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FOR DISCUSSION ONLY

# UNIFORM CONVERSION OR MERGER OF DIFFERENT TYPES OF BUSINESS ORGANIZATIONS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**FEBRUARY 2001**

# UNIFORM CONVERSION OR MERGER OF DIFFERENT TYPES OF BUSINESS ORGANIZATIONS ACT

*WITH PREFATORY NOTE AND REPORTER'S NOTES*



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*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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## UNIFORM CONVERSION OR MERGER OF DIFFERENT TYPES OF BUSINESS ORGANIZATIONS ACT

## PREFATORY NOTE

### Scope and Approach of the Uniform Merger and Conversion Act

Presently state business organization statutes (incorporated and unincorporated) vary in their approach to same-species and cross-species mergers, consolidations, conversions, share/entity interest exchanges, domestications and transfers 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 transfers, entity interest exchanges, domestications or single or dual entity status. 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 cross-species conversions and mergers but not for-profit or nonprofit cross-species entity interest exchanges or dual status transfers or domestications. ULLCA authorizes cross-form mergers and conversions but is silent regarding for-profit and nonprofit cross-species entity interest exchanges and dual status domestications and transfers.

As a result of this divergence in the law of business organizations, the Uniform Merger and Conversion Act ("UMCA") was conceived by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") as an effort to bring uniformity to the subjects of merger, conversion, consolidation, share/entity interest exchange, domestication and transfer between and among the same or different types of domestic and foreign for-profit and nonprofit entities. NCCUSL anticipated UMCA 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 UMCA should present a broad "junction-box" statute that would provide an option to states to treat UMCA either as a separate act or as a series of amendments to present entity legislation.

As of February, 2001, three similar projects are being pursued by the American Bar Association ("ABA"). First, the Committee on Corporate Laws of the ABA has drafted and had a first reading of 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. At present, 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 UMCA. The NCCUSL Drafting Committee, its Chair and Reporter are working closely with the Chair of the MBCA junction-box project as well as the Co-Chairs of the Joint Task Force.

The first draft of UMCA is presented in five Articles. The first Article sets forth: (1) name; (2) scope; (3) regulatory approvals; and (4) definitions. The definitional section utilizes generic terminology intended to encompass both corporate and unincorporated ("cross-species") transactions. The definitional section also introduces a new concept in corporate and unincorporated law - that of a same or different form conversion with continuing status in the jurisdiction of formation by the converting entity. Such "dual" or "multiple status" for entity conversions is presently not anticipated by any state business organization law. Delaware and Pennsylvania, however, authorize "dual status" for same form domestications or transfers for domestic and non-US corporations and unincorporated entities. UMCA expands on the Delaware/Pennsylvania concept to include same or different form "domestication" within or outside of the United States. The draft makes no attempt to resolve internal governance issues inherent in entities governed by the organic laws of two or more jurisdictions.

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 the entity interest exchange. The entity interest exchange is derived from the share exchange in corporate law and 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; (4) transitional rules to address third party rights negotiated at a time prior to the widespread use of entity interest exchanges; and (5) contractual or statutory appraisal rights for certain affected owners. Each of these points is addressed in the first draft.

Article 4 governs conversion and conversion and continuing existence transactions. Article 4 is intended to address traditional intrastate and foreign "different-form conversions" as well as the "same-form, non-US" transactions known as "domestication" and "transfer." Article 4 expands these traditional concepts to include "continuing status" for domestic and foreign entities where the organic laws of each jurisdiction permit dual status. Article 4 also sets forth: (1) default approval rules; (2) informational requirements for conversions and conversions with continuing converted existence; and (3) transitional rules for "new" conversions and conversions with continuing existence. In addition, Article 4 acknowledges the possibility of contractual appraisal rights for certain owners in the conversions authorized under Article 4.

Article 5 sets out miscellaneous provisions, including: (1) severability; (2) effective date; (3) repeals; (4) applicability; and (5) savings clause.

# UNIFORM MERGER AND CONVERSION ACT

## [ARTICLE] 1

## GENERAL PROVISIONS

**SECTION 101. SHORT TITLE.** This [Act] may be cited as the Uniform Merger and Conversion Act.

**SECTION 102. DEFINITIONS.** In this [Act]:

(1) "Conversion" means the procedure authorized under this [Act] in which:

(A) a domestic entity continues in the form of a different type of domestic entity or any type of foreign entity; or

(B) in which a foreign entity continues in the form of a domestic entity of any type.

(2) "Converting entity" means the entity that adopts a plan of conversion and that files a statement of conversion.

(3) "Converting continuing entity" means:

(A) an entity which under this [Act] elects to domesticate in a foreign jurisdiction in the same or another form but continues its existence in its original form in its jurisdiction of formation or organization; or

(B) a foreign entity which under the organic laws of its jurisdiction of formation or organization elects to domesticate in this [State] in the same or another form but continues its existence in its original form in its original jurisdiction of formation or organization.

(4) "Domestic entity" means an entity created under or whose internal affairs are governed by the laws of this [State].

(5) "Entity" means a person other than an individual, whether or not organized for profit, that either possesses its own separate existence or has the power to sue in its own name.

(6) "Entity interest exchange" means the procedure authorized under this [Act] in which:

(A) a domestic entity may acquire all of the entity interests of one or more classes or series of another domestic or foreign entity in exchange for entity interests, securities, obligations, rights to acquire entity interests or securities, cash, other property, or any combination of the foregoing; or

(B) all of the interests of one or more classes or series of a domestic entity may be acquired by another domestic or foreign entity in exchange for entity interests, securities, obligations, rights to acquire entity interests or securities, cash, other property, or any combination of the foregoing.

(7) "Entity manager" means a person by or under whose authority the powers of an entity are exercised and under whose direction the business and affairs of the entity are managed pursuant to the entity's organic law.

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

(9) "Foreign entity" means an entity created under or whose internal affairs are governed by a law other than the laws of this [State].

(10) "Merger" means the procedure authorized under this [Act] in which:

(A) a domestic entity is combined with one or more domestic or foreign entities and one of those entities or a new domestic or foreign entity survives the procedure; or

(B) two or more foreign entities are combined into a new domestic entity.

(11) "Merging entity" means an entity that is a party to a merger and that is in existence immediately prior to the filing of the statement of merger.

(12) "Nonfiling entity" means an entity that is not created by the filing of a public organic document.

(13) "Nonprofit entity" means an entity that is not organized for a purpose involving pecuniary profit to its owners.

(14) "Organic document" means a private or public organic document.

(15) "Organic law" means the law that provides for the creation of an entity or that governs its internal affairs.

(16) "Owner" means a person who:

(A) owns an interest in the profits or assets of an entity;

(B) is entitled to vote on issues involving the entity's internal affairs except as an agent, assignee, proxy, or transferee; or

(C ) in the case of a foreign entity, is admitted as a member in accordance with the laws of the jurisdiction under which the entity is formed or its internal affairs are governed.

(17) "Ownership interest" means the interest in an entity held by an owner.

(18) "Owner's liability" means personal liability for a debt, obligation, or liability of an entity that is imposed on an owner:

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

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

(19) "Private organic document" means the set of rules for governing the internal affairs of

an entity that may be adopted by its owners and that is not required to be filed of public record.

(20) "Public organic document" means the document filed of public record that creates an entity.

(21) "Surviving entity" means a converting entity that continues in existence following a conversion or a merging entity that continues in existence following a merger.

## Reporter's Notes

**Issues for Further Consideration by the Drafting Committee:** whether the term "conversion" should be divided into two terms - one to describe the traditional concept of converting *from one form to another* and one to describe the traditional concept of domesticating *from one jurisdiction to another in the same form;* whether "converting continuing entity" should be narrowed to include only international domestication in which an entity continues its existence in the same form; whether the term "entity" should make reference solely to *private*, as opposed to *governmental or quasi-governmental*, organizations; whether the term "owner" should require ownership "of record"; and whether "owner" should also require rights to both profits *and* voting.

**"Conversion" [(1)]** - As presently drafted, the term "conversion" includes the procedures known as "domestication" and "transfer" in which an entity changes the jurisdiction in which it is created but does not alter its form. The definition in Section 102 is based upon the Model Entity Merger and Conversion Act § 102 (A Joint Project of the Committee on Corporate Laws and the Committee on Partnerships and Unincorporated Business Associations of the Section of Business Law of the American Bar Association, draft of 10-25-00).

**"Converting continuing entity" [(3)]** - The term "converting continuing entity" is defined in the broadest sense to include a change in an entity's jurisdiction with or without a corresponding change in form where the entity continues in its original form in its former jurisdiction of organization. For example, the term anticipates that a Delaware LLC may "convert" into a Minnesota corporation and maintain its former status as a Delaware LLC. If the entity makes the election for "continuing" or "dual" status, it will be governed by the laws of two jurisdictions. In this case, it seems imperative that a "converting continuing" or "dual status" entity be comprised of the same owners in the constituent entities in order to minimize conflicts in fiduciary duties. "Converting continuing status" will only be available where both the converting and continuing jurisdictions permit multiple status.

**"Entity" [(5)]** - The definition of entity is intended to be inclusive and to reflect the unique nature of certain types of incorporated entities. For example, in some jurisdictions corporations are created under special acts, special corporation acts or for special purposes. In those jurisdictions, the definition should be conformed accordingly. The present definition also specifically includes nonprofit entities. Section 102(5) is based upon the Model Entity Merger

and Conversion Act § 102.

**Merger" [(10)]** - 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.

**"Nonfiling entity" [(12)]** - 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].

**"Owner" [(16)]** - An "owner" is a person who owns an interest in profits or assets of an entity or who has voting rights except as an agent, assignee, transferee or holder of a proxy. The alternative form of the definition is intended to address the unique nature of "ownership" in nonprofit entities where persons often possess voting, but not economic, rights. Query whether the term grants rights to transferees or assignees of economic benefits greater than those presently anticipated under certain unincorporated association acts.

The term "owner" includes a general partner in a general or limited partnership, a limited partner in a limited partnership (including a limited liability partnership or a limited liability limited partnership), a member of a limited liability company, a shareholder of a corporation, a member of a nonprofit corporation, a member of an unincorporated nonprofit association, or a beneficiary of a business trust. "Owner" is broadly defined to anticipate alternate tests of ownership based upon the laws of an entity formed in a foreign jurisdiction.

**"Ownership interest" [(17)]** - 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.

**"Private organic document" [(18)]** - The term "private organic document" is intended to embrace only those agreements anticipated by the organic law of the affected entity. A "private organic document" includes a partnership agreement in a general partnership (including a limited liability partnership), a partnership agreement in a limited partnership (including a limited liability limited partnership), an operating agreement in a limited liability company, the bylaws of a for-profit or nonprofit corporation, and the bylaws of a business trust. The term does not include an agreement restricting the transfer or voting rights of an entity interest (e.g. shareholder voting agreements or voting trust agreements).

**"Public organic document" [(19)]** - A "public organic document" is a document that is filed of public record. A "public organic document" includes a statement of qualification for a limited liability partnership, 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.

**SECTION 103. REQUIRED REGULATORY APPROVALS.**

(a) Except as provided in subsection (b), a domestic entity that by the laws of this [State] is subject to the supervision of the [Attorney General], the [Department of Banking], the [Department of Insurance] or the [Public Utility Commission] shall not participate in a transaction under this [Act] unless the agency expressly approves the transaction in writing. The [Secretary of State] shall not accept a filing under this [Act] by such an entity unless the filing is accompanied by the written approval of the appropriate agency.

(b) Property held in trust by a nonprofit entity shall not, by any transaction under this [Act], be diverted from the objects for which it was donated, granted or devised, unless and until the governing authority obtains an order of court specifying the disposition of the property pursuant to [cite appropriate statutory or nondiversion provisions].

(c) This [Act] may not be used to effect a transaction that:

(1) [converts an insurance company organized on the mutual principle into one organized on a stock-share basis].

(2) [other excluded transactions].

**Reporter's Notes**

**Issues for Further Consideration by the Drafting Committee**. At its November, 2000 meeting in Washington, D.C., the Drafting Committee discussed the issue that regulatory approvals may be necessary to effect any merger or conversion of certain nonprofit entities. The Committee did not specifically exclude certain transactions from the jurisdiction of the [Act]. The present language is taken directly from the Model Entity Merger and Conversion Act § 103 and permits regulated transactions to occur where appropriate written approvals are obtained. Section 103(c) expressly prohibits certain transaction under the [Act]. The Drafting Committee may wish to expand or delete all or part of § 103.

**SECTION 104. SCOPE.**

Domestic entities of the following types shall not have the power to effect a merger or conversion under this [Act]:

(1) [corporation to corporation];

(2) [unincorporated to unincorporated].

**Reporter's Notes**

**Issues for Further Consideration by the Drafting Committee**. At its November, 2000 meeting in Washington, D.C., the Drafting Committee charged the Reporter with drafting an act with the broadest application. In particular, the Committee discussed whether a corporate-to-corporate merger or conversion could be accomplished under this [Act]. Because the Model Entity Merger and Conversion Act, as well as the MBCA (draft of 2-1-01), specifically relegate all corporate-to-corporate mergers, conversions, consolidations, and domestications to resolution under the MBCA, the Drafting Committee may wish to reconsider whether the provisions of this [Act] should apply to strictly corporate combinations. *See* Model Entity Merger and Conversion Act § 203 and Commentary; MBCA, chapter 9 (draft of 2-1-01).

In addition, 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).

## [ARTICLE] 2

## MERGER

**SECTION 201. MERGER**.

(a) Pursuant to a plan of merger approved under Section 202, one or more domestic entities may merge with one or more domestic or foreign entities of any type. If the surviving entity is a domestic entity, the effects of the merger shall be as provided in Section 205. If the surviving entity is a foreign entity, the effects of the merger shall be as provided in the laws of the foreign jurisdiction.

(b) A foreign entity may be a party to a merger pursuant to this [Act], or may be created in such a merger, only if:

(1) the merger is permitted by the organic laws of the foreign entity; and

(2) in effecting the merger, the foreign entity complies with the requirements of its organic laws.

**SECTION 202. PLAN OF MERGER.**

(a) A plan of merger shall state:

(1) the name, form and jurisdiction of formation or organization of each of the merging entities;

(2) the name, form and jurisdiction of formation or organization of the surviving or resulting entity;

(3) the terms and conditions of the merger;

(4) that a plan of merger has been approved and executed by each merging entity;

(5) 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;

(6) if the surviving or resulting entity is not a domestic entity, that such resulting or surviving entity may be served with process in this [State] for enforcement of any obligation of any domestic entity which is to merge, irrevocably appointing the [Secretary of State] as its agent to accept service of process in any such action, suit or proceeding and specifying the street address to which a copy of such process shall be mailed to it by the [Secretary of State].

(7) any provisions required by the organic laws under which any party to the merger is organized; and

(8) any other provisions relating to the merger that the parties may desire.

(b) Subject to Section 206 and any contractual rights, a plan of merger may be terminated or amended pursuant to a provision for termination or amendment contained in the plan of merger. In no event shall the termination or amendment be approved by less than the consent required to approve the merger.

**Reporter's Notes**

**Issues for Further Consideration by the Drafting Committee.**

**Section 202(a)** - The various uniform unincorporated acts, as well as the MBCA, set forth varying degrees of information to be included in a plan of merger. The list in Section 202 is an amalgamation of various statutes, including RUPA, Re-RULPA, ULLCA, and select Delaware partnership merger provisions. Information that has been excluded include: "the manner and basis for converting the interest of each party to the merger into interests or obligations of the surviving entity, into money or other property in whole or in part", ULLCA §904(b)(5) and RUPA § 905(b)(5); "the street address of the surviving entity's chief executive office," RUPA § 905(b)(6); "the street address of the surviving entity's principal place of business," ULLCA § 905 (b)(6); and "that a copy of the agreement of merger ... will be furnished by the surviving or resulting ... entity, on request and without cost, to any [owner] of any domestic [entity] or any person holding an interest in any other business entity which is to merge ...", 6 *Del.C.* § 18-209(c)(6)(regarding information to be contained in a certificate of merger). The Drafting Committee may wish to

expand or reduce the information required for a plan of merger. Query whether a laundry list-like plan of merger is necessary to effectuate the transaction or whether such information need only be contained in the filed statement of merger.

**Section 202(b) -** Other statutes set forth differing tests for the abandonment or termination of a plan of merger. For example, MBCA § 11.02(e) provides that, prior to the filing of articles of merger, a plan to amend the merger may be subject to shareholder approval and as such cannot be amended as to: (1) the amount or kind of interests to be received by the shareholder under the plan of merger; (2) the articles of incorporation or organic documents of any surviving entity with limited exceptions; or (3) any other terms or conditions of the plan if the modification would "adversely affect such shareholder in any material respect." The Drafting Committee may wish to include analogous limitations on amendment or termination under this Act.

**SECTION 203. APPROVAL OF PLAN OF MERGER.**

Subject to the provisions of Section 206, a plan of merger authorized by this [Act] shall be approved by each merging entity according to the entity's private organic documents or, if there is no applicable private organic document, then in the manner set forth in the entity's organic law for approving and effectuating a merger. [If the organic law of a domestic entity does not provide procedures for the approval and effectuation of a merger, then by all the owners of the merging entity.]

**Reporter's Notes**

**Issues for Further Consideration by the Drafting Committee.** Section 203 anticipates a merger under any one of three scenarios: (1) by the vote set forth in the entity's organic documents; (2) by the vote required for mergers under the organic law of the entity; or (3) in the absence of a statutory vote requirement, by the vote of all the owners of the entity. The Drafting Committee may wish to delete the third alternative.

**SECTION 204. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.**

(a) A statement of merger shall be signed on behalf of each party to the merger.

(b) The statement of merger shall include:

(1) the name, form and jurisdiction of formation or organization of the parties to the

merger;

(2) the name, form and jurisdiction of formation or organization of each surviving or resulting entity;

(3) the terms and conditions of the merger;

(4) 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;

(5) a statement as to each merging entity that the merger was approved and executed as required by the entity's organic law;

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

(7) if the surviving entity preexists the merger, any amendments required by the organic law of the entity;

(8) a statement that the plan of merger is on file at a place of business of the surviving or resulting entity and shall state the street address thereof;

(9) any information required by the organic laws of any merging entity; and

(10) any other information relating to the merger that the parties may desire.

(c) Each merging entity must file the statement of merger in the office of the [Secretary of State].

(d) Appropriate modifications shall be made to any document required to be filed with the [Secretary of State] to effectuate a merger by the organic laws of each entity that is a party to a merger authorized by this [Act] to conform to the nature of each entity that is a party to the merger. Where two or more domestic entities are parties to a merger, the documents required to

be filed with the [Secretary of State] by the organic laws of each entity may be combined into one document.

(e) A merger becomes effective under this [Article] upon the later of:

(1) the filing of the statement of merger and the performance of any acts required to effectuate the merger under the organic laws of each merging entity; or

(2) a later date or time (which shall be a date or time certain) specified in the statement of merger.

**Reporter's Notes**

**Section 204-** Section 204 does not require the plan of merger to be filed with the statement of merger.

**Section 204(e) -** This Section, as with Re-RULPA § 1108(d), RUPA §§905(e) and ULLCA § 906, does not permit a merger to become effective until all acts required by each merging entity are satisfied. This section thus anticipates differing filing requirements for foreign entities. The Drafting Committee may wish to reduce the information required to be contained in the statement of merger.

**SECTION 205. EFFECT OF MERGER.**

(a) When a merger becomes effective:

(1) the surviving entity continues or the resulting entity 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, liabilities, and other obligations of each merging entity that ceases to exist continue as obligations of the surviving entity;

(5) an action or proceeding pending by or against any merging entity that ceases to

exist may be continued as if the merger had not occurred;

(6) except as prohibited by other law, all of the rights, privileges, immunities, powers and purposes of each merging entity that ceases to exist vest in the surviving entity;

(7) except as otherwise provided by the organic law of a merging entity, the merger is not deemed to require the winding up, the payment of liabilities or the distribution of the assets of the non-surviving entity;

(8) the public organic document of the surviving entity is amended to the extent approved by the merging parties;

(9) the public organic document of surviving entity that is created by the merger becomes effective;

(10) the ownership interests of each merging entity that are to be converted in the merger are converted and the former holders of those ownership interest are entitled only to the rights provided to them under the terms of the merger and to any rights they may hold under the organic law of their entity.

(b) A person who becomes subject to owner liability for some or all of the debts, obligations or liabilities of any entity as a result of a merger shall have owner liability only to the extent provided in the organic law of the entity and only for those debts, obligations and liabilities that accrued after the effective date of the statement of merger.

(c) The effect of a merger on the owner liability of a person who had owner liability for some or all of the debts, obligations or liabilities of a party to the merger shall be as follows:

(1) the merger does not discharge any owner liability under the organic laws of the entity in which the person was an owner to the extent any such owner liability accrued before the

effective date of the statement of merger;

(2) the person shall not have owner liability under the organic laws of the entity in which the person was an owner prior to the merger for any debt, obligation or liability that accrues after the effective date of the merger;

(3) the provisions of the organic laws of any entity for which the person had owner liability before the merger shall continue to apply to the collection or discharge of any owner liability preserved by subsection 205(c)(1), as if the merger had not occurred; and

(4) the person shall have whatever rights of contribution from other persons as provided by the organic laws of the entity for which the person had owner liability with respect to any owner liability preserved by subsection 205(c)(1), as if the merger had not occurred.

(d ) Upon a merger becoming effective, a foreign entity that is the surviving or resulting entity in the merger and that is not authorized to transact business in this [State] is deemed to :

(1) appoint the [Secretary of State] as its agent for service of process for the purposes of enforcing an obligation under this section; and

(2) agree to promptly pay the amount, if any, to which the owners of each domestic entity that is a party to a merger is entitled under the entity's organic laws.

**Reporter's Notes**

**Section 205(a) -** Section 205(a)(7) derives from ULLCA § 906(d). *See also* 6 Del.C. § 18-209(g)(not requiring a non-surviving entity to wind up its affairs or pay its liabilities and distribute its assets). At its November, 2000 meeting, the Drafting Committee requested that the Reporter make no express reference to "dissolution" regarding the effects of a merger or conversion.

**Section 205(b), (c) -** The language of §§ 205 (c) and (d) is taken from the Model Entity Merger and Conversion Act, §§ 9.55 (c) and (d) with one modification - the terms "arose" and arises" have been changed to "accrued" and "accrues" as per the direction of the Drafting Committee to the Reporter.

**Section 205(d)-** This section is derived from the Model Entity Merger and Conversion Act § 202 © (providing that a foreign surviving entity is deemed to appoint the Secretary of State as agent for service of process in any proceeding to enforce pre-existing appraisal rights and to agree to promptly pay those amounts, if any, that are due).

**SECTION 206. RESTRICTIONS ON APPROVAL OF MERGER.**

(a) If a person will have owner's liability with respect to a surviving entity, approval and amendment of a plan of merger are ineffective without the [written?] consent of that person, [unless:

(1) the private organic document of the entity provides for the approval of the merger with consent of less than all owners; and

(2) that person has assented to that provision in the private organic document.

(b) A person does not give the assent required by subsection (a) merely by assenting to a provision of the private organic document which permits the entity to be amended or converted with the consent of less than all owners.]

**Reporter's Notes**

Section 206 represents the diverse views taken by the Drafting Committee at its November, 2000 meeting in Washington, D.C. The provisions of subsection (a) represent the perspective that an owner who will assume personal liability in the surviving entity must consent [in writing?] to the merger. The bracketed provisions suggest a possible alternative and is derived from Re-RULPA § 1110. Alternative approaches are included for discussion purposes.

[**SECTION 207. CONTRACTUAL APPRAISAL RIGHTS.**

A plan of merger may provide that contractual appraisal rights with respect to an owner interest in a merging entity shall be available for any class or group of owners or ownership interests in connection with any merger as approved pursuant to this [Article] in which a [domestic] entity is a constituent party.]

## Reporter's Notes

One of the recurring themes in the discussions by the Drafting Committee in November, 2000 was that of appraisal rights. The Drafting Committee acknowledged that appraisal rights are typically granted by statute for corporate entities that participate in certain types of mergers. On the other hand, unincorporated entity statutes generally do not grant appraisal rights to owners. The exception to this rule is where the owners of an unincorporated entity have created appraisal rights by contract. Section 207 is placed in this draft solely for the purpose of generating discussion. Section 207, as drafted, is not intended to alter the existing law of the various jurisdictions regarding unincorporated entities. Instead, § 207 is designed simply to acknowledge these rights by statute where the parties to a merger either created, granted or authorized those rights before, during or simultaneous with the merger negotiations. It is assumed that any contractual appraisal rights must be approved as required by the organic laws of the affected entity.

# [ARTICLE] 3

# ENTITY INTEREST EXCHANGE

**SECTION 301. ENTITY INTEREST EXCHANGE**.

(a) Through an entity interest exchange:

(1) a domestic entity may acquire all of the entity interests of one or more classes or series of another domestic or foreign entity in exchange for entity interests, securities, obligations, rights to acquire entity interests or securities, cash, other property, or any combination of the foregoing; or

(2) all of the entity interests of one or more classes or series of a domestic entity may be acquired by another domestic or foreign entity in exchange for entity interests, securities, obligations, rights to acquire entity interests or securities, cash, other property, or any combination of the foregoing.

(b) A foreign entity may be a party to an entity interest exchange pursuant to this [Act] only if:

(1) the entity interest exchange is permitted by the organic law of the foreign entity; and

(2) in effecting the entity interest exchange, the foreign entity complies with the requirements of its organic law.

(c) If any debt security, note or similar evidence of indebtedness for money borrowed, whether secured or unsecured, indenture or other contract, issued, incurred, accrued or executed by a domestic entity before [the effective date of this Act] contains a provision applying to a

merger or conversion of the entity that does not refer to an entity interest exchange, the provision shall be deemed to apply to an entity interest exchange of the entity until such time as the provision is subsequently amended.

## Reporter's Notes

**Issues for Further Consideration by the Drafting Committee.** An entity interest exchange is an extension of the share exchange anticipated in Section 11.03 of the MBCA (draft of 2-1-01) and Section 203 of the Model Entity Merger and Conversion Act (draft of 10-25-00). The entity interest exchange, like the share exchange, permits a business combination between one or more entities with the effect that: (1) the separate existence of one or more of those entities does not cease; and (2) another entity acquires the ownership interest of one or more of the parties. This same result 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 share/interest exchange provides a direct method to achieve the result of a triangular merger.

Section 302 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 a make applicable 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 interest exchange is universally recognized in corporate or alternative entity law. To date, approximately 12 jurisdictions provide for a share exchange within their corporate law. Texas currently permits share exchanges as well as interest exchanges. *See* Texas Business Corporation Act, Article 5.02 and Texas Revised Partnership Act, Article 6132b-9,03.

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.

Two issues which the Drafting Committee may wish to consider concerning entity interest exchanges are: (1) whether an entity interest exchange negatively affects third-party rights; and

(2) whether a transition rule will be necessary to preserve those rights. As to the first issue, a common scenario envisions preferred stock interests, debenture covenants, or LLC or LP interests which have been negotiated to protect certain contract rights upon the occurrence of a merger or conversion. If an "entity interest exchange" is not anticipated at the time these contracts are negotiated, then arguably such contractual rights may be compromised or eliminated upon an "entity interest exchange." The second issue would attempt to alleviate such undermining of the parties contractual expectations via a transitional rule that would drag entity interest exchanges under the auspices of mergers for some period of time. *See* § 301(c).

**Section 301(c) -** Section 301(c) is a transitional rule that is intended to protect the rights of certain contract claimants. In particular, § 301(c) allows creditor provisions that were negotiated in anticipation of a merger or conversion to be deemed to apply to an entity interest exchange until such time as the contractual provisions are subsequently amended by the parties.

**SECTION 302. PLAN OF ENTITY INTEREST EXCHANGE.**

(a) A plan of entity interest exchange shall state:

(1) the name, form and jurisdiction of formation or organization of each entity whose interests will be acquired and the name, form and jurisdiction of formation or organization of the other entity that will acquire those interests;

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

(3) that a plan of entity interest exchange has been approved and executed by each party to the entity interest exchange;

(4) 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;

(5) any provisions required by the organic laws under which any party to the entity interest exchange is organized; and

(6) any other provisions relating to the entity interest exchange that the parties may desire.

(b) Subject to Section 305 or any contractual rights, a plan of entity interest exchange may be terminated or amended pursuant to a provision for termination or amendment contained in the plan of entity interest exchange. In no event shall the termination or amendment be approved by less that the consent required to approve the plan.

**Reporter's Notes**

**Section 302(b) -** The termination and abandonment rules of § 302(b) for the entity interest exchange mirror those for mergers and conversions.

**SECTION 303. APPROVAL OF ENTITY INTEREST EXCHANGE.**

Subject to the provisions of Section 306, a plan of entity interest exchange authorized by this [Act] shall be approved by each entity that is a party to the entity interest exchange according to the entity's private organic documents or, if there is no applicable private organic document, then in the manner set forth in the entity's organic law for approving and effectuating an entity interest [or share] exchange. [If the organic law of a domestic entity does not provide procedures for the adoption, approval and effectuation of an entity interest [or share] exchange, a plan of entity interest exchange shall be adopted and approved, and the entity interest exchange effectuated, in accordance with the provisions of {chapters 11 and 13 of the Model Business Corporation Act}. For purposes of applying those provision:

(i) the entity, its interest holders, entity interests, and combined organic documents shall be deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively; and

(ii) if the affairs of the entity are managed by a group of persons that is not identical to the interest holders, that group shall be deemed to be the board of directors.]

**Reporter's Notes**

**Issues for Further Consideration by the Drafting Committee.** Section 303 is derived from the Model Entity Merger and Conversion Act § 203(c). The rationale underpinning § 303 is that presently only the MBCA contains detailed *model* rules regarding share exchanges. In light of the lack of uniformity in the area of share/interest exchanges, reference to the MBCA provides, at the least, a *model* paradigm for practitioners. As an alternative, § 303 could, in the absence of organic law on share or interest exchanges, create a default to merger rules. Another alternative would either require unanimous consent of entity owners or prohibit interest exchanges where an entity's organic law is silent regarding the transaction.

**SECTION 304. FILINGS REQUIRED FOR ENTITY INTEREST EXCHANGE; EFFECTIVE DATE.**

(a) A statement of entity interest exchange shall be signed on behalf of each party to the entity interest exchange.

(b) The statement of entity interest exchange shall include:

(1) the name, form and jurisdiction of formation or organization of the parties to the entity interest exchange;

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

(3) 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;

(4) a statement as to each party to the entity interest exchange that the exchange was approved and executed as required by the entity's organic law;

(5) a statement that the plan of entity interest exchange is on file at a place of business of the controlling entity and shall state the street address thereof;

(6) any information required by the organic law of the parties to the entity interest

exchange; and

(7) any other information relating to the entity interest exchange that the parties may desire.

(c) Each party to the entity interest exchange shall file the statement of entity interest exchange in the office of the [Secretary of State].

(d) Appropriate modifications shall be made to any document required to be filed with the [Secretary of State] to effectuate an entity interest exchange by the organic laws of each entity that is a party to an entity interest exchange authorized this [Act] to conform to the nature of each entity that is a party to the entity interest exchange. Where two or more domestic entities of different types are parties to an entity interest exchange, the documents required to be filed with the [Secretary of State] by the organic laws of each entity may be combined into one document.

(e) An entity interest exchange becomes effective under this [Article] upon the later of:

(1) the filing of the statement of entity interest exchange and the performance of any acts required to effectuate the entity interest exchange under the organic law of each entity to the interest exchange; or

(2) a later date or time (which shall be a date or time certain) specified in the statement of entity interest exchange.

**SECTION 305. EFFECT OF ENTITY INTEREST EXCHANGE.**

(a) When an entity interest exchange becomes effective, the interests of each entity that are to be exchanged for entity interests, securities, obligations, rights to acquire entity interests or securities, cash other property, or any combination of the foregoing, are entitled only to the rights provided to them in the plan of entity interest exchange or to any rights they may have under the

organic law governing the entities to the interest exchange.

(b) A person who becomes subject to owner liability for some or all of the debts, obligations or liabilities of any entity as a result of an entity interest exchange shall have owner liability only to the extent provided in the organic law of the entity and only for those debts, obligations and liabilities that accrued after the effective date of the statement of entity interest exchange.

(c) The effect of an entity interest exchange on the owner liability of a person who had owner liability for some or all of the debts, obligations or liabilities of a party to the entity interest exchange shall be as follows:

(1) the entity interest exchange does not discharge any owner liability under the organic law of the entity in which the person was an owner to the extent any such owner liability accrued before the effective date of the statement of entity interest exchange;

(2) the person shall not have owner liability under the organic law of the entity in which the person was an owner prior to the entity interest exchange for any debt, obligation or liability that accrues after the effective date of the statement of entity interest exchange;

(3) the provisions of the organic law of any entity for which the person had owner liability before the entity interest exchange shall continue to apply to the collection or discharge of any owner liability preserved by subsection 305(c)(1), as if the entity interest exchange had not occurred; and

(4) the person shall have whatever rights of contribution from other persons as provided by the organic law of the entity for which the person had owner liability with respect to any owner liability preserved by subsection 305(c)(1), as if the entity interest exchange had not

occurred.

(d) Upon an entity interest exchange becoming effective, a foreign entity that is the controlling entity in the exchange and not authorized to transact business in this [State] is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process for the purposes of enforcing an obligation under this section; and

(2) agree to promptly pay the amount, if any, to which the owners of each domestic entity that is a party to the entity interest exchange is entitled under the entity's organic law.

**Reporter's Notes**

**Section 305** - Section 305 is derived in significant part from the MBCA § 11.07 (draft of 2-1-01).

**Sections 305(b) and (c)** - Sections 305 (b) and (c) are taken from the Model Entity Merger and Conversion Act §§ 9.55 (c) and (d) with appropriate modifications being made regarding the "accrual" of obligations. Section 305 also attempts to preserve liability for owner obligations only to the extent such liabilities accrued before the effective date of the entity interest exchange. Subsequent alterations in underlying liabilities or obligations are not preserved.

**SECTION 306. RESTRICTIONS ON APPROVAL OF ENTITY INTEREST EXCHANGE.**

(a) If a person will have owner's liability as a result of an entity interest exchange, approval and amendment of a plan of entity interest exchange are ineffective without the [written] consent of that person, [unless:

(1) the private organic document of the entity provides for the approval of the entity interest exchange with consent of less that all owners; and

(2) that person has assented to that provision in the private organic document.

(b) A person does not give the assent required by subsection (a) merely by assenting to a provision of the private organic document which permits the entity to be amended, converted or merged with the consent of less than all owners.]

**Reporter's Notes**

Section 306 reflects, in the context of an entity interest exchange, the views expressed by the Drafting Committee in Washington regarding non-unanimous consent in mergers and conversions where owner liability may result. Section 306 is included for purposes of discussion by the Drafting Committee at its meeting in March, 2001.

**[SECTION 307. CONTRACTUAL APPRAISAL RIGHTS.**

A plan of entity interest exchange may provide that contractual appraisal rights with respect to an owner interest in an entity that is a party to an entity interest exchange shall be available for any class or group of owners or ownership interests in connection with an entity interest exchange as approved pursuant to this [Article] in a [domestic] entity that is a constituent party to the entity interest exchange.]

**Reporter's Notes**

**Section 307** - Section 307, like its counterpart § 207, is included in this draft solely for the purpose of discussion by the Drafting Committee. Section 307 reflects the present theory in corporate law that shareholders in share exchanges are entitled to statutory appraisal rights. *See* MBCA, Chapter 13. Section 307 is intended to acknowledge appraisal rights for owners in unincorporated entities that are parties to an entity interest exchange where those rights are negotiated prior to, during or simultaneous with the plan of entity interest exchange. As with § 207, it is assumed that appraisal rights will be approved in whatever manner required by the organic laws of the affected entity.

# [ARTICLE] 4

# CONVERSION; CONVERSION AND CONTINUANCE OF ENTITY EXISTENCE

## SECTION 401. CONVERSION; CONVERSION AND CONTINUANCE OF ENTITY EXISTENCE.

(a) [Except as provided in subsection (e)], a domestic entity may become a different form of domestic entity. The laws of this [State] govern the effect of converting an entity organized in this [State].

(b) [Except as provided in subsection (e)], a domestic entity may become a foreign entity of any form if the organic laws of the foreign jurisdiction permit the domestic entity to become an entity in that jurisdiction. The laws of the foreign jurisdiction shall govern the effect of converting to an entity organized in that jurisdiction.

(c) A foreign entity may become a domestic entity of any form if the laws of the jurisdiction in which the foreign entity is organized authorize it to become a domestic entity in another jurisdiction. The laws of this [State] shall govern the effect of converting to a domestic entity pursuant to this [Article].

{(d) Upon compliance with the provisions of this [Article], a converting domestic entity may elect to continue its existence in this [State] after its conversion to a foreign entity if the laws of the foreign jurisdiction permit such continuation. If a converting domestic entity elects to continue its existence in this [State] after its conversion, the converting continuing entity shall be governed by the laws of this [State] to the same extent as prior to its conversion. So long as the converting continuing entity continues to exist in this [State] following the filing of a statement of

conversion and continuance, the converting continuing entity and the entity formed, incorporated, created or that otherwise came into being as a consequence of the conversion in a foreign jurisdiction shall, for all purposes of the laws of this [State], constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of this [State] and the laws of such foreign jurisdiction.

(e) A converting foreign entity may elect to continue its existence in the foreign jurisdiction after its conversion to a domestic entity in this [State] if the organic laws of the foreign jurisdiction permit such continuance. If a converting foreign entity elects to continue its existence in the foreign jurisdiction, the foreign converting continuing entity shall be governed by the laws of this [State] and any applicable laws of the foreign jurisdiction. So long as the foreign converting continuing entity exists in the foreign jurisdiction and in this [State] following the filing of a statement of conversion and continuance, the converting continuing entity and the entity formed, incorporated, created or that otherwise came into being as a consequence of the conversion in this [State] shall, for all purposes of the laws of this [State], constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of this [State] and the laws of such foreign jurisdiction.}

(f) If any debt security, note or similar evidence of indebtedness for money borrowed, whether secured or unsecured, indenture or other contract, issue, incurred, accrued or executed by a domestic entity before [the effective date of this Act] contains a provision applying to a merger that does not refer to a conversion or conversion and continuance of entity existence, the provision shall be deemed to apply to a conversion or conversion and continuance of entity existence until such time as the provision is subsequently amended.

(g) Domestic entities of the following types shall not have the power to participate in a conversion under this [Article].

(1)

(2)

**Reporter's Notes**

**Issues for Further Consideration by the Drafting Committee.** The conversion authorized by Section 401 includes a domestication and is derived from § 301 of the Model Entity Merger and Conversion Act.

**Subsections (d) and (e) -** Subsections (d) and (e) are optional and are intended to permit "dual" or "continuing" status for converting entities. Subsection (d) is derived from the transfer and domestication provisions of the Delaware limited partnership and limited liability company acts.

At its November, 2000 meeting, the Drafting Committee considered various justifications for permitting the creation of "continuing" or "dual status" entities. Included within those justifications were: (1) the ability of domestic entities to profit from rules in foreign jurisdictions which derive their benefits from "resident" (as opposed to "doing business") status (*e.g.*, trading advantages obtained from membership on multiple securities exchanges); (2) Internet companies that at present are precluded from certain benefits and/or transactions as a result of non-resident status; (3) interstate practices of law where the affected jurisdictions restrict, in some manner, the form in which a law practice may be conducted; (4) certain educational institutions which are currently restricted in securing state financial aid where the applicable educational institution is not domestic-chartered; (5) dual citizenship for corporations that existed in the United States for decades for the purpose of permitting railroad companies to exercise eminent domain rights in contiguous states; and (6) some jurisdictions that presently recognize dual status for either corporate and/or unincorporated entities (*see, e.g.*, Delaware, Pennsylvania, and Virginia).

As a point of information, in 1995 the General Corporation Law of Delaware (the "DGCL") was amended to authorize a procedure under 8 *Del.C.* § 390 whereby corporations could transfer from Delaware to a non-US jurisdiction. Ostensibly, the amendment made clear that a Delaware corporation could move to a jurisdiction that did not recognize a reincorporation merger. In its original form, § 390 required the transferring corporation to cease its existence in Delaware. In the two years following the amendment of § 390, Delaware practitioners discovered that certain profitable transactions could not be effected without the transferring corporation retaining its domicile in Delaware. To effectuate these transactions, the DGCL was further amended in 1997 to permit a "transfer" to a foreign jurisdiction and a "continuance" in Delaware. The 1997 amendments to § 390 caused some misgiving among Delaware practitioners. In particular,

attorneys were concerned about the theoretical uncertainties caused by one entity's internal corporate structure being governed by the organic laws of two jurisdictions. Although the amendments to § 390 make no attempt to resolve these uncertainties, it was determined by the Delaware Bar and Legislature that the business advantages in permitting "dual status" outweighed any lack of legal certainty.

**Subsection (f)** - Subsection (f) provides a transitional rule to protect third-party rights where "safe harbors" in indentures, preferred stock provisions, bonds, or other contractual commitments have been negotiated in anticipation of mergers but at a time prior to the prevalence of "single" or "dual status" conversions. The transitional rule is intended to protect these contract claimants by making such "safe harbor" provisions applicable upon a conversion or merger. The transitional rule will not apply if the provisions are subsequently modified by the parties.

**Subsection (g)** - Subsection (g) is optional and may be used to exclude certain types of entities from the scope of this Article. Section 104 of this Act, on the other hand, anticipates the general exclusion of certain types of domestic entities from the operation of the Act.

**SECTION 402. PLAN OF CONVERSION; PLAN OF CONVERSION AND CONTINUANCE OF ENTITY EXISTENCE.**

(a) A domestic entity may participate in a conversion or conversion and continuance of entity existence by adopting and approving a plan of conversion or a plan of conversion and continuance of entity existence.

(b) A plan of conversion or plan of conversion and continuance of entity existence shall state:

(1) the name, form and jurisdiction of formation or organization of the converting entity and if it elects to continue its existence in this [State] after the conversion;

(2) the name and form of entity that the converting entity will be immediately after the conversion and, if it will be a foreign entity, its jurisdiction of organization;

(3) 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

statement of conversion and continuance of entity existence;

(4) that the conversion or conversion and continuance of entity existence has been approved and executed in accordance with the provisions of this [Article];

(5) the terms and conditions of the conversion or conversion and continuance of entity existence;

(6) the full text, as it will be in effect immediately after consummation of the conversion or conversion and continuance of entity existence, of:

(i) the public organic document of the converted entity;

(ii) if the converted entity will be a nonfiling entity, any private organic document; or

(iii) if the converting entity elects to continue its existence in this [State] after its conversion, its public organic document or, if it is a nonfiling entity, any private organic document; and

(7) any other provision relating to the conversion or conversion and continuance of entity existence that the parties may desire.

(c) Subject to Section 406 and any contractual rights, the plan of conversion or conversion and continuance of entity existence may be terminated or amended pursuant to a provision for termination or amendment contained in the plan of conversion or conversion and continuance of entity existence. In no event shall the termination or amendment be approved by less than the consent required to approve the plan.

**Reporter's Notes**

**Sections 403(a) and (b)** are derived from the Model Entity Merger and Conversion Act §

302 as well as select provisions from the Delaware limited partnership and limited liability company acts.

**Section 402 (b).** The Drafting Committee may wish to consider expanding or eliminating provisions in § 402 (b) regarding the information to be set forth in a plan of conversion or plan of conversion and continuance. The information contained in § 402(b) is an amalgamation of analogous provisions in the Model Entity Merger and Conversion Act as well as the transfer and domestication provisions of the Delaware unincorporated acts.

**Section 402 (c).** Section 402 (c) is derived from Re-RULPA. The Drafting Committee may wish to expand or eliminate this provision.

## SECTION 403. APPROVAL ON PLAN OF CONVERSION OR PLAN OF CONVERSION AND CONTINUANCE OF ENTITY EXISTENCE.

Subject to Section 406, a plan of conversion or plan of conversion and continuance of entity existence authorized by this [Act] shall be approved by each converting entity according to the entity's private organic document, then in the manner set forth in the entity's organic law for approving and effectuating a conversion or a conversion and continuance of entity existence. [If the organic law of a domestic entity does not provide procedures for the approval and effectuation of a conversion or conversion and continuance of entity existence, then by all owners of the converting entity.]

### Reporter's Notes

Section 403, as does § 203, provides a default rule of unanimous approval by the owners of the affected entity. An alternative approach could create a default rule which references merger approval procedures. (*See, e.g.*, Texas unincorporated acts; Model Entity Merger and Conversion Act § 303(a)).

## SECTION 404. FILINGS REQUIRED FOR CONVERSION OR CONVERSION AND CONTINUANCE OF ENTITY EXISTENCE; EFFECTIVE DATE.

(a) A statement of conversion or conversion and continuance of entity existence shall be signed on behalf of the converting entity.

(b) The statement of conversion or conversion and continuance of entity existence shall include:

(1) the name, form and jurisdiction of formation or organization of the converting entity;

(2) the name and form of the surviving entity;

(3) the jurisdiction to which the converting entity shall be transferred;

(4) the future effective date or time (which shall be a date or time certain) of the conversion or conversion and continuance of entity existence if it is not to be effective upon the filing of the statement of conversion or conversion and continuance of entity existence;

(5) a statement as to the converting entity that the conversion or conversion and continuance of entity existence was approved and executed as required by the entity's organic law;

(6) in the case of a statement of conversion of a domestic entity to a foreign entity:

(i) a statement that the existence of the converting entity shall cease when the statement of conversion becomes effective; and

(ii) the agreement of the converting entity that it may be served with process in this [State] in any action, suit or proceeding for enforcement of any obligation of the converting entity arising while it was an entity of this [State], and that it irrevocably appoints the [Secretary of State] as its agent to accept service of process in any such action, suit or proceeding;

(7) in the case of a statement of conversion of a foreign entity to a domestic entity:

(i) a statement that the existence of the converting entity shall cease when the statement of conversion becomes effective;

(ii) the agreement of the converting entity to be governed by the laws of this [State] for all purposes; and

(iii) if the surviving entity is a filing entity, either contain all of the information required to be set forth in its public organic document or have attached a public organic document;

(8) in the case of a statement of conversion and continuance of entity existence by a domestic entity, a statement by the domestic entity that it will continue to exist as a domestic entity of this [State] after the statement of conversion and continuance of entity existence becomes effective;

(9) in the case of a statement of conversion and continuance of entity existence by a converting foreign entity, a statement by the converting foreign entity that it will continue to exist as a foreign entity after the statement of conversion and continuance of entity existence becomes effective; and

(10) the address to which a copy of the process referred to in subsection (b)(6) shall be mailed to it by the [Secretary of State].

(c) A statement of conversion or conversion and continuance of entity existence shall be filed in the office of the [Secretary of State].

(d) A conversion or conversion and continuance of entity existence becomes effective under this [Article] upon the later of:

(1) the filing of the statement of conversion or conversion and continuance of entity

existence and the performance of any acts required to effectuate the conversion or conversion and continuance of entity existence under the organic law of each converting entity; or

(2) a later date or time (which shall be a date or time certain) specified in the statement of conversion or conversion and continuance of entity existence.

**Reporter's Notes**

The conversion provisions of § 404 are based in significant part on the Model Entity Merger and Conversion Act § 304. The conversion and continuance provisions are derived from domestication and transfer procedures authorized under the Delaware limited partnership and limited liability company laws.

**SECTION 405. EFFECT OF CONVERSION OR CONVERSION AND CONTINUANCE OF ENTITY EXISTENCE.**

(a) When a conversion becomes effective:

(1) the converting entity shall cease to exist;

(2) the surviving entity shall become subject to the organic laws of the jurisdiction of conversion;

(3) the surviving entity's existence shall be deemed to have commenced 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) the conversion shall not be deemed to affect any obligations or liabilities of the converting entity that accrued prior to its conversion;

(5) all rights, privileges and powers of the converting entity, and all property, real, personal and mixed, and all debts due to the converting entity, shall vest in the surviving entity and the title to any real property vested by deed or otherwise in the converting entity shall not

revert or be in any way impaired by reason of this [Article];

(6) all rights of creditors and all liens upon any property of the converting entity shall be preserved unimpaired, and all accrued debts, liabilities and duties of the converting entity shall attach to the surviving entity and may be enforced against it to the same extent as if such debts, liabilities and duties were incurred by it.

(b) When a conversion of a domestic entity into a foreign entity becomes effective, the surviving entity is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process in any proceeding to enforce the rights of owners who exercise rights in connection with the conversion pursuant to the entity's organic law; and

(2) agree that it will promptly pay the amount, if any, to which the owners are entitled.

(c) When a conversion and continuance of entity existence becomes effective:

(1) in the case of a conversion and continuance of entity existence of a domestic entity to a foreign entity;

(i) the domestic entity shall continue to exist in, and shall be subject to the laws of, this [State];

(ii) the continuing domestic entity and the entity formed following the conversion and continuance of entity existence shall, for all purposes of the laws of this [State], constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and shall exist under the laws of this [State] and the organic laws of the foreign jurisdiction;

(2) in the case of a conversion and continuance of entity existence of a foreign entity to a domestic entity;

(i) the foreign entity shall continue to exist in, and be subject to the organic laws of, the foreign jurisdiction; and

(ii) the continuing foreign entity and the entity formed following the conversion and continuance shall, for all purposes of the laws of this [State], constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and shall exist under the laws of the foreign jurisdiction and the laws of this [State].

(c) Any owner of a domestic entity that is a party to a conversion or conversion and continuance of entity existence under this [Act] who, prior to the conversion or conversion and continuance of entity existence, was liable for the obligations or debts of the entity shall not, by reason of the conversion or conversion and continuance of entity existence, be released from such obligations or debts that accrued prior to the effective date of the conversion or conversion and continuance.

(d) Upon a conversion or conversion and continuance of entity existence becoming effective, a foreign entity that is the surviving or continuing entity in the conversion and is not authorized to transact business in this [State] is deemed to:

(1) appoint the [Secretary of State] as its agent for service of process for the purposes of enforcing an obligation under this [Article]; and

(2) agree to promptly pay the amount, if any, to which the owners of each domestic entity that is a party to a conversion is entitled under the entity's organic law.

**SECTION 406. RESTRICTIONS ON APPROVAL OF CONVERSION OR CONVERSION AND CONTINUANCE OF ENTITY EXISTENCE.**

(a) If a person will have owner's liability with respect to a surviving or continuing entity,

approval and amendment of a plan of conversion or conversion and continuance of entity existence are ineffective without the [written] consent of that person, [unless:

(1) the private organic document of the entity provides for the approval of the conversion or conversion and continuance of entity existence with consent of less than all owners; and

(2) that person has assented to that provision in the private organic document.

(b) A person does not give the assent required by subsection (a) merely by assenting to a provision of the private organic document which permits the entity to be amended, merged or exchanged pursuant to an entity interest exchange with the consent of less than all owners.

## ARTICLE [5]

## MISCELLANEOUS PROVISIONS

**SECTION 501. 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 502. 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 503. EFFECTIVE DATE.** This [Act] takes effect January 1, 200___.

**SECTION 504. REPEALS.** Except as otherwise provided in Section 505 effective January 1, 20___ [drag-in-date], the following [Acts] and parts of [Acts] are repealed: [RUPA; Re-RULPA; ULLCA; MBCA as amended and in effect immediately before the effective date of this [Act].

**SECTION 505. APPLICABILITY.**

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

(1)

(2)

(b) Except as provided in subsection (c), beginning January 1, 20___, [drag-in-date], this

[Act] governs all [domestic and foreign entities, whether or not organized for profit].

(c) Each of the following provisions of [RUPA; Re-RULPA, ULLCA and the MBCA] as amended and in effect immediately before the effective date of this [Act] continue to apply after January 1, 20__ [drag-in-date], except as otherwise provided as follows:

(1)

(2)

**SECTION 506. SAVINGS CLAUSE.** This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect.