D R A F T

FOR DISCUSSION ONLY

UNIFORM ENTITY TRANSACTIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR
TUCSON, ARIZONA

JULY 26 - AUGUST 2, 2002

UNIFORM ENTITY TRANSACTIONS ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

October 30, 2002

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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Prefatory Note

Scope and Approach of the Uniform Entity Transactions Act

Presently state business organization statutes (incorporated and unincorporated) vary in their approach to same-species and cross-species mergers, consolidations, divisions, conversions, share/entity interest exchanges, and domestications by or among domestic and foreign for-profit and nonprofit entities. The dissimilarities in state statutes generally entail either silence or non-uniformity regarding: (1) authorized transactions; (2) same-form or cross-form transactions; (3) inclusion of for-profit and nonprofit entities; (4) inclusion of incorporated and unincorporated organizations; and (5) single or dual status for converting, domesticating or transferring entities. The uniform unincorporated organization acts also differ in their treatment of same-species and cross-species transactions. For example, *RUPA* (1997) authorizes the conversion or merger of partnerships or limited partnerships. *RUPA* does not, however, anticipate the conversion or merger of forms of business other than partnerships or limited partnerships nor does it address divisions, entity interest exchanges, or domestications. *RULPA* (1976 with 1985 amendments) is silent regarding cross-entity transactions. A *RULPA* limited partnership could, however, effect a conversion or merger by "linking back" to the limited *RUPA* merger or conversion provisions. *Re-RULPA* anticipates for-profit and nonprofit cross-species conversions and mergers but not cross or same-species entity interest exchanges, divisions or domestications. *ULLCA* authorizes cross-form mergers and conversions but is silent regarding for-profit and nonprofit cross or same-species entity interest exchanges, divisions and domestications.

As a result of this divergence in the law of business organizations, the Uniform [Entity Transaction] Act (the "Uniform Act") was conceived by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") as an effort to bring uniformity to the subjects of mergers, divisions, conversions, consolidations, share/entity interest exchanges, and domestications between and among the same or different types of domestic and foreign for-profit and nonprofit entities. NCCUSL anticipated the [Act] to exist either as a "junction-box/cross-entity" act or as an act that would set forth amendments to be "dropped into" existing business organization acts. As of its November, 2000 meeting, the Drafting Committee determined that the Uniform Act should present a broad "junction-box" statute that would provide an option to states to treat the [Act] either as a separate act or as a series of amendments to present entity legislation.

As of May, 2002, three similar projects are being pursued by the American Bar Association ("ABA"). First, the Committee on Corporate Laws of the ABA Business Law Section has drafted and published a new Chapter 9 of the *MBCA* which is a "junction-box" statute that authorizes domestic business corporations to become a different form of entity or, conversely, permits non-domestic business corporations to become a domestic business corporation. The procedures anticipated by Chapter 9 of the MBCA include: (1) *domestication* (a procedure in

which a corporation may change its state of incorporation, either domestic to foreign or foreign to domestic); (2) *nonprofit conversion* (a procedure that permits a domestic business corporation to become either a domestic nonprofit corporation or a foreign nonprofit corporation); (3) *foreign nonprofit domestication and conversion* (a procedure that permits a foreign nonprofit corporation to become a domestic business corporation); and (4) *entity conversion* (procedures that authorize a domestic business corporation to become a domestic or foreign other entity or that permit a foreign other entity to become a domestic business corporation). Because Chapter 9 of the *MBCA* anticipates only those transactions that involve a *domestic business corporation* either at the outset or at the termination of the transaction, the ABA has constituted a second project to deal with nonprofit corporations as a constituent party to the foregoing transactions. The second project will thus likely focus on the same types of transactions as Chapter 9 of the *MBCA* but for inclusion instead within the Model Nonprofit Corporation Act. To date, an exposure draft of the Model Nonprofit Corporation Act amendments has not been circulated for review. The third project is one spearheaded by a Joint Task Force of the Committee on Corporate Laws and the Committee on Partnerships and Unincorporated Business Organizations of the Business Law Section ("Joint Task Force") of the ABA. The Joint Task Force is charged with drafting a model act that addresses mergers, conversions and entity interest exchanges of *different forms* of business entities. The Model Act is presently entitled the Model Inter-Entity Transactions Act (draft of 3-02)("*MITA*"). *MITA* has been circulated for review and comment. In addition, for a period of several weeks in January and February, 2002, weekly two-hour conference calls were held to review the 2001 draft of *MITA*. Several members of the ABA Committee, including ABA advisors George Coleman, Bill Clark, Bob Keatinge and Barry Nekritz and Reporter of the NCCUSL project, Ann Anker, participated in each of these calls. An updated draft of 2002 resulted. Unlike Chapter 9 of the *MBCA, MITA* addresses only those transactions that involve *different forms of entities.* Thus, because a domestication does not indicate a change of form, domestications are not covered by *MITA*. Reference would only be made to *MITA* for cross-form transactions. *MITA* also anticipates the *repeal and/or amendment of* all cross-form provisions in *RUPA, ULLCA and Re-RULPA.* The only provisions of the Uniform Unincorporated Acts that would not be affected would be those involving the same type of business (*e.g.*, mergers between same-form partnerships or between limited liability companies). Further, *MITA* would *add* entity interest exchanges and domestications to uniform unincorporated law and thereafter tie all voting requirements for both domestications and exchanging entities in interest exchanges to that necessary for a merger.

The Uniform Act, in its present state, is drafted as a free-standing, "junction-box" statute that will: (1) *repeal* all existing merger and conversion provisions in all Uniform Unincorporated Acts; (2) *replace* those provisions with new, broader merger and conversion provisions; and (3) *add* the new transactions of divisions, entity interest exchanges and domestications. The Uniform Act also sets forth the necessary approvals for each of these transactions. With the Uniform Act repealer, therefore, a practitioner need only review the Uniform Act to locate the substantive rules for all domestic alternative entity mergers, divisions, entity interest exchanges, conversions and domestications. In sum, the Uniform Act will *enable* cross-form and same-form mergers, divisions, conversions and entity interest exchanges in addition to domestications for unincorporated entities. The Uniform Act will permit a domestic incorporated entity to use the

Act only if the organic law and organic rules governing the domestic incorporated entity permit the transaction. Foreign entities may use the Uniform Act if the organic law and organic rules of the foreign entity do not prohibit the transaction.

The three ABA projects are at varying degrees of completion but the work of each clearly overlaps, to some degree, with the scope and purpose of the Uniform Act. The NCCUSL Drafting Committee, its Chair, Reporter and ABA advisors are working closely with the Chair of the *MBCA* junction-box and division projects as well as the Co-Chairs of the Joint Task Force.

The present draft of the Uniform Act is presented in seven Articles. The first Article sets forth: (1) name; (2) definitions; and (3) authorization for entity transaction. The definitional section utilizes generic terminology intended to encompass both corporate and unincorporated ("cross-species") transactions.

Article 2 governs mergers. Article 2 is derived in large part from existing corporate and unincorporated laws. Certain provisions dealing with necessary approvals, information required in the plan of merger and some filing requirements represent an amalgamation of existing law.

Article 3 governs divisions. The division is a special type of merger that permits a dividing entity to subdivide itself into two or more separate and distinct entities. The division presently does not exist in any uniform unincorporated act. The ABA, on the other hand, is reviewing a proposed addition to the *MBCA and to MITA* regarding divisions. The division provisions of Article 3 reflect the unique nature of the contractual allocation of assets and liabilities that result from a division.

Article 4 governs the entity interest exchange. The entity interest exchange is derived from the share exchange in corporate law and reflected in Chapters 11 and 13 of the *MBCA*. The entity interest exchange does not presently exist in separate form in any Uniform Unincorporated Association Act. The Drafting Committee, at its first meeting in November, 2000, opted to include provisions for an entity interest exchange. Certain difficulties are presented by the entity interest exchange, including: (1) necessary default approvals; (2) informational requirements for a plan of entity interest exchange; (3) filing requirements for the exchange; and (4) contractual or statutory appraisal rights for certain affected owners. Each of these points is addressed in this draft.

Article 5 governs conversions. Article 5 is intended to address traditional intrastate and foreign "different-form conversions." Article 5 also sets forth: (1) default approval rules; and (2) informational requirements for conversions.

Article 6 governs domestications. Article 6 is intended to authorize a foreign entity to domesticate as a domestic unincorporated entity of the same type and to authorize a domestic unincorporated entity to domesticate as a foreign entity of the same type so long as the organic rules of the foreign jurisdiction permit the domestication and the organic law of the foreign entity does not prohibit the domestication. Article 6 provides: (1) requirements for a plan of

domestication; (2) approvals, including a default rule of approval; (3) necessary filings; (4) effectiveness of a foreign entity domesticating as a domestic entity of the same type; and (5) contractual appraisal rights.

Article 7 sets out miscellaneous provisions, including: (1) severability; (2) effective date; (3) repeals of affected provisions in *RUPA, ULLCA and Re-RULPA*; (4) applicability; (5) savings clause; and (6) e-sign language.

UNIFORM ENTITY TRANSACTIONS ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [Act] may be cited as the Uniform [Entity Transactions] Act.

SECTION 102. DEFINITIONS. In this [Act]:

(1) "Acquiring entity" means the entity that acquires all of one or more classes OR series of ownership or transferee interests of an exchanging entity in an entity interest exchange.

(2) "Conversion" means a transaction authorized by [Article] 5.

(3) "Converted entity" means the entity that continues in existence after a conversion.

(4) "Converting entity" means the entity that adopts a plan of conversion and that files a statement of conversion pursuant to section 504.

(5) "Dividing entity" means the entity that is to be divided pursuant to [Article] 3.

(6) "Division" means a transaction authorized by [Article] 3.

(7) "Domestic entity" means a domestic incorporated entity and a domestic unincorporated entity.

(8) "Domestic incorporated entity" means a corporation or other incorporated entity created under or whose internal affairs are governed by the law of this [State].

(9) "Domestic unincorporated entity" means an unincorporated entity whose internal affairs are governed by the law of this [State].

(10) "Domesticated entity" means the entity that continues in existence after a

domestication.

(11) "Domesticating entity" means the entity that adopts a plan of domestication and that files a statement or plan of domestication pursuant to section 604.

(12) "Domestication" means a transaction authorized by [Article] 6.

(13) "Entity" means a person other than an individual, whether or not organized for profit, that either has a separate legal existence or the power to sue or be sued in its own name. The term does not include an estate, trust (other than a business or land trust), governmental, or quasi-governmental subdivision, agency, or instrumentality.

(14) "Entity interest exchange" means a transaction authorized by [Article] 4.

(15) "Exchanging entity" means the entity of which all of one or more of the classes or series of the ownership or transferee interests are exchanged.

(16) "Filing entity" means an entity that is created by the filing of a public organic document.

(17) "Foreign entity" means an entity other than a domestic entity.

(18) "Merger" means a transaction authorized by [Article] 2.

(19) "Merging entity" means an entity that is a party to a merger and exists immediately before the filing of the statement of merger or the adoption of a plan of merger.

(20) "Nonfiling entity" means an entity other than a filing entity.

(21) "Nonqualified foreign entity" means a foreign entity that is not authorized to transact business in this [State] by the failure to file an appropriate filing with the [Secretary of State].

(22) "Organic law" means the statute or body of law that governs the enforceability and

interpretation of the organic rules of an entity.

(23) "Organic rules" mean the private or public rules, whether or not in a record, that govern the internal affairs of an entity.

(24) "Owner" means a person that is:

(A) with respect to a general or limited partnership, a partner;

(B) with respect to a limited liability company, a member;

(C) with respect to a business trust, the owner of a beneficial interest in the trust;

(D) with respect to a corporation, a shareholder, member or governing body of a nonprofit corporation without members;

(E) with respect to a nonprofit unincorporated entity, a member or, if there are no members, its governing body; and

(F) with respect to any other business organization, a person that has an ownership interest in the organization.

(25) "Ownership interest" means an owner's proprietary interest in an entity.

(26) "Owner's liability" means personal liability for debts, obligations, and liabilities of an entity which is imposed on an owner:

(A) solely by reason of the person's status as an owner in the entity; or

(B) by a public organic document or the organic rules of the entity that impose liability on an owner for all or specified debts, obligations and liabilities of the entity.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(28) "Public organic document" means the public record the filing of which creates an entity.

(29) "Qualified foreign entity" means a foreign entity that is authorized to transact business in this [State] by an appropriate filing with the [Secretary of State].

(30) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(31) "Sign" means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate the record.

(32) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(33) "Surviving entity" means the entity that continues in existence after or is created by a merger or an entity that continues in existence after or is created by a division.

(34) "Transfer" includes an assignment, conveyance, sale, lease, mortgage, security interest, encumbrance and gift.

(35) "Transferee" means a person to which all or part of a transferee interest has been transferred, whether or not the transferor is an owner.

(36) "Transferee interest" means an owner's share of the profits and losses of an entity and an owner's right to receive distributions.

Reporter's Notes

"Conversion" [(2)] - The term "conversion" involves the procedure whereby a domestic unincorporated entity of one type is converted into an entity of another type whether domestic or foreign. "Conversion" also involves the procedure whereby a domestic or foreign entity is converted into a domestic unincorporated entity of another type.

The term "type" is used throughout this [Act] to mean: (1) with respect to entities of the same form, general and limited liability partnerships and limited and limited liability limited partnerships; and (2) with respect to entities of a different form, any incorporated or unincorporated entities not specified in (1). In other words, a general partnership is of the same "type" of entity as a limited liability partnership. Likewise, a limited partnership and a limited liability limited partnership are of the same "type" of entity. A general partnership is a different "type" of entity than a limited partnership, limited liability limited partnership, limited liability company, or corporation. In its March 2002 draft, the drafting committee placed this information within the text of the [Act]. It was removed and placed within the commentary on the recommendation of the Committee on Style.

"Dividing entity" [(5)] - "Dividing entity" is used in this [Act] to define the domestic or foreign entity that is to be subdivided into separate and distinct entities. The dividing entity may or may not be a surviving entity.

"Division" [(6)] - The term "division" is used to define a type of merger whereby a domestic unincorporated entity may "divide" itself into: (1) two or more domestic entities; (2) the dividing entity and one or more domestic entities or one or more foreign entities; (3) one or more domestic entities and one or more foreign entities; or (4) two or more foreign entities. A division also includes the procedure whereby a foreign entity is divided into: (1) two or more domestic unincorporated entities; (2) the dividing entity and one or more domestic unincorporated entities; or (3) one or more domestic unincorporated entities and one or more foreign entities of any type. *See, e.g.*, 15 *Pa.C.S.* § 8961 *et seq*. (2001)(division of domestic LLC); 15 *Pa.C.S.* § 8576 *et seq*. (2001)(division of domestic limited partnership); 15 *Pa.C.S.* § 1951 *et seq*. (2001)(division of domestic corporation). In general, a division permits a dividing entity to contractually allocate assets and liabilities among new or existing entities. The liabilities may be allocated among surviving entities in any manner so long as the allocation does not constitute a fraudulent conveyance. Presently, Pennsylvania only allows a division to new entities whereas Texas permits a division to an existing or new surviving entity.

"Domestic incorporated entity" [(8)] - The term "domestic incorporated entity" is used throughout this [Act]: (1) to distinguish the domestic entities that are *authorized* to engage in a merger, conversion, entity interest exchange or domestication *pursuant to this [Act]* with any other entity; and (2) to make clear that a domestic *incorporated* entity may engage in a transaction with a domestic *unincorporated* entity governed by this [Act] only if the organic rules and organic law governing the incorporated entity permits the transaction. Because jurisdictions vary in their description of incorporated entities, states should conform this section accordingly.

The note to "domestic corporate entity" has been modified to reflect the decision of the Committee at its December meeting in New Orleans, 2001 to delete the default rule regarding use by domestic corporations of this [Act] where the law governing the corporate entity is silent as to the transaction. The prior default rule permitted domestic incorporated entities to use this act to effect a transaction with a domestic unincorporated entity if the organic law governing the domestic incorporated entity were silent on the transaction. For example, assume Colorado were to adopt this [Act]. Assume further that Colorado does not presently permit a conversion of a Colorado corporation to a Colorado LLC (not true). The proposed default rule would permit the Colorado corporation to convert to a Colorado LLC pursuant to this [Act]. An earlier (and broader) default rule would permit a Minnesota corporation (assuming silence in the Minnesota corporate law) to convert to a Colorado LLC pursuant to the Colorado law. The policy underlying the first default rule is that the domestic corporate law is silent regarding the transaction and does not, therefore, prohibit the transaction. Also, the entity is remaining within the adopting jurisdiction. The policy underpinning the second default rule is that, as with the first, the organic law governing the foreign entity does not *prohibit* the transaction and the entity is *leaving* the jurisdiction. Finally, because many of these transactions can be accomplished through an intermediate merger, lack of a default rule *requires* the intermediate step. The default rule, if available, would authorize the transaction in one step rather than two.

"Domestic entity" [(7)] - The term "domestic entity" in this [Act] refers to domestic incorporated and unincorporated entities created under or whose internal affairs are governed by the organic laws of an adopting jurisdiction.

At least one jurisdiction, California, provides that, notwithstanding that an entity is formed under the laws of another jurisdiction, that entity will be deemed to be governed by the entity law of California if the entity has sufficient contacts in that jurisdiction. The ostensible purpose of the California rule is to grant cumulative voting rights to shareholders of Delaware corporations where the Delaware entity is engaging in business and has minimum contacts in California. If California courts were bound to apply Delaware law, the shareholders would have only cumulative voting rights if the certificate of incorporation so provided.

"Domestic unincorporated entity [(9)] - The term "domestic unincorporated entity" is used throughout this [Act] to describe the entities for which this [Act] was intended to apply. The listing is not intended to be exhaustive and an adopting [state] should conform this section accordingly.

"Domestication" [(12)] - The term "domestication" in this [Act] authorizes a domestic unincorporated entity to change its *jurisdiction* of formation *but not its type* so long as the organic law of the foreign jurisdiction permits the domestication. The legal effect of the domestication out of an adopting [state] likely would be governed by the laws of the *domesticated* entity. There is, however, some concern that the "effectiveness" of a domestication could be governed by the organic law of the *domesticating* entity. Of course, there is no uncertainty regarding "effectiveness" if the organic law of the domesticating and domesticated entities is the same.

The term "domestication" also authorizes the procedure whereby a foreign unincorporated entity becomes a domestic unincorporated entity of the same type. The legal effect of the latter transaction is likely governed by the laws of the jurisdiction adopting this [Act], subject, of course, to the above commentary.

"Entity" [(13)] - The definition of the term "entity" is intended to be broad but also to reflect the unique nature of certain types of incorporated and unincorporated entities. For example, in some jurisdictions corporations are created under special acts, special corporation acts or for special purposes. Also, many jurisdictions have entities that are unique to specific forums. In those jurisdictions, the definition should be conformed according to what the [State] wishes to include or exclude from the scope of this [Act]. The present definition also specifically includes nonprofit entities. The definition excludes sole proprietorships but includes general partnerships under both *UPA* and *RUPA*.

The definition of "entity" was redrafted to reflect the Committee's decision in New Orleans, 2001 to specifically exclude estates, trusts (other than business or land trusts) and governmental or quasi-governmental entities, agencies or subdivisions.

"Foreign Entity" [(17)] - The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by *UPA* (1916) is a domestic or foreign partnership. Likely, a *UPA* partnership will be deemed to be a domestic entity where the greatest nexus of contacts are found. Consider also: A limited partnership formed in Delaware as a limited liability limited partnership is a domestic entity of Delaware, governed by the laws of Delaware. If the Delaware LLLP were to transact business in a jurisdiction that does not authorize the creation of LLLPs, it would be deemed to be a foreign *LP* in that jurisdiction (an entity of the same "type" as the domestic entity, but one without a shield against personal liability).

"Merger" [(18)] - The term "merger" in this [Act] includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities. The term "merger" also includes the traditional two-party merger in which one party does not survive the transaction. "Merger" also includes a forward or reverse triangular merger where a third, subsidiary, entity is formed to effect the transaction on behalf of one of the constituent entities to the merger.

"Nonfiling entity" [(20)] - A "nonfiling entity" is one that is not formed by the filing of a public document. The term includes general partnerships, unincorporated nonprofit associations and [business trusts]. On the other hand, an LLP requires the filing of a statement of qualification *for the purpose of gaining a limited liability shield.* The statement of qualification *does not create the entity.*

"Organic law" [(22)] - The term "organic law" reflects the position of the Committee that

"organic law" should be linked to the enforceability and interpretation of the "organic rules" that govern the internal affairs of an entity.

"Organic rules" [(23)] - The term "organic rules" is intended to include all governing rules of an entity whether or not in written form. The term is intended to include agreements in "record" form as defined in *ULLCA* at § 101 (16)("information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.") as well as oral partnership agreements and oral operating agreements among LLC members. "Organic rules" represent either the parties' *actual, negotiated* agreement ***or****, in a default situation, what the law deems* the parties' agreement to be. For example, assume in an LLC that three members agree to profit-sharing but do not specify managerial rights. In this circumstance, the parties *actual agreement* reflects rights to receive profits that may be different from those provided for by statute. Further, the parties' agreement regarding management *is imposed by law.* Both the actual and "constructive" (default) agreements constitute the "organic rules" of the entity.

"Owner" [(24)] - The term "owner" provides a listing of the types of persons who are considered to have an economic or other proprietary right in a for-profit or not-for-profit entity.

The present language is that suggested by the Committee in December of 2001. The language is taken largely from *Re-Rulpa* § 1101 (8). An accompanying definition for "ownership interest" was added at § 102 to clarify the meaning of § 102 (23)(E). Subsection (D) has been modified to reflect for-profit and nonprofit corporations and the differing "ownership" interests of each. Also, a new subsection (E) has been added regarding ownership interests in nonprofit entities.

"Ownership interest" [(25)] - An "ownership interest" includes a partnership interest in a general partnership (including a limited liability partnership), a partnership interest in a limited partnership (including a limited liability limited partnership), a membership interest in a limited liability company, a share in a corporation, a membership interest in a nonprofit corporation, a membership interest in an unincorporated association, and a beneficial interest in a business trust. Where nonprofit entities have no membership interests, the ownership interest would include the interest held by the entity's governing body.

"Owner's liability" [(26)] - "Owner's liability" is used in this [Act] to make clear that personal liability of an owner will be preserved in transactions governed by the [Act]. Personal liabilities, as anticipated by this [Act], are those imposed on an owner *by the organic law* or *by any organic rule of the entity.*

"Person" [(27)] - The term "person" is taken from *ULLCA* § 101(14). The drafting committee considered using the definition of "person" from Article 1 of the *UCC.* After consideration of the Article 1 definition, the drafting committee concluded that the *ULLCA* definition reflects the intent of this [Act].

"Public organic document" [(28)] - A "public organic document" is a document that is filed of public record to *create* an entity. A "public organic document" includes a certificate of limited partnership, the articles of organization for a limited liability company, the articles of incorporation for a nonprofit or for-profit corporation, the articles of association for an unincorporated nonprofit association, or a deed of trust of a business trust. "Public organic document" does not include *a statement of partnership authority* filed pursuant to § 303 of *RUPA or a statement of qualification for an LLP or LLLP* . With regard to the filing of a statement of qualification for an LLP or LLLP, such a filing *does not constitute the filing that* ***creates*** *the entity.* Rather, an LLP is an *already-formed general partnership* that has filed a statement of qualification for the purpose of gaining limited liability for its partners. As to an LLLP, the underlying entity (the LP) is formed by filing a certificate of formation followed by or simultaneous with the filing of a statement of qualification (in those jurisdictions that permit an LLLP). *(Re-Rulpa* permits the creation of an LLLP by the inclusion of the necessary LLLP language in the certificate of formation, thereby eliminating the second filing.)

"Record" [(30)] - The term "record" is intended to include the broadest degree of information so long as the information is retrievable in a "perceivable" form. This language is taken from *ULLCA* § 101 (16) and *Re-Rulpa* § 102 (20).

"Transferee" [(35)] - The term transferee means a person to whom an owner has transferred her rights, in whole or in part, to receive profits, losses, and distributions of an entity. A transferee has no rights to participate in management or conduct of an entity, to demand access to information concerning the entity, or to inspect or copy entity books or records. *See RUPA* § 503 (1997); *Re-Rulpa* § 702 (2001); *ULLCA* §§ 502, 503 (1995)("distributional interest" that may be transferred). A transferable interest may be subject to a charging order in appropriate circumstances. *See RUPA* § 504 (1997); *Re-Rulpa* § 703; *ULLCA* § 504 (1995). No Uniform Unincorporated Act presently grants, by statute, a right to a transferee to bring a direct or derivative suit against an entity to enforce rights granted in a transfer. *See, e.g.*, *Re-Rulpa* (2001) § 1001 (direct action may be brought by a "partner"); § 1002 (a "partner" may bring a derivative action) and *ULLCA* (1995) § 1101 (a "member" may bring a derivative action). Whether a provision such as § 104 of *RUPA* (stating that "the principles of law and equity supplement this [Act], unless displaced by particular provisions of the Act") would grant recourse to a transferee to sue non-transferor/owners for breach of contractual or fiduciary duties would be subject to interpretation by a court. *But see U-H Acquisitions Co. v. Barbo*, 1994 Del.Ch. Lexis 9 (holding that assignee of limited partnership interest had no standing to sue for a breach of fiduciary duty in allegedly interested transaction by general partner); *Kellis v. Ring*, 92 Cal.App. 3d 854 (1979) (holding that "mere assignee" of limited partnership interest lacked standing to bring fiduciary claim against general partner); *Bauer v. Bloomfield Co/Holden Joint Venture*, 849 P.2d 1365 (Al. 1993)(holding that assignee of general partnership interest had no claim against partnership for allegedly wrongful business decision to withhold distributions; in dicta, court further stated that: "We are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest.").

SECTION 103. AUTHORIZATION FOR ENTITY TRANSACTIONS. Subject to other applicable law:

(a) A domestic unincorporated entity may effect a merger pursuant to [Article] 2, a division pursuant to [Article] 3, an entity interest exchange pursuant to [Article 4], a conversion pursuant to [Article] 5, or a domestication pursuant to [Article] 6;

(b) A foreign entity may effect a merger, a division, an entity interest exchange, a conversion or a domestication with a domestic unincorporated entity pursuant to this [Act] if the transaction is not prohibited by the organic law or the organic rules of the entity; and

(c) A domestic incorporated entity may effect a merger pursuant to [Article] 2, a division pursuant to [Article] 3, an entity interest exchange pursuant to [Article] 4 or a conversion pursuant to [Article] 5 with a domestic unincorporated entity if the transaction is permitted by the organic law and organic rules of the entity.

Reporter's Notes

Section 103 - Section 103 is intended to allow all domestic *unincorporated* entities to use this [Act] to accomplish a merger, division, conversion, domestication or entity interest exchange with another domestic or foreign entity unless another body of law or the organic rules of the entity *prohibit* the transaction. For example, this [Act] is intended to permit a nonprofit unincorporated entity to convert to a for-profit unincorporated entity *if the regulatory agency governing the nonprofit entity permits the transaction.* Consider the following example: a charitable Kentucky entity decides to convert to a for-profit LLC. Assume the conversion of the charitable entity is regulated by the Attorney General of Kentucky (point of information: many states have regulatory provisions for *mergers* of for-profit entities and nonprofit entities but have *no provision governing the conversion of the same entity. Query whether the transaction is not regulated or whether the rules for merger would apply by default.)*. Assume further that the Kentucky LLC statute permits the conversion of a nonprofit entity to a for-profit entity by the adoption of a plan of conversion and the filing of a statement of conversion. Assume also that the regulatory rules governing the conversion of nonprofit Kentucky entities require notice and written approval by the Attorney General's office. The Kentucky nonprofit entity proceeds to file a certificate of conversion with the appropriate Kentucky filing agency after having complied

with the approval procedures of the Kentucky LLC conversion provisions. The Attorney General's office, however, has not received notice of the conversion. This [Act] is intended to *permit the LLC filing to stand* (in order to protect the integrity of the public record) *subject to possible rescission or other penalty* (for example, loss of license or loss of favorable tax treatment). In other words, this [Act] *enables* the transaction, *subject to other applicable law.* The [Act] makes no attempt to determine what penalty will result for failure to secure required regulatory approval.

In addition, if a transaction involves only domestic unincorporated entities, this Act will *replace* existing statutory provisions regarding mergers, divisions, conversions, domestications and/or entity interest exchanges for those entities that a [State] wishes to subject to the [Act]. The [Act] is, therefore, *not intended to be one of several methods to achieve these transactions.* (On this point, the drafting committee, at its first meeting, decided *to create the exclusive method* by which targeted unincorporated entities could achieve the named transactions. The [Act] was not intended to be *in addition to prior statutory or common law methods.)* Also, if a transaction involves only domestic unincorporated entities and the preexisting law of the adopting jurisdiction does not provide for one of the named transactions, adoption of this [Act] will *enable* the previously omitted transaction for the targeted entities. If a transaction involves a domestic unincorporated entity and a domestic corporation, this Act will govern only the unincorporated side of the transaction; the organic law of the corporate entity will govern the corporate half. Conversely, if a transaction involves a domestic unincorporated entity and a domestic corporate entity and the organic law and organic rules governing the corporate entity permit the transaction, the domestic corporate entity may elect to accomplish the transaction with a domestic unincorporated entity pursuant to this Act. If a transaction involves a domestic corporate entity and another domestic corporate entity or any type of foreign entity, *this Act will not govern.*

Subject to other applicable law, a foreign entity may use this Act to effect any of the named transactions if the organic rules governing the foreign entity permit the transaction and the transaction is not prohibited by the organic law of the foreign entity. For example, if the organic law of the foreign entity is silent regarding a division but the private operating agreement of the entity permits the division, the foreign entity may accomplish the transaction by means of an unincorporated entity governed by this [Act]. The necessary filing in the foreign jurisdiction regarding the division may be problematic to the extent the [Secretary of State] in the foreign jurisdiction may not be empowered to accept the division filing. In addition, if the filing in the "silent" jurisdiction indicates that the foreign entity is dissolving and the organic law of the resulting domestic entity provides that the "dividing" entity is not dissolved, an uncertainty is created regarding the legal effect of the division. A court could logically conclude that the "dissolution" filing in the foreign jurisdiction accomplishes the statutory transfer of the assets and liabilities of the dividing entity (without a dissolution) as provided by the terms of this [Act]. Finally, it is anticipated that a domestication of a foreign entity pursuant to this [Act] must involve an unincorporated entity.

At its December, 2001 meeting, the Committee decided to delete the broad default rule of the prior draft regarding domestic incorporated entities. As presently drafted, a domestic corporation may use this [Act] only if the organic law and organic rules governing the corporate entity *permit the transaction* (the prior draft permitted an "election" into this Act by a domestic incorporated entity if the organic law or organic rules of the corporate entity were silent on the transaction, *e.g.,* a division). A domestication is omitted from the types of transactions authorized for domestic incorporated entities because domestications of corporate entities necessarily involve only corporate law.

In addition, at its December, 2001 meeting, the Committee decided to omit prior § 103 that referenced "Required Regulatory Approvals." It was determined by the Committee that a provision regarding regulatory supervision exceeded the scope of this Act. Adopting jurisdictions should, however, consider whether domestic or foreign entities such as banks, insurance companies, community hospitals or public utilities that require regulatory approval to enter into a *merger* should be able to effect a conversion, division, domestication or entity interest exchange without obtaining the same regulatory approval. Likewise, because this Act will permit new transactions in many states, legislators should consider the effect of these new transactions in the context of nonprofit entities. The following provision on regulatory approval appears in the current draft of the Model Inter-Entity Transactions Act (*MITA* draft of 3/02):

103. Subordination of [Act] to regulatory laws.

(a) Regulatory law unaffected. - This [Act] is not intended to authorize any entity to do any act prohibited by any regulatory law.

(b) Effect of transaction. - Except as expressly provided otherwise by or pursuant to regulatory law:

(1) The filing by the secretary of state of any document under this [Act] shall not be effective to exempt the entity from any of the requirements of any regulatory law.

(2) Failure to comply with a regulatory law in connection with a transaction under this [Act] shall not affect the valid existence of the converted, exchanging or surviving entity.

(3) If a transaction under this [Act] is enjoined or reversed because of a violation of a regulatory law, that action shall not affect the valid existence of a converting, exchanging or merging entity which shall be reinstated.

(c) Required compliance with regulatory law. - *Except as provided in subsection (b)(2), any document filed by the secretary of state or any action taken by any person under the authority of this [Act] in violation of any regulatory law shall be ineffective as against this State, including the departments, agencies, boards and commissions thereof, unless and until the violation is cured.*

Finally, in those jurisdiction where certain professions are limited in their use of limited

liability entities, those statutes should be conformed accordingly. *See, e.g.*, R.I.Gen.Laws § 7-5.1-3 (restricting the corporate practice of certain professions to domestic corporations only). *But see* R.I.Gen.Laws § 7-12-31.1(b)(3)(permitting foreign limited liability partnerships to practice law) and Article II, Rule 10 of the Rhode Island Supreme Court Rules (permitting foreign corporations and partnerships to practice law through appropriately licensed attorneys)

SECTION 104. GOVERNING LAW.

(a) Following a transaction authorized by this [Act], the organic law of a surviving entity continues to govern the entity.

(b) Unless displaced by a specific provision in this [Act], the principles of law and equity, including those governing the rights of creditors, transferees or assignees, supplement this [Act].

Reporter's Notes

Section 104 - Section 104 was reinstated after a most useful Conference discussion at the Annual Meeting in Tucson in 2002 concerning creditor rights following, or during, the transaction procedures set forth in the [Act] - particularly that of a division.

Section 104(a) is intended to make clear that subsequent to a transaction authorized and completed according to this [Act], the organic law of the *surviving entity* continues to govern the entity unabated.

Section 104(b) is included to make clear that unless a particular provision of this [Act] displaces "other law," the principles of law and equity continue to apply, *especially including the rights of creditors, transferees, assignees or other appropriate parties.* Examples of "other" law that might govern creditor rights in the transactions set forth in this [Act] are the various uniform fraudulent transfer and conveyance acts; common law fraud; state insolvency statutes; Title 11 of the U.S.C. regarding creditor rights in federal bankruptcy proceedings; cases interpreting the rights of creditors following leveraged buyouts, spinoffs, asset purchases or other similar transactions; cases interpreting the liability of corporate directors for distributions to executives or shareholders while the corporation is insolvent, or operating in the vicinity of "insolvency;" the rights of creditors during or following real estate transactions; creditor rights under Articles 8 and 9 of the UCC; cases interpreting creditor claims under GAAP; and creditor rights cases arising under any Uniform Unincorporated Act, including when the right to partner contribution arises and the liability of an unincorporated entity for unlawful distributions during or resulting in insolvency of the entity. [This Note will be expanded to include reference to specific cases and statutes.]

[ARTICLE] 2
MERGER

SECTION 201. MERGER.

(a) One or more domestic unincorporated entities may merge with one or more domestic or foreign entities pursuant to this [Article].

(b) A foreign entity may merge pursuant to this [Article] with a domestic unincorporated entity, or may be created in such a merger, if the merger is not prohibited by the organic law or organic rules of the foreign entity.

(c) A domestic incorporated entity may merge pursuant to this [Article] with one or more domestic unincorporated entities, or may be created in such a merger, but only if the merger is permitted by the organic law and organic rules of the domestic incorporated entity.

Reporter's Notes

The statutory merger contemplated by this [Act] involves the combination of one or more domestic unincorporated entities with or into one or more other domestic or foreign entities. Upon the effective date of the merger, all the assets and liabilities of the constituent entities vest in the surviving entity as a matter of law. As such, mergers require the existence of at least two separate entities before the transaction and may have only one entity survive the merger. If independent existence of the constituent entities is favored at the conclusion of the transaction, a merger may not be the optimal vehicle to accomplish the statutory transfer of assets and liabilities. Independent existence could be better accomplished through an entity interest exchange pursuant to Article 3.

Additionally, corporate entities that are a party to a merger likely will be subject to appraisal rights by minority shareholders. On the other hand, most state alternative entity statutes are silent on the issue of "appraisal rights" for minority owners in unincorporated entities. However, in those jurisdictions that protect dissenting owners in unincorporated entities, the statutes provide for "buyout," "appraisal" or "contractual appraisal" rights. *See* Ann E. Conaway Anker, *Restructuring (or "Shuffling") Equity Interests in Cross-Form Mergers and Conversions,* Inter-Entity Mergers and Conversions, presented by the Committee on Taxation and Committee on Partnerships and Unincorporated Business Organizations, Chicago, August 2001.

Further, the vote necessary to accomplish a merger likely will vary depending upon the nature

of the constituent entities, *e.g,.* majority vote for corporate entities and either unanimity or a contracted-for percentage for unincorporated entities (presuming a default voting requirement). *Id.* Whether "adoption" or "approval" by managers is required is dependent upon the nature of the constituent entity as well as the private organic documents of that entity. For example, a limited partnership may require approval by the general partner/s, voting or not as a class. Likewise, a manager-managed limited liability company may require approval or adoption by the manager/s. Board approval by a domestic corporation would be governed by the organic law of the corporate entity.

Finally, the availability of fiduciary duties (or the contractual modification of these duties) to redress unfairness in statutory mergers may depend upon the "corporateness," or lack thereof, of the entities participating in the merger. *Id.*

Section 201(a) - Section 201(a) provides for mergers between the same or different types of domestic unincorporated entities and between domestic unincorporated entities and domestic or foreign incorporated entities. Thus, a merger between two domestic limited partnerships would be governed by this Act as would a merger between a domestic limited partnership and a domestic limited liability company. If the merger involves a domestic general partnership and a domestic corporation, this Act would govern the general partnership and the organic law of the domestic corporate entity would govern the corporation. If the merger were between two domestic corporations or a domestic and foreign corporation, this Act would not apply.

Section 201(a) only speaks to the domestic side of a merger. For example, if the organic law of a foreign entity that is to merge with a domestic unincorporated entity does not permit the transaction, this [Act] will not "authorize" the transaction for the foreign entity. Thus, in order to assure that these transactions take place with ease across state lines, uniformity of law is required. This [Act] is intended to *enable the targeted transactions as to* ***domestic unincorporated entities*** *only*. There is some limited extraterritorial effect to the [Act] under § 201(b) as to foreign entities whose organic law and rules *are silent* regarding the transaction. In those circumstances, it may fairly be said that some degree of risk is involved in giving an unconditional legal opinion as to the effect of a transaction involving a foreign entity from a "silent" jurisdiction.

Section 201(b) - Section 201(b) enables a foreign entity to be a party to a merger with a domestic unincorporated entity *upon two conditions:* (1) where the *organic rules of the foreign entity do not prohibit the merger*; and (2) where the *merger is not prohibited by the organic law of the foreign entity.* As previously stated in the Reporter's Notes to § 103(b), use of this Act by a foreign entity could raise questions as to the validity or legal effect of the transaction in the foreign jurisdiction. Yet, as presently drafted, the merger *could occur* without specific statutory direction in the foreign jurisdiction, subject, of course, to a legal opinion by counsel. Likewise, if the foreign entity is regulated by a state agency (*e.g.*, the banking commission, the insurance commissioner, or the Attorney General's office), the legal effect of the merger may subsequently be challenged on regulatory grounds.

Section 201(c) - Section 201(c) authorizes mergers involving domestic incorporated entities where the organic law and organic rules of the incorporated entity permit this type of merger. As stated in the legislative note to § 103, a prior, broader default rule was abandoned by the drafting committee.

SECTION 202. PLAN OF MERGER.

(a) Subject to sections 103(a) and (c) and sections 201(a) and (c), a domestic entity may be a party to a merger by proposing, adopting and approving a plan of merger.

(b) A plan of merger must be in a record and must state or contain:

(1) the name, jurisdiction of formation and type of organization of each merging entity, and the name, jurisdiction of formation and type of organization of the surviving entity;

(2) the terms and conditions of the merger;

(3) the manner and basis of converting the ownership or transferee interests of each merging entity of which the entity has notice into ownership or transferee interests, securities, or obligations; rights to acquire ownership or transferee interests or securities, cash, or other property; or any combination of the foregoing;

(4) if the surviving entity is to be created by the merger, its public organic documents, if any, and the full text of its organic rules;

(5) if the surviving entity exists before the merger, any amendments to its public organic documents or organic rules that are stated or contained in the plan of merger;

(6) the future effective date or time, which shall be a date or time certain, of the merger if it is not to be effective upon the filing of the statement of merger or the plan of merger pursuant to section 204 (b); and

(7) any provision required by the organic law or organic rules of each merging entity.

(c) A plan of merger may state or contain any other information relating to the merger that the parties may desire.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is set forth in the plan.

Reporter's Notes

Subject to §§ 103(a) and (c) and §§ 201(a) and (c), for this [Act] to apply, at least one of the constituent organizations must be a domestic entity.

Section 202(b)(3) - Section 202(b)(3) enables constituent organizations to provide for continuing interests in a surviving entity for some equity holders and the payment of some other form of consideration for other equity participants. In addition, constituent entities may use a merger to reorganize the capital structure of the surviving entity. Because § 202(b)(3) ostensibly permits the non-uniform treatment of equity holders in a merger, some concern has been raised as to whether the language of section 202(b)(3) should be modified to either *enable, limit or eliminate* an "equity shuffle" in a merger. *See Ann E. Conaway Anker, Restructuring (or "Shuffling") Equity Interests in Cross-Form Mergers and Conversions*, Inter-Entity Mergers and Conversions, presented by the Committee on Taxation and Committee on Partnerships and Unincorporated Business Organizations, Chicago, August 2001. As presently drafted, a non-uniform "equity shuffle" may be accomplished in a merger involving an unincorporated entity and the minority owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal right currently afforded to minority stockholders in merging corporate entities. Arguably, any perceived "unfairness" in the "shuffle" may be resolved under the guise of fiduciary duties, assuming, of course, that such duties have not been contractually modified or eliminated.

Section 203(b)(3) - The inclusion of transferee interests in § 203(b)(3) is not intended *to create* a requirement that any particular transferee interest be contained in a plan. It is also not intended to create rights in a transferee that do not otherwise exist: (1) in the organic law governing the affected entity; or (2) in a contract to which the entity is a party. Rather, § 203(b)(3) is *permissive only* and should be read to include only those transferee interest *of which the entity has notice*. For example, assume an Alabama general partnership is to merge with a Texas LLC. Assume also that the partnership has three partners and one partner has assigned her economic rights to her adult child. If the partnership has knowledge of the merger, the adult child's transferee interest *may*, *and arguably should*, be taken into account in the

merger. If, on the other hand, the partnership has no knowledge of the transfer, § 203(b)(3)does *not create the obligation to include the transferee interest nor does it create standing to sue for its absence in the plan.* The prior draft of the [Act] contained a provision defining "knowledge and notice." That section was omitted on the theory that the organic law of participating entities contain these provisions.

Section 203(b)(4) and (5) - Sections 203(b)(4) and (5) were added after the drafting committee's meeting in March, 2002. Concern was expressed that parties contemplating a merger may approve a plan without having reviewed the *actual text of a new entity's public organic documents or organic rules or an existing entity's amendments to its public organic documents or organic rules.* The "organic rules" that are referenced here include the default rules of the entity to the extent they were not contractually modified by the parties.

Section 203(c) - Section 203(c) provides the statutory authority for a merging party to include information in a plan of merger that is not specifically listed in § 203(b). One such possibility is that of appraisal rights. For example, most states do not provide for appraisal rights for minority dissenting owners of unincorporated entities. A merging entity, could, however, negotiate such a dissenter's right and thereafter articulate the right pursuant to § 203(c). Whether the so-called "appraisal right" is that anticipated in corporate law (which, in some states, does not include in the appraisal any element for breach of fiduciary duty) or, in the alternative, that of the "buyout" right of *RUPA* would be jurisdiction-dependent. Likewise, the appropriate degree of judicial scrutiny would depend upon the applicable jurisdiction.

Section 203(d) - Section 203 (d) is new and is patterned after 15 *Pa.C.S.* § 8962(B)(2001) and similar language found in the *MBCA* and in *MITA* (2002).

SECTION 203. APPROVAL OF PLAN OF MERGER.

(a) A plan of merger must be proposed, adopted and approved by a domestic unincorporated entity according to a provision for merger in the entity's organic rules or, if there is no such provision in the organic rules, then by all the owners of the domestic unincorporated entity.

(b) A plan of merger must be proposed, adopted and approved by a domestic incorporated entity or a foreign entity according to a provision for merger in the entity's organic rules or, if there is no such provision in the organic rules, then in accordance with the organic law of the

entity regarding mergers. The holders of ownership or transferee interests of a domestic entity that proposes, adopts and approves a plan of merger may exercise appraisal rights if the holders of the ownership or transferee interests would have been entitled to exercise appraisal rights under the organic law of the entity.

(c) Subject to the organic law of each of the domestic merging entities, a plan of merger may be terminated or amended:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

(d) If a person would have owner's liability with respect to a surviving entity, approval and amendment of a plan of merger are not effective without the consent in a record of the person, unless:

(1) the organic rules of the entity provide for the proposal, adoption and approval of the merger and owner's liability would result with consent of fewer than all owners; and

(2) the person has consented in a record to the organic rules that contain that provision.

Reporter's Notes

Section 203(a) - Section 203(a) provides the substantive rule applicable to the approval of mergers by *domestic unincorporated entities* under this [Act]. Section 203(a) sets out an alternative two-part test: first, approval follows any provision in the entity's organic rules that is *specific to mergers*; and, second, if the organic rules do not mention mergers, the necessary vote becomes unanimous approval by the owners of the domestic unincorporated entity. In essence, § 203 allows the parties to *specifically* prescribe merger approval or, in the alternative, defaults to unanimity. A third alternative is also available for the approval of a merger, *i.e., the number specified for the amendment of the operating agreement of the entity.* For example, consider an LLC that wishes to merge with a corporation. Assume that the operating agreement of the LLC

is silent regarding approval of mergers but provides for amendment of the operating agreement by a 2/3 vote. Section 203(a) provides that because no *specific provision for merger appears in the operating agreement, the default rule is unanimity.* Yet, because this [Act] does not repeal any substantive provisions regarding the internal operation or governance of the LLC (with the exception of the "transactional" provisions of the underlying acts), the LLC is entitled to amend its operating agreement to *add a specific provision for merger. See, e.g.*, (1) § 404(a)(2) that provides: "except as otherwise provided in subsection (c), any matter relating to the business of the company may be decided by a majority of the members;" (2) § 404(c)(1) that provides: "the only matters of a member or manager-managed company's business requiring the consent of all of the members are: (1) the amendment of the operating agreement under Section 103 ..."; (3) § 103 that provides that the operating agreement prevails over the "default" rules of the LLC Act with *the exception of those enumerated in § 103(b)*; and (4) *Section 103(b) does not prohibit the amendment of § 404(c)(1) requiring unanimous consent for the amendment of the operating agreement*. In summation, the LLC rules governing the approval of the merger with the corporation effectively look first to *an existing provision for approval of mergers* and then to the default rules of the LLC Act. The LLC Act thereafter provides the third alternative of amendment of the operating agreement by a 2/3 vote to *add a specific merger provision at a number fewer than all in order to trump the unanimity default rule.* The third alternative was not included within the text of this [Article] because of its redundancy in relation to existing entity law.

Further, approval under § 203(a) is intended to include whatever managerial decision is required to effectuate the merger (*e.g.* manager consent in a manager-managed LLC if the organic rules of the LLC require managerial approval; directorial adoption and shareholder approval for a corporation). For example, if the organic rules of an entity require a procedure for the *proposal, adoption and/or approval* of the merger, § 203(a) mandates conformance to all of those rules. If the organic rules require only the *approval* of the requisite vote of owners or only the *adoption and approval*, then § 203(a) mandates only that required by the organic rules, nothing more. Section 203(a) is not intended to impose any greater requirements for effecting a merger than those required by the applicable organic rules or organic law of the entity

Section 203(b) - Section 203(b) defers to the organic rules or organic law of all other merging entities. As with § 203(a), § 203(b) is not intended to create an approval procedure greater than that required by the organic rules or organic law of the domestic or foreign merging entity. Section 203(b) also makes clear that if appraisal rights were available for an owner or transferee of a merging domestic entity before the merger, those appraisal rights remain in effect after the merger.

Section 203(c) - Section 203(c) permits abandonment or termination according to a provision in a plan of merger or, unless prohibited by the plan of merger, by the same consent as required to approve the plan.

Section 203(d) - Section 203(d) reflects the Committee's general view that persons who will

assume personal liability in the surviving entity must consent in a record to the merger. Section (d) further provides that any non-unanimous consent provision should specifically anticipate a merger *where owner liability could result* and the person who will assume personal liability *must have consented in a record to the organic rules that contain that provision* . Hence, a general provision for a less-than-unanimous vote alone would not be sufficient under § 203(d). Likewise, a specific provision for a non-unanimous vote would be ineffective against a person who did not consent in a record to the specific rules containing the non-unanimity provision.

Sections 203(d)(1) and (2) - Sections 203(d)(1) and (2) are *ex ante* provisions that are intended to anticipate and facilitate a merger with an unshielded entity by a vote of fewer than all the owners. As such, any attempt to modify an operating agreement *to add* such a provision would require consent in a record by the requisite number of owners. The record requirement thus cannot be avoided by *ex post* oral modifications.

SECTION 204. STATEMENT OF MERGER; EFFECTIVE DATE.

(a) A statement of merger must be signed on behalf of each party to the merger and filed with the [Secretary of State].

(b) A plan of merger that is approved and that contains all the information required by subsection (c) may be signed and filed with the [Secretary of State] instead of a statement of merger.

(c) The statement of merger must state or contain:

(1) the name, jurisdiction of formation and type of organization of each merging entity, and the name, jurisdiction of formation and type of organization of each surviving entity;

(2) if the merger is not to be effective upon the filing of the statement of merger or the plan of merger pursuant to subsection (b), the effective date or time certain of the merger, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State];

(3) a statement as to each merging entity that the merger was proposed, adopted and

approved as required by section 203;

(4) if the surviving entity is to be created by the merger, a copy of the entity's public organic;

(5) if the surviving entity is a domestic nonfiling entity, the street address of its chief executive office or principal place of business;

(6) if the surviving entity is a foreign entity, either:

(A) if it is a qualified foreign entity, its registered agent and registered office in this [State]; or

(B) if it is a nonqualified foreign entity, the street address of its chief executive office or principal place of business;

(7) if the surviving entity exists before the merger, any amendments to its public organic documents or organic rules that are stated or contained in the plan of merger; and

(8) any information required by the organic law or organic rules of the parties to the merger.

(d) A statement of merger or plan of merger may state or contain any other information relating to the merger that the parties may desire.

(e) A merger becomes effective pursuant to this [Article] upon:

(1) the date and time of filing of the statement of merger or the plan of merger pursuant to section 204(b), as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing; or

(2) a date or time certain specified in the statement or plan, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State].

Reporter's Notes

Section 204(a) - Section 204(a) states the general rule that the statement of merger must be signed by each party to the merger and thereafter filed with the office of the [Secretary of State].

Section 204(b) - Section 204(b) allows the plan of merger to be filed in lieu of the statement of merger so long as the plan contains all the information required in the statement, has been approved, is signed by an appropriate person and is filed with the [Secretary of State]. Section 204(b) was added in order to grant to recording authorities the specific statutory power to accept a plan for filing. A merger initiated by a plan filed in lieu of a statement of merger becomes effective under § 204(d) as if a statement of merger had been filed.

Section 204(c)(2) - Section 204(c)(2) has been amended to reflect the Committee's decision to cap future effective dates at 90 days after delivery to the appropriate recording authority for filing.

Sections 204(c)(5) and (c)(6)(B) - Sections 204(c)(5) and (c)(6)(B) require a nonfiling domestic or foreign entity to provide a *street address* for the entity's chief executive office or principal place of business. A post office box would not satisfy the address mandate of either section. The chief executive office or principal place of business of the domestic nonfiling entity need not be within the jurisdiction of formation of the domestic nonfiling entity. The purpose and intent of §§ 204(b)(5) and (c)(6)(B) is to give notice of a specific place at which the nonfiling entity may be found for all purposes, including that of service of process.

Section 204(e)(1) - Section 204(e)(1) has added language regarding effective dates of filings. The language, "the date and time of filing *...as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing,*" is taken from the ABA Model Inter-Entity Transaction Act (draft of 3-02) § 204(c)(1). The language was included because of previous NCCUSL debates regarding potential litigation determining the precise time at which "filing" occurs. As drafted, § 203(c)(1) anticipates a jurisdiction-specific determination of "filing," taking into consideration whatever local procedures govern recording and filing of public documents. Thus, for example, if the Kansas Secretary of State deems "filing" to occur upon docketing and the Iowa Secretary of State considers "filing" to occur upon date-stamping, each local filing time, though different, would prevail. Section 204(e)(1) makes no attempt to prescribe an omnibus "filing" time.

Section 204(e)(2) - Section 204(e)(2) caps a later effective date to 90 days after the statement or plan is delivered to the [Secretary of State] for filing.

SECTION 205. EFFECT OF MERGER.

(a) When a merger becomes effective pursuant to this [Article], the following rules apply:

(1) The surviving entity either continues or comes into existence.

(2) Each entity that merges into the surviving entity ceases to exist as a separate entity.

(3) All property owned, and every contract right possessed, by each entity that merges into the surviving entity vests in the surviving entity without reversion or impairment.

(4) All debts, obligations, and liabilities, including all state and local taxes, of each merging entity that ceases to exist continue as debts, obligations, and liabilities of the surviving entity.

(5) An action or proceeding pending by or against a merging entity that ceases to exist continues as if the merger had not occurred.

(6) Unless prohibited by law other than this [Act], all of the rights, privileges, immunities, powers and purposes of each merging entity that ceases to exist vest in the surviving entity.

(7) Unless otherwise provided by the organic law of a merging entity, the merger does not require the winding up, the payment of liabilities or the distribution of the assets of the entity that is not the surviving entity.

(8) If a surviving entity exists before the merger, its public organic documents, if any, and its organic rules, including any agreement provided for in the plan of merger, are amended to the extent provided in the plan of merger and are binding upon the owners of the surviving entity.

(9) If a surviving entity is created by the merger, its public organic documents, if any,

and its organic rules, including any agreement provided for in the plan of merger, become effective and are binding upon the owners of the surviving entity.

(10) The ownership or transferee interests of each merging entity that were to be converted in the merger are converted and the former owners or transferees of those interests are entitled only to the rights provided to them under the plan of merger and to any rights they hold under the organic law or organic rules of the merging entity.

(b) A person that becomes subject to owner's liability with respect to a surviving entity as a result of a merger has owner's liability only to the extent provided in the organic law of the entity and only for those debts, obligations, and liabilities that are incurred after the merger becomes effective.

(c) The effect of a merger on the owner's liability of a person that ceases to have owner's liability as a result of a merger is as follows:

(1) The merger does not discharge an owner's liability under the organic law of the merging entity in which the person was an owner to the extent any such owner's liability was incurred before the merger becomes effective.

(2) The person does not have owner's liability under the organic law of the merging entity in which the person was an owner before the merger for any debts, obligations, or liabilities that are incurred after the merger becomes effective.

(3) The organic law of the merging entity continues to apply to the collection or discharge of an owner's liability preserved by paragraph (1), as if the merger had not occurred.

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the merging entity with respect to an owner's liability preserved by

paragraph (1), as if the merger had not occurred.

(d) When a merger becomes effective, a foreign entity that is the surviving entity in the merger is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing the rights of owners or transferees of each domestic entity that is a party to the merger; and

(2) agree to pay promptly an amount to which the owners or transferees of each domestic entity that is a party to the merger are entitled under the organic law or organic rules of the domestic merging entity.

Reporter's Notes

Section 205(a) - Section 205(a) is intended to reflect the general understanding that in a merger, the assets and liabilities of the merging entities automatically vest in the surviving entity. As such, the surviving entity becomes the owner of all real and personal property of the merged entities and is subject to all debts, obligations and liabilities of the merging entities. Further, § 205(a)(7) is intended to make clear that the merger does not trigger the dissolution or winding up of the merging entities. As a result, a merger should not constitute a transfer, assignment or conveyance of any property held by the merging entities prior to the merger. Claims of reverter or impairment of title otherwise applicable should not be triggered by the merger.

As to actions or claims pending against merging entities that are not to survive the merger, such claims may proceed under § 205(a)(5) as if the merger had not occurred. The surviving entity may, but need not, be substituted in any claim or proceeding that is continued after the merger. Substitution of the surviving entity's name in any continued proceeding has no effect on the substantive rights of the claimants in the continued action.

Section 205(b) - Section 205(b) states the rule of *future owner's liability.* Section 205(b) sets forth the general rule that an owner in a *surviving entity* shall be personally liable only for the debts and obligations of the surviving entity that *arise after* the effective date of a merger.

Section 205(c) - Section 205(c) states the rule of *past owner's liability.* Section 205(c) has four parts: (1) *an owner in a merging entity* who had personal liability for the debts and obligations of the merging entity under the entity's organic law *is not discharged* from those debts *if the debts arose before the effective date of the merger*; (2) an *owner in a merging entity*

shall not have owner's liability for the debts and obligations of the surviving entity *if those debts arose after the effective date of the merger*, (3) the *organic law governing the merging entity continues* in effect for the *purpose of preserving the owner's liability of subsection (1)* despite the nonexistence of the merging entity after the merger; and (4) the *organic law of the merging entity continues* to apply for the *purpose of any contribution rights* that may attach to liabilities preserved under subsection (1), again notwithstanding the nonexistence of the merging entity after the merger.

Sections 205(b) and (c) - Sections 205 (c) and (d) *do not address* the circumstance where an owner has owner's liability for an entity *both before and after a merger*. For example, assume a corporation merges into an existing limited partnership with a sole GP. Assume also that the LP is the surviving entity. Because the GP had personal liability both before and after the merger, it is assumed that the organic law governing the LP would determine the GP's past and future liability. The same assumption would apply where a GP merges into an LP and a former partner in the GP becomes the sole GP in the surviving LP.

Section 205(d) - Section 205(d) provides that where a foreign entity survives the merger, the foreign entity is deemed to appoint the [Secretary of State] as its agent for service of process in any proceeding to enforce the ownership rights of owners in domestic entities. The foreign entity is thus deemed to implicitly consent to the provisions of this [Act] by entering into a merger with a domestic unincorporated entity.

[ARTICLE] 3

DIVISION

SECTION 301. DIVISION.

(a) A domestic unincorporated entity may divide pursuant to this [Article] into:

(1) two or more domestic entities;

(2) the dividing entity and one or more domestic or foreign entities;

(3) one or more domestic entities and one or more foreign entities; or

(4) two or more foreign entities.

(b) A foreign entity may divide pursuant to this [Article] into two or more domestic unincorporated entities, the dividing entity and one or more domestic unincorporated entities, or one or more foreign entities and one or more domestic unincorporated entities if the division is not prohibited by the organic law and organic rules of the foreign entity.

(c) A domestic incorporated entity may divide pursuant to this [Article] into two or more domestic unincorporated entities, the dividing entity and one or more unincorporated domestic entities, one or more domestic unincorporated entities and one or more domestic incorporated entities, or one or more domestic unincorporated entities and one or more foreign entities but only if the division is permitted by the organic law and organic rules of the domestic incorporated entity.

Reporter's Notes

Article 3 is new. At its December, 2001 meeting, the Committee charged the Reporter with gathering information concerning the division. Presently, Pennsylvania has the most explicit provisions for divisions of domestic corporations, LLCs and LPs. *See, e.g.,* 15 Pa.C.S. § 8961 *et seq*. (2001)(division of domestic LLC); 15 *Pa.C.S.* § 8576 *et seq*. (2001)(division of domestic

limited partnership); 15 *Pa.C.S.* § 1951 *et seq*. (2001)(division of domestic corporation). In general, the Pennsylvania statutes permit a single dividing entity to contractually allocate its assets and liabilities to new entities. The allocation of liabilities is, by statute, subject to a test of fraud on owners or fraud in the conveyance of assets. The Pennsylvania division provisions first appeared in 1972 for nonprofit entities. The statutes have since been broadened to include for-profit corporations, LPs and LLCs. Pennsylvania does not, at present, provide for a division of a general partnership.

Texas, by contrast, implicitly permits a division in its merger statutes by providing that an entity can merge into more than one other entity. Presumably Texas will permit a division into an existing as well as a new entity. (Point of information - in a recent European Union directive to member states, all members of the EU *must* contain provisions authorizing divisions in their statutory laws.)

In the Committee's first discussions of the division at its meeting in March, 2002, some points of concern were raised and vetted at length. The first issue was that of the *novation* of contractual obligations between the dividing entity and its creditors. The concern of the committee was that prior language in the statute permitted a novation *by operation of law*. That language was removed with the understanding that a creditor whose claim was compromised or impaired by a division retained defenses against the allocation (*e.g.*, fraud on owners or creditors, fraudulent conveyance or fraudulent transfer law, or transfers in violation of law).

Another issued that spawned considerable discussion was that of title to real estate held by surviving entities. Some committee members felt that a title company would not insure title where real property was "divided" according to a plan and statement of division. Others felt that the filing of the plan of division within the county of the location of affected property would be sufficient. Memoranda were circulated by the ABA advisor from the Real Estate Committee of Business Law Section (Barry Nekritz) to various title companies for their opinion on the issue. The committee is awaiting further information. Section 305 and the Reporter's Notes thereto address this concern.

A third issue that was raised and discussed by the committee was that of requiring a special consent to accomplish a division. The theory underlying a requirement of special consent was the unique nature of the division and the contractual allocation of assets and liabilities that the division permits. The committee, at its first discussion on the issue, rejected a special consent requirement on the theory that the transaction is being accomplished today in the form of a spin-off or reorganization without a "special consent." The division, like the spin-off or reorganization, permits the contractual "removal" of assets and liabilities through lengthy, complicated, highly-lawyered agreements. Therefore, in the interest of efficiency of transactions, the special consent idea was rejected and the division remained in its present form.

A final discussion point was that of abuse of choice-of-law for the entity. The point was raised that a division could be utilized by the owners of a dividing entity to allocate assets and/or

corresponding liabilities into jurisdictions more favorable to debtors. While abuse of choice-of-law is possible with the division, it was agreed by the committee that equity, if not other law, would unwind an "unfair" or "inequitable" allocation. Other committee members noted that a change in organic law of an entity could as easily be accomplished through a merger, conversion or domestication. As such, the division remained in its present form for consideration by the committee of the whole.

SECTION 302. PLAN OF DIVISION.

(a) Subject to section 103(a) and (c) and sections 301(a) and (c), a domestic entity may be a party to a division by proposing, adopting and approving a plan of division.

(b) A plan of division must be in a record and must state or contain:

(1) the name, jurisdiction of formation and type of organization of the dividing entity, and the name, jurisdiction of formation and type of organization of the surviving entities;

(2) the terms and conditions of the division;

(3) the manner and basis of:

(i) the reclassification of the ownership or transferee interests of any surviving entity of which the parties have notice, and the manner and basis of reclassifying the ownership or transferee interests of the dividing entity of which the parties have notice into ownership or transferee interests, other securities, or obligations; rights to acquire interests or other securities, cash, or other property; or any combination of the foregoing;

(ii) the disposition of the ownership or transferee interests of which the parties have notice, into securities, obligations, rights to acquire interests or other securities of the entities surviving the division; and

(iii) the allocation of the assets and liabilities of the dividing entity between and among the surviving entities;

(4) a statement that the dividing entity will or will not survive the division;

(5) if a surviving entity is to be created by the division, its public organic documents, if any, and the full text of any organic rules that are contained in the plan of division;

(6) if a surviving entity exists before the division, any amendments to its public organic documents or organic rules that are stated or contained in the plan of division;

(7) the future effective date or time, which shall be a date or time certain, of the division if it is not to be effective upon the filing of the statement of division or the plan of division pursuant to section 304(b); and

(8) any provisions required by the organic law or organic rules of the dividing or surviving entities.

(c) A plan of division may state or contain any other information relating to the division that the parties may desire.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan.

Reporter's Notes

Section 302 is new and is patterned in substantial part on the Pennsylvania division statutes as well as Chapter 12, Subchapter B of the *MBCA*. Transferee interests are specifically referenced for possible inclusion as consideration in a division.

SECTION 303. APPROVAL OF PLAN OF DIVISION.

(a) A plan of division must be proposed, adopted and approved by a domestic unincorporated entity according to a provision for division in the entity's organic rules or, if there

is no such provision in the organic rules, then by all the owners of the domestic unincorporated entity.

(b) A plan of division must be proposed, adopted and approved by a domestic incorporated entity or a foreign entity according to a provision for division in the entity's organic rules or, if there is no such provision in the organic rules, then in accordance with the organic law of the entity regarding divisions or, if there is no such organic law, then in accordance with the organic law of the entity regarding mergers. The holders of ownership or transferee interests of a domestic entity that proposes, adopts and approves a plan of division may exercise appraisal rights if the holders of the ownership or transferee interests would have been entitled to exercise appraisal rights under the organic law of the dividing entity.

(c) Subject to the organic law of each domestic dividing or surviving entity, a plan of division may be terminated or amended:

(i) as provided in the plan; or

(ii) unless prohibited by the plan, by the same consent as was required to approve the plan.

(d) If a person would have owner's liability with respect to a surviving entity, approval and amendment of a plan of division are not effective without the consent in a record of the person, unless;

(1) the organic rules of the entity provide for the proposal, adoption and approval of the division and owner's liability would result with consent of fewer than all owners; and

(2) the person has consented in a record to the organic rules that contain that provision.

Reporter's Notes

Section 303 has been adapted to mirror the approval provisions for each of the transactions provided for in this Act. As such, the commentary to analogous provisions also apply to § 303.

Section 303(b)- Section 303(b) adds another default rule for domestic incorporated and foreign entities. The additional default rule permits these entities to satisfy the approval procedures by the vote necessary to effect a *merger* if there is no organic rule or organic law regarding divisions. The policy underlying the additional default rule is that the division could be accomplished through a series of *mergers* in a long-form transaction. Therefore, if the division could indirectly be accomplished through an *inefficient means, it should be enabled pursuant to this [Article] through an efficient one as well.*

SECTION 304. STATEMENT OF DIVISION; EFFECTIVE DATE.

(a) A statement of division must be signed on behalf of the dividing entity and filed with the [Secretary of State].

(b) A plan of division that is approved and that contains all the information required by subsection (c) may be signed and filed with the [Secretary of State] instead of a statement of division.

(c) The statement of division must state or contain:

(1) the name, jurisdiction of formation and type of organization of the dividing entity, and the name, jurisdiction of formation and type of organization of each surviving entity;

(2) if the division is not to be effective upon the filing of the statement of division or the plan of division pursuant to subsection (b), the effective date or time certain of the division, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State];

(3) a statement as to the dividing entity that the division was approved as required by

section 303;

(4) a statement that the dividing entity will or will not survive the division;

(5) if a surviving entity is to be created by the division, a copy of the entity's public organic document;

(6) if a surviving entity is a domestic nonfiling entity, the street address of its chief executive office or principal place of business;

(7) if a surviving entity is a foreign entity, either:

(A) if it is a qualified foreign entity, its registered agent and registered office in this [State]; or

(B) if it is a nonqualified foreign entity, the street address of its chief executive office or principal place of business;

(8) if a surviving entity is in existence prior to the division, any amendments to its public organic documents or organic rules that are stated or contained in the plan of division; and

(9) any information required by the organic law or organic rules of the parties to the division.

(d) A statement of division or plan of division may state or contain any other information relating to the division that the parties may desire.

(e) A division becomes effective pursuant to this [Article] upon:

(1) the date and time of filing of the statement of division or plan of division pursuant to section 304(b), as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing; or

(2) a date or time certain specified in the statement or plan, which is not more than 90

days after the statement or plan is delivered for filing to the [Secretary of State].

Reporter's Notes

Section 304 is drafted to mirror the filing requirements of mergers. Certain modifications were made to reflect the unique nature the division.

SECTION 305. EFFECT OF DIVISION.

(a) When a division becomes effective pursuant to this [Article], the following rules apply:

(1) The dividing entity is subdivided into the distinct and independent surviving entities named in the plan of division.

(2) If the dividing entity is not to survive the division, the existence of the dividing entity ceases.

(3) The surviving entities continue or come into existence.

(4) All property owned, and every contract right possessed, by the dividing entity are allocated to and vested in the surviving entities as specified in the plan of division, or, if no such allocation is made and the dividing entity survives the division, all property owned and every contract right possessed vest in the dividing entity, or, if no such allocation is made and the dividing entity does not survive the division, all property owned and every contract right possessed vest equally among the surviving entities, as tenants in common.

(5) An action or proceeding pending by or against a dividing entity that ceases to exist continues against the surviving entities as tenants in common as if the division had not occurred.

(6) All liens upon the property of the dividing entity are not impaired by the division.

(7) To the extent allocations of debts, obligations, and liabilities, including state and

local taxes, are specified in the plan of division, the debts, obligations and liabilities of the dividing entity become the debts, obligations and liabilities of the surviving entities as specified in the plan, or, if there is no allocation of debts, obligations and liabilities and the dividing entity survives the division, the debts, obligations and liabilities vest in the dividing entity, or, if there is no allocation of debts, obligations and liabilities and the dividing entity does not survive the division, equally among the surviving entities, as tenants in common.

(8) Each surviving entity holds any assets and liabilities allocated to it by the plan of division or by statute as the successor to the dividing entity, and those assets and liabilities are not deemed to be assigned or transferred to the new entity.

(9) If a dividing or surviving entity exists before the division, its public organic documents, if any, and its organic rules, including any agreement provided for in the plan of division, are amended to the extent provided in the plan of division and are binding on the owners of the entity..

(10) If a surviving entity is created by the division, its public organic documents, if any, and its organic rules, including any agreement provided for in the plan of division, become effective and are binding upon the owners of the surviving entity.

(11) The ownership or transferee interests of the dividing entity and each surviving entity that were to be converted in the division are converted and the former owners or transferees of those interests are entitled only to the rights provided to them under the plan of division and to any rights they hold under the organic law or organic rules of the dividing or surviving entity.

(b) The allocation of any interest in real property [wherever located] having a remaining

term of [30 years] or more by a dividing entity to a new surviving entity is not effective until one of the following documents is filed in the [office for the recording of deeds] in which the property is located:

(1) a deed, lease or other instrument of confirmation describing the tract or parcel;

(2) a duly executed duplicate original copy of the statement of division;

(3) a copy of the statement of division certified by the [Secretary of State]; or

(4) [*any other documents that may be filed under the practice in the adopting state*].

(c) A person that becomes subject to owner's liability with respect to a surviving entity as a result of a division has owner's liability only to the extent provided in the organic law of that entity and only for those debts, obligations and liabilities that are incurred after the division becomes effective.

(d) The effect of a division on the owner's liability of a person that ceases to have owner's liability as a result of a division is as follows:

(1) The division does not discharge an owner's liability under the organic law of the dividing entity in which the person was an owner to the extent any such owner's liability was incurred before the division becomes effective;

(2) The person does not have owner's liability under the organic law of the dividing entity in which the person was an owner before the division for any debts, obligations, or liabilities that are incurred after the division becomes effective;

(3) The organic law of the dividing entity continues to apply to the collection or discharge of an owner's liability preserved by paragraph (1), as if the division had not occurred; and

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the dividing entity with respect to an owner's liability preserved by paragraph (1), as if the division had not occurred.

(e) When a division becomes effective, a foreign entity that is a surviving entity in the division is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing the rights of owners or transferees of each domestic entity that is a party to the division; and

(2) agree to pay promptly an amount to which the owners or transferees of each domestic entity that is a party to a division are entitled under the organic law or organic rules of the domestic entity.

Reporter's Notes

Section 305 is adapted from the Pennsylvania division statutes with modifications to reflect the Committee's decisions in December, 2001 regarding analogous merger provisions.

Sections 305(a)(1) - (a)(3) - Sections 305 (a)(1)- (a)(3) state the general rules that the division results in the subdivision of a single entity into two or more new or existing entities. The rules also anticipate that the filing of a statement of division may either terminate the dividing entity and create two or more new entities or continue the existence of the dividing entity and recognize the new or continuing existence of one or more other entities.

Section 305(a)(4) - Section 305(a)(4) provides that the property, rights and causes of action of the dividing entity may be allocated to the surviving entities without reversion or impairment in any manner stated in the plan. If the plan is silent as to the allocation of these rights and property, the dividing entity retains the rights if it survives the division otherwise the surviving entities take the property on a per capita basis as tenants in common. The allocation is, of course, subject to the challenges of fraud, fraudulent conveyances and violation of law.

Section 305(a)(5) - Section 305(a)(5) provides that after the division, each surviving entity is liable solely for the debts and obligations undertaken in its name. No liability is imputed between or among surviving entities for obligations arising after the division.

Section 305(a)(7) - Section 305(a)(7) concerns the allocation of the liabilities of the dividing entity. The rule of § 305(a)(7) is that the liabilities of the dividing entity may be allocated among surviving entities in any manner. The liabilities so allocated become the liability of the receiving/surviving entity. The exception to the allocation of liabilities ("freeing of liabilities") includes any defense recognized in the jurisdiction of formation of the affected entity. Such defenses against an allocation specified in a plan include fraud on owners, a violation of law or a fraudulent conveyance. In these cases, the allocation fails and the dividing entity retains the liabilities if it survives the division or, if the dividing entity ceases to exist, the surviving entities are jointly and severally liable for the failed allocation. For example, assume a corporation is to be divided into four LLCs. The plan of division can allocate particular assets and liabilities to each LLC. Assume that one LLC is to receive a piece of equipment with a fair market value of $5,000. Assume further that the same LLC is allocated an account payable of $20,000. Because the account payable far exceeds the equipment so allocated, the account payable may be deemed to be fraudulent with the result that the allocation fails. The account payable thereafter becomes the liability of a surviving dividing entity or of all four LLCs, jointly and severally. If the account payable were $3,000, the allocation would seem to be enforceable with the result that the dividing entity and the other 3 LLCs are "free" of that liability.

Section 305(a)(9) - Section 305(a)(9) effects the "transfer" of the dividing entity's assets and liabilities without an "assignment." As with a merger, a division should not trigger "assignment" or "conveyance" clauses.

Section 305(b) - Section 305(b) is intended to prevent the use of a division to avoid real estate transfer taxes. An adopting jurisdiction may wish *to require the filing of a plan of division* in the county where "divided" real estate or property is located. California, for instance, permits the recording of a plan and title companies are thereafter entitled to rely upon the plan regarding title.

Section 305(c) and (d) - Like its counterparts in §§ 205(c) and (d), Sections 305(c) and (d) address only future and past owner's liability. It is not intended to address continuing owner liability.

[ARTICLE] 4

ENTITY INTEREST EXCHANGE

SECTION 401. ENTITY INTEREST EXCHANGE.

(a) By an entity interest exchange:

(1) a domestic unincorporated entity may acquire pursuant to this [Article] all of one or more classes or series of ownership or transferee interests of which the entity has notice of another domestic or foreign entity in exchange for ownership or transferee interests, securities, or obligations; rights to acquire ownership or transferee interests or securities, cash, or other property; or any combination of the foregoing; or

(2) all of one or more classes or series of ownership or transferee interests of which the entity has notice of a domestic unincorporated entity may be acquired by another domestic entity pursuant to this [Article] or by a foreign entity in exchange for ownership or transferee interests, securities, or obligations; rights to acquire ownership or transferee interests or securities, cash, or other property; or any combination of the foregoing.

(b) A foreign entity may be a party to an entity interest exchange pursuant to this [Article] with a domestic unincorporated entity if the entity interest exchange is not prohibited by the organic law or organic rules of the foreign entity.

(c) A domestic incorporated entity may be a party to an entity interest exchange pursuant to this [Article] with a domestic unincorporated entity but only if the entity interest exchange is permitted by the organic law and organic rules of the domestic incorporated entity.

Reporter's Notes

An entity interest exchange is the same transaction as the share exchange provided for in

Section 11.03 of the *MBCA*. The entity interest exchange anticipated by Article 4 permits a business combination between one or more domestic unincorporated entities or between a domestic unincorporated entity and a domestic incorporated or foreign entity of any type. The effect of the entity interest exchange is that: (1) the separate existence of one or more of the exchanging entities does not cease; and (2) the acquiring entity acquires all of the ownership interests of one or more classes of the exchanging entities and, as a result of the exchange, becomes the controlling entity. This same result, that of two or more independent entities, may be accomplished by a reverse triangular merger wherein a new third entity is formed to effectuate the combination while simultaneously preserving the independent existence of the principal parties. The entity interest exchange provides *a direct method* to achieve the *indirect method* of a triangular merger. The entity interest exchange also allows an *indirect* acquisition method through the use of consideration in the exchange that is not provided by the acquiring entity (*e.g.,* consideration from another or related entity).

Section 401 - Section 401 is intended to make applicable any appraisal rights that may attach by virtue of the organic law of the entities to the entity interest exchange. It is also intended to enable any appropriate procedure for terminating or abandoning an entity interest exchange after it has been approved by the appropriate interest holders but prior to the effectuation of the entity interest exchange.

It may be noted that neither the share nor entity interest exchange is universally recognized in corporate or alternative entity law. To date, jurisdictions adopting the *MBCA* provide for a share exchange within their corporate law. Non-*MBCA* jurisdictions are not uniform in their acceptance of share exchanges. For example, Delaware does not permit share exchanges.

Many states have not provided for an entity interest exchange within their alternative entity law. For those jurisdictions that do provide for entity interest exchanges *see Texas Business Corporation Act, Article 5.02 and Texas Revised Partnership Act, Article 6132b-9,03* (Texas provides for both the share and entity interest exchange); and *NRS Chapter 92A* (permitting an entity interest exchange).

To illustrate the problem presented by a lack of uniformity regarding share or interest exchanges, consider the following. In a recent acquisition involving a Delaware corporation by a Spanish corporation, the laws of Spain would not permit a triangular merger to effectuate the transaction. Because the parties to the transaction desired independent, wholly-owned entities at the end of the acquisition, the transaction had to be structured as a share exchange (a transaction that Spanish law would permit). Delaware law does not authorize share exchanges. As a consequence, the Delaware corporation was reincorporated in Virginia (Virginia permits share exchanges) via a merger and the Spanish acquisition was then effected by a share exchange with the reincorporated Virginia entity.

Section 401(a) - Section 401(a) provides for an entity interest exchange between a domestic unincorporated entity and a domestic incorporated entity or a foreign entity of any type. Section

401(a) also enables an entity interest exchange among domestic unincorporated entities of the same or different types. The entity interest exchange of § 401(a) allows an acquiring entity to acquire *all* of the ownership or transferee interests *of one or more classes of which the entity has notice*. The entity interest exchange does not require the acquisition of *all of the ownership* or transferee interests of the exchanging entity. For example, assume that an LLC with three classes of membership interests enters into an entity interest exchange with another LLC. The acquiring entity need only acquire all of the ownership interests of *one or more classes* of the LLC membership interests.

Further, § 401(a) limits the application of the provision to transferee interests *of which the entity has notice*. As drafted, § 401(a) is not intended to grant any rights in transferees greater than those available under statutory or common law. Section 401(a) is permissive only.

Section 401(b) - Section 401(b) allows a foreign entity to effectuate an entity interest exchange with a domestic unincorporated entity if the entity interest exchange is not prohibited by the organic law or organic rules of the foreign entity. *See* Reporter's Notes to § 201(b) regarding potential legal issues arising under § 401(a).

Section 401(c) - As with section 201(c), section 401(c) enables a domestic incorporated entity to be a party to an entity interest exchange with a domestic unincorporated entity if the organic law and organic rules of the incorporated entity *permit* the entity interest exchange. As indicated in the Reporter's Notes to § 401(c), a broader default rule for domestic incorporated entities was abandoned at the drafting committee's December, 2001 meeting.

SECTION 402. PLAN OF ENTITY INTEREST EXCHANGE.

(a) Subject to sections 103(a) and (c) and sections 401(a) and (c), a domestic entity may be a party to an entity interest exchange by proposing, adopting and approving a plan of entity interest exchange.

(b) A plan of entity interest exchange must be in a record and must state or contain:

(1) the name, jurisdiction of formation and type of organization of each exchanging entity, and the name, jurisdiction of formation and type of organization of the acquiring entity;

(2) the terms and conditions of the entity interest exchange;

(3) the manner and basis of exchanging or converting ownership or transferee

interests of the exchanging entity of which the entity has notice into ownership or transferee interests, securities, or obligations; rights to acquire ownership or transferee interests or securities, cash or other property; or any combination of the foregoing;

(4) any amendments to the public organic documents or organic rules of the exchanging or acquiring entity;

(5) the future effective date or time, which shall be a date or time certain, of the entity interest exchange if it is not to be effective upon the filing of the statement of entity interest exchange or the plan of entity interest exchange pursuant to section 404(b); and

(6) any provision required by the organic law or organic rules of each party to the entity interest exchange.

(c) A plan of entity interest exchange may state or contain any other information relating to the entity interest exchange that the parties may desire.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is set forth in the plan.

Reporter's Notes

Section 402(a) - Section 402(a) states the general intent that, for this [Article] to apply, one of the constituent entities must be a domestic unincorporated entity.

Section 402 (b)(3) - Section 402 (b)(3) poses the same "shuffling" issue as § 202(b)(3). One difference in § 402(b)(3) is that the two entities to the interest exchange will remain after the transaction whereas § 202 anticipates the possible non-survival of one of the parties to a merger. In any event, § 402(b)(3) ostensibly permits the non-uniform elimination or modification of ownership or transferee rights in an entity interest exchange

Section 402(c) - Section 402(c), as with § 202(c), permits an exchanging entity to include information in the plan of entity interest exchange that otherwise would not be mandated by the

organic law or organic rules of the entity. Section 402(c) was included to create the statutory authority for entities to include this information despite its absence in § 403. One type of provision that might be added is that for contractual appraisal rights. As stated in the Reporter's Notes to § 202, most jurisdictions do not provide for appraisal rights for dissenting owners in unincorporated entities. If, however, an exchanging entity were to negotiate such a contractual right and thereafter wished to include that right in the plan of interest exchange, § 402(c) would permit its inclusion.

SECTION 403. APPROVAL OF PLAN OF ENTITY INTEREST EXCHANGE.

(a) A plan of entity interest exchange must be proposed, adopted and approved by a domestic unincorporated exchanging entity according to a provision for entity interest exchange in the entity's organic rules or, if there is no such provision in the organic rules, then by all the owners of the domestic unincorporated exchanging entity.

(b) A plan of entity interest exchange must be proposed, adopted and approved by a domestic incorporated exchanging entity or a foreign exchanging entity according to a provision for entity interest exchange in the entity's organic rules or, if there is no such provision in the organic rules, then in accordance with the organic law of the entity regarding entity interest exchanges or, if there is no such organic law, then in accordance with the organic law of the entity regarding mergers. The holders of ownership or transferee interests of a domestic entity that proposes, adopts and approves a plan of entity interest exchange may exercise appraisal rights if the holders of the ownership or transferee interests would have been entitled to exercise appraisal rights under the organic law of the entity.

(c) Subject to the organic law of the domestic unincorporated exchanging entity, a plan of entity interest exchange may be terminated or amended:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

(d) If a person would have owner's liability with respect to an acquiring entity, approval and amendment of a plan of entity interest exchange are not effective without the consent in a record of the person, unless:

(1) the organic rules of the entity provide for the proposal, adoption and approval of the entity interest exchange and owner's liability would result with consent of fewer than all owners; and

(2) that person has consented in a record to the organic rules that contain that provision.

Reporter's Notes

Section 403(a) - Section 403(a) states the general rule that a domestic unincorporated entity may be an acquiring or exchanging entity in an entity interest exchange. As such, section 403(a) *will become the substantive law which enables this transaction for domestic unincorporated entities*. Section 403(a), in this regard, is altering present unincorporated entity law since no uniform unincorporated act currently allows for an entity interest exchange. In addition, § 403(a) permits a domestic unincorporated entity to be a party to an entity interest exchange with another domestic incorporated entity or a foreign entity of any type. Section 403(a) does not enable an entity interest exchange between two domestic incorporated entities.

Section 403(a), like its counterpart in section 203 (a), provides alternative approval tests. These alternative tests defer to the parties' *specific intent* first, then to *unanimity*.

Section 403(b) - Section 403(b) presently defers to the parties' specific intent first, then to the approval required under the entity's organic law regarding entity interest exchanges, and finally defaults to the approval necessary to effect a merger under the entity's organic law (incorporated entities likely will default to the number in the entity's organic rules for merger or to a majority vote and unincorporated entities likely will default to the number specified for merger in the entity's organic rules for merger or to unanimity). The final default rule will permit an entity interest exchange by the vote necessary to accomplish a *merger if the organic law of the entity is silent regarding entity interest exchanges*. As with the same default rule in § 303(b), the policy underlying the § 403(b) default rule is efficiency of transactions where the

same end result could be effected through a series of mergers.

Section 403(c) - Section 403(c) permits termination or abandonment according to a bargained-for provision to that effect in a plan of exchange or with the same consent as was necessary to approve the transaction.

Section 403(d) - Sections 403(d) adopts the same approach as§ 203(d) regarding the incurrence of owner's liability as a result of an entity interest exchange. This section prohibits an entity interest exchange without the consent in record form of any person who will incur owners' liability upon the effectiveness of the exchange.

SECTION 404. STATEMENT OF ENTITY INTEREST EXCHANGE; EFFECTIVE DATE.

(a) A statement of entity interest exchange must be signed on behalf of each party to the entity interest exchange and filed with the [Secretary of State].

(b) A plan of entity interest exchange that is approved and that contains all the information required by subsection (c) may be signed and filed with the [Secretary of State] instead of a statement of entity interest exchange.

(c) The statement of entity interest exchange must state or contain:

(1) the name, jurisdiction of formation and type of organization of the exchanging entity, and the name, jurisdiction of formation and type of organization of the acquiring entity;

(2) if the entity interest exchange is not to be effective upon the filing of the statement of entity interest exchange or the plan of entity interest exchange pursuant to subsection (b), the effective date or time certain of the entity interest exchange, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State];

(3) a statement as to the exchanging entity that the entity interest exchange was

proposed, adopted and approved as required by section 403;

(4) any amendments to the public organic documents or organic rules of an exchanging or acquiring entity that are stated or contained in the plan of exchange; and

(5) any information required by the organic law or organic rules of the parties to the entity interest exchange.

(d) A statement of entity interest exchange or plan of entity interest exchange may state or contain any other information relating to the entity interest exchange that the parties may desire.

(e) An entity interest exchange becomes effective pursuant to this [Article] upon:

(1) the date and time of filing of the statement of entity interest exchange or the plan of entity interest exchange pursuant to section 404(b), as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing; or

(2) a date or time certain specified in the statement or plan, which is not more than 90 days after the statement is delivered for filing to the [Secretary of State].

Reporter's Notes

Section 404 - Section 404 does not require that the plan of entity interest exchange be filed of public record. It is the intent of the committee that a plan of entity interest exchange could be used as a substitute for the statement of entity interest exchange so long as the plan is appropriately approved and reflects all the information required to be contained in the statement under section 404. It is the intent of section 404 that a plan could serve as the appropriate public filing and that the filing of the plan would have the same legal effect as the filing of the statement of entity interest exchange. Section 404(b) provides the statutory authority for the filing of a plan in substitution of a statement.

The information required to be filed in the statement under section 404 is intentionally less burdensome than that required for a merger under section 204. The present draft adopts a minimalist filing philosophy because: (1) a filing as to the *transaction* will be required by any domestic unincorporated acquiring or exchanging entity; (2) both the acquiring and the

exchanging entity *remain in existence* after the exchange (although arguably in a reorganized or recapitalized form); and (3) the terms and conditions of the exchange or any resulting restructuring or recapitalization will have been approved by the owners under section 403. Section 404 thus omits a reference to *terms and conditions* because owner approval has already been met (assuming, also, that where approval is defective, the owners have recourse under contract or alternative entity law). A filing as to the *transaction* allows at least some minimal protection for secured lenders who have loaned against collateral that may have "shifted" in some manner in an exchange which results in a recapitalization or restructuring. Also, in light of new Article 9, it seemed advisable to provide for a *notice* filing regarding the *transaction* and to thereafter leave the secured lenders to police their collateral and a possible new debtor accordingly.

Section 404(b)(4) - Section 404(b)(4) is drafted to reflect certain differences in the organic laws of incorporated and unincorporated entities. For example, where an entity interest exchange is used for the purpose of recapitalizing an unincorporated entity, alternative entity law does not require an amendment to a public organic document in order to protect creditors. Corporate law, conversely, would require an amendment to a corporation's certificate of incorporation where authorized capital has been increased or otherwise modified. Therefore, if an entity interest exchange is between only unincorporated entities and the private organic documents of the exchanging and acquiring entities permit the transaction, an argument could be made that no filing is necessary. Conversely, if the exchange is between an unincorporated entity and an incorporated organization, the filing for the corporate entity could be effected simply by an amendment to the corporation's certificate of incorporation rather than a filing of an entity interest exchange. At present, the draft adopts a minimalist compromise.

Section 404(c)(1) - Section 404(c)(1) has added the language "as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing." This language was taken from the ABA Model Entity Transactions Act (draft of 10-17-01) § 304(c)(1). The language was included because of prior debates regarding when "filing" occurs.

SECTION 405. EFFECT OF ENTITY INTEREST EXCHANGE.

(a) When an entity interest exchange becomes effective pursuant to this [Article], the following rules apply:

(1) The ownership and transferee interests of each entity that were to be exchanged in the entity interest exchange are exchanged and the former owners or transferees of those interests

are entitled only to the rights provided to them under the plan of entity interest exchange and to any rights they hold under the organic law or organic rules of the entity to the entity interest exchange.

(2) The acquiring entity becomes the holder of the ownership or transferee interests in the exchanging entity as stated in the plan of entity interest exchange.

(3) The public organic documents and organic rules, including any agreement provided for in the plan, of the parties to the entity interest exchange are amended to the extent provided in the plan of entity interest exchange and under the organic law of the entities to the exchange and are binding upon the owners of the entities to the exchange.

(b) A person that becomes subject to owner's liability with respect to an entity as a result of an entity interest exchange has owner's liability only to the extent provided in the organic law of the entity and only for those debts, obligations, and liabilities that are incurred after the entity interest exchange becomes effective.

(c) The effect of an entity interest exchange on the owner's liability of a person that ceases to have owner's liability as a result of the entity interest exchange is as follows:

(1) The entity interest exchange does not discharge an owner's liability under the organic law of the entity in which the person was an owner to the extent any such owner's liability was incurred before the entity interest exchange becomes effective;

(2) The person does not have owner's liability under the organic law of the entity in which the person was an owner before the entity interest exchange for any debts, obligations, or liabilities that are incurred after the entity interest exchange becomes effective;

(3) The organic law of an entity continues to apply to the collection or discharge of an

owner's liability preserved by paragraph (1), as if the entity interest exchange had not occurred; and

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the entity with respect to an owner's liability preserved by paragraph (1), as if the entity interest exchange had not occurred.

(d) When an entity interest exchange becomes effective, a foreign entity that is the acquiring entity in the exchange is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing the rights of owners or transferees of each domestic entity that is a party to the entity interest exchange; and

(2) agree to pay promptly an amount to which the owners or transferees of each domestic entity that is a party to the entity interest exchange are entitled under the organic law or organic rules of the domestic exchanging entity.

Reporter's Notes

Section 405(a) - Section 405(a) has been redrafted since the meeting of March, 2001. At present, section 405(a) attempts to make clear four points - that after the entity interest exchange becomes effective: (1) the *entity interests* of the *exchanging entity* are exchanged, converted or canceled as provided in the plan; (2) the *only rights* of the *former holders* of the exchanging entity are those received as consideration for the exchange, conversion or cancellation; (3) the *acquiring entity* becomes the *owner* of the exchanging entity's ownership or transferee interests (and thus the controlling entity); and (4) the *organic documents* of the parties *are amended* by the entity interest filing, thus obviating the need for repetitive filings (*i.e.,* a filing as to the *entity interest exchange* and another filing to reflect *amendments to public organic documents* as required by the laws governing the respective entities).

Section 405(b) - Section 405(b) states the rule for *future owner's liability*. Section 405(b) provides that an *owner in an acquiring entity* shall have *personal liability only for the debts and obligations of the acquiring entity* that arise *after the effective date* of the exchange. This section parallels analogous provisions in Articles 2 (mergers), 3 (divisions), 5 (conversions) and 6

(domestications).

Section 405(c) - Section 405(c) states the rule for past owner's liability. Section 405(c) is drafted in four parts: (1) an *owner in an exchanging entity* who had personal liability for the debts and obligations of the exchanging entity under the entity's organic law *is not discharged* from those debts and obligations *if the debts arose before the effective date* of the exchange; (2) an *owner in an exchanging entity shall not have owner's liability* for the debts and obligation of the *acquiring entity* if those *debts arose after the effective date* of the exchange; (3) the *organic laws* or the *exchanging entity continue to apply* for any *past owner's liability that is preserved* under subsection (1); and (4) the *organic laws of the exchanging entity continue to apply* regarding any *contribution rights* among owners that were *preserved under subsection (1)*.

Sections 405(b) and (c) - Sections 405(b) and (c) do not address the issue of continuing owner liability. *See* Reporter's Notes at §§ 205(b) and (c).

[ARTICLE] 5

CONVERSION

SECTION 501. CONVERSION.

(a) A domestic unincorporated entity may pursuant to this [Article]:

(1) convert to a different type of domestic entity; or

(2) become a foreign entity of a different type if the conversion is not prohibited by the organic law or organic rules of the foreign entity.

(b) A foreign entity convert may pursuant to this [Article] to a domestic unincorporated entity of a different type if the conversion is not prohibited by the organic law or organic rules of the foreign entity.

(c) A domestic incorporated entity may convert pursuant to this [Article] to a domestic unincorporated entity but only if the conversion is permitted by the organic law and organic rules of the domestic incorporated entity.

Reporter's Notes

The conversion contemplated by Article 5 involves the transformation of one type of entity into a different type of entity. The conversion, like the merger of Article 2, transfers all the property, rights, privileges, title, debts, obligations, liabilities and duties of the converting entity to the converted entity by operation of law. Unlike a merger, however, a conversion involves a *single entity* which, after the conversion, is considered to be the *same entity* as before the conversion. The conversion, therefore, provides a *direct method* to accomplish what before required the creation of *two entities* followed by a merger of the entities. Because a conversion involves only a change of form, it should not constitute a "sale" or "conveyance" under state law or applicable contract provisions.

The conversion is a relatively recent transaction. For example, the first appearance of a conversion in uniform unincorporated law occurred in 1994 with *RUPA*. It was followed in 1995 with *ULLCA* and in 2001 with *Re-RULPA (RULPA 1976, with 1985 amendments,* is silent as to conversions; however, due to linkage, *RULPA* could be interpreted to permit the same

conversions anticipated by *RUPA*) . The conversion provisions of *RUPA* are limited to conversions by general partnerships to limited partnerships and vice versa. This Act, therefore, greatly expands the scope of the conversion provisions of *RUPA*. *See* §§ 902-904.

By comparison, *ULLCA* (1995) permits conversions between partnerships, limited partnerships and LLCs. This Act would, as with *RUPA,* greatly expand the conversion provisions of *ULLCA*. *See* §§ 902, 903.

Re-RULPA (2001) contains the broadest provisions regarding conversions in uniform unincorporated law. *Re-RULPA,* for the first time, permits cross–form conversions. This Act would replace the conversion provisions of *Re-RULPA* and thus create a "junction-box" for *all* uniform unincorporated entities.

With regard to incorporated entities, the most recent version of the *MBCA*, for the first time, permits cross-form conversions so long as one party to the conversion is a domestic corporation. These provisions were published in the October version of the *Business Lawyer* (2001).

Section 501(a) - Section 501(a) states the substantive rule for conversions involving domestic unincorporated entities. Section 501(a)(1) permits a conversion of a domestic unincorporated entity to a different type of domestic entity. For example, § 501(a) permits the conversion of a domestic general partnership to a domestic limited partnership and vice versa. Section 501(a)(1) would also permit a conversion from an LLC to a general or limited partnership. Section 501(a)(2) would enables a conversion of a domestic unincorporated entity to a foreign entity of a different type so long as the conversion is not prohibited by the organic law or organic rules of the foreign entity. For example, § 501(a)(2) enables a South Carolina general partnership (the domestic entity) convert to a North Carolina limited partnership if the organic law of North Carolina does not prohibit the conversion.

Section 501(b) - Section 501(b) enables a conversion of foreign entity to a domestic unincorporated entity of a different type so long as the organic law and organic rules of the foreign entity do not prohibit the conversion. For example, a foreign LLC could convert to a domestic partnership or limited partnership pursuant to § 501(b). Section 501(b) would not enable a conversion of a foreign LLC to a domestic LLC - such a transaction would be governed by the domestication provisions of Article 6. In addition, as stated in the Reporter's Notes to § 201(b), filing problems could occur for the foreign entity if the recording authority in that jurisdiction is not empowered to accept the conversion filing.

Section 501(c) - Section 501(c) states the rule for conversions between domestic incorporated and domestic unincorporated entities. Section 501(c) allows a domestic incorporated entity to use this provision to effect a conversion with a domestic unincorporated entity if the organic law and organic rules of the domestic incorporated entity permit the conversion.

SECTION 502. PLAN OF CONVERSION.

(a) Subject to sections 103(a) and (c) and sections 501(a) and (c), a domestic entity may convert by proposing, adopting and approving a plan of conversion.

(b) A plan of conversion must be in a record and must state or contain:

(1) the name, jurisdiction of formation and type of organization of the converting entity, and the name, jurisdiction of formation and type of organization of the converted entity;

(2) the terms and conditions of the conversion;

(3) the manner and basis of converting the ownership or transferee interests of the converting entity of which the entity has notice into ownership or transferee interests, securities, or obligations; rights to acquire ownership or transferee interests or securities, cash, or other property; or any combination of the foregoing;

(4) if the converted entity is a filing entity, a copy of the entity's public organic documents and the full text of its organic rules;

(5) if the converted entity is a nonfiling entity, the full text of the entity's organic rules;

(6) the future effective date or time, which shall be a date or time certain, of the conversion if it is not to be effective upon the filing of the statement of conversion or the plan of conversion pursuant to section 504(b); and

(7) any provision required by the organic law or organic rules of the converting entity.

(c) A plan of conversion may state or contain any other information relating to the conversion that the parties may desire.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is

set forth in the plan.

Reporter's Notes

Sections 503(a) - Section 503(a) states the substantive rule governing domestic unincorporated entities pertaining to conversions. Section 503(a) provides for a conversion between a domestic unincorporated entity and a different type of domestic unincorporated entity. Section 503(a) also provides for a conversion from a domestic unincorporated to a domestic incorporated entity if the organic law and organic rules of the corporate entity permit the conversion. Section 503(a) also permit a domestic unincorporated entity to convert to a foreign entity of a different type if the organic law and organic rules of the foreign entity do not prohibit the conversion. Section 503(a) does not enable a domestic incorporated entity to convert to a foreign entity of a different type.

Section 503(b) - Section 503(b) tracks the provisions of§§ 203, 303 and 403 relating to plans for mergers, divisions and entity interest exchanges. Certain modifications have been made to reflect the differing nature of conversions.

Section 503(b)(4) - Section 503(b)(4), like its counterparts in the merger, division and entity interest exchange sections, appears to enable a restructuring or "shuffling" of entity interests upon a conversion. *See* Reporter's Notes to analogous sections.

SECTION 503. APPROVAL OF PLAN OF CONVERSION.

(a) A plan of conversion must be proposed, adopted and approved by a domestic unincorporated entity according to a provision for conversion in the entity's organic rules or, if there is no such provision in the organic rules, then by all the owners of the domestic unincorporated entity.

(b) A plan of conversion must be proposed, adopted and approved by a domestic incorporated entity or a foreign entity according to a provision for conversion in the entity's organic rules or, if there is no such provision in the organic rules, then in accordance with the organic law of the entity regarding conversions or, if there is no such organic law, then in accordance with the organic law of the entity regarding mergers. The holders of ownership or

transferee interests of a domestic entity that proposes, adopts and approves a plan of conversion may exercise appraisal rights if the holders of the ownership or transferee interests would have been entitled to exercise appraisal rights under the organic law of the entity.

(c) Subject to the organic law of the domestic converting entity, a plan of conversion may be terminated or amended:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

(d) If a person would have owner's liability with respect to a converted entity, approval and amendment of a plan of conversion are not effective without the consent in a record of the person, unless:

(1) the organic rules of the converting entity provide for the proposal, adoption and approval of the conversion and owner's liability would result with consent of fewer than all owners; and

(2) the person has consented in a record to the organic rules that contain that provision.

Reporter's Notes

Section 503(a) - Section 503(a) states the substantive rule for approval of a conversion by a domestic unincorporated entity. Section 503(a) thus repeals all existing approval provisions for conversions in *RUPA*, *Re-RULPA* and *ULLCA* and replaces them with section 503(a). According to section 503(a), approval for a conversion, subject only to the rules for assumption of owner's liability, is alternatively: (1) the number specified for conversion in the entity's organic rules; or (2) if no number is designated for conversion, then by all the owners of the converting entity. This hierarchy of approvals defers *first* to the converting entity's *specific intent* regarding conversions and defaults thereafter to *a rule of unanimity*. This hierarchy of approvals mirrors that of mergers, divisions and entity interest exchanges.

Section 503(b) - Section 503(b) states an approval rule of deference. Under section 503(b)(1),

therefore, a plan of conversion for a domestic incorporated entity or a foreign entity of any type shall be approved first according to the organic rules governing the converting entity, then according to the organic law of the entity regarding conversion and finally according to the organic law of the entity regarding mergers.

Section 503(c) - Section 503(c) follows analogous termination and abandonment provisions in the merger, division and entity interest exchange sections.

Section 503(d) - Section 503(d) provides a general exception for approvals of conversions. As such, section 503(d) requires consent in a record of all persons who will have owner's liability in a converted entity. The specific exception to § 503(d) allows imposition of owner's liability in a converted entity if an owner in a converting entity has consented to a provision for conversion that could result in owner's liability with less than unanimous consent.

SECTION 504. STATEMENT OF CONVERSION; EFFECTIVE DATE.

(a) A statement of conversion must be signed on behalf of the converting entity and filed with the [Secretary of State].

(b) A plan of conversion that is approved and that contains all the information required by subsection (c) may be signed and filed with the [Secretary of State] instead of a statement of conversion.

(c) The statement of conversion must state or contain:

(1) the name, jurisdiction of formation and type of organization of the converting entity, and the name, if it is to be changed, jurisdiction of formation and type of organization of the converted entity;

(2) if the conversion is not to be effective upon the filing of the statement of conversion or the plan of conversion pursuant to subsection (b), the effective date or time certain of the conversion, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State];

(3) a statement that the conversion was approved as required by section 503;

(4) if the converted entity is a domestic filing entity, a copy of the entity's public organic documents;

(5) if the converted entity is a domestic nonfiling entity, the street address of its chief executive office or principal place of business; and

(6) if the converted entity is a foreign entity, either:

(A) if it is a qualified foreign entity, its registered agent and registered office in this [State]; or

(B) if it is a nonqualified foreign entity, the street address of its chief executive office or principal place of business; and

(7) any information required by the organic law or organic rules of the parties to the conversion.

(d) A statement of conversion or plan of conversion may state or contain any other information relating to the conversion that the parties may desire.

(e) A conversion becomes effective pursuant to this [Article] upon:

(1) the date and time of filing of the statement of conversion or the plan of conversion pursuant to section 504(b), as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing; or

(2) a date or time certain specified in the statement or plan, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State].

Reporter's Notes

Section 504 - Section 504 states the substantive filing requirements for converting domestic unincorporated entities. The specific filing requirements are stated in section 504(b). These

requirements generally mirror those of the transactions set forth in this [Act].

Section 504(c)(4) - Section 504(c)(4) allows a converted entity that is a domestic filing entity to either: (1) contain all information to be required to organize the converted entity in the statement of conversion; or (2) attach a copy of the domestic converted entity's public organic documents to the conversion filing. The intent of § 504(c)(4) is efficiency in filings as well as public notice regarding the transaction.

Section 504(c)(5) - Section 504(c)(5) requires a converted entity that is a domestic nonfiling entity to provide the *street address* of the converted entity's chief executive office or principal place of business. A post office box would not satisfy § 504(b)(5). The intent of § 504(b)(5) is to provide notice of the place at which the converted entity may be found for all purposes, including that of service of process. The chief executive office or principal place of business is not required to be located within the converted entity's jurisdiction of formation.

Section 504(c)(6) - Section 504(c)(6) imposes on converted foreign entities a filing requirement that includes information of either: (1) a registered agent and registered office for a qualified foreign entity in the converting entity's jurisdiction of formation; or (2) a *street address* of its chief executive office or principal place of business for a nonqualified foreign entity. As with section 504(c)(5), a post office box would not satisfy the policy or intent of the section. Section 504(c)(6) provides notice of a place at which the foreign entity may be found for all purposes, including service of process.

Section 504(d) - Section 504(d) is new. The section was added to grant to recording authorities the statutory basis upon which to accept certain documents for filing.

Section 504(e) - Section 504(e) sets out the general rule that the conversion becomes effective upon the later of filing or a date or time specified in the statement of conversion. Section 504(d)(1) states the intent that "filing" for purpose of determining the effectiveness of the conversion is to be determined by the *means normally used for filing* within each [jurisdiction] adopting this [Act].

SECTION 505. EFFECT OF CONVERSION.

(a) When a conversion becomes effective pursuant to this [Article], the following rules apply:

(1) The converting entity ceases to exist and all public organic documents filed with the [Secretary of State] are no longer effective.

(2) The converted entity becomes subject to the organic law of the jurisdiction of conversion.

(3) The converted entity's existence commences on the date the converting entity commenced its existence in the jurisdiction in which the converting entity was first created, formed, incorporated or otherwise came into being.

(4) All property owned, and every contract right possessed, by the converting entity vests in the converted entity without reversion or impairment.

(5) All debts, obligations, and liabilities, including all state and local taxes, of the converting entity continue as debts, obligations, and liabilities of the converted entity.

(6) An action or proceeding pending by or against the converting entity continues as if the conversion had not occurred.

(7) Unless prohibited by law other than this [Act], all of the rights, privileges, immunities, powers and purposes of the converting entity vest in the converted entity.

(8) Unless otherwise provided by the organic law of a converting entity, the conversion does not require the winding up, the payment of liabilities or the distribution of the assets of the converting entity.

(9) The ownership or transferee interests of the converting entity that were to be converted in the conversion are converted and the former owners or transferees of those interests are entitled only to the rights provided to them under the plan of conversion and to any rights they hold under the organic law or organic rules of the converting entity.

(10) If a converted entity is a filing entity, the statement of conversion, its public organic documents and its organic rules, including any agreement provided for in the plan of

conversion, become effective and are binding upon the owners of the converted entity.

(11) If a converted entity is a nonfiling entity, its organic rules, including any agreement provided for in the plan of conversion, become effective and are binding upon the owners of the converted entity.

(b) A person that becomes subject to owner's liability with respect to a converted entity as a result of a conversion has owner's liability only to the extent provided in the organic law of the entity and only for those debts, obligations, and liabilities that are incurred after the conversion becomes effective.

(c) The effect of a conversion on the owner's liability of a person that ceases to have owner's liability as a result of a conversion is as follows:

(1) The conversion does not discharge an owner's liability under the organic law of the converting entity in which the person was an owner to the extent any such owner's liability was incurred before the conversion becomes effective.

(2) The person does not have owner's liability under the organic law of the converting entity in which the person was an owner before the conversion for any debts, obligations, or liabilities that are incurred after the conversion becomes effective.

(3) The organic law of the converting entity continues to apply to the collection or discharge of an owner's liability preserved by paragraph (1), as if the conversion had not occurred.

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the converting entity with respect to an owner's liability preserved by paragraph (1), as if the conversion had not occurred.

(d) When a conversion becomes effective, the foreign converted entity is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing the rights of owners or transferees of the converting entity; and

(2) agree to pay promptly an amount to which the owners or transferees of the converting entity are entitled under the organic law or organic rules of the domestic converting entity.

Reporter's Notes

Section 505(a) - Section 505(a) governs the *legal effect of a conversion where the converted entity is a domestic entity*. For example, section 505(a) regulates the effect of a conversion of a foreign entity to a domestic entity or the conversion of a domestic entity of one type to a domestic entity of another type.

Section 505(a) provides an exhaustive list of the effect of a conversion where the converted entity is a domestic entity. First, under section 505(a), the converting entity ceases to exist and the public organic documents under which the converting entity operated are no longer effective. Second, the converted entity becomes subject to the organic laws of the jurisdiction of conversion and the converted entity is deemed to have come into existence at the time the converting entity was formed, created or otherwise came into being. Third, all actions or proceedings, rights and privileges, and debts and obligations of the converting entity vest in the converted entity unimpaired as if the conversion had not occurred. Fourth, all owner interests in the converting entity shall be reclassified as provided in the plan of conversion and all rights of the owners in the converted entity become effective as stated in the plan. Finally, sections 505(a)(8) and (9) provide the filing effect of the statement of conversion for a converted filing and nonfiling entity.

Section 505(b) - Section 505(b) provides the rule for *future owner's liability*. Section 505(b) states the general rule that an *owner in a converted entity* shall be personally liable only for the debts and obligations of the *converted entity* that *are incurred after the effective date* of the conversion.

Section 505(c) - Section 505(c) provides the rule for *past owner's liability.* Section 505(c) has four parts: (1) an *owner in a converting entity* who had personal liability for the debts of the converting entity under the entity's organic law *is not discharged* from those debts if the *debts arose before the effective date* of the conversion; (2) an *owner in a converting entity* shall not have owner's liability for the *debts of the converted entity* if those *debts arose after the effective date* of the conversion; (3) the *organic laws of the converting entity continue* to apply for any past owner's liability preserved under section 505(c)(1)(past personal liability regarding the converting entity); and (4) the *organic laws of the converting entity* relative to *rights of contribution* among owners in the converting entity continue to apply for owner's liabilities preserved under section

505(c)(1)(contribution rights among owners in a converting entity). Sections 505(b) and (c) do not address the circumstance where owner's liability exists before and after a conversion.

Section 505(d) - Section 505(d) states the rule governing the *legal effect of a conversion where the converted entity is a foreign entity*. According to § 505(d), a foreign converted entity: (1) is deemed to appoint the [Secretary of State] as its agent for service of process to enforce any rights of owners or transferees in the domestic converting entity; and (2) agrees to pay any amount owed to the owners of the converted entity arising either in contract or from the organic laws of the converting entity. Section 505(d) is intended to protect creditors where the converting entity can no longer be found in the domestic jurisdiction for purpose of service of process. Likewise, § 505(b) protects owners and transferees in the domestic converting entity who have not received payment of whatever consideration was owed to them in the conversion. The converted foreign entity in the latter circumstance not only agrees to pay those claims but also is deemed to appoint the [Secretary of State] as its agent for service of process.

[ARTICLE] 6

DOMESTICATION

SECTION 601. DOMESTICATION.

(a) A domestic unincorporated entity may domesticate as a foreign entity of the same type pursuant to this [Article].

(b) A foreign unincorporated entity may domesticate pursuant to this [Article] as a domestic unincorporated entity of the same type but only if the domestication is not prohibited by the organic law or organic rules of the foreign entity.

Reporter's Notes

Article 6 authorizes a foreign unincorporated entity to become a domestic unincorporated entity of the same type and also authorizes a domestic unincorporated entity to become a foreign unincorporated entity of the same type. Article 6 arguably governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this [Act]. Likewise, the organic laws of a foreign jurisdiction, and not Article 6, would arguably govern the legal effect of a domestic unincorporated entity that domesticates in another jurisdiction. In the latter scenario, Article 6 serves as to statutorily *enable* a domestic unincorporated entity to domesticate to a foreign jurisdiction. Article 6 does not create a right in the domestic entity to be received in the foreign jurisdiction. Section 601 has *not been drafted* to allow a foreign incorporated entity to become a domestic incorporated entity.

The domestication authorized by Article 6 differs from a conversion in that a domestication requires that the domesticating entity be the same type as the domesticated entity. In a conversion, the converting entity must change its type. A domestication likewise differs from a merger because a merger requires two existing entities - a domestication and conversion involve the same entity. As with a conversion, all rights and privileges, debts and liabilities, actions or proceedings of a domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale, transfer, assignment or conveyance and does not give rise to a claim of reverter or impairment of title.

SECTION 602. PLAN OF DOMESTICATION.

(a) Subject to section 103(a) and section 601(a), a domestic unincorporated entity may domesticate by proposing, adopting and approving a plan of domestication.

(b) A plan of domestication must be in a record and must state or contain:

(1) the name, jurisdiction of formation and type of organization of the domesticating entity, and the name, if it is changed, and jurisdiction of formation of the domesticated entity;

(2) the terms and conditions of the domestication;

(3) the manner and basis of converting the ownership or transferee interests of the domesticating entity of which the entity has notice into ownership or transferee interests, securities, or obligations; rights to acquire ownership or transferee interests or securities, cash, or other property; or any combination of the foregoing;

(4) if the domesticated entity is a filing entity, a copy of its public organic documents and the full text of any amendments to its organic rules;

(5) if the domesticated entity is a nonfiling entity, the full text of any amendments to its organic rules;

(6) the future effective date or time, which shall be a date or time certain, of the domestication if it is not to be effective upon the filing of the statement of domestication or the plan of domestication pursuant to section 604(b); and

(7) any provision required by the organic law or organic rules of the domesticating entity.

(c) A plan of domestication may state or contain any other information relating to the domestication that the parties may desire.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is set forth in the plan.

Reporter's Notes

Subject to section 103(a), for this [Article to apply], the domesticating (and hence the domesticated) entity must be an unincorporated entity.

Section 602(b)(1) - Section 602(b)(1) is drafted slightly differently from prior language relating to information required to be contained in a plan of merger, division, conversion or entity interest exchange. Section 602(b)(1) requires disclosure of the name of the domesticated entity if the name has changed and does not require the disclosure of domesticated entity's type of organization**.** These changes reflect the intrinsic attributes of a domestication, *i.e.,* that the entity is, by definition, the *same type of organization* and likely will be continuing in business under its original name. If, however, the entity were to change its name, that modification would be required to be disclosed under § 602(a)(1).

Section 602(b)(3) - The language of section 602(b)(3) is identical to that found in Articles 2 (mergers), 3 (divisions), 4 (entity interest exchanges) and 5 (conversions). Previous Reporter's Notes raised for the Committee the issue of **"**shuffling**"** entity interests in the foregoing transactions. As was stated in those notes, the language of the parallel provisions could be interpreted to allow an "equity shuffle" notwithstanding the absence of "appraisal" rights for owners in unincorporated entities. Further, for the foregoing transactions that involve both an incorporated and an unincorporated entity, the present provisions of Chapter 13 of the *MBCA* would grant appraisal rights to owners in the incorporated entity. In the current draft of Chapter 9 of the *MBCA* (entitled Domestication and Conversion), however, the conforming amendments to Chapter 13 with respect to domestication do *not* permit an appraisal right for shareholders in a domestication.

SECTION 603. APPROVAL OF PLAN OF DOMESTICATION.

(a) A plan of domestication must be proposed, adopted and approved by a domestic unincorporated entity according to a provision for domestication in the entity's organic rules or, if there is no such provision in the organic rules, then by all the owners of the domestic unincorporated entity.

(b) A plan of domestication for a foreign entity must be proposed, adopted and approved according to a provision for domestication in the entity's organic rules or, if there is no such provision in the organic rules, then in accordance with the organic law of the entity regarding domestications or, if there is no such organic law, then in accordance with the organic law of the entity regarding mergers. The holders of ownership or transferee interests of a domestic entity that proposes, adopts and approves a plan of domestication may exercise appraisal rights if the holders of the ownership or transferee interests would have been entitled to exercise appraisal rights under the organic law or organic rules of the entity.

(c) Subject to the organic law of the domesticating entity, a plan of domestication may be terminated or amended:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

(d) If a person would have owner's liability with respect to a domesticated entity, approval and amendment of a plan of domestication are not effective without the consent in a record of the person, unless:

(1) the organic rules of the entity provide for the proposal, adoption and approval of the domestication and owner's liability would result with consent of fewer than all owners; and

(2) the person has consented in a record to the organic rules that contain that provision.

Reporter's Notes

Section 603(a) - Section 603(a) sets out the substantive rule of approval for a domestication by a domestic unincorporated entity. The approvals anticipated by section 603(a) follow: (1) the parties *specific intent* regarding the approval necessary to effect a domestication; and (2) a *default rule of unanimity* by the owners of the domesticating entity. The hierarchy of approvals in section

603 mirror those for approvals of domestic unincorporated entities engaging in mergers, divisions, entity interest exchanges and conversions. *See* Reporter's Notes for § 203(a) regarding the third alternative of amendment of a partnership or LLC operating agreement.

Section 603(b)- Section 603(b) provides an approval rule of deference for a foreign domesticating entity. The rule of deference requires whatever approval is mandated by the organic rules of the entity, then by the approval required by organic laws governing the foreign entity, and finally, by the approval required by the organic law of the entity regarding mergers.

Section 603(d) - Section 603(d) limits the approvals of §§ 603 (a) and (b). According to § 603(c), if a person will have owner's liability in the domesticated entity, the general approval rules of § 603(a) will be ineffective without the consent in a record of the person having owner's liability. The impact of § 603(c) is somewhat different than in previous Articles. For example, if a Delaware limited partnership domesticated into Texas, the entity is of the same type and the owner's liability of any general (or limited) partner arguably has not changed (assuming that the case precedent in the jurisdiction of the domesticated entity is substantially the same as that of the domesticating entity). Likewise, if an Iowa general partnership domesticated into Minnesota, the personal liability of the general partners arguably remains the same. In this sense, § 603(c) creates a veto power in an owner even where the nature of the entity (and, consequently, owners' liability) remains unchanged. On the other hand, if the general partnership laws of Minnesota and Iowa differed or had been interpreted to create differing rights/duties of the partners, a veto power may be appropriate.

Section 603(c) - Section 603(c), like its counterparts in Articles 2 (mergers), 3 (divisions), 4(entity interest exchanges) and 5 (conversions), allows termination or abandonment of a plan of domestication according to a provision for termination or abandonment in the plan or by the same consent as was necessary to approve the plan. Prior Reporter's Notes suggested an extension to the circumstances in which termination or abandonment may be accomplished. The suggestion included permitting "managerial decisions" that reflected an adverse or unforeseen change of market conditions. The suggestion would allow maximum flexibility in owners and "managers" of unincorporated entities to adapt to unpredictable market fluctuations. As an example, consider a publicly-traded limited partnership that has adopted and approved a plan of domestication. Assume further that the plan is to be effective within a week. In the time following the approval, market conditions change unexpectedly and in a manner detrimental to the anticipated domestication by the limited partnership. According to § 603(d), it would appear that the plan will become effective despite these market changes if the parties did not draft a termination or abandonment clause. Further, even assuming such a clause were present, the general partners of the limited partnership may well not have sufficient time to solicit the limited partners to abandon the plan. In these circumstances, the general partners could, assuming an extension of the rule of § 603(d), abandon the plan without limited partner approval. Any adverse consequence of the abandonment would be redressed in an action by the limited partners against the general partners for breach of fiduciary duty.

SECTION 604. STATEMENT OF DOMESTICATION; EFFECTIVE DATE.

(a) A statement of domestication must be signed on behalf of the parties to the domestication and filed with the [Secretary of State].

(b) A plan of domestication that is approved and that contains all the information required by subsection (c) may be signed and filed with the [Secretary of State] instead of a statement of domestication.

(c) The statement of domestication must state or contain:

(1) the name, jurisdiction of formation and type of organization of the domesticating entity, and the name, if it is to be changed, and jurisdiction of formation of the domesticated entity.

(2) if the domestication is not to be effective upon the filing of the statement of domestication or the plan of domestication pursuant to subsection (b), the effective date or time certain of the domestication, which is not more than 90 days after the statement is delivered for filing to the [Secretary of State];

(3) a statement that the domestication was approved as required by section 603;

(4) if the domesticated entity is a qualified foreign entity, its registered agent and registered office in this [State]; or

(5) if the domesticated entity is a nonqualified foreign entity, the street address of its chief executive office or principal place of business.

(d) A statement of domestication or plan of domestication may state or contain any other information relating to the domestication that the parties may desire.

(e) A domestication becomes effective pursuant to this [Article] upon:

(1) the date and time of filing of the statement of domestication or the plan of domestication pursuant to section 604(b), as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing; or

(2) a date or time certain specified in the statement or plan, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State].

Reporter's Notes

Section 604 - Section 604 states the substantive filing requirements for domestic unincorporated entities. Specific filing mandates are set forth in § 604(c). Section 604 generally mirror that of the filing requirements in Articles 2 (mergers), 3 (divisions), 4 (entity interest exchanges) and 5 (conversions). All modifications are noted in the Reporter's comments.

Section 604(b) Section 604(b) is new and grants the power to recording authorities to accept a plan for filing in substitution of a statement of domestication.

Section 604(c)(1) - Section 604(c)(1) is modified to reflect the unique nature of the domestication. Sections 604(c)(1) therefore requires only the name, jurisdiction and type of organization of the domesticating entity and the name, if changed, and jurisdiction of the domesticated entity. These modifications reflect that the domesticated entity will be the same as the domesticating entity and that the entity may well continue in business under the same name. Where a name change occurs, § 604(c)(1) requires disclosure of that fact.

Sections 604(c)(4) and (5) - Sections 604(c)(4) and (5) required notice of where the domesticated entity may be found for all purposes, including that of service of process. Section 604(c)(4) relates to a qualified foreign entity. As to this domesticated entity, disclosure will include the name and address of its registered agent within the jurisdiction of the domesticating entity. Section 604(c)(5) requires notice of where a nonqualified foreign entity may be found. Section 604(c)(5) therefore requires disclosure of the street address of the entity's chief executive office or principal place of business. Unlike § 604(c)(4), this section does not require a "presence" by the foreign entity in the jurisdiction of the domesticating entity. Both sections protect creditors who wish to pursue claims against the domesticating entity.

Section 604(e)(1) - Section 604(e)(1) alters somewhat the articulation of the effective date of the filing of the statement of domestication. Section 604(e)(1), as with the analogous provisions in the other Articles, attempts to make clear that the effectiveness of a "filing" will be fact- and jurisdiction-dependent. A statement of domestication filed under this Article would, therefore, be governed by this [Act] in addition to the local rules for recording and filing documents with the appropriate [Secretary of State]. For example, if the Kansas Secretary of State "files" documents

upon docketing and California upon date stamping, effectiveness would be governed by the practices of the local recording officials. Section 604(c)(1) makes no attempt to impose an omnibus filing date.

SECTION 605. EFFECT OF DOMESTICATION.

(a) When a domestication becomes effective pursuant to this [Article], the following rules apply:

(1) The domesticating entity ceases to exist and all public organic documents filed with the [Secretary of State] are no longer effective.

(2) The domesticated entity becomes subject to the organic law of the jurisdiction of domestication.

(3) The domesticated entity's existence commences on the date the domesticating entity commenced its existence in the jurisdiction in which the domesticating entity was first created, formed, incorporated or otherwise came into being.

(4) All property owned, and every contract right possessed, by the domesticating entity vests in the domesticated entity without reversion or impairment.

(5) All debts, obligations, and liabilities, including all state and local taxes, of the domesticating entity continue as debts, obligations, and liabilities of the domesticated entity.

(6) An action or proceeding pending by or against the domesticating entity continues as if the domestication had not occurred.

(7) Unless prohibited by law other than this [Act], all of the rights, privileges, immunities, powers and purposes of the domesticating entity vest in the domesticated entity.

(8) Unless otherwise provided by the organic law of a domesticating entity, the

domestication does not require the winding up, the payment of liabilities or the distribution of the assets of the domesticated entity.

(9) The ownership or transferee interests of the domesticating entity that were to be reclassified in the domestication are reclassified and the former owners or transferees of those interests are entitled only to the rights provided to them under the plan of domestication and to any rights they hold under the organic law or organic rules of the domesticating entity.

(10) If a domesticated entity is a filing entity, the statement of domestication, its public organic documents and its organic rules, including any agreement provided for in the plan of domestication, are binding upon the owners of the domesticated entity.

(11) If a domesticated entity is a nonfiling entity, its organic rules, including any agreement provided for in the plan of domestication, constitute the organic rules of the domesticated entity and are binding upon the owners of the domesticated entity.

(b) A person that becomes subject to owner's liability with respect to a domesticated entity as a result of a domestication has owner's liability only to the extent provided in the organic law of the entity and only for those debts, obligations and liabilities that are incurred after the domestication becomes effective.

(c) The effect of a domestication on the owner's liability of a person that ceases to have owner's liability as a result of a domestication is as follows:

(1) The domestication does not discharge an owner's liability under the organic law of the domesticating entity in which the person was an owner to the extent any such owner's liability was incurred before the domestication becomes effective.

(2) The person does not have owner's liability under the organic law of the

domesticating entity in which the person was an owner before the domestication for any debts, obligations, or liabilities that are incurred after the domestication becomes effective.

(3) The organic law of the domesticating entity continues to apply to the collection or discharge of an owner's liability preserved by paragraph (1), as if the domestication had not occurred.

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the domesticating entity with respect to an owner' liability preserved by paragraph (1), as if the domestication had not occurred.

(d) When a domestication becomes effective, a foreign domesticated entity is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing the rights of owners or transferees of the domesticating entity; and

(2) agree to pay promptly an amount to which the owners or transferees of the domesticating entity are entitled under the organic law or organic rules of the domesticating entity.

Reporter's Notes

Section 605(a) - Section 605(a) governs the *legal effect of a domestication where the domesticated entity is a domestic entity.* If a domestic entity domesticates into a foreign jurisdiction, the legal effect of the domestication would arguably be governed by the organic laws of the foreign jurisdiction.

Section 605 is intended to set forth an exhaustive list. Section 605(a)(3) states the general proposition that the domesticated entity is deemed to have begun its existence at the time the domesticating entity was first formed or otherwise created. As such, the domesticated entity is the same entity whose existence relates back to the creation of the domesticating entity. Sections 605(a)(4), (5), (6) and (7) preserve all actions or proceedings, rights and privileges and creditor claims and liens pending against the domesticating entity unimpaired. A domestication, therefore, is not a sale, conveyance, transfer or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment or conveyance. Section 605(a)(9) states the rule that the ownership or transferee interests of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and that the

owners or transferees of the domesticating entity are entitled to those rights. Section 605(a)(9), on its face, allows certain owners in the domesticating entity to be entitled to a continuing equity interest in the domesticated entity whereas other owners in the domesticating entity may be cashed out as a result of the transaction. (As previously noted, this transaction is one for which the *MBCA* does not grant dissenter's rights.) Finally, sections 605(a)(10) and (11) address the effect of the filing of a statement of domestication on a filing and nonfiling domesticated entity.

Section 605(b) - Section 605(b) states the rule for *future owner's liability.* Section 605(b) provides that an owner in a domesticated entity shall be personally liable only for the debts and obligations of the domesticated entity that arise after the effective date of the domestication. This rule is not extraterritorial because it seeks to limit liability to actions that occur after the domestication.

Section 605(c) - Section 605(c) addresses past owner liability. To the extent that these rules address the *legal effect of owner liability after a domestication*, they are more properly the subject of the organic law of the foreign jurisdiction. This section was bracketed in prior drafts. Query whether § 605(d) should be included since whatever owner's liability existed before the domestication will continue after the transaction as well.

Section 605(d) - Section 605(d) states a rule for domestic entities that domesticate into a foreign jurisdiction. Sections 605(d)(1) and (2) require the domesticating entity to appoint the Secretary of State as its agent for purposes of service of process and to agree to pay any amounts which may be owing to the owners of the domesticating entity. This section parallels analogous provisions in Articles 2 (mergers), 3 (divisions), 4 (entity interest exchanges) and 5 (conversions).

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Uniform Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act and 15 U.S.C. Section 7001, et seq.), but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001 (c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7001 (b)).

SECTION 703. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of the [Act] are severable.

SECTION 704. EFFECTIVE DATE. This [Act] takes effect [January 1, 200___.]

SECTION 705. REPEALS. Except as otherwise provided in Section 705 effective [January 1, 20___] [drag-in-date], the following [Acts] and parts of [Acts] are repealed:

(1) Sections 901 through 908 of the [Revised Uniform Partnership Act];

(2) Sections 1101 through 1113 of the [Revised Uniform Limited Partnership Act (2001)];

(3) Sections 1001 through 1009 of the [Limited Liability Company Act].

SECTION 706. APPLICABILITY.

(a) Before January 1, 20___ [drag-in-date], this [Act] governs only:

(1)

(2)

(b) Except as otherwise provided in subsection (c), beginning January 1, 20___, [drag-in-date], this [Act] governs all [domestic unincorporated and {electing} foreign entities].

(c) Each of the following provisions sections 901 through 908 of the [Revised Uniform Partnership Act]; sections 1101 through 1113 of the [Revised Uniform Limited Partnership Act (2001)]; and sections 1001 through 1009 of the [Uniform Limited Liability Company Act] continue to apply after [January 1, 200_][drag-in-date], except as otherwise provided as follows:

(1)

(2)

SECTION 707. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before the effective date of this [Act].