MODEL ENTITY TRANSACTIONS ACT (2007)

(Last Amended 2013)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SECOND YEAR
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WITH PREFATORY NOTE AND COMMENTS

August 19, 2015

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 123rd year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff, and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft, and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up-to-date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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MODEL ENTITY TRANSACTIONS ACT (2007)
(Last Amended 2013)

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MODEL ENTITY TRANSACTIONS ACT (2007)
(Last Amended 2013)

Prefatory Note

1. Development of the Act

The Model Entity Transactions Act (META) is the result of a unique collaborative effort of the National Conference of Commissioners on Uniform State Laws (ULC) and the American Bar Association (ABA) to address an issue that cuts across their traditional areas of expertise.

For over 90 years, the ULC has prepared and periodically revised uniform laws governing general partnerships and limited partnerships. Similarly, for over 50 years committees of the ABA have prepared and periodically revised model laws for the incorporation of business corporations and nonprofit corporations.

Beginning in the 1990s, three new types of business entities – limited liability companies, limited liability partnerships, and limited liability limited partnerships – have come into wide use; other forms of business entities once thought to be almost obsolete – most notably business trusts and cooperatives – have attained new prominence; and a form of entity previously organized only under the common law – unincorporated nonprofit associations – has been recognized by statute. In addition, restructuring transactions by and among all of the various types of entities have begun to occur with increased frequency. Because of a lack of clear statutory authority in most states, these restructuring transactions have often been completed in two or three indirect steps rather than directly in a single transaction.

The ULC included provisions permitting mergers among different forms of entities and authorizing the conversion of one form of entity to another in the Uniform Limited Liability Company Act (1996 and 2006), Uniform Limited Cooperative Association Act (2007), Uniform Partnership Act (1997), and Uniform Limited Partnership Act (2001). The ABA added conversion provisions to the Model Business Corporation Act in 2003, and the Third Edition of the Model Nonprofit Corporation Act adopted in 2008 also included conversion provisions. In each case, the new provisions only apply if an entity of the type formed under the statute is a party to the transaction. Both the ULC and the ABA recognized, however, that a better approach would be for states to enact a single statute covering all types of restructuring transactions by and among all types of entity forms. Thus, the ULC and the ABA independently began projects to prepare a comprehensive statute to meet this need.

After beginning their independent drafting projects, both the ULC and the ABA realized that combining their respective areas of expertise would produce the best product for enactment by the states. They have accordingly combined their efforts so that the Model Entity Transactions Act draws on the expertise of the ULC in the law of unincorporated entities and of the ABA in the law of corporations.

Prior to the development of META, state business organization statutes (both

incorporated and unincorporated) varied in their approach to mergers involving the same or different types of entities, consolidations, conversions, share/interest exchanges, and domestications by or among domestic and foreign for-profit and nonprofit entities. The dissimilarities in state statutes included: (1) which transactions were authorized; (2) approval requirements; (3) whether entities of more than one type could be parties to the same transaction; (4) inclusion of for-profit and nonprofit entities; (5) inclusion of incorporated and unincorporated organizations; and (6) single or dual status for converting, domesticating, or transferring entities.

2. Scope of the Act

META deals comprehensively with both same-type and cross-type merger, interest exchange, conversion, and domestication transactions for all types of entities.

Article 1 of the act sets forth general provisions applicable to the other articles. It defines terms that are used throughout the act, specifies the general procedures for the filings required under other articles, and provides specific rules dealing with all transactions.

Article 2 governs mergers. Article 2 is derived in large part from existing corporation and unincorporated entity 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 interest exchanges. The interest exchange transaction is derived from the share exchange in corporate law and reflected in Chapter 11 of the Model Business Corporation Act. Prior to the development of this act, interest exchanges were not authorized as a separate form of transaction in any uniform unincorporated entity act.

Article 4 governs conversions. A conversion is a statutory procedure authorizing an entity to change its form of organization to another type of entity.

Article 5 governs domestications. It authorizes a foreign entity to become a domestic entity of the same type and authorizes a domestic entity to become a foreign entity of the same type so long as the laws of the foreign jurisdiction authorize the domestication.

Article 6 sets out certain miscellaneous provisions, including: (1) consistency of application; (2) e-sign language; (3) savings clause; (4) severability clause; (5) conforming amendments and repeals; and (6) effective date.

Since merger statutes have stood the test of time and business lawyers are used to working with the merger provisions, a policy decision was made to incorporate basically the same requirements, including approval requirements and substantive law rules, for mergers in the articles dealing with interest exchanges, conversions, and domestications. Moreover, an interest exchange (which is in effect a triangular merger accomplished without the need for a transitory third party to the triangular merger) is effectively a form of merger transaction; and a conversion or domestication can be accomplished through a merger transaction by merging the converting or

domesticating entity into a new form of entity (in the case of a conversion) or the same form of entity formed in another state (in the case of a domestication). Thus, although there are differences because of the different nature of each type of transaction, the provisions in Sections 302 through 306, (interest exchanges), 402 through 406 (conversions), and 502 through 506 (domestications) are patterned after and look quite similar to Sections 202 through 206 (mergers).

Because of the incompleteness and diversity of existing entity statutes with respect to the four types of restructuring transactions dealt with in META, it is extremely important that an enacting state thoroughly review the Legislative Notes in the act, especially the Legislative Note following Section 606, as well as the state's existing entity statutory framework before a bill to enact META is drafted. In most cases, several amendments to existing entity statutes will have to be made in order to avoid gaps and possible conflicts with META. Where a potential conflict exists, the enacting state will have to determine whether to continue the existing rule or to adopt the META rule and draft the bill accordingly.

META was approved in 2007. It was amended in 2011 and 2013 to harmonize the language of its provisions with similar provisions in the other uniform entity acts as part of the Harmonization of Business Entity Acts Project. The amendments are for the most part non-substantive, technical, and stylistic. They include a number of new and revised definitions, the addition of several provisions regarding restructuring transactions involving cooperatives, new provisions on the effective date of META transactions, and a new provision specifying the effect of a continuing trust obligation to a non-surviving entity in a merger and the effect of a bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance made to a merging entity that is not the surviving entity and that takes effect or remains payable after the merger. *See* Section 104(c).

META is Article 2 of the Uniform Business Organizations Code (2011) (Last Amended 2013) (UBOC). If a state enacts META and subsequently enacts the UBOC, the state's initial version of META should be repealed and reenacted as Article 2 of the UBOC.

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MODEL ENTITY TRANSACTIONS ACT (2007)
(Last Amended 2013)

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [act]:

(1) "Acquired entity" means the entity, all of one or more classes or series of interests of which are acquired in an interest exchange.

(2) "Acquiring entity" means the entity that acquires all of one or more classes or series of interests of the acquired entity in an interest exchange.

(3) "Approve" means, in the case of an entity, for its governors and interest holders to take whatever steps are necessary under the entity's organic rules, organic law, and other law to:

(A) propose a transaction subject to this [act];

(B) adopt and approve the terms and conditions of the transaction; and

(C) conduct any required proceedings or otherwise obtain any required votes or consents of the governors or interest holders.

(4) "Conversion" means a transaction authorized by [Article] 4.

(5) "Converted entity" means the converting entity as it continues in existence after a conversion.

(6) "Converting entity" means the domestic entity that approves a plan of conversion pursuant to Section 403 or the foreign entity that approves a conversion pursuant to the law of its jurisdiction of formation.

(7) "Distributional interest" means the right under an unincorporated entity's organic law

and organic rules to receive distributions from the entity.

(8) "Domestic", with respect to an entity, means governed as to its internal affairs by the law of this state.

(9) "Domesticated entity" means the domesticating entity as it continues in existence after a domestication.

(10) "Domesticating entity" means the domestic entity that approves a plan of domestication pursuant to Section 503 or the foreign entity that approves a domestication pursuant to the law of its jurisdiction of formation.

(11) "Domestication" means a transaction authorized by [Article] 5.

(12) "Entity":

(A) means:

(i) a business corporation;

(ii) a nonprofit corporation;

(iii) a general partnership, including a limited liability partnership;

(iv) a limited partnership, including a limited liability limited partnership;

(v) a limited liability company;

[(vi) a general cooperative association;]

(vii) a limited cooperative association;

(viii) an unincorporated nonprofit association;

(ix) a statutory trust, business trust, or common-law business trust; or

(x) any other person that has:

(I) a legal existence separate from any interest holder of that person; or

(II) the power to acquire an interest in real property in its own name; and

(B) does not include:

(i) an individual;

(ii) a trust with a predominantly donative purpose or a charitable trust;

(iii) an association or relationship that is not an entity listed in subparagraph (A) and is not a partnership under the rules stated in [Section 202(c) of the Uniform Partnership Act (1997) (Last Amended 2013)] [Section 7 of the Uniform Partnership Act (1914)] or a similar provision of the law of another jurisdiction;

(iv) a decedent's estate; or

(v) a government or a governmental subdivision, agency, or instrumentality.

(13) "Filing entity" means an entity whose formation requires the filing of a public organic record. The term does not include a limited liability partnership.

(14) "Foreign", with respect to an entity, means an entity governed as to its internal affairs by the law of a jurisdiction other than this state.

(15) "Governance interest" means a right under the organic law or organic rules of an unincorporated entity, other than as a governor, agent, assignee, or proxy, to:

(A) receive or demand access to information concerning, or the books and records of, the entity;

(B) vote for or consent to the election of the governors of the entity; or

(C) receive notice of or vote on or consent to an issue involving the internal affairs of the entity.

(16) "Governor" means:

(A) a director of a business corporation;

(B) a director or trustee of a nonprofit corporation;

(C) a general partner of a general partnership;

(D) a general partner of a limited partnership;

(E) a manager of a manager-managed limited liability company;

(F) a member of a member-managed limited liability company;

[(G) a director of a general cooperative association;]

(H) a director of a limited cooperative association;

(I) a manager of an unincorporated nonprofit association;

(J) a trustee of a statutory trust, business trust, or common-law business trust; or

(K) any other person under whose authority the powers of an entity are exercised and under whose direction the activities and affairs of the entity are managed pursuant to the organic law and organic rules of the entity.

(17) "Interest" means:

(A) a share in a business corporation;

(B) a membership in a nonprofit corporation;

(C) a partnership interest in a general partnership;

(D) a partnership interest in a limited partnership;

(E) a membership interest in a limited liability company;

[(F) a share in a general cooperative association;]

(G) a member's interest in a limited cooperative association;

(H) a membership in an unincorporated nonprofit association;

(I) a beneficial interest in a statutory trust, business trust, or common-law business trust; or

(J) a governance interest or distributional interest in any other type of unincorporated entity.

(18) "Interest exchange" means a transaction authorized by [Article] 3.

(19) "Interest holder" means:

(A) a shareholder of a business corporation;

(B) a member of a nonprofit corporation;

(C) a general partner of a general partnership;

(D) a general partner of a limited partnership;

(E) a limited partner of a limited partnership;

(F) a member of a limited liability company;

[(G) a shareholder of a general cooperative association;]

(H) a member of a limited cooperative association;

(I) a member of an unincorporated nonprofit association;

(J) a beneficiary or beneficial owner of a statutory trust, business trust, or common-law business trust; or

(K) any other direct holder of an interest.

(20) "Interest holder liability" means:

(A) personal liability for a liability of an entity which is imposed on a person:

(i) solely by reason of the status of the person as an interest holder; or

(ii) by the organic rules of the entity which make one or more specified interest holders or categories of interest holders liable in their capacity as interest holders for all

or specified liabilities of the entity; or

(B) an obligation of an interest holder under the organic rules of an entity to contribute to the entity.

(21) "Jurisdiction", used to refer to a political entity, means the United States, a state, a foreign country, or a political subdivision of a foreign country.

(22) "Jurisdiction of formation" means the jurisdiction whose law includes the organic law of an entity.

(23) "Merger" means a transaction in which two or more merging entities are combined into a surviving entity pursuant to a record filed by the [Secretary of State].

(24) "Merging entity" means an entity that is a party to a merger and exists immediately before the merger becomes effective.

(25) "Organic law" means the law of an entity's jurisdiction of formation governing the internal affairs of the entity.

(26) "Organic rules" means the public organic record and private organic rules of an entity.

(27) "Person" means an individual, business corporation, nonprofit corporation, partnership, limited partnership, limited liability company, [general cooperative association,] limited cooperative association, unincorporated nonprofit association, statutory trust, business trust, common-law business trust, estate, trust, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(28) "Plan" means a plan of merger, plan of interest exchange, plan of conversion, or plan of domestication.

(29) "Plan of conversion" means a plan under Section 402.

(30) "Plan of domestication" means a plan under Section 502.

(31) "Plan of interest exchange" means a plan under Section 302.

(32) "Plan of merger" means a plan under Section 202.

(33) "Private organic rules" means the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all its interest holders, and are not part of its public organic record, if any. The term includes:

(A) the bylaws of a business corporation;

(B) the bylaws of a nonprofit corporation;

(C) the partnership agreement of a general partnership;

(D) the partnership agreement of a limited partnership;

(E) the operating agreement of a limited liability company;

[(F) the bylaws of a general cooperative association;]

(G) the bylaws of a limited cooperative association;

(H) the governing principles of an unincorporated nonprofit association; and

(I) the trust instrument of a statutory trust or similar rules of a business trust or common-law business trust.

(34) "Property" means all property, whether real, personal, or mixed or tangible or intangible, or any right or interest therein.

(35) "Protected agreement" means:

(A) a record evidencing indebtedness and any related agreement in effect on [the effective date of this [act]];

(B) an agreement that is binding on an entity on [the effective date of this [act]];

(C) the organic rules of an entity in effect on [the effective date of this [act]]; or

(D) an agreement that is binding on any of the governors or interest holders of an entity on [the effective date of this [act]].

(36) "Public organic record" means the record the filing of which by the [Secretary of State] is required to form an entity and any amendment to or restatement of that record. The term includes:

(A) the articles of incorporation of a business corporation;

(B) the articles of incorporation of a nonprofit corporation;

(C) the certificate of limited partnership of a limited partnership;

(D) the certificate of organization of a limited liability company;

[(E) the articles of incorporation of a general cooperative association;]

(F) the articles of organization of a limited cooperative association; and

(G) the certificate of trust of a statutory trust or similar record of a business trust.

(37) "Record", used as a noun, 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.

(38) "Registered foreign entity" means a foreign entity that is registered to do business in this state pursuant to a record filed by the [Secretary of State].

(39) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

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

(40) "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.

(41) "Statement of conversion" means a statement under Section 405.

(42) "Statement of domestication" means a statement under Section 505.

(43) "Statement of interest exchange" means a statement under Section 305.

(44) "Statement of merger" means a statement under Section 205.

(45) "Surviving entity" means the entity that continues in existence after or is created by a merger under [Article] 2.

(46) "Transfer" includes:

(A) an assignment;

(B) a conveyance;

(C) a sale;

(D) a lease;

(E) an encumbrance, including a mortgage or security interest;

(F) a gift; and

(G) a transfer by operation of law.

(47) "Type of entity" means a generic form of entity:

(A) recognized at common law; or

(B) formed under an organic law, whether or not some entities formed under that law are subject to provisions of that law that create different categories of the form of entity.

Comment

This section defines the terms that are used in the act. Many of the definitions describe attributes that are significant in some forms of entity and not in others. For example, the concept of separate "distributional" and "governance" interests are inherent in unincorporated entities but have no counterpart in corporations. In addition, because some statutes use different terms to describe the same transaction, the definitions are intended to be broad enough to encompass those similar transactions, regardless of how described. See, for example, "domestication"

below.

"Acquired entity" [(1)] – This definition recognizes that an interest exchange may involve only the acquisition of a particular "class" or "series" of interests in an entity. Model Business Corporation Act § 6.01 does not expressly define "class" or "series." Because the interests of members in an unincorporated business organization often tend to be distinctive, it may be that each member's interest will comprise a separate class or series. For an explanation of a new and different meaning of the word "series," see the comment to Section 301(a). The term "acquired entity" does not encompass series under that new meaning.

"Acquiring entity" [(2)] – An "acquiring entity" is an entity that acquires the interests of the acquired entity in an interest exchange governed by Article 3.

"Approve" [(3)] – The term "approve" encompasses all of the steps necessary for an entity to propose a transaction, adopt and approve the terms and conditions of the transaction, and obtain the necessary action on the transaction by the governors and interest holders of the entity. The term includes procedural requirements such as notice to interest holders, preparation of voting lists, etc. The principal laws that will govern approval by an entity of a transaction under this act are the entity's organic law and this act, but regulatory laws may also apply.

"Conversion" [(4)] – The term "conversion" means a transaction authorized by Article 4 pursuant to which an entity of one type is converted into an entity of another type. As used in this act, the term "conversion" does not include a transaction in which an entity changes the jurisdiction in which it is organized but does not change to a different form of entity; that type of transaction is referred to in this act as a "domestication" and is governed by Article 5.

"Converted entity" [(5)] – This term is used in Article 4 to refer to the entity that results from a conversion.

"Converting entity" [(6)] – A converting entity is the entity that becomes the converted entity under Article 4.

"Distributional interest" [(7)] – This term is similar to the concept of a "transferable interest" found in the organic laws of several types of unincorporated entities, but has a broader meaning because the scope of this act includes entities in addition to those whose organic law uses the term "transferable interest."

"Domestic" [(8)] - The term "domestic," when used in this act with respect to an entity, means an entity whose internal affairs are governed by the organic laws of the adopting jurisdiction. Except in the case of general partnerships and unincorporated nonprofit associations, this will mean an entity that is formed, organized, or incorporated under domestic law. In the case of a general partnership organized under the Uniform Partnership Act (1997) (Last Amended 2013) (1997 UPA), it will mean a general partnership whose governing law under 1997 UPA § 104 is the law of the adopting state. Under 1997 UPA § 104 the governing law is determined by the location of the partnership's principal office, except for limited liability partnerships where the governing law is the state where the statement of qualification is filed. It

is a factual question whether the activities and organization of an unincorporated nonprofit association make it a domestic or foreign entity.

"Domesticated entity" [(9)] – This term is used in Article 5 and means the entity that is domesticated pursuant to Article 5. By the nature of the transaction, the domesticated entity will be of the same type as the domesticating entity.

"Domesticating entity" [(10)] – This term is used in Article 5 and means the entity that is domesticated pursuant to Article 5.

"Domestication" [(11)] – The term "domestication" means a transaction of the kind authorized by Article 5 pursuant to which an entity may change its *jurisdiction* of formation *but not its type* so long as the laws of the foreign jurisdiction permit the domestication. The legal effect of the domestication of an entity out of an adopting state will be governed by the laws of both the adopting state and the foreign jurisdiction. Some statutes include what is described in this act as "domestication" in their definition of a "conversion." *See, e.g.*, Colo. Rev. Stat. § 7-90-201(2) and (3). It is intended that the domestication provisions of this act will apply to a transaction that may be characterized under another act as a "conversion" if it meets the definition of "domestication" under this act.

"Entity" [(12)] – This definition determines the overall scope of the act because only an "entity" may participate in the transactions authorized by Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications). *See* Sections 201 (authorization of mergers), 301 (authorization of interest exchanges), 401 (authorization of conversions), and 501 (authorization of domestications).

Paragraph (A)(x) is a "catch-all" provision that includes within the definition of "entity" any type of organization authorized under an enacting state's law that is not listed specifically in the preceding paragraphs of this definition. Paragraph (A)(x) is intended to include all forms of private organizations, regardless of whether organized for profit, and artificial legal persons other than those excluded by paragraph (B). This definition does not exclude regulated entities such as public utilities, banks, and insurance companies. Should a state desire to exclude certain types of regulated entities or any of the entities listed in paragraph (A)(i)-(x) from participating in transactions permitted by the act for policy reasons, that may be done by listing those types of entities in Section 110(a), or by permitting those type of entities to engage in transactions under this act generally but prohibiting certain types of transactions by listing those transactions in Section 110(b).

Unincorporated nonprofit associations are treated as a type of entity in paragraph (A)(viii) because Section 5 of the Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013) (UUNAA) specifically states that an unincorporated nonprofit association is an entity. In many states, the status of a nonprofit association may not be clear. Nevertheless, in most states a nonprofit association has the power to acquire an interest in real property in its own name and therefore would qualify as an "entity" under paragraph (A)(x). See Section 6 of the UUNAA which gives an unincorporated nonprofit association the power to acquire in its own name an interest in real property.

Subparagraph (B)(i) of this definition excludes a sole proprietorship from the concept of an "entity."

Trusts with a predominately donative purpose, such as inter vivos and testamentary trusts and charitable trusts, are treated in many states as having a separate legal existence, but they have been excluded from the definition of "entity" (and thus are not within the scope of this act) under paragraph (B)(ii) because they should not be able to engage in transactions under this act as a matter of public policy. Trusts that carry on a business, however, such as business and statutory entity trusts, are "entities." *See* paragraph (A)(ix).

Subparagraph (B)(iii) of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not listed in paragraph (A) and is not a partnership under the 1997 UPA. In that connection, Section 202(c) of the 1997 UPA provides in part:

> In determining whether a partnership is formed, the following rules apply:
> (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
> (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

Limited liability partnerships and limited liability limited partnerships are "entities" because they are general partnerships and limited partnerships, respectively, that have made the additional required election claiming LLP or LLLP status. A limited liability partnership is not, therefore, a separate type of entity from the underlying general or limited partnership that has elected limited liability partnership status. Thus, for example, the election of a general partnership to become a limited liability partnership is not a conversion subject to Article 4.

Under paragraph (B)(iv), decedent's estates are excluded from the definition of an entity for the same policy reason as trusts with a predominately donative purpose and charitable trusts.

This same public policy rationale is the justification for the exclusion of governmental subdivisions, agencies, or instrumentalities in paragraph (B)(v).

"Filing entity" [(13)] – Whether an entity is a filing entity is determined by reference to whether its legal existence requires the filing of a document with the state filing office. To fit within this definition, the filing must be necessary but need not be sufficient to form the entity. *See, e.g.*, Section 201(d) of the Uniform Limited Liability Company Act (2006) (Last Amended 2013) ("A limited liability company is formed when the company's certificate of organization becomes effective *and* at least one person becomes a member.") (emphasis added).

While the statute refers to the "formation" of an entity, it is intended to encompass corporations which are "incorporated" and limited liability companies which are "organized" as well as entities such as limited partnerships which are "formed" under their organic laws.

Business trusts (sometimes referred to as "statutory trusts") present a special problem. In some states a business trust could be a filing entity or a common law relationship, while in other states business trusts are only recognized at common law. Under section 201(a) of the Uniform Statutory Trust Entity Act (2009) (Last Amended 2013), a statutory trust entity formed under that act is formed by delivery of a certificate of trust to the appropriate filing office, and is a filing entity.

The term does not include a limited liability partnership because an election filed by a general partnership claiming that status (*e.g.*, a statement of qualification under 1997 UPA § 901) does not form the entity. A limited liability limited partnership, on the other hand, is a filing entity because the underlying limited partnership is formed by filing a certificate of limited partnership.

"Foreign" [(14)] – The term "foreign entity," when used in this act with respect to an 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 the Uniform Partnership Act (1914) (1914 UPA) is a domestic or foreign partnership. A 1914 UPA partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of partnerships under the 1997 UPA that have not registered as limited liability partnerships will be governed by 1997 UPA § 104(2) ("law of the jurisdiction in which the partnership has its principal office").

"Governance interest" [(15)] – A governance interest is typically only part of the interest that a person will hold in an unincorporated entity and is usually coupled with a distributional interest (or economic rights). Memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests and memberships in other nonprofit entities may not include either governance interests or distributional interests. In some unincorporated business entities, there is a more limited right to transfer governance interests than there is to transfer distributional interests. An interest holder in such an unincorporated business entity who transfers only a distributional interest and retains the governance interest will also retain the status of an interest holder. Whether a transferee who acquires only a distributional interest will acquire the status of an interest holder is determined by the definition of "interest holder."

Governors of an entity have the kinds of rights listed in the definition of "governance interest" by reason of their position with the entity. For a governor to have a "governance interest," however, requires that the governor also have those rights for a reason other than the governor's status as such. A manager who is not a member in a limited liability company, for example, will not have a governance interest, but a manager who is a member will have a governance interest arising from the ownership of a membership interest.

"Governor" [(16)] – This term has been chosen to provide a way of referring to a person who has the authority under an entity's organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of

entities. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

"Interest" [(17)] – In the usual case, the interest held by an interest holder will include both a governance interest and a transferable interest (or economic rights). Members in nonprofit corporations or unincorporated nonprofit associations generally do not have any distributional interest because they do not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders under this act.

"Interest exchange" [(18)] – The term "interest exchange" means a transaction authorized by Article 3 pursuant to which an entity may acquire interests in another entity. The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself. *See* Section 301(a).

"Interest holder" [(19)] – This act does not refer to "equity" interests or "equity" owners or holders because the term "equity" could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but only have a right to vote on its internal affairs.

"Interest holder liability" [(20)] – This term is used to describe the vicarious liability of an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term includes only personal liability of an interest holder for a debt of the entity imposed on the interest holder either by statute or by the organic rules to the extent authorized pursuant to the organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder liabilities for purposes of this act. Thus, for example, if a state's business corporation law makes shareholders personally liable for unpaid wages because of their status as shareholders, that liability would be an "interest holder liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "interest holder liability" because it is a direct liability and not based on the status of being a shareholder. Similarly, the liability to return an improper distribution is not an interest holder liability because it is a direct liability of the interest holder based on receipt of the distribution.

"Jurisdiction of formation" [(22)] – The term "jurisdiction of formation" refers to the jurisdiction whose laws include the organic law of the entity. The scope of this act is not limited to United States jurisdictions, although for practical purposes that will largely be the case since a transaction that impinges on a foreign country may be conducted under this act only if the laws of the foreign country authorize the transaction. *See* Sections 201(b) (mergers), 301(b) (interest exchanges), 401(b) (conversions), and 501(b) (domestications).

"Merger" [(23)] – The term means a transaction in which two or more entities are combined into a single entity pursuant to a filing with the filing office. 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.

"Merging entity" [(24)] – The term "merging entity" refers to each entity that is in existence immediately before a merger and is a party to the merger. It will include the surviving entity if the surviving entity exists before the merger becomes effective. It does not include an entity that provides consideration to be received by interest holders if that entity is not a party to the merger.

"Organic law" [(25)] – Organic law means statutes that govern the internal affairs of an entity. To the extent other statutes should be applicable to a transaction under this act, their effect is preserved by Section 103.

Entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.*, CAL. CORP. CODE § 2115 (Foreign Corporations), N.Y. NOT-FOR-PROFIT-CORP. §§ 1318-1321 (Liabilities of Directors and Officers of Foreign Corporations), 15 PA.CONS.STAT. § 6145 (Applicability of Certain Safeguards to Foreign Corporations). Such a "sticky fingers" law is not included within the definition of "organic law" for purposes of this act because those laws are not part of the law of the entity's jurisdiction of formation.

"Organic rules" [(26)] – The term "organic rules" means an entity's public organic record and private organic rules. The organic rules, together with this act, the organic law, and the common law provide the rules governing the internal affairs of the entity.

"Plan" [(28)] – The term "plan" is a short-hand way of referring to the plan of merger, interest exchange, conversion, or domestication, as the case may be, depending on which form of transaction is taking place. *See* Sections 202 (plan of merger), 302 (plan of interest exchange), 402 (plan of conversion), and 502 (plan of domestication).

"Private organic rules" [(33)] – The term private "organic rules" is intended to include all governing rules of an entity that are binding on all of its interest holders, whether or not in record form, except for the provisions of the entity's public organic record, if any. The term is intended to include agreements in "record" form such as corporate bylaws, as well as oral partnership agreements and oral operating agreements among LLC members.

"Property" [(34)] – The term "property" has the standard meaning of that term in uniform acts at the time this act was promulgated.

"Protected agreement" [(35)] – The term "protected agreement" refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of the act. Thus a revolving line of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of the act. If a protected agreement has provisions

that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication even though the agreement does not mention those other types of transactions. *See* Sections 301(d) (interest exchanges), 401(c) (conversions), and 501(d) (domestications).

"Public organic record" [(36)] – A "public organic record" is a record that is required to be filed publicly to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of partnership authority filed under 1997 UPA § 303 or any of the other statements that may be filed under the 1997 UPA since those statements do not create a new entity. Similarly, the term does not include a statement of authority filed under the Uniform Limited Liability Company Act (2006) (Last Amended 2013). A limited liability partnership is the same entity as the partnership that files a statement of qualification under 1997 UPA § 901 to become a limited liability partnership and thus the statement is not a public organic record. A statement of authority filed under Section 7 of the UUNAA or a statement appointing an agent filed under Section 29 of that act is also not a public organic record. Where a public organic record has been amended or restated, the term means the public organic record as last amended or restated.

In those states where a deed of trust or other instrument is publicly filed to create a business trust, that filing will constitute a public organic record. But in those states where a business trust is not created by a public filing, the deed of trust or similar record will be part of the private organic rules of the business trust.

"Record" [(37)] – The term "record" has the standard meaning of that term in uniform acts at the time this act was promulgated.

"Registered foreign entity" [(38] – This term refers to a foreign entity that is registered to transact business in the state pursuant to a public filing.

"Sign" [(39)] – The term "sign" has the standard meaning of that term in uniform acts at the time this act was promulgated.

"State" [(40)] – The term "state" has the standard meaning of that term in uniform acts at the time this act was promulgated.

"Surviving entity" [(45)] – The term "surviving entity" refers to either a merging entity that survives the merger or the new entity created by the merger.

"Transfer" [(46)] – The term "transfer" is broadly defined to include all types of conveyances of interests in property.

"Type of entity" [(47] – The term "type of entity" has been developed in an attempt to distinguish different legal forms of entities. It is sometimes difficult to decide whether one is dealing with a different form of entity or a variation of the same form. For example, a limited partnership, although it has been defined as a partnership, is a different type of entity from a general partnership, while a limited liability partnership is not a different type of entity from a

general partnership. In some states cooperatives are categories of business corporations or nonprofit corporations, while in other states cooperatives are a separate type of entity.

SECTION 103. RELATIONSHIP OF [ACT] TO OTHER LAWS.

(a) Unless displaced by particular provisions of this [act], the principles of law and equity supplement this [act].

(b) This [act] does not authorize an act prohibited by, and does not affect the application or requirements of, law other than this [act].

(c) A transaction effected under this [act] may not create or impair a right, duty, or obligation of a person under the statutory law of this state relating to a change in control, takeover, business combination, control-share acquisition, or similar transaction involving a domestic merging, acquired, converting, or domesticating business corporation unless:

(1) if the corporation does not survive the transaction, the transaction satisfies any requirements of the law; or

(2) if the corporation survives the transaction, the approval of the plan is by a vote of the shareholders or directors which would be sufficient to create or impair the right, duty, or obligation directly under the law.

Comment

Subsection (a) – Subsection (a) is a standard provision in uniform acts and has been included to make clear that unless a particular provision of this act displaces "other law," the principles of law and equity continue to apply, including with respect to the rights of interest holders, creditors, transferees, assignees, or other similar parties. Thus subsection (a) preserves case law regarding common law fraud; the rights of creditors following leveraged buyouts, spinoffs, asset purchases, or other similar transactions; and creditors rights under other laws.

Subsection (b) – Subsection (b) preserves existing regulatory law in an adopting state in general terms. Adopting states should consider more carefully integrating this act with their various regulatory laws. For example, in some states certain professions are limited in their use of limited liability entities. *See also* Section 104.

Laws other than this act that will apply to transactions under the act include, for example,

the various uniform fraudulent transfer and fraudulent conveyance acts; state insolvency statutes; federal bankruptcy law; and Articles 8 and 9 of the UCC.

Subsection (c) – Many states have enacted "antitakeover" statutes intended to make it more difficult to acquire control of a publicly-traded corporation. Those statutes often provide that their application to a particular corporation cannot be changed unless the corporation obtains certain specified approvals, such as a vote of disinterested directors or a supermajority vote by the shareholders. The purpose of the special requirements in subsection (c) on varying the application of an antitakeover statute is to protect against a hostile acquirer or group of shareholders seeking to use the act to avoid the application of the antitakeover statute.

Subsection (c) protects the application of antitakeover statutes from being affected by a transaction under this act by requiring that the transaction be approved in a manner that would be sufficient to approve changing the application of the antitakeover statute. If a transaction is approved in that manner, there is no policy reason to prohibit the application of the antitakeover statute from being varied by a transaction under this act. If the application of an antitakeover statute cannot be varied by action of an entity subject to it, then a transaction under this act will be permissible only if the antitakeover provision continues to apply after the transaction or the transaction itself is permissible under the antitakeover statute.

SECTION 104. REQUIRED NOTICE OR APPROVAL.

(a) A domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer of this state to be a party to a merger must give the notice or obtain the approval to be a party to an interest exchange, conversion, or domestication.

(b) Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this [act] becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise transferred unless, to the extent required by or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the entity obtains an appropriate order of [the appropriate court] [the Attorney General] specifying the disposition of the property.

(c) A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance which is made to a merging entity that is not the surviving

entity; and which takes effect or remains payable after the merger inures to the surviving entity.

(d) A trust obligation that would govern property if transferred to a nonsurviving entity applies to property that is transferred to the surviving entity under this section.

Legislative Note: *As an alternative to enacting subsection (a), a state may identify each of its regulatory laws that requires prior approval for a merger of a regulated entity, decide whether regulatory approval should be required for an interest exchange, conversion, or domestication, and make amendments as appropriate to those laws.*

As with subsection (a), an adopting state may choose to amend its various laws with respect to the nondiversion of charitable property to cover the various transactions authorized by this act as an alternative to enacting subsection (b).

Comment

Subsection (a) – Because at least some of the provisions of this act will be new in most states, it is likely that existing state laws that require regulatory approval of transactions by businesses such as banks, insurance companies, or public utilities may not be worded in a fashion that will include at least some of the transactions authorized by this act. The purpose of subsection (a) is to ensure that transactions under this act will be subject to the same regulatory approval as mergers. This section is based on whether a merger by a regulated entity requires prior approval because the transactions authorized by this act may be effectuated indirectly in many cases under existing law by establishing a wholly-owned subsidiary of the desired type and then merging into it.

The consequence of violating subsection (a) should be the same as in the case of a merger consummated without the required approval.

Subsection (b) – This act applies generally to nonprofit corporations and unincorporated nonprofit associations. As in the case of laws regulating particular industries, a state's laws governing the nondiversion of charitable property to other uses may not cover some of the transactions authorized by this act. To prevent the procedures in this act from being used to avoid restrictions on the use of charitable property held by nonprofit entities, subsection (b) requires approval of the effect of transactions under this act by the appropriate arm of government having supervision of nonprofit entities.

An approval or order obtained under this section may impose conditions or specify the disposition of assets or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this act specifying the effects of a transaction. *See* Sections 206 (effect of merger), 306 (effect of interest exchange), 406 (effect of conversion), and 506 (effect of domestication).

Subsections (c) and (d) – These subsections clarify the legal effect of a merger on bequests, etc. that were originally made to an entity that does not survive the merger. These

issues do not arise in an interest exchange, conversion, or domestication transaction because the entity to which the bequest, etc was made survives in some form after the transaction.

SECTION 105. STATUS OF FILINGS. A filing under this [act] signed by a domestic entity becomes part of the public organic record of the entity if the entity's organic law provides that similar filings under that law become part of the public organic record of the entity.

Comment

Articles of merger and other similar documents filed under the Model Business Corporation Act are made a part of the articles of incorporation of each domestic business corporation that is a party to the merger by Section 1.40(1) of the Model Business Corporation Act. This section provides that filings under this act will similarly become part of the public organic document of a domestic corporation. It should be noted that some state statutes no longer require filed documents to be "signed" in order to facilitate electronic filing. *See, e.g,,* Colorado Rev. Stat. § 7-90-301 *et seq*. In such cases, this section should be modified to delete the reference to "signed" and merely refer to being filed (or accepted for filing).

SECTION 106. NONEXCLUSIVITY. The fact that a transaction under this [act] produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law other than this [act].

Comment

This section allows a transaction that has the same end result as one of the transactions governed by this act, but that is accomplished in a manner not within the scope of this act, to be exempt from this act. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities can be accomplished pursuant to sale of assets statutory provisions rather than under Article 2 of this act, even though the end result of the transaction is essentially the same as if the two entities had merged into a third entity.

SECTION 107. REFERENCE TO EXTERNAL FACTS. A plan may refer to facts ascertainable outside the plan if the manner in which the facts will operate upon the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a party to the transaction.

Comment

This section is based on, but more concise than, Section 1.20(k) of the Model Business Corporation Act.

SECTION 108. ALTERNATIVE MEANS OF APPROVAL OF TRANSACTIONS.

Except as otherwise provided in the organic law or organic rules of a domestic entity, approval of a transaction under this [act] by the affirmative vote or consent of all its interest holders satisfies the requirements of this [act] for approval of the transaction.

Comment

This section makes it clear that a unanimous vote by the interest holders of an entity constitutes the only approval needed of a transaction under this act. That is consistent with the default rules on approval in Sections 203 (approval of a merger), 303 (approval of an interest exchange), 403 (approval of a conversion), and 503 (approval of a domestication).

SECTION 109. APPRAISAL RIGHTS.

(a) An interest holder of a domestic merging, acquired, converting, or domesticating entity is entitled to appraisal rights in connection with the transaction if the interest holder would have been entitled to appraisal rights under the entity's organic law in connection with a merger in which the interest of the interest holder was changed, converted, or exchanged unless:

(1) the organic law permits the organic rules to limit or eliminate the availability of appraisal rights; and

(2) the organic rules provide such a limit or elimination.

(b) An interest holder of a domestic merging, acquired, converting, or domesticating entity is entitled to contractual appraisal rights in connection with a transaction under this [act] to the extent provided:

(1) in the entity's organic rules;

(2) in the plan; or

(3) in the case of a business corporation, by action of its governors.

(c) If an interest holder is entitled to contractual appraisal rights under subsection (b) and the entity's organic law does not provide procedures for the conduct of an appraisal rights proceeding, [Chapter 13 of the Model Business Corporation Act] applies to the extent practicable or as otherwise provided in the entity's organic rules or the plan.

Legislative Note: *Subsection (a) preserves appraisal rights (sometimes referred to as "dissenters' rights") granted by other laws. As an alternative to enacting subsection (a), a state may amend the appraisal rights provisions of its organic laws to specify which transactions under this act will give rise to appraisal rights. If that alternative approach is adopted, subsections (b) and (c) should be designated as subsections (a) and (b).*

Comment

In this section, the term "appraisal rights" is intended to refer to any provision in the entity's organic law providing for the buy-out of an interest holder that objects to a transaction under this act.

Subsection (a) – If an entity's organic law permits the organic rules to limit the availability of appraisal rights, such a provision of the organic rules will apply to the availability of appraisal rights under this section. This section, however, does not authorize the organic rules to limit the availability of appraisal rights in a transaction under the act if the entity's organic law does not authorize such a provision of the organic rules.

Section 13.02(a)(1)(i) of the Model Business Corporation Act does not provide for appraisal rights in connection with a merger for shares that remain outstanding after consummation of the merger. Appraisal rights will similarly not be available under Section 109(a) for shares that are not changed or converted in connection with a merger.

Subsection (b) and (c) – This act permits a plan to set forth the terms and conditions of a transaction. A domestic entity may thus choose to grant optional appraisal rights as part of the terms of a transaction in circumstances where appraisal rights would not be available under this section. Subsection (b) validates the grant of such contractual appraisal rights. *Cf.* 6 Del. Code §§ 15-120 (general partnerships), 17-212 (limited partnerships), and 18-210 (limited liability companies) which validate "contractual appraisal rights"; and Model Business Corporation Act § 13.02(a)(5) which permits the articles of incorporation, bylaws, or a resolution of the board of directors to confer appraisal rights in contexts in which they would otherwise not be available. Legislative authorization in subsection (b) of the grant of contractual appraisal rights removes any question as to whether a court would have jurisdiction to hear a case in which the parties were attempting to create jurisdiction in the court by private agreement. The procedures to be followed in a contractual appraisal rights proceeding under subsection (b) will be the appraisal rights procedures in the entity's organic law if that law provides such procedures. If the entity's

organic law does not provide procedures for conducting an appraisal rights proceeding, subsection (c) makes the appraisal rights procedures in the state's business corporation law applicable unless the entity's organic rules or the plan provide otherwise.

[SECTION 110. EXCLUDED ENTITIES AND TRANSACTIONS.

(a) The following entities may not participate in a transaction under this [act]:

(1)

(2).

(b) This [act] may not be used to effect a transaction that:

(1)

(2).]

Legislative Note: *Subsection (a) may be used by states that have special statutes restricted to the organization of certain types of entities. A common example is banking statutes that prohibit banks from engaging in transactions other than pursuant to those statutes.*

Nonprofit entities may participate in transactions under this act with for-profit entities, subject to compliance with Section 104. If a state desires, however, to exclude entities with a charitable purpose or to exclude other types of entities from the scope of the act, that may be done by referring to those entities in subsection (a).

Subsection (b) may be used to exclude certain types of transactions governed by more specific statutes. A common example is the conversion of an insurance company from mutual to stock form. There may be other types of transactions that vary greatly among the states.

[ARTICLE] 2

MERGER

SECTION 201. MERGER AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [article]:

(1) one or more domestic entities may merge with one or more domestic or foreign entities into a domestic or foreign surviving entity; and

(2) two or more foreign entities may merge into a domestic entity.

(b) Except as otherwise provided in this section, by complying with the provisions of this

[article] applicable to foreign entities, a foreign entity may be a party to a merger under this [article] or may be the surviving entity in such a merger if the merger is authorized by the law of the foreign entity's jurisdiction of formation.

(c) This [article] does not apply to a transaction under:

(1) [Chapter 11 of the Model Business Corporation Act];

(2) [Chapter 11 of the Model Nonprofit Corporation Act];

(3) [Article 11 of the Uniform Partnership Act (1997) (Last Amended 2013)];

(4) [Article 11 of the Uniform Limited Partnership Act (2001) (Last Amended 2013];

(5) [Article 10 of the Uniform Limited Liability Company Act (2006) (Last Amended 2013];

(6) [Article 16 of the Uniform Limited Cooperative Association Act (2007) (Last Amended 2013)];

(7) [Article 9 of the Uniform Statutory Trust Entity Act (2009) (Last Amended 2013)];

(8) [Section 31 of the Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013)][; or

(9) Cite provisions of any other organic law that has merger provisions for entities of the same type].

Legislative Note: *The text of subsection (c) will depend on which choice a state makes with respect to the scope of the act. Four options are outlined in paragraph 3 of the Legislative Note following Section 606:*

1. It is anticipated that most states will choose either option (a) or (d). If a state chooses option (a), the state will retain all of the merger provisions for entities of the same type it currently has in its organic laws and will repeal any merger provisions for entities of different types in those laws. The end result will be that the merger provisions in the

organic laws will apply to mergers of entities of the same type and this act will apply to mergers involving entities of more than one type or mergers of entities of the same type where there are no existing merger provisions in an organic law. The format of subsection (c) incorporates this option.

2. If a state chooses option (b), it will add merger provisions for entities of the same type to all of its organic laws and the list of statutes in subsection (c) will simply need to be conformed to the state's entity law scheme.

3. If a state chooses option (c), subsection (c) is not necessary because this act will govern all mergers whether involving the same type of entity or different types of entities.

4. If a state chooses option (d), the list of statutes in subsection (c) will probably include only the business and nonprofit corporation act merger provisions because under option (d) this act will apply to mergers of unincorporated entities involving entities of the same type, as well as mergers involving different types of entities.

Comment

The merger transaction authorized by this act involves the combination of one or more domestic entities with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic surviving entity. 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 only one entity may survive the merger. If independent existence of the constituent entities is desired following the conclusion of the transaction, a restructuring transaction other than a merger must be used to accomplish the transfer of assets and liabilities.

Subsection (a) – Subsection (a)(1) states the general rule that subject to subsection (c) one or more domestic entities may merge with or into a domestic or foreign surviving entity. Subsection (a)(2) provides that two or more foreign entities may merge into a domestic surviving entity so long as the requirements of subsection (b) are met.

Subsection (b) – Subsection (b) provides that a foreign entity may be a party to a merger or may be the surviving entity in a merger only if the merger is authorized by the laws of the foreign entity's jurisdiction of formation.

Subsection (c) – It is expected that some adopting states will retain provisions on mergers solely between entities of the same type in their organic laws. On the other hand, there will be some types of entities where it is unlikely that merger provisions will be added to their organic law, for example, unincorporated nonprofit associations. In cases where the organic law provides for a merger involving entities all of the same type, the organic law and not this act applies to the transaction; but this act would apply to any merger involving entities of more than one type. In cases where the applicable organic law does not provide for mergers, this act will serve the important function of authorizing mergers involving entities of that type, as well as

cross-type mergers involving entities of that type. Some states have statutes that allow cross-type mergers as well as same-type mergers, in which case the cross-type provisions should be repealed when this act is enacted. *See* the Legislative Note following Section 606.

Tax Considerations – This act authorizes a merger for state entity law purposes. Federal law and other state law will independently determine how a merger transaction will be taxed.

SECTION 202. PLAN OF MERGER.

(a) A domestic entity may become a party to a merger under this [article] by approving a plan of merger. The plan must be in a record and contain:

(1) as to each merging entity, its name, jurisdiction of formation, and type of entity;

(2) if the surviving entity is to be created in the merger, a statement to that effect and the entity's name, jurisdiction of formation, and type of entity;

(3) the manner of converting the interests in each party to the merger into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) if the surviving entity exists before the merger, any proposed amendments to:

(A) its public organic record, if any; and

(B) its private organic rules that are, or are proposed to be, in a record;

(5) if the surviving entity is to be created in the merger:

(A) its proposed public organic record, if any; and

(B) the full text of its private organic rules that are proposed to be in a record;

(6) the other terms and conditions of the merger; and

(7) any other provision required by the law of a merging entity's jurisdiction of formation or the organic rules of a merging entity.

(b) In addition to the requirements of subsection (a), a plan of merger may contain any other provision not prohibited by law.

Comment

Subsection (a) – The requirements for the plan of merger are set forth in subsection (a). They are similar to plan of merger provisions in corporation statutes. *See* Model Business Corporation Act § 11.02(c). The requirements stated in this subsection are mandatory.

Subsection (a)(1) – Subsection (a)(1) requires that the plan of merger identify the parties to the merger. The name of a merging entity as it appears in the plan of merger will be its name in its jurisdiction of formation. *See* the comment to Section 205(b)(1) and (2).

Subsection (a)(3) – The language of subsection (a)(3) is similar to Model Business Corporation Act § 11.02(c)(3), and similar provisions in the uniform unincorporated entity acts (*see e.g.*, Uniform Partnership Act (1997) (Last Amended 2013) § 1122(a)(3). Although subsection (a)(3) and these other provisions are all phrased in similar language, what may be done under subsection (a)(3) with respect to providing for continuing interests in the surviving entity for some holders of interests of a class or series of a party to the merger while paying some other form of consideration to other holders of the same class or series of interests in that entity will vary depending on the type of entity involved and the extent to which its organic rules provide for non-uniform treatment of interest holders in a manner that is permissible under its organic law. Similarly the ability to use a merger to reorganize the capital structure of the surviving entity will vary depending on the type of entity involved and whether the entity has appropriately adopted relevant provisions in its organic rules.

If the organic law and organic rules of an unincorporated entity permit a non-uniform "equity shuffle" to be accomplished in a merger involving the unincorporated entity, the minority owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal rights currently afforded to minority stockholders in merging corporate entities. Any perceived unfairness in the shuffle would be addressed either (i) under principles of fiduciary duties and the contractual obligations of good faith and fair dealing, assuming, of course, that such duties and obligations have not been contractually modified or eliminated to the extent permitted by the applicable organic law, or (ii) by the exercise of whatever rights the minority owners may have to veto the transaction or to withdraw or to dissociate and be paid the value of their interests.

The Model Business Corporation Act generally requires that shares of the same class or series be treated in the same manner in a merger unless the corporation has adopted an applicable provision of its articles of incorporation pursuant to Section 6.01(e) of that act providing for variations in the treatment of holders of the same class or series of shares. Thus a determination of what may be done by way of an equity shuffle in the case of a corporation will require reference to its organic law and organic rules.

The consideration paid to the interest holders of the merging parties may be supplied in whole or part by a person who is not a party to the merger.

Subsection (b) - Subsection (b) provides the statutory authority for a merging party to include a provision in a plan of merger that is not specifically listed in subsection (a). One such possibility is contractual appraisal rights as provided in Section 109(b).

SECTION 203. APPROVAL OF MERGER.

(a) A plan of merger is not effective unless it has been approved:

(1) by a domestic merging entity:

(A) in accordance with the requirements, if any, in its organic law and organic rules for approval of:

(i) in the case of an entity that is not a limited cooperative association, the merger; or

(ii) in the case of a limited cooperative association, a transaction under this [article]; or

(B) by all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) in the case of an entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of the merger; or

(ii) in the case of an entity that is a limited cooperative association, neither its organic law nor organic rules provide for approval of a transaction under this [article]; and

(2) in a record, by each interest holder of a domestic merging entity which will have interest holder liability for debts, obligations, and other liabilities that are incurred after the merger becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

(A) the organic rules of the entity provide in a record for the approval of a merger in which some or all of its interest holders become subject to interest holder liability by the affirmative vote or consent of fewer than all the interest holders; and

(B) the interest holder consented in a record to or voted for that provision of the organic rules or became an interest holder after the adoption of that provision.

(b) A merger under this [article] involving a foreign merging entity is not effective unless the merger is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

Comment

Subsection (a) – Approval under this section includes whatever actions or procedures by the governors and interest holders of an entity are required by its organic law, as modified by its organic rules, to effectuate the merger. In the case of a business corporation, those procedures will include provisions for approval of a "short form" merger without a vote of the shareholders if a merger under this article satisfies the tests for being a short form merger. If the organic rules of an entity prescribe a procedure for the proposal, adoption and/or approval of a merger, the term "approval" includes compliance with all of those rules. *See* the definition of "approve" in Section 102(3).

If the organic law of an entity is silent with respect to procedures for approval of a merger, the organic rules may be amended to provide those procedures. Otherwise, the default procedure in subsection (a)(1)(B) requires approval by the interest holders entitled to vote on any matter.

The incorporation into this article of the merger procedures in the organic law of a party to a merger should be construed broadly to include not only express statutory procedures, but also applicable common law principles such as fiduciary duty standards of governors and majority interest holders. Statutory provisions on voting by classes or voting groups in a merger will also be applicable.

Subsection (a)(2) – Subsection (a)(2) deals with the situation where an interest holder of an entity that is a party to a merger will have vicarious liability for the liabilities of the surviving entity that are incurred after the merger is effective. The special approval requirement in subsection (a)(2) will be applicable, for example, to shareholders of a corporation that merges into a general partnership that is not a limited liability partnership if the shareholders become general partners of the surviving general partnership. If such a shareholder were to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect of exercising appraisal rights is that the shareholder would not become a general

partner in the surviving entity; and, in that case, the consent of that shareholder would not be required under subsection (a)(2).

The consent of an interest holder required by subsection (a)(2)(B) may be given either by (i) signing or agreeing generally to the terms of organic rules that include the required provision permitting less than unanimous approval of a merger in which interest holders become subject to owner liability, or (ii) voting for or consenting to an amendment to add such a provision.

Subsection (b) – Where a foreign entity is a party to a merger under this act, subsection (b) defers to the laws of the foreign jurisdiction for the requirements for approval of the merger by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws, such as this act if it has been adopted in the foreign jurisdiction. The laws of the foreign jurisdiction will also control the application of any special approval requirements found in the organic rules of the foreign entity.

SECTION 204. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER.

(a) A plan of merger may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic merging entity may approve an amendment of a plan of merger:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the merger is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by the interest holders of any party to the plan;

(B) the public organic record, if any, or private organic rules of the surviving entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(c) After a plan of merger has been approved and before a statement of merger is effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic merging entity may abandon the plan in the same manner as the plan was approved.

(d) If a plan of merger is abandoned after a statement of merger has been delivered to the [Secretary of State] for filing and before the statement is effective, a statement of abandonment, signed by a party to the plan, must be delivered to the [Secretary of State] for filing before the statement of merger is effective. The statement of abandonment takes effect on filing, and the merger is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of each party to the plan of merger;

(2) the date on which the statement of merger was filed by the [Secretary of State]; and

(3) a statement that the merger has been abandoned in accordance with this section.

Comment

This section sets out the requirements for amending or abandoning the plan of merger. They are similar to provisions for amending or abandoning mergers found in existing corporation merger statutes. *See* Model Business Corporation Act §§ 11.02(e) and 11.08.

SECTION 205. STATEMENT OF MERGER; EFFECTIVE DATE OF MERGER.

(a) A statement of merger must be signed by each merging entity and delivered to the [Secretary of State] for filing.

(b) A statement of merger must contain:

(1) the name, jurisdiction of formation, and type of entity of each merging entity that is not the surviving entity;

(2) the name, jurisdiction of formation, and type of entity of the surviving entity;

(3) if the statement of merger is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than 90 days after the date of filing;

(4) a statement that the merger was approved by each domestic merging entity, if any, in accordance with this [article] and by each foreign merging entity, if any, in accordance with the law of its jurisdiction of formation;

(5) if the surviving entity exists before the merger and is a domestic filing entity, any amendment to its public organic record approved as part of the plan of merger;

(6) if the surviving entity is created by the merger and is a domestic filing entity, its public organic record, as an attachment;

(7) if the surviving entity is created by the merger and is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(8) if the surviving entity is a foreign entity that is not a registered foreign entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 206(e).

(c) In addition to the requirements of subsection (b), a statement of merger may contain any other provision not prohibited by law.

(d) If the surviving entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed and may omit any provision that is not required to be included in a restatement

of the public organic record.

(e) A plan of merger that is signed by all the merging entities and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of merger and on filing has the same effect. If a plan of merger is filed as provided in this subsection, references in this [act] to a statement of merger refer to the plan of merger filed under this subsection.

(f) A statement of merger is effective on the date and time of filing or the later date and time specified in the statement of merger.

(g) If the surviving entity is a domestic entity, the merger becomes effective when the statement of merger is effective. If the surviving entity is a foreign entity, the merger becomes effective on the later of:

(1) the date and time provided by the organic law of the surviving entity; or

(2) when the statement is effective.

Comment

Subsection (a) – When the statement of merger is effective under subsection (f), the merger transaction occurs. The filing of a statement of merger also makes the transaction a matter of public record.

Subsection (b)(1) and (2) – The names of foreign entities set forth in the statement of merger will generally be their names in their jurisdiction of formation, except that if a foreign entity has been required to adopt a different name in order to register to do business in the adopting state, the foreign qualification statute will likely require that when the entity does business in the state it must use the name adopted for purposes of registering to do business. Engaging in a merger under this article will be part of the business done by the entity in the state and the name of the entity set forth in the statement of merger will thus need to be the name under which the entity has registered to do business. Use of the name under which the entity has registered to do business will allow the records in the filing office to associate the registration of the entity to do business with the statement of merger.

Subsection (b)(4) – The statement in subsection (b)(4) that the plan of merger was approved by each entity in accordance with this article necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of each merging

entity.

Subsection (b)(6) and (7) – The public organic record of a domestic surviving entity created by the merger that is attached to the statement of merger becomes the original, officially filed text of the public organic record of the surviving entity when the statement of merger takes effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity.

Similarly, a statement of qualification for a domestic limited liability partnership created by the merger that is attached to the statement of merger does not need to be filed separately.

Subsection (d) – Organic laws typically require an initial filing that creates an entity to be signed by the person serving as the incorporator or other organizer. Subsection (d), however, provides that the public organic record of the surviving entity does not need to be signed since it is itself attached to a signed record.

Subsection (d) also permits the public organic record of the surviving entity to omit any provision that is not required to be included in a restatement of the public organic record. Pursuant to this provision, for example, the public organic record of a business corporation created as the surviving entity in the merger would not need to state the name and address of each incorporator even though that information would be required by Section 2.02(a)(4) of the Model Business Corporation Act if the corporation were being incorporated outside the context of the merger.

Subsection (e) – A plan of merger that contains all the information required in the statement of merger may be filed instead of the statement of merger. The plan must be in a record and signed by each merging party.

Subsection (f) – The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it does so the statement becomes effective at the time and date specified. Subsection (f) is subject to the 90-day delayed effective date filing limitation in subsection (b)(3).

Subsection (g) – A merger in which the surviving entity is a domestic entity takes effect when the statement of merger takes effect. A merger in which the surviving entity is a foreign entity will usually also take effect when the statement of merger takes effect because the practice is to coordinate the filings that need to be made when a merger involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, subsection (g) provides that the merger transaction itself will take effect at the later of (i) when the statement of merger takes effect, and (ii) when the merger takes effect under the law of the foreign jurisdiction. That rule avoids the possibility that the merger will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domestic entity would cease to exist before it has been merged into the foreign entity.

It is only necessary for the filing office to record the effective date of the statement of

merger and the filing office does not need to be concerned with the effective date of the merger itself. Persons wishing to determine the effective date of a merger involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

SECTION 206. EFFECT OF MERGER.

(a) When a merger under this [article] becomes effective:

(1) the surviving entity continues or comes into existence;

(2) each merging entity that is not the surviving entity ceases to exist;

(3) all property of each merging entity vests in the surviving entity without transfer, reversion, or impairment;

(4) all debts, obligations, and other liabilities of each merging entity are debts, obligations, and other liabilities of the surviving entity;

(5) except as otherwise provided by law or the plan of merger, all the rights, privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

(6) if the surviving entity exists before the merger:

(A) all its property continues to be vested in it without transfer, reversion, or impairment;

(B) it remains subject to all its debts, obligations, and other liabilities; and

(C) all its rights, privileges, immunities, powers, and purposes continue to be vested in it;

(7) the name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(8) if the surviving entity exists before the merger:

(A) its public organic record, if any, is amended to the extent provided in the statement of merger; and

(B) its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger;

(9) if the surviving entity is created by the merger, its private organic rules are effective and:

(A) if it is a filing entity, its public organic record is effective; and

(B) if it is a limited liability partnership, its statement of qualification is effective; and

(10) the interests in each merging entity which are to be converted in the merger are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of merger and to any appraisal rights they have under Section 109 and the merging entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of a merging entity, a merger under this [article] does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the merging entity.

(c) When a merger under this [article] becomes effective, a person that did not have interest holder liability with respect to any of the merging entities and becomes subject to interest holder liability with respect to a domestic entity as a result of the merger has interest holder liability only to the extent provided by the organic law of that entity and only for those debts, obligations, and other liabilities that are incurred after the merger becomes effective.

(d) When a merger becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic merging entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The merger does not discharge any interest holder liability under the organic

law of the domestic merging entity to the extent the interest holder liability was incurred before the merger became effective.

(2) The person does not have interest holder liability under the organic law of the domestic merging entity for any debt, obligation, or other liability that is incurred after the merger becomes effective.

(3) The organic law of the domestic merging entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the merger had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by law other than this [act] or the organic rules of the domestic merging entity with respect to any interest holder liability preserved under paragraph (1) as if the merger had not occurred.

(e) When a merger under this [article] becomes effective, a foreign entity that is the surviving entity may be served with process in this state for the collection and enforcement of any debts, obligations, or other liabilities of a domestic merging entity in accordance with applicable law.

(f) When a merger under this [article] becomes effective, the registration to do business in this state of any foreign merging entity that is not the surviving entity is canceled.

Comment

With the exception of subsections (c) and (d), this section is similar to statutory provisions on the effect of a merger of a corporation with a corporation. *See* Model Business Corporation Act § 11.07.

Subsections (c) and (d) set forth rules for two circumstances that typically do not exist in a merger where all the entities involved are corporations. Subsection (c) deals with the situation where an interest holder that does not have vicarious liability for the obligations of a merging entity before the merger has interest holder liability after the merger. An example would be a

corporate shareholder who agrees to be a general partner in a limited partnership that is the surviving entity in a merger between a corporation and a limited partnership that is not a limited liability limited partnership. Subsection (d) deals with the situation where an interest holder has vicarious liability for the obligations of one of the merging parties before the merger but ceases to have any interest holder liability for the obligations of the surviving entity after the merger is effective. An example would be a general partner in a general partnership that merges into a corporation.

Under Section 203(a)(2), a merger cannot have the effect of making an interest holder of a domestic merging entity subject to interest holder liability for the debts, obligations, or other liabilities of any other person or entity unless the interest holder has executed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent.

Subsection (a) – Subsection (a) states the general understanding that in a merger the assets and liabilities of the merging entities automatically vest in the surviving entity. 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. A merger does not constitute a transfer, assignment, or conveyance of any property held by the merging entities prior to the merger. A merger also does not give rise to a claim that a contract with a merging entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger. The contract rights that are vested in the surviving entity include the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the merger. *See also* Section 104(c) which deals with the surviving entity's rights in trust obligations of a nonsurviving party in a merger and transactions such as bequests made to a nonsurviving party to a merger that take effect after the merger.

After a merger becomes effective, the law of the surviving entity's jurisdiction of formation governs the surviving entity.

See Sections 103(b) and 104(b) which modify the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise or any of the parties holds property committed to charitable purposes.

Subsection (a)(7) – All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued. Under subsection (a)(7), the name of the survivor may be, but need not be, substituted in any pending proceeding for the name of a party to the merger whose separate existence ceased as a result of the merger. The substitution may be made whether the survivor is a complainant or a respondent, and may be made at the instance of either the survivor or an opposing party. Such a substitution has no substantive effect because, whether or not the survivor's name is substituted, the survivor succeeds to the claims, and is subject to the liabilities, of any party to the merger whose separate existence ceased as a result of the merger.

Subsection (a)(8) – The private organic rules of an unincorporated entity typically may

be either oral or written. The plan of merger is not required to set forth amendments to oral provisions of the private organic rules of the surviving entity, and thus subsection (a)(8)(B) is limited in scope just to amendments to the private organic rules that are to be in a record, if any.

Subsection (a)(10) – *See* Section 109 and the comments to Section 109.

Subsection (c) – Subsection (c) sets forth the general rule that an interest holder that was not liable for the liabilities of a merging entity before the merger but will have personal liability for the obligations of the surviving entity after the merger will be personally liable only for the liabilities of a domestic surviving entity that are incurred after the effective date of a merger. When a liability is incurred will be determined by other applicable law.

Subsection (c) is limited to situations in which a person becomes personally liable with respect to a domestic entity. Personal liability with respect to a foreign entity will be controlled by the law of the foreign jurisdiction.

Subsection (d) – Subsection (d) provides four rules with respect to an interest holder who ceases to have interest holder liability after the effective date of the merger:

(1) the interest holder remains personally liable for any obligations that were incurred before the effective date of the merger;

(2) the interest holder does not have any personal liability for obligations of the surviving entity;

(3) the pre-existing personal liability of the interest holder is enforced against the interest holder on the same basis as if the merger had not taken place; and

(4) the interest holder has the same rights of contribution from other interest holders of the merging entity as the interest holder would have had if the merger had not occurred.

Subsection (e) – When a merger becomes effective, subsection (e) provides that a foreign entity that is the surviving entity may be served with process in this state. The proceedings covered by subsection (e) include a proceeding to enforce the rights of any interest holders of each domestic merging entity who are entitled to and exercise appraisal rights. One of the liabilities that a foreign surviving entity succeeds to is the obligation of a merging entity to pay the amount, if any, to which its interest holders who assert appraisal rights are entitled.

[ARTICLE] 3

INTEREST EXCHANGE

SECTION 301. INTEREST EXCHANGE AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [article]:

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

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

(b) Except as otherwise provided in this section, by complying with the provisions of this [article] applicable to foreign entities, a foreign entity may be the acquiring or acquired entity in an interest exchange under this [article] if the interest exchange is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to an interest exchange, the provision applies to an interest exchange in which the domestic entity is the acquired entity as if the interest exchange were a merger until the provision is amended after [the effective date of this [act]].

[(d) This [article] does not apply to a transaction under:

(1) [Chapter 11 of the Model Business Corporation Act];

(2) [Chapter 11 of the Model Nonprofit Corporation Act]; or

(3).]

Legislative Note: *As pointed out in the Legislative Note following Section 606, the scope of this article will depend on which of the four methods of dealing with the enacting state's existing interest exchange statutes is chosen. A state might choose to limit any existing interest exchange provisions to same-type transactions, for example interest exchanges where all of the entities are corporations. Any interest exchange provisions added to entity statutes should similarly be limited to same-type transactions. The net effect will be that the interest exchange provisions in the various entity statutes will govern same-type interest exchanges and Article 3 will govern cross-type interest exchanges. In the event a state does not have any existing interest exchange legislation and chooses not to add interest exchange provisions to any of its entity statutes, or chooses to repeal its existing interest exchange statutes, Article 3 will govern and will cover both same-type and cross-type interest exchanges.*

Comment

An interest exchange is the same type of transaction as the share exchange provided for in Section 11.03 of the Model Business Corporation Act ("MBCA"). The effect of an interest exchange is that: (1) the separate existence of the acquired entity is not affected; and (2) the acquiring entity acquires all of the interests of one or more classes of the acquired entity. An interest exchange also allows an indirect acquisition through the use of consideration in the exchange that is not provided by the acquiring entity (*e.g.*, consideration from another or related entity).

Neither share exchanges nor interest exchanges are universally recognized in either corporation or unincorporated entity laws. The effect of an interest exchange can be achieved through a triangular merger in which the acquiring entity forms a new subsidiary and the acquired entity is then merged into the new subsidiary. Article 3 allows the transaction to be accomplished directly in a single step, rather than indirectly through the triangular merger route.

Subsection (a) – The acquiring entity is not required to acquire all of the interests in the acquired entity. For example, assume that an LLC with three classes of membership interests enters into an interest exchange with an acquiring entity. The acquiring entity need only acquire all of the ownership interests of one or more classes of the LLC membership interests.

The "classes or series" referenced in Section 301(a) are commonly found in corporation law, and a class or series of shares in a corporation may be the subject of a transaction under this article. *See, e.g.*, MBCA § 6.02. Specific provisions authorizing classes and series are less common in unincorporated entity law; but if classes or series of interests are created in an unincorporated entity, the interests of one or more of those classes or series may be the subject of a transaction under this article. S*ee* 6 Del.C. §§ 15-407 (general partnerships), 17-208 (limited partnerships), and 18-215 (limited liability companies).

Some states have authorized the creation of "series" entities in which assets and liabilities of the entity may be segregated in different "series" and different interests may be associated with each series. *See, e.g.*, 6 Del. Code § 18-215 (series limited liability company). If the adopting

state has authorized series entities, a series in such an entity may be the subject of an interest exchange. This section also authorizes a domestic entity to acquire a series of a foreign series entity regardless of whether the adopting state has authorized domestic series entities.

Subsection (b) – Subsection (b) allows a foreign entity to effectuate an interest exchange with a domestic entity if the interest exchange is authorized by the organic law of the foreign entity.

Subsection (c) – This subsection deals with rights of parties to protected agreements (defined in Section 102(35)) when an interest exchange takes place. Because the concept of an interest exchange is relatively new, a person contracting with an entity or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this article should not be charged with the consequences of not having dealt with the concept of an interest exchange in the context of those special rights. Similarly, when the governance structure of an entity has been negotiated before the enactment of this act, the concept of an interest exchange may not have been reflected in any special governance arrangements; for example, special approval rights may have been provided for fundamental transactions, but those rights fail to include language that would make them applicable to an interest exchange. Subsection (c) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, an entity is a party to a contract that provides that the entity cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to an interest exchange in which the entity is the exchanging entity. If the entity fails to obtain the consent, the result will be that the other party will have the same rights it would have had if the entity were to participate in a merger without the required consent.

The transitional rule in subsection (c) ceases to make sense at such time as the provisions of the agreement giving rise to the special rights is first amended after the effective date of this article because at that time the provision may be amended to address expressly an interest exchange. The transitional rule will continue to apply, however, if a provision other than the specific provisions giving rise to the special rights is amended.

Subsection (d) – The statutes that should be listed in Section 301(d) are interest exchange statutes that already exist or are added to the state's various entity statutes when META is adopted. *See also,* the Legislative Note above.

SECTION 302. PLAN OF INTEREST EXCHANGE.

(a) A domestic entity may be the acquired entity in an interest exchange under this

[article] by approving a plan of interest exchange. The plan must be in a record and contain:

(1) the name and type of entity of the acquired entity;

(2) the name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) the manner of converting the interests in the acquired entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) any proposed amendments to:

(A) the public organic record, if any, of the acquired entity; and

(B) the private organic rules of the acquired entity that are, or are proposed to be, in a record;

(5) the other terms and conditions of the interest exchange; and

(6) any other provision required by the law of this state or the organic rules of the acquired entity.

(b) In addition to the requirements of subsection (a), a plan of interest exchange may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of interest exchange, which must be approved by the acquired entity in accordance with Section 303. The content of the plan of interest exchange is similar to the content of a plan of merger. *See* Section 202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

The plan of interest exchange may, but need not, be filed instead of the statement of interest exchange (Section 305) so long as it contains all the information required to be in the statement and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 305(d).

Subsection (a)(3) – Under this subsection, interest holders in the acquired entity may receive interests or securities of the acquiring entity or of a party other than the acquiring entity, obligations, rights to acquire interests, or securities, cash, or other property.

SECTION 303. APPROVAL OF INTEREST EXCHANGE.

(a) A plan of interest exchange is not effective unless it has been approved:

(1) by a domestic acquired entity:

(A) in accordance with the requirements, if any, in its organic law and organic rules for approval of an interest exchange;

(B) if neither its organic law nor organic rules provide for approval of an interest exchange, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

(i) in the case of an entity that is not a business corporation or a limited cooperative association, a merger, as if the interest exchange were a merger; or

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the interest exchange were that type of merger; or

(iii) in the case of a limited cooperative association, a transaction under this [article]; or

(C) by all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) in the case of an entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of an interest exchange or merger; or

(ii) in the case of a limited cooperative association, neither its organic law nor organic rules provide for approval of an interest exchange or a transaction under this [article]; and

(2) in a record, by each interest holder of a domestic acquired entity that will have interest holder liability for debts, obligations, and other liabilities that are incurred after the interest exchange becomes effective, unless, in the case of an entity that is not a business

corporation or nonprofit corporation:

(A) the organic rules of the entity provide in a record for the approval of an interest exchange or a merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all the interest holders; and

(B) the interest holder consented in a record to or voted for that provision of the organic rules or became an interest holder after the adoption of that provision.

(b) An interest exchange involving a foreign acquired entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

(c) Except as otherwise provided in its organic law or organic rules, the interest holders of the acquiring entity are not required to approve the interest exchange.

Legislative Note: *An issue that needs to be analyzed under this section is what approval requirements apply to an interest exchange if there are no interest exchange provisions for entities of the same type in the organic law for a particular type of entity. If an entity's organic law, and also its organic rules, are silent on approving an interest exchange, subsection (a)(1)(B) provides that the required approval is the approval required for a merger under the entity's organic law. If the entity's organic law required a majority vote of the entity's interest holders to approve a merger, the approval of an interest exchange if the entity is the acquired entity would also require a majority vote of its interest holders. If the organic law, on the other hand, required a unanimous vote of the entity's interest holders to approve a merger, a unanimous vote would also be required to approve an interest exchange. As a result, differences between entity laws on the vote required to approve a merger will be carried over into this act. It is important, therefore, that states review any differences in the merger approval requirements in their organic laws to determine if those differences are supported by appropriate policy considerations.*

If an entity's organic law does not provide for approval of either a merger or an interest exchange, and if the entity's organic rules are also silent on approval of a merger or interest exchange, then subsection (a)(1)(C) requires approval of an interest exchange by all of the entity's interest holders. States should evaluate how that approval requirement compares to any approval requirements it has adopted for mergers or interest exchanges in any of its other organic laws.

This article permits the organic rules of an acquired entity to be amended in the context of an interest exchange. The other articles in this act also permit the organic rules to be

amended in the contexts of the other types of transactions that may be accomplished under this act. When states conduct the analysis described in this Legislative Note of what approval requirement to adopt, they should also evaluate that question from the perspective of what approval requirements they provide in their organic laws for amending the organic rules of each type of entity.

The analysis described in this Legislative Note needs to be undertaken with respect to Sections 403 and 503 as well.

See the Legislative Note following Section 606 for additional information about these issues.

Comment

This section sets forth the required approval of an interest exchange. An interest exchange transaction governed by this article only requires approval by the acquired entity, unless the applicable organic law or the organic rules of the acquiring entity otherwise provide (*see* subsection (c)), a condition that rarely exists.

If the acquired entity is a domestic entity, one of three possibilities will be applicable:

(1) if the organic law (*see* Section 102(25)) governing the acquired domestic entity has specific provisions for approval of an interest exchange, or even if there are no such provisions, the organic rules (*see* Section 102(26)) of the acquired entity have specific provisions for approval of an interest exchange, then the approval provisions in the organic law or organic rules apply;

(2) if there are no specific provisions for approval of an interest exchange in the acquired entity's organic law or organic rules but either the organic law governing the acquired entity or the acquired entity's organic rules contain provisions for approval of mergers, then those merger provisions (except for any provisions that allow approval of a merger without a vote of the shareholders in the case of an acquired entity that is a corporation) apply; and

(3) if neither (1) or (2) are applicable, then unanimous consent of the acquired entity's interest holders will be required.

A three-tiered approval scheme is necessary because specific provisions for interest exchanges do not exist in many state corporation and unincorporated entity statutes or in the various types of entity organic rules.

If the acquired entity is a foreign entity, then approval is in accordance with the laws of the acquired entity's jurisdiction of formation. *See* subsection (b).

Subsection (a)(1)(B)((ii) – Many business corporation laws permit a corporation that owns a specified percentage of the shares of another corporation (typically 80 or 90%) to merge with the subsidiary corporation without a vote of the subsidiary's shareholders. Some

corporation laws also permit a merger to be effected without a vote of the shareholders in other situations as well; for example, 8 Del. Code § 251(g) and 15 Pa.C.S. § 1924(b)(4) permit a holding company structure to be formed through the device of a merger without the approval of the shareholders. Section 303(a)(1)(b)(ii) makes clear that those "short form" and other merger rules do not apply and a vote of the shareholders of an acquired entity that is a corporation is always required to approve an interest exchange under Article 3.

Subsection (a)(2) – See the comment to Section 203(a)(2) for an explanation of this interest holder liability provision.

SECTION 304. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE.

(a) A plan of interest exchange may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic acquired entity may approve an amendment of a plan of interest exchange:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the interest exchange is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the interest holders of the acquired entity under the plan;

(B) the public organic record, if any, or private organic rules of the acquired entity that will be in effect immediately after the interest exchange becomes effective, except for changes that do not require approval of the interest holders of the acquired entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(c) After a plan of interest exchange has been approved and before a statement of interest exchange is effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic acquired entity may abandon the plan in the same manner as the plan was approved.

(d) If a plan of interest exchange is abandoned after a statement of interest exchange has been delivered to the [Secretary of State] for filing and before the statement is effective, a statement of abandonment, signed by the acquired entity, must be delivered to the [Secretary of State] for filing before the statement of interest exchange is effective. The statement of abandonment takes effect on filing, and the interest exchange is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the acquired entity;

(2) the date on which the statement of interest exchange was filed by the [Secretary of State]; and

(3) a statement that the interest exchange has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Articles 2 (mergers), 4 (conversions), and 5 (domestications). *See* Sections 204 (mergers), 404 (conversions), and 504 (domestications).

SECTION 305. STATEMENT OF INTEREST EXCHANGE; EFFECTIVE DATE OF INTEREST EXCHANGE.

(a) A statement of interest exchange must be signed by a domestic acquired entity and delivered to the [Secretary of State] for filing.

(b) A statement of interest exchange must contain:

(1) the name and type of entity of the acquired entity;

(2) the name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) if the statement of interest exchange is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than 90 days after the date of filing;

(4) a statement that the plan of interest exchange was approved by the acquired entity in accordance with this [article]; and

(5) any amendments to the acquired entity's public organic record, if any, approved as part of the plan of interest exchange.

(c) In addition to the requirements of subsection (b), a statement of interest exchange may contain any other provision not prohibited by law.

(d) A plan of interest exchange that is signed by a domestic acquired entity and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of interest exchange and on filing has the same effect. If a plan of interest exchange is filed as provided in this subsection, references in this [act] to a statement of interest exchange refer to the plan of interest exchange filed under this subsection.

(e) A statement of interest exchange is effective on the date and time of filing or the later date and time specified in the statement.

(f) An interest exchange in which the acquired entity is a domestic entity becomes effective when the statement of interest exchange is effective.

Comment

The filing of a statement of interest exchange makes the transaction a matter of public record. The requirements for a statement of interest exchange are set forth in subsection (b).

They are essentially the same as the requirements for a statement of merger in Section 205.

Subsection (b)(3) and (e) – The effective date and time of a statement of interest exchange are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 305(b)(3).

Subsection (d) – A plan of interest exchange can be used as a substitute for the statement of interest exchange so long as the plan satisfies the requirements in subsection (d).

Subsection (f) – When the statement of interest exchange is effective under subsection (e), the interest exchange transaction occurs under subsection (f) if the acquired entity is a domestic entity. If the acquired entity is a foreign entity, the effectiveness of the interest exchange will occur when provided by the law of its jurisdiction of formation.

SECTION 306. EFFECT OF INTEREST EXCHANGE.

(a) When an interest exchange in which the acquired entity is a domestic entity becomes effective:

(1) the interests in the domestic acquired entity which are the subject of the interest exchange are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of interest exchange and to any appraisal rights they have under Section 109 and the acquired entity's organic law;

(2) the acquiring entity becomes the interest holder of the interests in the acquired entity stated in the plan of interest exchange to be acquired by the acquiring entity;

(3) the public organic record, if any, of the acquired entity is amended to the extent provided in the statement of interest exchange; and

(4) the private organic rules of the acquired entity that are to be in a record, if any, are amended to the extent provided in the plan of interest exchange.

(b) Except as otherwise provided in the organic law or organic rules of the acquired entity, the interest exchange does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the acquired entity.

(c) When an interest exchange becomes effective, a person that did not have interest holder liability with respect to the acquired entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the interest exchange has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that are incurred after the interest exchange becomes effective.

(d) When an interest exchange becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic acquired entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The interest exchange does not discharge any interest holder liability under the organic law of the domestic acquired entity to the extent the interest holder liability was incurred before the interest exchange became effective.

(2) The person does not have interest holder liability under the organic law of the domestic acquired entity for any debt, obligation, or other liability that is incurred after the interest exchange becomes effective.

(3) The organic law of the domestic acquired entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the interest exchange had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by law other than this [act] or the organic law or organic rules of the domestic acquired entity with respect to any interest holder liability preserved under paragraph (1) as if the interest exchange had not occurred.

Comment

Subsection (a) – In contrast to a merger, an interest exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring entity the assets of the acquired

entity, or render the acquiring entity liable for the liabilities of the acquired entity. Thus, subsection (a) is significantly simpler than Section 206(a) with respect to the effects of a merger.

When an interest exchange becomes effective: (1) the interests of the acquired entity are exchanged, converted, or canceled as provided in the plan; (2) the only rights of the former interest holders of the acquired entity whose interests are affected by the interest exchange are those rights related to the exchange, conversion, or cancellation; (3) the acquiring entity becomes the owner of the acquired entity's interests as provided in the plan; and (4) the organic rules of the acquired entity are amended as provided in the statement of interest exchange, thus obviating the need for repetitive filings (*i.e.*, a filing as to the entity interest exchange and another filing to reflect amendments to the public organic record as required by the laws governing the acquired entity).

Subsection (c) – Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Articles 2 (mergers), 4 (conversions), and 5 (domestications). *See* the comment to Section 206(c).

Subsection (d) – Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Articles 2 (mergers), 4 (conversions), and 5 (domestications). *See* the comment to Section 206(d).

[ARTICLE] 4

CONVERSION

SECTION 401. CONVERSION AUTHORIZED.

(a) By complying with this [article], a domestic entity may become:

(1) a domestic entity that is a different type of entity; or

(2) a foreign entity that is a different type of entity, if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(b) By complying with the provisions of this [article] applicable to foreign entities, a foreign entity may become a domestic entity that is a different type of entity if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a conversion, the provision applies to a conversion of the entity as if the conversion were a merger until the provision is amended after [the effective date of this

[act]].

Legislative Note: *Many states have existing provisions in their corporation and unincorporated entity statutes that allow conversions. These statutes, however, vary greatly. A few allow conversion of one type of entity into any other type of entity. Most, however, allow only limited types of conversions, e.g., general partnerships to limited partnerships (and limited partnerships to general partnerships) but not to all other types of entities. If a state has conversion provisions, the recommended course of action is to repeal all those statutes. See the Legislative Note following Section 606. The net effect will be that this act will apply to all conversions. Leaving the existing conversion provisions in place will create confusion for practitioners because in some cases there will be two applicable conversion statutes, the existing conversion statute and Article 4 of this act, but in other situations only Article 4 of this act will apply.*

Comment

The procedure in this article permits an entity to change to a different type of entity in its jurisdiction of formation or in a foreign jurisdiction. A transaction in which an entity changes its jurisdiction of formation but does not change its type is a domestication and is the subject of Article 5.

Subsection (a)(2) – Under subsection (a)(2) a conversion of a domestic entity into a foreign entity must be authorized by the law of the foreign jurisdiction. If this is not the case, it may be possible to achieve the same result by forming an entity of the type desired in the foreign jurisdiction and then merging the domestic entity into the new foreign entity under Article 2.

Subsection (b) – Subsection (b) allows a foreign entity to effectuate a conversion into a domestic entity only if the conversion is permitted by the laws of the foreign entity's jurisdiction of formation. *See* Section 102(22) for the definition of "jurisdiction of formation." When a foreign entity becomes a domestic entity pursuant to this article, the effect of the conversion will be as provided in Section 406. The procedures by which the conversion is approved, however, will be determined by the laws of the foreign entity's jurisdiction of formation.

SECTION 402. PLAN OF CONVERSION.

(a) A domestic entity may convert to a different type of entity under this [article] by approving a plan of conversion. The plan must be in a record and contain:

(1) the name and type of entity of the converting entity;

(2) the name, jurisdiction of formation, and type of entity of the converted entity;

(3) the manner of converting the interests in the converting entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any

combination of the foregoing;

(4) the proposed public organic record of the converted entity if it will be a filing entity;

(5) the full text of the private organic rules of the converted entity which are proposed to be in a record;

(6) the other terms and conditions of the conversion; and

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

(b) In addition to the requirements of subsection (a), a plan of conversion may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of conversion, which must be approved by the converting entity in accordance with Section 403. The content of a plan of conversion is similar to the content of a plan of merger. *See* Section 202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

The plan of conversion may, but need not, be filed instead of the statement of conversion, so long as it contains all of the information required to be in the statement of conversion and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 405(e).

Subsection (a)(3) – Interest holders in the converting entity may receive interests or other securities of the converted entity or of any other person, obligations, rights to acquire interests or other securities, cash, or other property. *See also* Sections 202(a)(3) (mergers), 302(a)(3) (interest exchanges), and 502(a)(3) (domestications).

SECTION 403. APPROVAL OF CONVERSION.

(a) A plan of conversion is not effective unless it has been approved:

(1) by a domestic converting entity:

(A) in accordance with the requirements, if any, in its organic rules for

approval of a conversion;

(B) if its organic rules do not provide for approval of a conversion, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

(i) in the case of an entity that is not a business corporation or limited cooperative association, a merger, as if the conversion were a merger;

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the conversion were that type of merger; or

(iii) in the case of a limited cooperative association, a transaction under this [article]; or

(C) by all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) in the case of any entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of a conversion or a merger; or

(ii) in the case of a limited cooperative association, neither its organic law nor organic rules provide for approval of a conversion or a transaction under this [article]; and

(2) in a record, by each interest holder of a domestic converting entity which will have interest holder liability for debts, obligations, and other liabilities that are incurred after the conversion becomes effective, unless, in the case of an entity that is not a business or nonprofit corporation:

(A) the organic rules of the entity provide in a record for the approval of a

conversion or a merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all the interest holders; and

(B) the interest holder voted for or consented in a record to that provision of the organic rules or became an interest holder after the adoption of that provision.

(b) A conversion of a foreign converting entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

Legislative Note: *The analysis of approval requirements in the Legislative Note to Section 303 should also be undertaken with respect to conversions.*

Comment

As is the case with the other types of transactions authorized by this act, there are three possible ways to obtain approval of a conversion by a domestic entity. The first is to determine if the organic rules (defined in Section 102(26)) of the converting entity contain specific approval provisions for conversions. If they exist, then those provisions apply to approval of the plan of conversion. If there are no provisions in the organic rules for approval of a conversion, then the provisions for approval of a merger in either the organic law (defined in Section 102(25)) or organic rules of the entity will apply. If there are no approval provisions for conversions in the entity's organic rules and no approval provisions for mergers in the entity's organic law or organic rules, then unanimous consent of all the entity's interests holders is required.

In the case of a foreign entity that is converting into another type of entity in this jurisdiction, subsection (b) provides that the required approval is determined by the laws of the foreign entity's jurisdiction of formation.

Subsection (a)(1)(B) – Subsection(a)(1)(B) requires that a conversion be approved by a business corporation in the same manner as a merger that requires approval by a vote of the shareholders. *See* the comment to Section 303(a)(1)(b)(ii).

Subsection (a)(2) – See the comment to Section 203(a)(2) for an explanation of this interest holder liability provision.

SECTION 404. AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION.

(a) A plan of conversion of a domestic converting entity may be amended:

(1) in the same manner as the plan was approved, if the plan does not provide for

the manner in which it may be amended; or

(2) by its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the conversion is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the interest holders of the converting entity under the plan;

(B) the public organic record, if any, or private organic rules of the converted entity which will be in effect immediately after the conversion becomes effective, except for changes that do not require approval of the interest holders of the converted entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(b) After a plan of conversion has been approved and before a statement of conversion is effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic converting entity may abandon the plan in the same manner as the plan was approved.

(c) If a plan of conversion is abandoned after a statement of conversion has been delivered to the [Secretary of State] for filing and before the statement is effective, a statement of abandonment, signed by the converting entity, must be delivered to the [Secretary of State] for filing before the statement of conversion is effective. The statement of abandonment takes effect on filing, and the conversion is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the converting entity;

(2) the date on which the statement of conversion was filed by the [Secretary of State]; and

(3) a statement that the conversion has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Sections 204 (mergers), 304 (interest exchanges), and 504 (domestications).

SECTION 405. STATEMENT OF CONVERSION; EFFECTIVE DATE OF CONVERSION.

(a) A statement of conversion must be signed by the converting entity and delivered to the [Secretary of State] for filing.

(b) A statement of conversion must contain:

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

(2) the name, jurisdiction of formation, and type of entity of the converted entity;

(3) if the statement of conversion is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than 90 days after the date of filing;

(4) if the converting entity is a domestic entity, a statement that the plan of conversion was approved in accordance with this [article] or, if the converting entity is a foreign entity, a statement that the conversion was approved by the foreign entity in accordance with the law of its jurisdiction of formation;

(5) if the converted entity is a domestic filing entity, its public organic record, as an attachment;

(6) if the converted entity is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(7) if the converted entity is a foreign entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 406(e).

(c) In addition to the requirements of subsection (b), a statement of conversion may contain any other provision not prohibited by law.

(d) If the converted entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic record.

(e) A plan of conversion that is signed by a domestic converting entity and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of conversion and on filing has the same effect. If a plan of conversion is filed as provided in this subsection, references in this [act] to a statement of conversion refer to the plan of conversion filed under this subsection.

(f) A statement of conversion is effective on the date and time of filing or the later date and time specified in the statement of conversion.

(g) If the converted entity is a domestic entity, the conversion becomes effective when the statement of conversion is effective. If the converted entity is a foreign entity, the conversion becomes effective on the later of:

(1) the date and time provided by the organic law of the converted entity; or

(2) when the statement is effective.

Comment

The filing of a statement of conversion makes the transaction a matter of public record. The requirements for a statement of conversion are set forth in subsection (b). They are essentially the same as the requirements for a statement of merger in Section 205.

Subsection (b)(3) and (f) – The effective date and time of a statement of conversion are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of conversion is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 405(b)(3).

Subsection (e) – A plan of conversion can be used as a substitute for the statement of conversion so long as the plan satisfies the requirements in subsection (e).

Subsection (g) – When the statement of conversion is effective under subsection (f), the conversion transaction occurs if the converted entity is a domestic entity. A conversion in which the converted entity is a foreign entity will usually also take effect when the statement of conversion takes effect because the best practice will be to coordinate the filings that need to be made when a conversion involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, subsection (g) provides that the conversion transaction itself will take effect at the later of (i) when the statement of conversion takes effect, and (ii) when the conversion takes effect under the law of the foreign jurisdiction. That rule avoids the possibility that the conversion will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the converting domestic entity would cease to exist before it has been converted into the foreign entity.

It is only necessary for the filing office to record the effective date of the statement of conversion and the filing office does not need to be concerned with the effective date of the conversion itself. Persons wishing to determine the effective date of a conversion involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

SECTION 406. EFFECT OF CONVERSION.

(a) When a conversion becomes effective:

(1) the converted entity is:

(A) organized under and subject to the organic law of the converted entity; and

(B) the same entity without interruption as the converting entity;

(2) all property of the converting entity continues to be vested in the converted entity without transfer, reversion, or impairment;

(3) all debts, obligations, and other liabilities of the converting entity continue as debts, obligations, and other liabilities of the converted entity;

(4) except as otherwise provided by law or the plan of conversion, all the rights, privileges, immunities, powers, and purposes of the converting entity remain in the converted entity;

(5) the name of the converted entity may be substituted for the name of the converting entity in any pending action or proceeding;

(6) if a converted entity is a filing entity, its public organic record is effective;

(7) if the converted entity is a limited liability partnership, its statement of qualification is effective;

(8) the private organic rules of the converted entity which are to be in a record, if any, approved as part of the plan of conversion are effective; and

(9) the interests in the converting entity are converted, and the interest holders of the converting entity are entitled only to the rights provided to them under the plan of conversion and to any appraisal rights they have under Section 109 and the converting entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of the converting entity, the conversion does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the converting entity.

(c) When a conversion becomes effective, a person that did not have interest holder liability with respect to the converting entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the conversion has interest holder liability only to the

extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that are incurred after the conversion becomes effective.

(d) When a conversion becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic converting entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The conversion does not discharge any interest holder liability under the organic law of the domestic converting entity to the extent the interest holder liability was incurred before the conversion became effective.

(2) The person does not have interest holder liability under the organic law of the domestic converting entity for any debt, obligation, or other liability that is incurred after the conversion becomes effective.

(3) The organic law of the domestic converting entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by other law or the organic rules of the domestic converting entity with respect to any interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

(e) When a conversion becomes effective, a foreign entity that is the converted entity may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities in accordance with applicable law.

(f) If the converting entity is a registered foreign entity, its registration to do business in this state is canceled when the conversion becomes effective.

(g) A conversion does not require the entity to wind up its affairs and does not constitute

or cause the dissolution of the entity.

Comment

A converted entity is the same entity as it was before the conversion; it just has a different legal form. The legal effects of this are set forth in subsection (a). The converted entity remains the owner of all real and personal property and remains subject to all the liabilities, actual or contingent, of the converted entity. A conversion is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. It does not give rise to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion. The contract rights that remain in the converted entity include, without limitation, the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the conversion.

When a conversion becomes effective, the internal affairs of the converting entity are no longer governed by its former organic law but instead by the organic law of the converted entity. As a result, filings that may have been made under the organic law of the converting entity, such as the following, will no longer be effective: a statement of qualification as a limited liability partnership under Section 901 of the Uniform Partnership Act (1997) (Last Amended 2013), a statement of partnership authority under Section 303 of that act, a statement of authority under Section 302 of the Uniform Limited Liability Company Act (2006) (Last Amended 2013), or a statement of authority under Section 7 of the Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013).

Subsection (a)(5) – All pending proceedings involving the converting entity are continued. The name of the converted entity may be, but need not be, substituted in any pending proceeding for the name of the converting entity.

Subsection (c) – Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* the comment to Section 206(c).

Subsection (d) – Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* the comment to Section 206(d).

Subsection (e) – When a domestic converting entity becomes a foreign entity as a result of a conversion, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the converting entity. Section 406(e), which parallels analogous provisions in Articles 2 (mergers) and 5 (domestications), authorizes service of process for all such claims in this state.

Subsection (g) – When a conversion takes effect, the entity continues to exist – simply in a different form. Subsection (g) thus makes clear that the conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

[ARTICLE] 5

DOMESTICATION

SECTION 501. DOMESTICATION AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [article], a domestic entity may become a domestic entity of the same type of entity in a foreign jurisdiction if the domestication is authorized by the law of the foreign jurisdiction.

(b) Except as otherwise provided in this section, by complying with the provisions of this [article] applicable to foreign entities a foreign entity may become a domestic entity of the same type of entity in this state if the domestication is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a domestication, the provision applies to a domestication of the entity as if the domestication were a merger until the provision is amended after [the effective date of this [act]].

[(d) This [article] does not apply to the domestication of:

(1) [a business corporation, if the state has adopted Subchapter 9B of the Model Business Corporation Act]; [or]

(2) [a nonprofit corporation, if the state has adopted Subchapter 9B of the Model Nonprofit Corporation Act]; [or]

(3).]

Legislative Note: *A few states have existing domestication provisions in their organic laws. Because a domestication is a transaction involving entities of the same type, as opposed to a transaction involving entities of different types, a state may choose to keep any existing domestication provisions in its organic laws and it may decide to add domestication provisions to its other organic laws. Any domestication provisions in other organic laws should be listed in subsection (d). In that case, Article 5 will apply only to domestications of an entity whose*

organic law does not authorize a domestication. If a state does not have domestication provisions in any of its organic laws, subsection (d) should be omitted.

Comment

A domestication authorized by Article 5 differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

As with a conversion, all rights and privileges, debts, obligations, and other liabilities, and 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.

Article 5 governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this act. On the other hand, the organic laws of the foreign jurisdiction, and not Article 5, will govern the legal effect of most aspects of a domestication of a domestic entity in another jurisdiction. In the latter scenario, Article 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Article 5 does not create a right in the domestic entity to be received in the foreign jurisdiction. Similarly, Section 501 does not provide a right on the part of a foreign entity to become a domestic entity if the domestication is not authorized by the laws of the foreign jurisdiction. If the foreign jurisdiction does not authorize a domestication, the same result can be accomplished by forming a new entity of the same type in the new state and merging the existing entity into the new entity.

SECTION 502. PLAN OF DOMESTICATION.

(a) A domestic entity may become a foreign entity in a domestication by approving a plan of domestication. The plan must be in a record and contain:

(1) the name and type of entity of the domesticating entity;

(2) the name and jurisdiction of formation of the domesticated entity;

(3) the manner of converting the interests in the domesticating entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) the proposed public organic record of the domesticated entity if it is a filing entity;

(5) the full text of the private organic rules of the domesticated entity that are

proposed to be in a record;

(6) the other terms and conditions of the domestication; and

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

(b) In addition to the requirements of subsection (a), a plan of domestication may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of domestication, which must be approved by the domesticating entity in accordance with Section 503. The content of a plan of domestication is similar to the content of a plan of merger. *See* Section 202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

The plan of domestication, may, but need not, be filed instead of the statement of domestication, so long as it contains all of the information required to be in the statement and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 505(e).

Subsection (a)(3) – Interest holders in the domesticating entity may receive interests or other securities of the domesticated entity or any other person, obligations, rights to acquire interests or other securities, cash, or other property.

SECTION 503. APPROVAL OF DOMESTICATION.

(a) A plan of domestication is not effective unless it has been approved:

(1) by a domestic domesticating entity:

(A) in accordance with the requirements, if any, in its organic rules for approval of a domestication;

(B) if its organic rules do not provide for approval of a domestication, in accordance with the requirements, if any, in its organic law and organic rules for approval of:

(i) in the case of an entity that is not a business corporation or limited cooperative association, a merger, as if the domestication were a merger;

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of the business corporation, as if the domestication were that type of merger; or

(iii) in the case of a limited cooperative association, a transaction under this [article]; or

(C) by all of the interest holders of the entity entitled to vote on or consent to any matter if:

(i) in the case of an entity that is not a business corporation or limited cooperative association, neither its organic law nor organic rules provide for approval of a domestication or a merger; or

(ii) in the case of a limited cooperative association, neither its organic law nor organic rules provide for approval of a domestication or a transaction under this [article]; and

(2) in a record, by each interest holder of a domestic domesticating entity that will have interest holder liability for debts, obligations, and other liabilities that are incurred after the domestication becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

(A) the organic rules of the entity in a record provide for the approval of a domestication or merger in which some or all of its interest holders become subject to interest holder liability by the vote or consent of fewer than all the interest holders; and

(B) the interest holder consented in a record to or voted for that provision of the organic rules or became an interest holder after the adoption of that provision.

(b) A domestication of a foreign domesticating entity is not effective unless it is

approved in accordance with the law of the foreign entity's jurisdiction of formation.

Legislative Note: *The analysis of approval requirements in the Legislative Note to Section 303 should also be undertaken with respect to domestications.*

Comment

Subsection (a) – As is the case with the other types of transactions authorized by this act, there are three possible ways to obtain approval of a domestication by a domestic entity. The first is to determine if the organic rules (defined in Section 102(26)) of the domesticating entity contain specific approval provisions for a domestication. If they exist, then those provisions apply to approval of the plan of domestication. If there are no domestication approval provisions, then the approval process for a merger in either the entity's organic law (defined in Section 102(25)) or organic rules will apply. If there are no specific domestication approval provisions in the entity's organic rules and no merger approval provisions in the entity's organic law or organic rules, then unanimous consent of all the entity's interest holders is required.

In the case of a foreign entity that is domesticating in this state, subsection (b) provides that the required approval is determined by the laws of the foreign entity's jurisdiction of formation.

Subsection (a)(1)(B)(ii) – Subsection(a)(1)(B) requires that a domestication be approved by a business corporation in the same manner as a merger that requires approval by a vote of the shareholders. *See* the comment to Section 303(a)(1)(B)(ii).

Subsection (a)(2) – See Comment 2 to Section 203(a)(2) for an explanation of this interest holder liability provision.

SECTION 504. AMENDMENT OR ABANDONMENT OF PLAN OF DOMESTICATION.

(a) A plan of domestication of a domestic domesticating entity may be amended:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the domestication is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other

property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the interest holders of the domesticating entity under the plan;

(B) the public organic record, if any, or private organic rules of the domesticated entity that will be in effect immediately after the domestication becomes effective, except for changes that do not require approval of the interest holders of the domesticated entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the interest holder in any material respect.

(b) After a plan of domestication has been approved by a domestic domesticating entity and before a statement of domestication is effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic domesticating entity may abandon the plan in the same manner as the plan was approved.

(c) If a plan of domestication is abandoned after a statement of domestication has been delivered to the [Secretary of State] for filing and before the statement is effective, a statement of abandonment, signed by the entity, must be delivered to the [Secretary of State] for filing before the statement of domestication is effective. The statement of abandonment takes effect on filing, and the domestication is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the domesticating entity;

(2) the date on which the statement of domestication was filed by the [Secretary of State]; and

(3) a statement that the domestication has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* Sections 204 (mergers), 304 (interest exchanges), and 404 (conversions).

SECTION 505. STATEMENT OF DOMESTICATION; EFFECTIVE DATE OF DOMESTICATION.

(a) A statement of domestication must be signed by the domesticating entity and delivered to the [Secretary of State] for filing.

(b) A statement of domestication must contain:

(1) the name, jurisdiction of formation, and type of entity of the domesticating entity;

(2) the name and jurisdiction of formation of the domesticated entity;

(3) if the statement of domestication is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than 90 days after the date of filing;

(4) if the domesticating entity is a domestic entity, a statement that the plan of domestication was approved in accordance with this [article] or, if the domesticating entity is a foreign entity, a statement that the domestication was approved in accordance with the law of its jurisdiction of formation;

(5) if the domesticated entity is a domestic filing entity, its public organic record, as an attachment;

(6) if the domesticated entity is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(7) if the domesticated entity is a foreign entity that is not a registered foreign

entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 506(e).

(c) In addition to the requirements of subsection (b), a statement of domestication may contain any other provision not prohibited by law.

(d) If the domesticated entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, but the public organic record does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic record.

(e) A plan of domestication that is signed by a domesticating domestic entity and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of domestication and on filing has the same effect. If a plan of domestication is filed as provided in this subsection, references in this [act] to a statement of domestication refer to the plan of domestication filed under this subsection.

(f) A statement of domestication is effective on the date and time of filing or the later date and time specified in the statement of domestication.

(g) A domestication in which the domesticated entity is a domestic entity becomes effective when the statement of domestication is effective. A domestication in which the domesticated entity is a foreign entity becomes effective on the later of:

(1) the date and time provided by the organic law of the domesticated entity; or

(2) when the statement is effective.

Comment

The filing of a statement of domestication makes the transaction a matter of public record. The requirements for a statement of domestication are set forth in subsection (b). They are essentially the same as the requirements for a statement of merger in Section 205.

Subsection (b)(3) and (f) – The effective date and time of a statement of domestication are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of domestication is effective on that date and time, subject to the 90 day maximum delayed effective date in subsection (b)(3).

Subsection (e) – A plan of domestication can be used as a substitute for the statement of domestication so long as the plan satisfies the requirements in subsection (e).

Subsection (g) – When the statement of domestication is effective under subsection (f), the domestication transaction occurs if the domesticated entity is a domestic entity. A domestication in which the domesticated entity is a foreign entity will usually also take effect when the statement of domestication takes effect because the best practice will be to coordinate the filings that need to be made in each jurisdiction so that they take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, subsection (g) provides that the domestication transaction itself will take effect at the later of (i) when the statement of domestication takes effect, and (ii) when the domestication takes effect under the law of the foreign jurisdiction. This rule avoids the possibility that the domestication will take effect in the domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domesticating domestic entity would cease to appear as an active entity on the records of this state before it appears as its active domesticated self on the records of the foreign jurisdiction.

It is only necessary for the filing office to record the effective date of the statement of domestication and the filing office does not need to be concerned with the effective date of the domestication itself. Persons wishing to determine the effective date of a domestication will be able to do so by consulting the records of the filing offices in each jurisdiction.

SECTION 506. EFFECT OF DOMESTICATION.

(a) When a domestication becomes effective:

(1) the domesticated entity is:

(A) organized under and subject to the organic law of the domesticated entity; and

(B) the same entity without interruption as the domesticating entity;

(2) all property of the domesticating entity continues to be vested in the domesticated entity without transfer, reversion, or impairment;

(3) all debts, obligations, and other liabilities of the domesticating entity continue as debts, obligations, and other liabilities of the domesticated entity;

(4) except as otherwise provided by law or the plan of domestication, all of the rights, privileges, immunities, powers, and purposes of the domesticating entity remain in the domesticated entity;

(5) the name of the domesticated entity may be substituted for the name of the domesticating entity in any pending action or proceeding;

(6) if the domesticated entity is a filing entity, its public organic record is effective;

(7) if the domesticated entity is a limited liability partnership, its statement of qualification is effective simultaneously;

(8) the private organic rules of the domesticated entity that are to be in a record, if any, approved as part of the plan of domestication are effective; and

(9) the interests in the domesticating entity are converted to the extent and as approved in connection with the domestication, and the interest holders of the domesticating entity are entitled only to the rights provided to them under the plan of domestication and to any appraisal rights they have under Section 109 and the domesticating entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of the domesticating entity, the domestication does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the domesticating entity.

(c) When a domestication becomes effective, a person that did not have interest holder liability with respect to the domesticating entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the domestication has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that are incurred after the domestication becomes effective.

(d) When a domestication becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic domesticating entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The domestication does not discharge any interest holder liability under the organic law of the domesticating domestic entity to the extent the interest holder liability was incurred before the domestication became effective.

(2) A person does not have interest holder liability under the organic law of the domestic domesticating entity for any debt, obligation, or other liability that is incurred after the domestication becomes effective.

(3) The organic law of the domestic domesticating entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

(4) A person has whatever rights of contribution from any other person as are provided by other law or the organic rules of the domestic domesticating entity with respect to any interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

(e) When a domestication becomes effective, a foreign entity that is the domesticated entity may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities in accordance with applicable law.

(f) If a domesticating entity is a registered foreign entity, the registration to do business in this state of the domesticating entity is canceled when the domestication becomes effective.

(g) A domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Comment

Subsection (a)(1) – The domesticated entity is the same entity as the domesticating entity; it has merely changed its jurisdiction of formation.

Subsection (a)(2) – A domestication 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.

Subsection (a)(5) – All pending proceedings involving the domesticating entity are continued. The name of the domesticated entity may be, but need not be, substituted in any pending proceeding for the name of the domesticating entity.

Subsection (a)(9) – The interests of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and the interest holders of the domesticating entity are only entitled to those rights. Subsection (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.

Subsection (c) – Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* the comment to Section 206(c).

Subsection (d) – Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* the comment to Section 206(d).

Subsection (e) – When a domestic domesticating entity becomes a foreign entity as a result of a domestication, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the domesticating entity. Subsection (e), which parallels analogous provisions in Articles 2 (mergers) and 4 (conversions), authorizes service of process for all such claims in this state.

Subsection (g) – When a domestication takes effect, the entity continues to exist – simply as a domestic entity under the laws of a different state. Subsection (g) thus makes clear that the domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

[ARTICLE] 6

MISCELLANEOUS PROVISIONS

SECTION 601. CONSISTENCY OF APPLICATION. In applying and construing this [act], consideration must be given to the need to promote consistency of the law with respect

to its subject matter among states that enact it.

Comment

This section differs from the usual provision in uniform acts because the scope of the act includes entities whose organic laws are not uniform acts.

SECTION 602. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act,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 7003(b).

Comment

This section responds to specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

SECTION 603. SAVINGS CLAUSE. This [act] does not affect an action commenced, proceeding brought, or right accrued before [the effective date of this [act]].

[SECTION 604. 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 this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a declaration by the highest court of this state stating a general rule of severability.*

SECTION 605. CONFORMING AMENDMENTS AND REPEALS.

(1) . . . .

(2) . . . .

(3) . . . .

SECTION 606. EFFECTIVE DATE. This [act] takes effect . . .

Legislative Note: *This Note provides a guide for amendments, repeals, and additions that must be made to existing statutes when META is enacted in a particular state. This is a complex task because of the wide variation in current state statutes with respect to the types of entities that can engage in one or more of the transactions authorized by META.*

1. Step One: Identify Existing Laws

The first step that must be taken is to identify all of the existing statutory provisions that allow for same-type (all of the entities involved are the same, e.g., a merger between two corporations) and cross-type (more than one type of entity is involved in the transaction, e.g., a merger between a corporation and a partnership) mergers, interest exchanges, conversions, and domestications for any kind of entity. An entity is defined in Section 102 to include all types of partnerships (general partnerships, limited liability partnerships, limited partnerships, and limited liability limited partnerships), limited liability companies, all types of corporations (including business corporations, nonprofit corporations, close corporations in those states that have separate statutes for close corporations, and professional corporations), business trusts, statutory trusts, cooperatives, and unincorporated nonprofit associations. Many states have statutes governing other types of business organizations. Some states, for example, have special statutory provisions for real estate investment trusts (in most other states, REITs would be considered a type of business trust). These special types of entities should also be included in the review process.

2. Step Two: Analyze Existing Laws

The next step is to analyze the overall existing statutory framework for same-type and cross-type transactions. This analysis likely will reveal that there are gaps in coverage for many of the types of transactions covered by the act, either directly or by default, even in those states that have adopted Chapter 9 and 11 of the Model Business Corporation Act and the uniform unincorporated organization acts.

Every state will have provisions for mergers of corporations into other corporations but not all states authorize interest exchanges between corporations (the corporate statutes generally refer to these as share exchanges). Not all states specifically authorize corporations to enter into merger or interest exchange transactions with other types of entities. Moreover, fewer existing corporate statutes have provisions for conversions of corporations into other types of entities or authorize corporations to domesticate in another state.

The same-type and cross-type landscape with respect to unincorporated entities is even less complete. The original Uniform Partnership Act (1997) (RUPA), which has been adopted in approximately 2/3 of the states (and in the District of Columbia, Puerto Rico and the Virgin Islands), for example, only authorizes mergers and conversions of general partnerships and limited partnerships. It does not allow conversions into any other type of entity or mergers with

any other type of entity; nor does it authorize interest exchange or domestication transactions. Several states that have adopted RUPA have provisions allowing same-type and cross-type conversions and mergers of general partnerships with not only limited partnerships but also with corporations and limited liability companies; and a few RUPA states follow the approach of RUPA as last amended in 2013 and have expanded the merger and conversion provisions to include any business entity (it is unclear in some of these states, however, whether these statutes apply to non-profit entities).

The statutory framework for limited partnership same-type and cross-type transactions is also quite varied. Most states have the Uniform Limited Partnership Act (1976 with 1985 Amendments). That act has no provisions dealing with merger, interest exchange, conversion, or domestication transactions. Some states allow conversions of limited partnerships into limited liability companies and a few states expand the conversion list to include corporations; most also allow mergers of limited partnerships into other limited partnerships and some other types of entities. Several states appear to exclude non-profit organizations, business trusts, and cooperatives from their cross-type list.

Most limited liability company statutes have provisions authorizing mergers and conversions, although the scope of coverage is quite varied. There are substantial differences with respect to same-type and cross-type transactions in the existing statutes.

There are very few same-type or cross-type provisions in statutes governing all the other types of entities that exist under state law. There are some exceptions, however, such as the Delaware Statutory Trust Act, 12 Del. Code §§ 3815 and 3820-23.

3. Step Three: Prepare Amendments and Repeals

Once the analysis of the existing same-type and cross-type statutes has been made, decisions need to be made as to which ones should be amended or repealed and whether to add additional provisions to these statutes. Under META, if the statute governing an entity has same-type provisions, those provisions govern the transaction in question. META provides default rules, however, if the other applicable entity statute has no same-type provisions for the transaction in question. META also applies to cross-type transactions (but defaults to applicable state entity law for approval requirements and the like). In deciding how to amend, repeal or add to the existing entity statutes, achieving two goals should be paramount:

1. *avoiding any potential inconsistency between META's provisions and similar provisions in the state's entity statutes; and*

2. *making the interplay between META and the state's various entity laws relatively easy to navigate.*

There are at least four ways to achieve these goals which are described below.

(a) Limit Existing Laws to Same-Type Transactions

This method is based on the assumption that practicing lawyers in a state will not be comfortable completely repealing all of the state's existing restructuring statutes and will want to retain at least the existing same-type transaction statutes, especially the merger statutes, the type of restructuring transaction with which lawyers are most familiar and are used to finding in the state's entity acts.

Implementing this approach is accomplished as follows:

1. *With respect to the state's corporation statutes:*
   - (i) *Repeal any cross-type provisions from the state's corporation merger statutes. In states whose corporate codes do not have any cross-type merger provisions, no amendments to the state's corporate merger provisions will be necessary. Most states also may not have interest exchange provisions in their corporate codes. If that is the case, same-type provisions for interest exchanges do not need to be added to the corporate codes because under META the requirements for approval of a merger and appraisal rights that a shareholder would have in a merger apply. See Sections 109(a) (appraisal rights), 203(a) (mergers), and 303(a) (interest exchange).*

   - (ii) *Repeal any conversion provisions in the state's corporation statutes. Article 4 of META will, therefore, govern all conversions.*

   - (iii) *Retain any existing domestication provisions in the state's organic laws. As is pointed out in the Legislative Note to META Section 501, these entity specific domestication provisions will be listed in Section 501(d) with the result being that Article 5 of META will apply to those types of entities whose organic laws do not already have domestication provisions.*

2. *With respect to the state's other entity statutes:*

   - (i) *Amend all the merger, interest exchange, and conversion provisions in the state's other entity statutes by stripping out all of the cross-type provisions in the merger provisions, and by repealing any interest exchange or conversion provisions. Any existing domestication provisions would be retained and an appropriate reference to those provisions would be included in Section 501(d).*

   - (ii) *The existing requirements for approval of mergers, interest exchanges, conversions, domestications, and amendment of the organic rules in the state's existing organic laws for unincorporated entities need to be carefully reviewed. The situation is more complicated, however, if there is not complete consistency among those organic laws; for example, as is sometimes the case, if the state's partnership statutes require unanimity but its LLC statute requires only a majority vote for some or all transactions. If there is not complete consistency, decisions will need to*

be made whether to retain the differences or to make all of the voting requirements either unanimous or majority. Other issues that will need to be resolved are what the appropriate vote should be for transactions other than mergers (i.e., interest exchanges, conversions, and domestications) where there are no existing voting provisions other than for mergers; what is the appropriate voting requirement for a transaction under META where an unincorporated entity organic law does not have any same-type or cross-type provisions for that type of transaction; and how the voting requirements under META relate to the vote required to amend an unincorporated entity's organic rules. Once this analysis is completed, it will be possible to construct the appropriate amendments to the state's existing unincorporated entity organic laws.

(b) Limit META to Cross-Type Transactions

A second method of integrating META with a state's organic laws is to delete from the existing organic laws any provisions that deal with cross-type transactions and add same-type merger and interest exchange, and domestication provisions to every organic law that does not currently have these provisions. Thus all same-type entity transactions would be governed by the state's organic laws and all cross-type transactions would be governed by META. This approach will require a large number of changes to existing organic laws in most states because same-type merger and interest exchange, and domestication provisions would have to be added to many of the state's organic laws, including its unincorporated nonprofit, cooperative, and business trust statutes. Article 5 of META would also not be enacted because the organic laws for each type of entity would have domestication provisions.

(c) Make META the Exclusive Statute for Both Same-type and Cross-type Transactions

A third method to integrate META with a state's existing organic laws is to repeal all the existing same-type and cross-type transaction provisions in all of the organic laws and add to META all the corporate merger approval and related statutory provisions such as appraisal rights, as well as substantially modifying Sections 203, 303, 403, and 503 so that there will be one set of approval provisions for a corporation engaging in a META transaction and a second set of approval provisions for unincorporated entities engaging in a META transaction.

(d) Have META Apply to a Corporation Engaging in a Cross-type Transaction and be the Exclusive Statute for Both Same-type and Cross-type Transactions for Unincorporated Entities

A fourth method to integrate META with a state's existing organic laws could be achieved by repealing any provisions for cross-type transactions from the corporation laws and, in addition by repealing all of the provisions for same-type and cross-type transactions in all of the state's unincorporated entity organic laws. This approach, which is a variant of (c), avoids the problem of incorporating the corporation law voting requirements and related provisions such as appraisal rights. It requires far fewer amendments to existing statutes than (a). This

method will work best, however, in a state where all of the existing unincorporated entity organic laws require unanimity for approval of a merger or similar transaction (and where unanimity is also required to amend each type of entity's organic rules), since that is the ultimate default rule in META. This approach will be quite cumbersome if the state's unincorporated entity organic laws require less than unanimous consent for some types of entities, because the less than unanimous approval requirements would have to be incorporated into META.

4. Step Four: Add appropriate cross references.

Finally, this appendix suggests that a reference to META should be placed in the state's entity statutes specifying the transactions that are governed by META. As an alternative to the statutory references proposed in this appendix, legislative notes could be used in those states that follow that practice. A note would be placed in the corporate statutes at the end of the merger and share exchange provisions stating that META is the primary statute that applies to reorganization transactions involving a corporation and another form of entity. For other entities whose organic laws have merger provisions, the legislative notes would appear at the end of those provisions stating META is the primary statute for any cross-type merger involving that type of entity and also is the primary statute governing both same-type and cross-type interest exchange and domestication transactions where that type of entity is a party. Finally, if there are no merger provisions for a particular type of entity, a legislative note should be placed at the end of the governing statute stating that META is the statute that governs merger, interest exchange, conversion and domestication transactions where that type of entity is involved.