governance Technologies 235
   3. Fleeing Sarbanes-Oxley 235
   4. Credit Costs and the Role of Debt 236

F. The Future of the Large Uncorporation 237
   1. Financial Engineering 238
   2. Financial Regulation 240
   3. Regulation of Uncorporations 241
   4. The Corporate Tax 243
   5. The Future of Publicly Held Uncorporations 245
   6. The Corporate/Uncorporate Partnership 246
CHAPTER 9. NEW DIRECTIONS 247
   A. Convergence or Divergence of Business Forms 247
   B. The Long-Term Future of the Uncorporation 249
   C. The Uncorporation and Mandatory Rules 250
   D. Toward the Disappearance of the Close Corporation? 252
   E. The Socially Responsible Uncorporation 254
   F. Small vs. Large Firms? 255
   G. The Future of the Business Association 256
   H. Why the Uncorporation Matters 256

TABLE OF CASES 259
INDEX 265