UNIFORM [MERGER AND CONVERSION ACT]

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [Act]:

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

(2) "Conversion" means the procedure authorized by this [Act] in which:

(A) a domestic unincorporated entity continues as a different type of domestic or foreign entity; or

(B) a foreign entity continues as a domestic unincorporated entity of a different type.

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

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

(5) "Domestic corporate entity" means a closely or publicly-held corporation, a close corporation, a professional corporation or any other incorporated entity created under or

whose internal affairs are governed by the laws of this [State].

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

(7) "Domestic unincorporated entity" means a general partnership, limited liability partnership, limited partnership, limited liability limited partnership, limited liability company, business trust or other non-corporate entity created under or whose internal affairs are governed by the laws of this [State].

(8) "Domesticated entity" means the entity that continues in existence after a domestication.

(9) "Domesticating entity" means the entity that adopts a plan of domestication and that files a statement of domestication.

(10) "Domestication" means the procedure authorized by this [Act] in which:

(A) a domestic unincorporated entity changes its jurisdiction of formation but does not change its type; or

(B) a foreign entity changes to a domestic unincorporated entity of the same type.

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

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

(A) a domestic unincorporated entity may acquire all of the entity interests

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

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

(13) "Exchanging entity" means the entity that exchanges one or more of the classes or series of entity interests in an entity interest exchange.

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

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

(16) "Merger" means the procedure authorized by this [Act] in which:

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

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

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

(18) "Nonfiling entity" means an entity that is not created by the filing of a public

organic document.

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

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

(21) "Organic document" means a private oral agreement, a private agreement in record form or a public organic document.

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

(23) "Owner" means a person who:

(A) [holds of record] an interest in the profits or assets of an entity in the ordinary course or upon liquidation other than as an assignee; or

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

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

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

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

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

(B) by a public or private organic document of an entity that imposes

liability on an owner for all or specified debts, obligations or liabilities of the entity.

(26) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability partnership, limited partnership, limited liability limited partnership, limited liability company, association, joint venture or any other legal or commercial entity.

(27) "Private organic document" means the set of rules for governing the internal affairs of an entity that may be adopted by its owners and that are not required to be filed of public record.

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

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

(30) "Subsidiary entity" mans an entity whose ownership interests are owned at least 90 percent (90%) or more by another entity.

(31) "Surviving entity" means the entity that continues in existence following a merger or the new entity that is created by a merger.

Reporter's Notes

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

"Domestic corporate entity" [5)] - The term "domestic corporate entity" is used throughout this [Act] to: (1) distinguish the domestic entities that are permitted to engage in a merger, conversion, entity interest exchange or domestication pursuant to this [Act]; and (2)

enable the "election" by a domestic corporate entity of the use of this [Act] where the organic law governing the incorporated entity is silent regarding the transaction. Because jurisdictions vary in their description of incorporated entities, states should conform this section accordingly.

"Domestic entity" [(6)] - The term "domestic entity" in this [Act] refers to domestic incorporated and unincorporated entities created under or whose internal affairs are governed by the organic laws of an adopting jurisdiction.

"Domestic unincorporated entity [(7)] - The term "domestic unincorporated entity" is used throughout this [Act] to describe the entities for which this [Act] was intended to apply. The listing is not intended to be exhaustive and an adopting [state] should conform this section accordingly.

"Domestication" [(10)] - The term "domestication" in this [Act] authorizes a domestic unincorporated entity to change its jurisdiction of formation but not its type so long as the organic law of the foreign jurisdiction permit the domestication. The legal effect of the domestication out of an adopting [state] would be governed by the laws of the domesticated entity. Likewise, the term "domestication" authorizes the procedure whereby a foreign unincorporated entity becomes
a domestic entity of the same type. The legal effect of the latter transaction is governed by the laws of the jurisdiction adopting this [Act].

"Entity" [(11)] - The definition of the term "entity" is intended to be inclusive and to reflect the unique nature of certain types of incorporated and unincorporated entities. For example, in some jurisdictions corporations are created under special acts, special corporation acts or for special purposes. In those jurisdictions, the definition should be conformed accordingly. The present definition also specifically includes nonprofit entities. The definition excludes sole proprietorships.

"Foreign Entity" [(15)] - The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs.

"Merger" [(16)] - The term "merger" in this [Act] includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities. The term "merger" also includes the traditional two-party merger in which one party does not survive the transaction. "Merger" also includes a forward or reverse triangular merger.

"Nonfiling entity" [(18)] - A "nonfiling entity" is one that is not formed by the filing of a public document. The term includes general partnerships, unincorporated nonprofit associations and [business trusts].

"Organic document" [(21)] - The term "organic document" is intended to include all

governing documents of an entity whether or not in written form. The term is intended to include agreements in "record" form as defined at ULLCA § 101 (16)("information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.").

"Owner" [(23)] - An "owner" is a person who owns [of record] an interest in profits or assets of an entity or who has voting rights under the entity's organic laws or organic documents except as an agent, assignee, transferee or holder of a proxy. The alternative form of the definition is intended to address the unique nature of "ownership" in nonprofit entities where persons often possess voting, but not economic, rights.

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

"Ownership interest" [(24)] - An "ownership interest" includes a partnership interest in a general partnership (including a limited liability partnership), a partnership interest in a limited partnership (including a limited liability limited partnership), a membership interest in a limited liability company, a share in a corporation, a membership interest in a nonprofit corporation, a membership interest in an unincorporated association, and a beneficial interest in a business trust.

"Person" [(26)] - The term "person" is taken from *ULLCA* § 101(14) with the exception of "government, governmental subdivision, agency or instrumentality" as per the March Committee discussion of 2001.

"Private organic document" [(27)] - The term "private organic document" is intended to embrace only those agreements anticipated by the organic law of the affected entity. "Private organic document" includes a written or oral partnership agreement in a general partnership (including a limited liability partnership), a written or oral partnership agreement in a limited partnership (including a limited liability limited partnership*) see Re-RULPA* § 111("required records" of a limited partnership do not mandate the creation of a written partnership agreement), a written or oral operating agreement in a limited liability company, *see ULLCA* § 103 and Comment (making clear the enforceability of oral as well as written operating agreements), the bylaws of a for-profit or nonprofit corporation, shareholder agreements and the bylaws of a business trust.

"Public organic document" [(28)] - A "public organic document" is a document that is filed of public record to create an entity. A "public organic document" includes a statement of qualification for a limited liability partnership, a certificate of limited partnership, the articles of organization for a limited liability company, the articles of incorporation for a nonprofit or for-

profit corporation, the articles of association for an unincorporated nonprofit association, or a deed of trust of a business trust. "Public organic document" does not include a statement of partnership authority filed pursuant to section 303 of *RUPA*.

"Subsidiary entity" [(30)] - The term "subsidiary entity" is used in section 206 to describe an entity whose owners may not be entitled to vote upon a merger where the owner of the subsidiary entity owns at least 90% or more of the ownership interests of the subsidiary entity. The term includes any type of entity formed or otherwise created by an adopting jurisdiction.

SECTION 103. REQUIRED REGULATORY APPROVALS.

[A domestic or foreign entity that by the laws of its governing jurisdiction is subject to the supervision of the{[Attorney General]},the {[Department of Banking]}, the {[Department of Insurance]}, or the {[Public Utility Commission]} in a merger shall not be a party to a transaction under this{[Act]} unless the supervising agency expressly approves the transaction in writing. The {[Secretary of State]} shall not accept a filing under this {[Act]} by such an entity unless the filing is accompanied by the written approval of the appropriate agency.]

Reporter's Notes

Section 103 - Section 103 is intended to make clear that domestic or foreign entities such as banks, insurance companies, community hospitals or public *utilities that require regulatory approval to enter into a merger* cannot be a party to a *conversion, domestication or entity interest exchange* under this [Act] without obtaining *the same agency approval*. The types of entities covered by Section 103 should be conformed by each state adopting this Act.

Likewise, because this Act will permit new transactions in many states, legislators should consider the effect of these new transactions in the context of nonprofit entities. As such, states may consider requiring approval of the effect of a conversion, domestication or entity interest exchange involving a nonprofit entity where the result of the transaction is the diversion of trust or charitable property to another purpose.

SECTION 104. SCOPE.

(a) Subject to section 103, all domestic unincorporated entities shall have the power to effect a merger, conversion, domestication or entity interest exchange under this [Act].

(b) Domestic incorporated entities shall not effect a merger, conversion, domestication or entity interest exchange [with a domestic unincorporated entity] under this [Act] unless the organic laws under which the domestic incorporated entity was formed have no provision governing the transaction and the [entity] elects to enable the transaction pursuant to this [Act].

Reporter's Notes

Section 104 - Section 104 is intended to make clear that all domestic unincorporated entities may use this act to accomplish a merger, conversion, domestication or entity interest exchange with another domestic or foreign entity. Stated differently, section 104 *enables* these transactions for all domestic unincorporated entities. As such, if a transaction involves only domestic unincorporated entities, this Act will replace existing statutes regarding mergers, conversions, domestications and/or entity interest exchanges. Similarly, if a transaction involves only domestic unincorporated entities and the preexisting law of the adopting jurisdiction does not provide for one of the named transactions, adoption of this [Act] *enables* the previously omitted transaction. If a transaction involves a domestic unincorporated entity and a domestic corporation, this Act governs only the unincorporated side of the transaction. Conversely, if a transaction involves a domestic unincorporated entity and a domestic corporate entity and the organic laws governing the corporate entity are silent on the transaction, in part or in whole, the domestic corporate entity may elect to enable the transaction with an domestic unincorporated entity pursuant to this Act. The Reporter needs direction as to whether the Committee intends the default rule to permit an "electing" domestic incorporated entity to use this Act to accomplish any of the transactions contemplated herein where the other "party" to the transaction is a foreign entity or another domestic corporate entity.

On a similar, but somewhat different, issue, the Committee may wish to consider permitting this [Act] to be a default statute for not only domestic corporate entities but also foreign entities where the organic laws governing the foreign entity are silent on the transaction. For example, assume the State of Colorado adopts this [Act]. Assume further that the State of Montana does not. Query whether a Montana entity could use this [Act] to engage in a transaction with a Colorado unincorporated entity in the State of Colorado? This example differs

from the question posed just above since here the Montana entity is "linking" with an unincorporated entity in a jurisdiction that has adopted this Act. The next logical extension of this scope rule is to permit the Montana entity to "link" with an "electing" Colorado incorporated entity.

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

[ARTICLE] 2

MERGER

SECTION 201. MERGER.

(a) One or more domestic unincorporated entities may be a party to a merger with one or more domestic or foreign entities of any type.

(b) Subject to section 104(b), one or more domestic incorporated entities may be a party to a merger with a domestic unincorporated entity pursuant to this [Act].

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

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

(2) the merger is not prohibited by any law of the jurisdiction that enacted those organic laws; and

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

Reporter's Notes

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

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

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

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

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

Section 201(b) - Section 201(b) enables a domestic corporate entity to be a party to a merger with a domestic unincorporated entity *only in a default posture, i.e.,* where the organic laws of the domestic corporate entity are silent regarding the merger, in whole or in part, and the entity elects to be governed by this [Act]. It is anticipated that all jurisdictions (MBCA and non-MBCA jurisdictions) have merger provisions governing domestic corporations and, as such, this Act will *not* govern the actions of a domestic corporate entity in a merger. This section could be drafted to expand the default rule to enable mergers between domestic "electing" incorporated entities and foreign entities.

Section 201(c) - Section 201(c) prohibits mergers involving foreign entities where the organic laws of the foreign entity do not permit this type of merger or, if permitted, the foreign entity fails to comply with the requirements of its organic laws. In addition, § 201(c) prohibits mergers involving foreign entities where other laws of the jurisdiction that enacted the entity's organic laws prohibit the transaction (*e.g.*, mergers of regulated entities or for-profit and nonprofit entities). As stated in the Reporter's Notes to section 104, the Committee may wish to broaden section 201(c) to permit a foreign entity to use this [Act] to accomplish a merger where the organic laws of the foreign entity are silent on the transaction but the receiving jurisdiction has adopted this [Act].

SECTION 202. PLAN OF MERGER.

(a) Subject to section 104(b) and 201(b), a domestic entity may be a party to a merger by adopting and approving a plan of merger.

(b) A plan of merger shall state:

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

(2) the terms and conditions of the merger;

(3) the manner and basis of converting one or more classes or groups of entity interests of each merging entity into entity interests, securities, obligations, rights to acquire entity interests or securities, cash, other property, or any combination of the foregoing;

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

(5) the future effective date or time (which shall be a date or time certain) of the merger if it is not to be effective upon the filing of the statement of merger;

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

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

Reporter's Notes

Subject to section 104 (b), for this [Act] to apply, it is generally intended that at least one of the constituent organizations would be a domestic unincorporated entity. Depending upon the scope of the default rule, however, this section could be drafted to enable a domestic "electing" incorporated entity to accomplish whatever is available for a domestic unincorporated entity.

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

Query: Should the plan be in record form?

SECTION 203. ACTION ON PLAN OF MERGER.

(a) Subject to sections 203(c) and (d), a plan of merger for a domestic unincorporated entity shall be approved according to a provision for merger in the entity's private organic documents or, if there is no applicable provision in the private organic documents, then

by [the number specified to amend the entity's private organic documents or, if there is no designated requirement for amendment, then by] all the owners of the domestic unincorporated entity.

(b) Subject to sections 203(c) and (d):

(1) a plan of merger for a domestic incorporated entity or a foreign entity of any type shall be approved according to a provision for merger in the entity's private organic documents or, if there is no applicable provision in the private organic documents, [then by the number specified to amend the entity's private organic documents], or, if there is no designated requirement for amendment, then in accordance with the organic laws of the entity; or

(2) if the organic laws of a domestic incorporated entity are silent regarding a merger with a domestic unincorporated entity, then the plan of merger shall be approved by [the number designated for amendment of the incorporated entity's certificate of incorporation or, if there is no designated requirement for amendment, then by all the owners of the domestic incorporated entity].

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

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

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

(d) A person does not give the assent required by subsection (c) merely by

assenting to a provision of the private organic documents which permit the entity to be modified or converted with the consent of less than all owners.]

(e) Subject to sections 203(c) and (d) and any applicable organic law of the merging entities, a plan of merger may be terminated or amended:

(1) as provided in the plan; and

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

Reporter's Notes

Section 203(a) - Section 203(a) provides the substantive rule applicable to the approval of mergers by domestic unincorporated entities under this [Act]. Section 203 (a) sets out an alternative three-part test: first, approval follows any provision in the entity's private organic documents that is *specific to mergers*; second, if the private organic documents do not mention mergers, approval follows the *general number or percentage* specified for amendment of the entity's private organic documents; and, third, if no number or percentage is specified for amendment in the entity's private organic documents, then *approval by default* requires the unanimous vote of the owners of the domestic unincorporated entity. In essence, section 203 allows the parties to *specifically* prescribe merger approval or, in the alternative, allows the *general* number necessary to alter or amend the parties' private contract to govern. Only where the parties have failed to *specifically* mention mergers or *generally* set out a number for altering the parties contract will unanimity prevail. Approval under § 203(a) is intended to include whatever managerial decision is required to effectuate the merger (*e.g.* manager consent in a manager-managed LLC if the private organic documents of the LLC require managerial approval).

Section 203(b) - Section 203(b)(1) defers to the private organic documents or organic law of all other merging entities. Section 203(b)(2) permits a domestic corporate entity that is a party to a merger with a domestic unincorporated entity to merge under this [Act] by the approval of the number necessary to amend the entity's certificate of incorporation, or, an a default mode, by all the owners. Section 203(b)(2) applies only if the organic law governing the domestic corporation is silent on cross-form mergers. [States] in such a position should conform § 203(b) accordingly.

Section 203(c) and (d)- Section 203(c) reflects the Committee's general view that persons who will assume personal liability in the surviving entity must consent in writing to the merger. Section 203(d) provides an exception to written consent where the private organic

documents of the merging entity allow approval with less than unanimous consent and a person assuming owner's liability has consented *to that particular provision.*

Section 203(e) - Section 203(e) permits abandonment or termination only according to a provision in a plan of merger and then only with the same consent as required to approve the plan. The Committee may wish to consider whether: (1) termination or abandonment may be accomplished by "managerial" approval only notwithstanding the absence of a provision for abandonment or termination in a plan; or (2) abandonment or termination by a requisite owner approval may be accomplished absent a provision to that effect in the plan.

SECTION 204. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.

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

(b) The statement of merger shall include:

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

(2) the future effective date or time (which shall be a date or time certain) of the merger if it is not to be effective upon the filing of the statement of merger;

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

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

(5) if the surviving entity is a domestic filing entity, a copy of the entity's public organic document;

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

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

(A) if it is a qualified foreign entity, its registered agent and registered office; or

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

(8) if the surviving entity is in existence prior to the merger, any amendments to its public organic documents that are provided in the plan of merger; and

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

(c) A statement of merger becomes effective under this [Article] upon:

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

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

Reporter's Notes

Section 204- Section 204 does not require the plan of merger to be filed with the statement of merger. However, if the plan of merger contains all the information required by the statement of merger, the plan may be filed as a substitute for the statement and the merger becomes effective under section 204 (c) as if a statement of merger had been filed.

Sections 204(b)(6) and (7)(B) - Sections 204(b)(6) and (7)(B) require a nonfiling domestic or foreign entity to provide a *street address* for the entity's executive office or principal place of business. A post office box would not satisfy the address mandate of either section. The executive office or principal place of business of the domestic nonfiling entity need not be within the jurisdiction of formation of the domestic nonfiling entity. The purpose and intent of sections

204(b)(6) and (7)(B) is to give notice of a specific place at which the nonfiling entity may be found for all purposes, including that of service of process.

Section 204(c) - At its meeting in Oklahoma City in March 2001, the Committee charged the Reporter with drafting language that would address so-called "gap" filings and inadvertent "dual-citizened" entities. For example, concern was expressed by the Committee that a filing in a foreign jurisdiction could inadvertently or mistakenly become effective before or after a domestic filing thus leaving in question the legality of a merger and the legal consequences of unintended "dual citizenship" in the "gap" between the domestic and foreign filings. The Reporter, with the aid and guidance of Melissa Wangeman, circulated a query to the Secretaries of State for possible "fixes" to this problem. One suggestion was that a filing in one jurisdiction "tie" effectiveness to a date and time specified in the filing in the other jurisdiction. This suggestion met with resounding disapproval (as we expected). Another suggestion that was considered is that of the "California" approach. In the California statutes regarding mergers of limited liability companies, § 17555(d) provides: "if the *surviving entity is a foreign limited liability company* ..., the *merger shall become effective in accordance with the laws of the [foreign surviving entity*]; but the *merger shall be effective as to any domestic disappearing [LLC] as of the time of effectiveness in the foreign jurisdiction* upon the filing in this state of a certificate of merger..." Interpreting this language, the following seems to occur: (1) if a California LLC merges into a Colorado LLC that survives and a certificate of merger is filed in Colorado on Dec. 5 and the certificate is filed in California on Dec. 15, the effective date in both jurisdictions is Dec. 5 because the California filing relates back to the earlier filing; (2) if a California LLC merges into a Colorado LLC that survives and the certificate is filed in Colorado on Dec. 15 and the certificate is filed in California on Dec. 5, the effective date is Dec. 15 because now the filing projects forward. It appears that the latter alternative is less problematic than a "relation back." However, when a very similar idea was circulated to the members of IACA by Melissa, the concern was lack of clarity of the records of the non-surviving entity. The California alternative is obviously available to this Committee.

After various other suggestions were rejected, the Reporter reluctantly returned to the language presently found in all Uniform Unincorporated and Model Acts with the understanding that a "fix" may well not be possible at this time. Clearly a legislative comment to practitioners regarding this problem is desirable.

Section 204(c)(1) has also added language regarding effective dates of filings. The language, "the date and time of filing ...*as evidenced by such means as the [Secretary of State] may use for the purpose of recording the date and time of filing,*" is taken from the ABA Model Entity Transaction Act (draft of 10-17-01) § 204(c)(1). The language was included because of previous NCCUSL debates regarding potential litigation determining the precise time at which "filing" occurs. As drafted, section 203(c)(1) anticipates a jurisdiction-specific determination of "filing," taking into consideration whatever local procedures govern recording and filing of public documents. Thus, for example, if the Kansas Secretary of State deems "filing" to occur upon docketing and the Iowa Secretary of State considers "filing" to occur upon date stamping,

each local filing time, though different, would prevail. Section 203(c)(1) makes no attempt to prescribe an omnibus "filing" time.

SECTION 205. EFFECT OF MERGER.

(a) When a merger becomes effective:

(1) the surviving entity continues or comes into existence, as the case may be;

(2) each entity that merges into the surviving entity ceases to exist as a separate entity;

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

(4) all debts, liabilities, and other obligations of each merging entity that ceases to exist continue as obligations of the surviving entity;

(5) an action or proceeding pending by or against any merging entity that ceases to exist may be continued as if the merger had not occurred;

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

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

(8) if the surviving entity is in existence prior to the merger, its public

organic documents, if any, and its private organic documents are amended to the extent provided in the plan of merger;

(9) if the surviving entity is created by the merger, its public organic documents, if any, and its private organic documents become effective;

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

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

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

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

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

(3) the organic laws of the merging entity shall continue to apply to the

collection or discharge of any owner liability preserved by subsection 205(c)(1), as if the merger had not occurred; and

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

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

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

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

Reporter's Notes

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

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

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

Section 205(c) - Section 205(c) states the rule of *past owner's liability.* Section 205(c) has four parts: (1) *an owner in a merging entity* who had personal liability for the debts and obligations of the merging entity under the entity's organic law *is not discharged* from those debts *if the debts arose before the effective date of the merger*; (2) an *owner in a merging entity shall not have owner's liability* for the debts and obligations of the surviving entity *if those debts arose after the effective date of the merger*, (3) the *organic law governing the merging entity continues* in effect for the *purpose of preserving the owner's liability of subsection (1)* despite the nonexistence of the merging entity after the merger; and (4) the *organic law of the merging entity continues* to apply for the *purpose of any contribution rights* that may attach to liabilities preserved under subsection (1), again notwithstanding the nonexistence of the merging entity after the merger.

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

SECTION 206. SHORT FORM MERGER.

(a) A domestic unincorporated entity that owns at least 90 percent of the outstanding ownership interests of each class or series of one or more subsidiary entities [or at least 90 percent of the capital and profits of one or more subsidiary entities] may merge with one or more of the subsidiary entities as provided in this [section] if each other party to the merger is organized under or is governed by the laws of a jurisdiction that permit a merger of this type.

(b) A domestic unincorporated entity whose outstanding ownership interests [or interests in capital and profits] are owned 90 percent or more by another domestic or foreign entity may merge pursuant to this section if each other party to the merger is organized under or is governed by the laws of a jurisdiction that permit a merger of this type.

(c) Subject to sections 203 (c) and (d), a merger under this [section] is required to be approved only by the owners of the entity owning at least 90 percent of the outstanding ownership interests [or interests in capital and profits] of each other party to the merger.

(d) If a domestic unincorporated entity merging under this section does not own all of the outstanding ownership interests of each class or series or ownership interests of each other party to the merger, the domestic unincorporated entity must [adopt a plan of merger] that shall include:

(1) the name, jurisdiction and type of organization of each party to the merger; and

(2) the manner and basis for converting one or more classes or groups of entity interests of the non-surviving entity into entity interests, securities, obligations, rights t acquire entity interests or securities, cash, other property, or any combination of the foregoing.

(e) The surviving entity shall mail a copy or summary of the plan of merger to each owner of the nonsurviving entity who does not waive the mailing requirement in writing.

(f) The surviving entity may not deliver a statement of merger to the [Secretary of State]] for filing until at least 30 days after the date the surviving entity mailed a copy of the plan of merger to each owner of the merging entities who did not waive the requirement of mailing.

Reporter's Notes

Sections 206(a) and (b) - Sections 206(a) and (b) are intended to enable a domestic unincorporated entity to effect a short-form merger. Section 206(a) addresses the right of a parent domestic unincorporated entity that wishes to merge with its subsidiary entity without a

vote of the subsidiary's owners. Section 206(b) addresses the transaction in which a parent entity (domestic or foreign) that owns at least 90% of the outstanding ownership interests of domestic unincorporated entity may merge with the domestic subsidiary entity without a vote. A domestic unincorporated subsidiary entity may be a party to a short-form merger with its parent entity so long as the organic laws of the parent entity permit a merger of this kind.

Section 206(c) - Section 206(c) states the general rule that only the parent entity's approval is necessary. One exception is noted in section 206 (c): that where a merger involves a party that is a general or limited partnership and owner liability will result from the merger, the person assuming owner liability must consent to the merger in writing. In that circumstance, section 206 (c) prohibits the transaction without compliance with sections 203 (c) and (d).

Section 206(d) - Section 206(d) provides that if the parent entity does not own 100% of the subsidiary, the parent must adopt of plan of merger that contains certain specified information. Section 206(d) anticipates that the plan of merger would *not* be necessary for 100% ownership.

Section 206(e) and (f)- Section 206(e) imposes a mailing requirement on the parent entity of a copy or summary of the plan of merger to any owner of the subsidiary entity that did not waive the mailing requirement. In tandem with section 206(e) is the requirement of section 206(f) that the parent entity not file a statement of merger, thus delaying the effective date of the merger, until 30 days after the plan or a copy of the plan is mailed to the owners of the subsidiary entity. Read together, owners of the subsidiary entity are protected from the effectiveness of the merger to the extent of the passage of 30 days and the owners' prompt verification of the terms of the merger as set out in the plan or its copy.

SECTION 207. CONTRACTUAL APPRAISAL RIGHTS.

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

Reporter's Notes

Section 207 - Section 207 is not intended to create "appraisal" or "buyout" rights. Instead, it is intended to statutorily recognize those rights where the parties to a merger either created, granted or authorized those rights before, during or simultaneous with merger negotiations. It is assumed that any contractual appraisal rights will be approved and enforced as

required by the organic laws of the affected entity.

Some jurisdictions have created statutory "buyout" (rather than "appraisal") rights for minority owners in domestic unincorporated entities. Arguably, the term "buyout" could redress more claims than those anticipated by an appraisal.

Further, use of the term "appraisal" may carry with it some unintended negative corporate "baggage" - baggage which the Committee may or may not wish to include by reference. For example, in some jurisdictions, an "appraisal" does not include any claim for breach of contract or breach of fiduciary duty since these latter claims do not exclusively challenge the monetary value of the transaction (*i.e.*, the fiduciary claim could be alleging unfair procedure or timing of the merger). In these jurisdictions, therefore, the "contractual appraisal" right could be interpreted by a "corporate" court to exclude tangential, but related, allegations. The upshot of severing these claims is that the parties are put to the expensive task of litigating separate claims for "appraisal" and breach of fiduciary duty or breach of contract.

In the alternative, section 207 could be re-crafted as a contractual "buyout" or other "exit" right. The obvious disadvantage to the use of the term "buyout" is that it is presently a term of art in partnership law. *See RUPA* § 701 et al. Consider two alternatives. First, parties to a merger involving a general partnership agree to merge and grant "general buyout rights for dissenting partners" but do not define the extent of the buyout rights. In this instance, a court interpreting RUPA could limit the claims that may be redressed under this right in accordance with other provisions of RUPA (*e.g.*, the requirement in some jurisdictions of an accounting where an action involves intra-partner disputes). Alternatively, consider the transaction where the parties to a merger involving a general partnership bargain for a "buyout right" and that right is defined to include an accounting, all claims for breach of contract or fiduciary duty, all rights of set-off but, not, for example, values of goodwill. In the latter circumstance, the same court should enforce the terms as bargained-for and not according to the "buyout" right anticipated in RUPA. *See, e.g., RUPA* § 701. Clearly, the limits and interpretations of partnership buyout rights are jurisdiction-sensitive.

The advantage to including section 207, or some similar provision, is that it, *by statute,* acknowledges that these rights are in the nature of corporate *"dissenter's" or "appraisal*" rights notwithstanding the fact that they were created in *contract* - a distinction which may have other legal consequences. For example, in Delaware "appraisal" cases are heard by the expertised Court of Chancery and contract cases are heard by the Superior Court. In jurisdictions like Delaware, then, the absence of section 207 would force parties to litigate contractual "appraisal" rights in the Superior Court where the court's docket is overloaded and the judges are not accustomed to determining "appraised" values of ownership interests. All other disputes arising from the merger would be determined by the Court of Chancery hence forcing bifurcation of issues arising out of and relating to the same transaction.

[ARTICLE] 3

ENTITY INTEREST EXCHANGE

SECTION 301. ENTITY INTEREST EXCHANGE.

(a) Through an entity interest exchange:

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

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

(b) Subject to section 104(b), a domestic incorporated entity may be a party to an entity interest exchange pursuant to this [Act] with a domestic unincorporated entity.

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

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

(2) the entity interest exchange is not prohibited by any law of the jurisdiction that enacted that organic law; and

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

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

Reporter's Notes

An entity interest exchange is the same transaction as the share exchange provided for in Section 11.03 of the *MBCA*. The entity interest exchange anticipated by Article 3 permits a business combination between one or more domestic unincorporated entities or between a domestic unincorporated entity and a domestic incorporated or foreign entity of any type. The effect of the entity interest exchange is that: (1) the separate existence of one or more of the exchanging entities does not cease; and (2) the acquiring entity acquires the ownership interests of one or more of the exchanging entities and, as a result of the exchange, becomes the controlling entity. This same result, that of two or more independent entities, may be accomplished by a reverse triangular merger wherein a new third entity is formed to effectuate the combination while simultaneously preserving the independent existence of the principal parties. The entity interest exchange provides *a direct method* to achieve the *indirect method* of a triangular merger.

Section 301 - Section 301 is intended to make applicable any appraisal rights that may attach by virtue of the organic law of the entities to the entity interest exchange. It is also intended to enable any appropriate procedure for terminating or abandoning an entity interest exchange after it has been approved by the appropriate interest holders but prior to the effectuation of the entity interest exchange.

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

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

(permitting an entity interest exchange).

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

Section 301(a) - Section 301(a) provides for an entity interest exchange between a domestic unincorporated entity and a domestic incorporated entity or a foreign entity of any type. Section 301(a) also enables an entity interest exchange among domestic unincorporated entities of the same or different types.

Section 301(b) - Section 301(b), as presently drafted, allows a domestic incorporated entity to "elect" to be governed by this [Act] to effectuate an entity interest exchange with a domestic unincorporated entity. This section could be redrafted to permit: (1) an entity interest exchange between domestic incorporated entities where the incorporated entity's organic laws do not provide for an exchange; or (2) an entity interest exchange between a domestic incorporated entity and a foreign entity of any type - again where the laws governing the domestic incorporated entity do not enable the transaction. By broadening the default rule beyond purely domestic transactions, the section necessarily assumes that silence in the domestic corporate laws does not mean prohibition but rather neutrality or failure to consider the transaction.

Section 301(c) - As with section 201(c), section 301(c) could be drafted to permit a foreign entity whose organic laws do not *enable* an entity interest exchange with an entity governed by this [Act] to accomplish the exchange by exchanging interests with an entity whose [State legislature] had adopted this [Act] - this [Act] thus becoming the "junction box" for the transaction.. By so doing, the foreign entity remains an entity in good standing in its jurisdiction as does the domestic entity in its jurisdiction. To broaden the scope in this manner, section 301(c) would have to delete the language of section 301(c)(1).

Section 301(d) - Since the entity interest exchange is fairly new, section 301(d) provides a transitional rule that is intended to protect the rights of certain contract claimants. In particular, section 301(d) allows creditor provisions that were negotiated in anticipation of a *merger or conversion* or *a merger only* to be deemed to apply to an entity interest exchange until such time as the contractual provisions are subsequently amended by the parties. The transitional rule could be crafted to be triggered upon a *merger only or upon any similar transaction permitted in the adopting jurisdiction,* thus protecting creditors in jurisdictions that have yet to anticipate *cross-form* transactions.

SECTION 302. PLAN OF ENTITY INTEREST EXCHANGE.

(a) Subject to section 104(b) and 301(b), a domestic entity may be a party to an entity interest exchange by adopting and approving a plan of entity interest exchange.

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

(1) the name, jurisdiction and type of organization of each exchanging entity whose interests will be exchanged and the name, jurisdiction and type of organization of the acquiring entity that will acquire those interests;

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

(3) the manner and basis of exchanging or converting one or more classes or series of entity interests of the exchanging entity into entity interests, securities, obligations, rights to acquire entity interests or securities, cash or other property, or any combination of the foregoing;

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

(5) the future effective date or time (which shall be a date or time certain) of the entity interest exchange if it is not to be effective upon the filing of the statement of entity interest exchange;

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

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

Reporter's Notes

Section 302 (a) - Section 302(a) states the general intent that for this [Article] to apply, one of the constituent entities should be a domestic unincorporated entity. Subject to section 104(b), however, an "electing" domestic incorporated entity could also opt into this [Act] in order to accomplish an entity interest exchange. Depending upon the Committee's decision regarding scope, that domestic incorporated entity may be limited to transactions with domestic unincorporated entities.

Section 302 (b)(3) - Section 302 (b)(3) poses the same "reshuffling" issue as section 202(b)(3). One difference in section 302 (b)(3) is that the two entities to the exchange will remain after the transaction whereas section 202 anticipates the possible non-survival of one of the parties to a merger. In any event, section 302(b)(3) ostensibly permits the non-uniform elimination or modification of ownership rights in an entity interest exchange.

Query: Should the plan be in record form?

SECTION 303. ACTION ON PLAN OF ENTITY INTEREST EXCHANGE.

(a) Subject to the provisions of Section 303 (c) and (d), a plan of entity interest exchange for an exchanging or acquiring domestic unincorporated entity shall be approved by each such acquiring or exchanging entity according to a provision for an entity interest exchange in the entity's private organic documents or, if there is no applicable provision for an entity interest exchange in the private organic documents, then by [the number specified to amend the entity's private organic documents or, if there is no designated number specified for amendment, then by] all the owners of the acquiring or exchanging domestic unincorporated entity.

(b) Subject to sections 303(c) and (d):

(1) a plan of entity interest exchange for an exchanging or acquiring domestic incorporated entity or a foreign entity of any type shall be approved according to a provision for an entity interest exchange in the entity's private organic documents or, if there is

no applicable provision for an entity interest exchange in the private organic documents, [then by the number specified to amend the entity's private organic documents], or, if there is no designated requirement for amendment, then in accordance with the organic laws of the entity; or

(2) if the organic laws of a domestic corporate entity are silent regarding an entity interest exchange, then the plan of entity interest exchange shall be approved by the [number specified for amendment of the domestic incorporated entity's certificate of incorporation or, if there is no designated requirement for amendment, then by all the owners of the domestic incorporated entity.]

(c) If a person will have owner's liability with respect to an acquiring or exchanging entity, approval and amendment of a plan of entity interest exchange are ineffective without the written consent of that person, [unless:

(1) the private organic documents of the entity provide for the approval of the entity interest exchange with consent of less than all owners; and

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

(d) A person does not give consent required by section 303 (c) merely by assenting to a provision in the private organic documents which permits the entity to be modified or converted with the consent of less than all owners.]

(e) Subject to sections 303 (c) and (d) and any applicable organic law of the acquiring or exchanging domestic entities, a plan of entity interest exchange may be terminated or amended:

(1) as provided in the plan; and

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

Reporter's Notes

Section 303 (a) - Section 303 (a) states the general rule that a domestic unincorporated entity may be an acquiring or exchanging entity in an entity interest exchange. As such, section 303 (a) *will become the substantive law which enables this transaction for domestic unincorporated entities*. Section 303 (a), in this regard, is altering present unincorporated entity law since no uniform unincorporated act currently allows for an entity interest exchange. In addition, section 303 (a) permits a domestic unincorporated entity to be a party to an entity interest exchange with another domestic incorporated entity or a foreign entity of any type. Section 303 (a) does not enable an entity interest exchange between two domestic incorporated entities unless the default rule is interpreted to allow "electing" domestic corporations to accomplish this goal. To reach this conclusion, section 301(b) would have to be redrafted to interpret the silence of the domestic corporate law to not prohibit this transaction. (Anecdotally, such a result could very well be incorrect. For example, in Delaware the corporate law council has considered and rejected a share exchange. The alternative entity section of the bar, on the other hand, is giving some consideration to permitting an entity interest exchange).

Another alternative for Section 303(a) is to create a default rule that would allow a domestic incorporated entity whose organic laws do not provide for an entity interest exchange [but do provide for a *merger between domestic entities of different types*] to elect to be governed by this [Act] where the other party to the exchange is a domestic unincorporated entity. (Again, for informational purposes only, this result would undermine the intent of the Delaware corporate law council). Query whether this section should be intended to enable an entity interest exchange between a domestic incorporated entity and a foreign entity of any type?

Finally, the Committee may wish to adopt a default rule that would enable transactions between domestic unincorporated entities and *foreign entities* whose organic laws do not provide for the cross-form exchange within its jurisdiction. As noted above, this result can only be accomplished by revising the language of section 301(b).

Section 303 (a), like its counterpart in section 203 (a), provides as series of alternative approval tests. These alternative tests defer to the parties' *specific intent* first, their *general intent* second, and finally to *unanimity.*

Section 303 (b)(1) - Section 303 (b)(1) presently defers to the parties' *specific intent* first, their *general intent* second and thereafter to the *default rule* set forth in the organic laws governing the entity. In this sense, section 303 (a) and (b)(1) only differ as to the final default rule: (1) section 303 (a) provides that the *substantive default rule for domestic unincorporated entities is unanimity;* and (2) section 303 (b)(1) defers to whatever default rule is provided for in

the organic laws of the affected domestic incorporated or foreign entity.

Section 303 (b)(2) - Section 303(b)(2) needs Committee direction. First, the Committee could decide that if the organic laws of a domestic incorporated entity are silent as to an entity interest exchange, section 303 (b)(2) can be drafted to fill in that gap in the entity interest exchange law of the domestic incorporated entity but only as to transactions between domestic entities. On the other hand, this Committee could decide to create a broader default rule that would *enable* an entity interest exchange between a *domestic incorporated entity and another domestic unincorporated entity or a foreign entity of any type* if the organic laws of the incorporated entity permit same- or cross-form mergers. In that case, section 303 (b)(2) could be drafted to provide that if a jurisdiction that presently permits a *merger* between *domestic or foreign incorporated and unincorporated entities* could, by adoption of this [Act], *enable* an *entity interest exchange between the same domestic and foreign incorporated and unincorporated entities.* Section 303 (b)(2) would thereafter state the appropriate alternatives for approval. In the alternative, the default rule could be drafted to "tie" to approvals for *mergers.* Using this alternative, the present unanimity requirement would likely be replaced by a majority vote.

Sections 303 (c) and (d) - Sections 303 (c) and (d) adopt the same approach as sections 203 (c) and (d) regarding the incurrence of owner's liability as a result of an entity interest exchange. These sections prohibit an entity interest exchange without the written consent of any person who will incur owners' liability upon the effectiveness of the exchange.

Section 303 (e) - Section 303 (e) permits termination or abandonment only according to a bargained-for provision to that effect in a plan of exchange and only with the same consent as was necessary to approve the transaction. As with section 203 (c), and the accompanying Reporter's Notes, the Committee may wish to expand the circumstances under which termination or abandonment can occur. Such an expansion could include either: (1) managerial decision-making where circumstances have unpredictably changed since approval of the plan and gaining owner approval would delay, to the detriment of an affected entity, immediate termination or abandonment.

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

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

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

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

(2) the future effective date or time (which shall be a date or time certain) of the entity interest exchange if it is not to be effective upon the filing of the statement of entity interest exchange;

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

(4) any amendments to the public organic document of a party to the entity interest exchange that are provided for in the plan of exchange;

(5) any information required by the organic law of the parties to the entity interest exchange; and

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

(c) An entity interest exchange becomes effective under this [Article] upon:

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

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

Reporter's Notes

Section 304 - Section 304 does not require that the plan of entity interest exchange be filed of public record. At its meeting in Oklahoma City, the Committee expressed the desire that a plan of entity interest exchange could be used as a substitute for the statement of entity interest exchange so long as the plan reflected all the information required to be contained in the statement under section 304. It is the intent of section 304 that a plan could serve as the appropriate public filing and that the filing of the plan would have the same legal effect as the filing of the statement of entity interest exchange.

The information required to be filed in the statement under section 304 is intentionally less burdensome than that required for a merger under section 204. The present draft adopts a minimalist filing philosophy because: (1) a filing as to the *transaction* will be required by any domestic unincorporated acquiring or exchanging entity; (2) both the acquiring and the exchanging entity *remain in existence* after the exchange (although arguably in a reorganized or recapitalized form); and (3) the terms and conditions of the exchange or any resulting restructuring or recapitalization will have been approved by the owners under section 303. Section 304 thus omits a reference to *terms and conditions* because owner approval has already been met (assuming, also, that where approval is defective, the owners have recourse under contract or alternative entity law). A filing as to the *transaction* allows at least some minimal protection for secured lenders who have loaned against collateral that may have "shifted" in some manner in an exchange which results in a recapitalization or restructuring. Also, in light of new Article 9, it seemed advisable to provide for a *notice* filing regarding the *transaction* and to thereafter leave the secured lenders to police their collateral and a possible new debtor accordingly. [Melissa Wangeman again provided great assistance by soliciting the members of IACA regarding their procedures or views as to filings for exchanges. It is the general consensus of the responses we received that some form of filing is useful and that it should probably be less burdensome than that for the merger.]

The prior provision regarding inclusion of a statement that the "plan of entity interest exchange was on file at a place of business" of the acquiring entity did not seem appropriate for two reasons: (1) an owner who has approved the transaction does not need this information to protect an ownership interest; and (2) arguably a creditor would not have standing to use this provision to demand access to the plan.

The Committee may wish to consider whether *any filing* is necessary. There is a less-than-unanimous view that an exchange is a private matter and thus not a proper subject for public filings.

Section 304(b)(4) - Section 304(b)(4) is drafted to reflect certain differences in the organic laws of incorporated and unincorporated entities. For example, where an entity interest exchange is used for the purpose of recapitalizing an unincorporated entity, alternative entity law does not require an amendment to a public organic document in order to protect creditors. Corporate law, conversely, would require an amendment to a corporation's certificate of incorporation where authorized capital has been increased or otherwise modified. Therefore, if an entity interest

exchange is between only unincorporated entities and the private organic documents of the exchanging and acquiring entities permit the transaction, an argument could be made that no filing is necessary. Conversely, if the exchange is between an unincorporated entity and an incorporated organization, the filing for the corporate entity could be effected simply by an amendment to the corporation's certificate of incorporation rather than a filing of an entity interest exchange. At present, the draft adopts a minimalist compromise.

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

SECTION 305. EFFECT OF ENTITY INTEREST EXCHANGE.

(a) When an entity interest exchange becomes effective, the interests of each entity that are to be exchanged for entity interests, securities, obligations, rights to acquire entity interests or securities, cash, or other property, or any combination of the foregoing, are exchanged, converted or canceled as provided in the plan of entity interest exchange. The former holders of those entity interests shall thereafter be entitled only to the rights provided to them in the plan of entity interest exchange or to any rights they may have under the organic law governing the entities to the interest exchange. The acquiring entity shall become the holder of the entity interests in the exchanging entity as stated in the plan of entity interest exchange. The organic documents of the parties to the entity interest exchange shall be amended to the extent provided in the plan of entity interest exchange or as provided under the organic law governing the entities to the exchange.

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

obligations and liabilities that occurred after the effective date of the statement of entity interest exchange.

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

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

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

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

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

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

deemed to:

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

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

Reporter's Notes

Section 305(a) - Section 305(a) has been redrafted since the meeting of March, 2001. At present, section 305(a) attempts to make clear four points - that after the entity interest exchange becomes effective: (1) the *entity interests* of the *exchanging entity* are exchanged, converted or canceled as provided in the plan; (2) the *only rights* of the *former holders* of the exchanging entity are those received as consideration for the exchange, conversion or cancellation; (3) the *acquiring entity* becomes the *owner* of the exchanging entity's ownership interests (and thus the controlling entity); and (4) the *organic documents* of the parties *are amended* by the entity interest filing, thus obviating the need for repetitive filings (*i.e.,* a filing as to the *entity interest exchange* and another filing to reflect *amendments to public organic documents* as required by the laws governing the respective entities).

Section 305(b) - Section 305(b) states the rule for *future owner's liability*. Section 305(b) provides that an *owner in an acquiring entity* shall have *personal liability only for the debts and obligations of the acquiring entity* that arise *after the effective date* of the exchange. This section parallels analogous provisions in Articles 2 (mergers), 4 (conversions) and 5 (domestications).

Section 305(c) - Section 305(c) states the rule for past owner's liability. Section 305(c) is drafted in four parts: (1) an *owner in an exchanging entity* who had personal liability for the debts and obligations of the exchanging entity under the entity's organic law *is not discharged* from those debts and obligations *if the debts arose before the effective date* of the exchange; (2) an *owner in an exchanging entity shall not have owner's liability* for the debts and obligation of the *acquiring entity* if those *debts arose after the effective date* of the exchange; (3) the *organic laws* or the *exchanging entity continue to apply* for any *past owner's liability that is preserved* under subsection (1); and (4) the *organic laws of the exchanging entity continue to apply* regarding any *contribution rights* among owners that were *preserved under subsection (1)*.

SECTION 306. CONTRACTUAL APPRAISAL RIGHTS.

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

Reporter's Notes

Section 306 - Section 306, like its counterpart § 207, is not intended to create an "appraisal" or "buyout" right. Instead, it is intended to create a *statutory basis* for recognizing contractual appraisal rights. At its meeting in Oklahoma City, it was noted by the Chair of the Committee that a court would logically enforce any contractual right negotiated during or simultaneous with the approval of an entity interest exchange. While the Chair is obviously correct, inclusion of section 307 provides a statutory basis for acknowledging that right - a difference which is critical in some jurisdictions. For example, as state in the Reporter's Notes to section 207, in Delaware, the Court of Chancery has jurisdiction to hear all matters involving corporations and alternative entities. On the other hand, the Superior Court of Delaware has jurisdiction to decide all contractual disputes. Hence, without an analog of section 306, in Delaware, the Superior Court would hear disputes arising from the contract creating appraisal rights and the Court of Chancery would determine all other matters regarding the entity interest exchange.

Also, as stated in the Reporter's Notes to section 207, the Committee may wish to consider use of different terminology as to this "exit" right. Presently, the most recent provisions of the *MBCA* (and the *Model Entity Transactions Act* by reference) provide "appraisal" rights for owners of incorporated entities for all transactions except domestication.

[ARTICLE] 4

CONVERSION

SECTION 401. CONVERSION

(a) A domestic unincorporated entity may become a different type of domestic entity. The laws of this [State] govern the effect of converting an entity organized in this [State].

(b) A domestic unincorporated entity may become a foreign entity of a different type if the organic laws of the foreign jurisdiction permit the domestic entity to become an entity in that jurisdiction. The laws of the foreign jurisdiction shall govern the effect of converting to an entity organized in that jurisdiction.

(c) Subject to section 104(b), a domestic incorporated entity may become a domestic unincorporated entity if the organic laws governing the domestic incorporated entity are silent regarding the conversion and the [entity] elects to be governed by this [Article]. The laws of this [State] govern the effect of converting a domestic incorporated entity organized in this [State] which elects to convert pursuant to this [Article].

(d) Subject to section 104(b), a domestic incorporated entity may become a foreign entity of a different type if the domestic incorporated entity elects to be governed by this [Article] and the organic laws of the foreign jurisdiction permit the domestic incorporated entity to become an entity in that jurisdiction. The laws of the foreign jurisdiction shall govern the effect of converting to an entity organized in that jurisdiction.

(e) A foreign entity may become a domestic entity of a different type only if:

(1) this type of conversion is permitted by the organic laws of the foreign entity;

(2) the conversion is not prohibited by any law of the jurisdiction that enacted those organic laws; and

(3) in effecting the conversion, the foreign entity complies with the requirements of its organic laws. The laws of the foreign jurisdiction govern the effect of converting to an entity organized in the foreign jurisdiction.

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

Reporter's Notes

The conversion contemplated by Article 4 involves the transformation of one form of business into a different form of business. The conversion, like the merger of Article 2, transfers all the property, rights, privileges, title, debts, obligations, liabilities and duties of the converting entity to the converted entity by operation of law. Unlike a merger, however, a conversion involves a *single entity* which, after the conversion, is considered to be the *same entity* as before the conversion. The conversion, therefore, provides a *direct method* to accomplish what before required the creation of *two entities* followed by a merger of the entities. Because a conversion involves only a change of form, it should not constitute a "sale" or "conveyance" under state law or applicable contract provisions.

The conversion is a relatively recent transaction. For example, the first appearance of a conversion in uniform unincorporated law occurred in 1994 with *RUPA*. It was followed in 1995 with *ULLCA* and in 2001 with *Re-RULPA (RULPA 1976, with 1985 amendments,* is silent as to conversions; however, due to linkage, *RULPA* could be interpreted to permit the same conversions anticipated by *RUPA*) . The conversion provisions of *RUPA* are limited to conversions by general partnerships to limited partnerships and vice versa. This Act, therefore, greatly expands the scope of the conversion provisions of *RUPA*. *See* §§ 902-904.

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

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

With regard to incorporated entities, the most recent version of the *MBCA*, for the first time, permits cross-form conversions so long as one party to the conversion is a domestic

corporation. These provisions were published in the October version of the *Business Lawyer* (2001).

Section 401(a) - Section 401(a) states the substantive rule for conversions between domestic entities where one party to the transaction is a domestic unincorporated entity. Section 401(a) would, for example, permit a conversion from a general partnership form to a limited partnership and vice versa. Section 401(a) would also permit a conversion from an LLC to a general or limited partnership. Section 401(a) would also enable a conversion between any type of domestic unincorporated entity and a domestic corporation (the so-called "cross-form" conversion). The laws of the [State] adopting this [Act] would govern the effect of the conversion.

Section 401(b) - Section 401(b) enables a conversion of a domestic unincorporated entity to a foreign entity of a different type so long as the organic laws governing the foreign entity permit the conversion. For example, a domestic LLC could convert to a foreign partnership, limited partnership or corporation pursuant to section 401(b). Section 401(b) would not enable a conversion of a domestic LLC to a foreign LLC - such a transaction would be governed by the domestication provisions of Article 5. The laws of the foreign jurisdiction would govern the effect of conversion under 401(b).

Section 401(c) - Section 401(c) states the default rule for conversions between domestic incorporated and unincorporated entities. Section 401(c) allows a domestic incorporated entity to use this provision to effect a conversion with a domestic unincorporated entity. Section 401(c) is only triggered if the organic laws governing the incorporated entity are silent regarding domestic cross-form conversions and the domestic incorporated entity elects to use this [Article] to achieve the conversion..

Section 401(d) - Section 401(d) reflects a broadened default rule. As stated, section 401(d) allows a *domestic incorporated entity* to "elect" to accomplish a cross-form conversion to a *foreign entity* if the organic laws governing the domestic incorporated entity neither provide for nor prohibit the conversion. The laws of the foreign jurisdiction would govern the effect of this conversion.

Section 401(e) - Section 401(e) states the substantive rule that a foreign entity may use this [Act] to effect a conversion with a domestic unincorporated entity. A domestic incorporated entity could accomplish the same transaction with this [Act] if there is a "gap" in the organic laws of the domestic entity and the entity "elects" to be governed by this [Act]. Section 401(e) assumes that the organic laws governing the foreign entity permit this transaction and that the entity has complied with its laws. The Committee may wish to broaden section 401(e) to allow a conversion by a foreign entity with a domestic entity of a different type so long as the organic laws of the foreign entity *do not prohibit the transaction.* Under the present draft, a further broadening of scope would permit a foreign entity converting to a domestic unincorporated entity or an "electing" domestic corporate entity.

Section 401(f) - Section 401(f) states a transitional rule since the cross-form conversion is a relatively new transaction which few jurisdictions have addressed. Section 401(f) is intended to protect creditors who have drafted "due on sale" "merger" protections by triggering the same "due on sale" clauses by a conversion. Because cross-form conversions are becoming better known in the marketplace, the Committee may feel section 401(f) to be paternalistic and unnecessary.

SECTION 402. PLAN OF CONVERSION.

(a) Subject to sections 104(b) and 401, a domestic entity may participate in a conversion by adopting and approving a plan of conversion.

(b) A plan of conversion shall state:

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

(3) the terms and conditions of the conversion;

(4) the manner and basis of converting one or more classes or series of entity interests of the converting entity into entity interests, securities, obligations, rights to acquire entity interests or securities, cash, other property or any combination of the foregoing;

(5) that the conversion has been approved and executed in accordance with the organic laws of the converting entity;

(6) the future effective date or time (which shall be a date or time certain) of the conversion;

(7) the full text, as it will be in effect immediately after consummation of the conversion, of:

(A) the public organic document of the converted entity; or

(B) if the converted entity will be a nonfiling entity, any private

organic document; and

(8) any other provision relating to the conversion that the parties may desire.

Reporter's Notes

Sections 403(a) - Section 403(a) states the substantive rule governing domestic unincorporated entities pertaining to conversions. Section 403(a) provides for a conversion between a domestic unincorporated entity and different form of domestic unincorporated entity. Section 403(a) also provides for a conversion from a domestic unincorporated to a domestic incorporated entity. Likewise, section 403(a) permits an "electing" domestic incorporated entity to accomplish the same transactions as granted to domestic unincorporated entities.

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

Section 403(b)(4) - Section 403(b)(4), like its counterparts in the merger and entity interest exchange sections, appears to enable a restructuring or "shuffling" of entity interests upon a conversion. As the Reporter's Notes to the analogous sections indicate, the Committee may wish to speak to this issue directly.

Query: Should the plan be in record form?

SECTION 403. APPROVAL ON PLAN OF CONVERSION.

(a) Subject to sections 403(c) and (d), a plan of conversion for a domestic unincorporated entity shall be approved according to a provision for conversion in the entity's private organic documents or, there is no applicable provision in the private organic documents, then by [the number specified to amend the entity's private organic documents or, if there is no designated provision for amendment, then by] all owners of the converting entity.]

(b) Subject to sections 403(c) and (d):

(1) a plan of conversion for a domestic incorporated entity or a foreign entity of any type shall be approved according to a provision for conversion in the entity's private organic documents or, if there is no applicable provision in the private organic documents, [then by the number specified to amend the entity's private organic documents] or, if there is no designated requirement for amendment, then in accordance with the organic laws of the entity; or

(2) if the organic laws of a domestic incorporated entity provide for a merger with a domestic unincorporated entity [or a foreign entity] but are silent on conversion, then the plan of conversion shall be approved by [the number designated for amendment of the incorporated entity's certificate of incorporation or, if there is no designated requirement for amendment, then by] all the owners of the domestic incorporated entity.]

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

(1) the private organic documents of the converting entity provide for the approval of the conversion with consent of less than all owners; and

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

(d) A person does not give the assent required by subsection (c) merely by assenting to a provision in the private organic documents which permit the entity to be modified or converted with the consent of less than all owners.]

(e) Subject to section 403(c) and (d) and any applicable organic law of the converting entity, a plan of conversion may be terminated or amended:

(1) as provided in the plan; and

(2) except as prohibited by the plan, by the same consent as was required to approved the plan.

Reporter's Notes

Section 403(a) - Section 403(a) states the substantive rule for approval of a conversion by a domestic unincorporated entity. Section 403(a) thus repeals all existing approval provisions for conversions in *RUPA*, *Re-RULPA* and *ULLCA* and replaces them with section 403(a). According to section 403(a), approval for a conversion, subject only to the rules for assumption of owner's liability, is alternatively: (1) the number specified for conversion in the entity's private organic documents; (2) if no number is designated for conversion, then the number specified for amendment of the entity's private organic documents; and (3) if there is no stated number for amendment, then by all the owners of the converting entity. This hierarchy of approvals defers *first* to the converting entity's *specific intent* regarding conversions; *second* to the entity's *general intent* for modification of the organization's private organic documents; and *finally* articulate a *default rule* of unanimity. This hierarchy of approvals mirrors that of mergers and entity interest exchanges.

Section 403(b)(1) - Section 403(b)(1) states an approval rule of deference. Under section 403(b)(1), therefore, a plan of conversion for a "non-electing" domestic incorporated entity and a foreign entity of any type shall be approved: (1) first, according to a *specific provision* for conversion in the entity's private organic documents; (2) second, according to a *general provision* set out in the entity's private organic documents relating to amendment; and (3) finally, if there is no designated number specified for amendment, then, by default, according to the organic laws governing the converting entity.

Section 403(b)(2) - Section 403(b)(2) sets out a substantive rule of approval for an "electing" domestic incorporated entity. Section 403(b)(2) provides for two descending approval alternatives: (1) first, according to the number designated for amendment in the entity's certificate of incorporation; and (2) second, by all the owners of the domestic incorporated entity. As with parallel approval provisions for "electing" domestic incorporated entities, the present "default rule" could link to approval provisions for *mergers* before defaulting to unanimity. In this case, the default rule would likely be a simple majority vote of the owners of the incorporated entity.

Section 403(c) - Section 403(c) provides a general exception for approvals of conversions. As such, section 403(c) requires written consent of all persons who will have owner's liability in a converted entity. The specific exception to 403(c) allows imposition of owner's liability in a converted entity if an owner in a converting entity has assented to a provision for conversion with less than unanimous consent.

Section 403(d) - Section 403(d) limits the consent requirement of section 403(c) to assent to a *specific provision for conversion with less than unanimous consent*. Consequently, section 403(c) *could not be satisfied by assent to a provision allowing for amendment of the converted entity's organic documents with less than unanimous consent*.

Section 403(e) - Section 403(e) follows analogous termination and abandonment provisions in the merger and entity interest exchange sections. As stated in the prior Reporter's Notes on those provisions, the Committee may wish to consider broadening the termination and abandonment rules to permit "managerial" action or action notwithstanding the absence of a provision for termination or abandonment in the plan. Broadening the rule would allow for flexibility upon the occurrence of an unforeseen change of circumstance. Arguably, any undue harm to owners of the converting entity resulting from increased flexibility could be redressed by a breach of fiduciary duty claim or assertion of other legal or equitable remedies.

SECTION 404. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

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

(b) The statement of conversion shall include:

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

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

(3) a statement that the conversion was approved and executed as required by the entity's organic law;

(4) if the converted entity is a domestic filing entity, either contain all of the information required to be set forth in the converted entity's public organic documents or have attached a copy of the entity's public organic documents;

(5) if the converted entity is a domestic nonfiling entity, the street address

of its executive office or principal place of business; and

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

(A) if it is a qualified foreign entity, its registered agent and registered office; or

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

(c) A statement of conversion becomes effective under this [Article] upon:

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

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

Reporter's Notes

Section 404 - Section 404 states the substantive filing requirements for converting domestic unincorporated entities and "electing" domestic incorporated entities. The specific filing requirements are stated in section 404(b). These requirements generally mirror those of the merger anticipated in Article 2.

Section 404(b)(4) - Section 404(b)(4) allows a converted entity that is a domestic filing entity to either: (1) contain all information to be required to organize the converted entity in the statement of conversion; or (2) attach a copy of the domestic converted entity's public organic documents to the conversion filing. The intent of section 404(b)(4) is efficiency in filings as well as public notice regarding the transaction.

Section 404(b)(5) - Section 404(b)(5) requires a converted entity that is a domestic nonfiling entity to provide the *street address* of the converted entity's executive office or principal place of business. A post office box would not satisfy section 404(b)(5). The intent of section 404(b)(5) is to provide notice of the place at which the converted entity may be found for all

purposes, including that of service of process. The executive office or principal place of business is not required to be located within the converted entity's jurisdiction of formation.

Section 404(b)(6) - Section 404(b)(6) imposes on converted foreign entities a filing requirement that includes information of either: (1) a registered agent and registered office for a qualified foreign entity; or (2) a *street address* of its executive office or principal place of business for a nonqualified foreign entity. As with section 404(b)(5), a post office box would not satisfy the policy or intent of the section. Section 404(b)(6) provides notice of a place at which the foreign entity may be found for all purposes, including service of process.

Section 404(c) - Section 404(c) sets out the general rule that the conversion becomes effective upon the later of filing or a date or time specified in the statement of conversion. Section 404(c)(1) states the intent that "filing" for purpose of determining the effectiveness of the conversion is to be determined by the *means normally used for filing* within each [jurisdiction] adopting this [Act].

SECTION 405. EFFECT OF CONVERSION.

(a) When a conversion under this [Article] in which the converted entity is a domestic entity becomes effective:

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

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

(3) the converted entity's existence shall be deemed to have commenced on the date the converting entity commenced its existence in the jurisdiction in which the converting entity was first created, formed, incorporated or otherwise came into being;

(4) any action or proceeding pending against the converting entity shall be continued against the converted entity as if the conversion had not occurred;

(5) all rights, privileges and powers of the converting entity, and all

property, real, personal and mixed, and all debts due to the converting entity, shall vest in the converted entity and the title to any real property vested by deed or otherwise in the converting entity shall not revert or be in any way impaired by reason of this [Article];

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

(7) the entity interests of the converting entity are reclassified into entity interests, securities, obligations, rights to acquire entity interests or securities, cash or other property in accordance with the plan of conversion; and the owners of the entity interests of the converting entity are entitled only to the rights provided in the plan of conversion or to any other rights they may have under the organic law of the converting entity;

(8) in the case of a converted entity that is a filing entity, the statement of conversion, or the public organic document attached to the statement of conversion, constitutes the public organic document of the converted entity; and

(9) in the case of a converted entity that is a nonfiling entity, the private organic document provided for in the plan of conversion constitutes the private organic document of the converted entity.

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

(1) appoint the [Secretary of State] as its agent for service of process in any proceeding to enforce the rights of owners who exercise rights in connection with the conversion

pursuant to the converting entity's organic law; and

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

(c) An owner who becomes subject to owner's liability for some or all of the debts, obligations or liabilities of a converted entity shall be personally liable only for those debts, obligations or liabilities of the converted entity that arise after the effective date of the statement of conversion.

(d) The owner's liability of an owner in a converted entity for the debts, obligations and liabilities of the converting entity shall be as follows:

(1) the conversion does not discharge any owner's liability under the organic law of the converting entity to the extent such owner's liability arose before the effective date of the statement of conversion;

(2) the owner shall not have owner's liability under the organic law of the converting entity for any debt, obligation or liability of the converted entity that arises after the effective date of the statement of conversion;

(3) the provision of the organic laws of the converting entity shall continue to apply to the collection or discharge of any owner's liability preserved by subsection (1) as if the conversion had not occurred and the converted entity were still the converting entity; and

(4) an owner shall have whatever rights of contribution from other owners as are provided by the organic law of the converting entity with respect to any owner's liability preserved by subsection (1) as if the conversion had not occurred and the converted entity were still the converting entity.

Reporter's Notes

Section 405(a) - Section 405(a) governs the *legal effect of a conversion where the converted entity is a domestic entity.* For example, section 405(a) regulates the effect of a conversion of a foreign entity to a domestic entity or the conversion of a domestic entity of one type to a domestic entity of another type.

Section 405(a) provides an exhaustive list of the effect of a conversion where the converted entity is a domestic entity. First, under section 405(a), the converting entity ceases to exist and the public organic documents under which the converting entity operated are no longer effective. Second, the converted entity becomes subject to the organic laws of the jurisdiction of conversion and the converted entity is deemed to have come into existence at the time the converting entity was formed, created or otherwise cam into being. Third, all actions or proceedings, rights and privileges, and debts and obligations of the converting entity vest in the converted entity unimpaired as if the conversion had not occurred. Fourth, all owner interests in the converting entity shall be reclassified as provided in the plan of conversion and all rights of the owners in the converted entity become effective as stated in the plan. Finally, sections 405(a)(8) and (9) provide the filing effect of the statement of conversion for a converted filing and nonfiling entity.

Section 405(b) - Section 405(b) states the rule governing the *legal effect of a conversion where the converted entity is a foreign entity.* According to section 405(b), a foreign converted entity: (1) is deemed to appoint the [Secretary of State] as its agent for service of process to enforce any rights of owners in the domestic converting entity; and (2) agrees to pay any amount owed to the owners of the converted entity arising either in contract or from the organic laws of the converting entity. Section 405(b) is intended to protect creditors where the converting entity can no longer be found in the domestic jurisdiction for purpose of service of process. Likewise, section 405(b) protects owners in the domestic converting entity who have not received payment of whatever consideration was owed to them in the conversion. The converted foreign entity in the latter circumstance not only agrees to pay those claims but also is deemed to appoint the [Secretary of State] as its agent for service of process.

Section 405(c) - Section 405(c) provides the rule for *future owner's liability*. Section 405(c) states the general rule that an *owner in a converted entity* shall be personally liable only for the debts and obligations of the *converted entity* that *arise after the effective date* of the conversion.

Section 405(d) - Section 405(d) provides the rule for *past owner's liability.* Section 405(d) has four parts: (1) an *owner in a converting entity* who had personal liability for the debts of the converting entity under the entity's organic law *is not discharged* from those debts if the *debts arose before the effective date* of the conversion; (2) an *owner in a converting entity* shall

not have owner's liability for the *debts of the converted entity* if those *debts arose after the effective date* of the conversion; (3) the *organic laws of the converting entity continue* to apply for any past owner's liability preserved under section 405(d)(1)(past personal liability regarding the converting entity); and (4) the *organic laws of the converting entity* relative to *rights of contribution* among owners in the converting entity continue to apply for owner's liabilities preserved under section 405(d)(1)(contribution rights among owners in a converting entity).

SECTION 406. CONTRACTUAL APPRAISAL RIGHTS.

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

Reporter's Notes

Section 406 - Section 406 is not intended to create any "appraisal" right for the owners of a domestic converting entity. Rather, section 406 grants statutory recognition to "appraisal" rights that are negotiated, created and enforced in contract. As explained in the Reporter's Notes in previous sections relating to contractual appraisal rights, some jurisdictions must provide a statutory basis for the right in order to vest jurisdiction in a particular court.

As noted before, a jurisdiction adopting this [Act] may wish to consider re-labeling the "appraisal" right of 406 so as to de-link any "negative" corporate precedent.

ARTICLE [5]

DOMESTICATION

SECTION 501. DOMESTICATION.

(a) A domestic unincorporated entity may become a foreign entity of the same type and a foreign unincorporated entity may become a domestic unincorporated entity of the same type only if:

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

(2) the domestication is not prohibited by any law of the jurisdiction that enacted those organic laws; and

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

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

Reporter's Notes

Article 5 authorizes a foreign unincorporated entity to become a domestic unincorporated entity of the same type and also authorizes a domestic unincorporated entity to become a foreign unincorporated entity of the same type. Article 5 governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this [Act]. The organic laws of a foreign jurisdiction, and not Article 5, would govern the legal effect of a domestic unincorporated entity that domesticates in another jurisdiction. In the latter scenario, Article 5 serves as to statutorily *enable* a domestic unincorporated entity to domesticate to a foreign jurisdiction. Article 5 does not create a right in the domestic entity to be *received* in the foreign jurisdiction. Section 501 has *not been drafted* to allow a foreign incorporated entity to become a domestic corporation even where the organic laws of the foreign jurisdiction permit the domestication and the organic laws governing domestic corporations are silent regarding the transaction. The latter case allows a "re-incorporation" under this Article - a result which may well exceed the broadest default scope the Committee may intend. The Reporter needs Committee direction on this issue.

The domestication anticipated by Article 5 is, in various alternative entity statutes, defined as a conversion without a change in the type of the organization. At its March, 2001 meeting, the Committee decided to create separate provisions for a conversion (Article 4 -same entity with a change of form and possibly change of jurisdiction) and a domestication (Article 5 - same entity with a change in jurisdiction but not form).

The domestication authorized by Article 5 differs from a conversion in that a domestication requires that the domesticating entity be the same as the domesticated entity. In a conversion, the converting entity must change its form. A domestication likewise differs from a merger because a merger requires two existing entities - a domestication and conversion involve the same entity. As with a conversion, all rights and privileges, debts and liabilities, actions or proceedings of a domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale, transfer, assignment or conveyance and does not give rise to a claim of reverter or impairment of title.

Section 501(b) - Section 501(b) states a transitional rule since many jurisdictions have yet to address alternative entity domestication. Section 501(b) is intended to protect creditors who have negotiated "due on sale" clauses triggered, generally, by a merger. Under section 501(b), the same "due on sale" clause would be triggered by a domestication until the first time the parties amended the agreement containing the applicable language.

SECTION 502. PLAN OF DOMESTICATION.

(a) Subject to section 104(b), a domestic unincorporated entity may domesticate to another jurisdiction by adopting and approving a plan of domestication.

(b) A plan of domestication shall state:

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

(2) the terms and conditions of the domestication;

(3) the manner and basis of converting one or more classes or series of entity interests of the domesticating entity into entity interests, securities, obligations, rights to acquire entity interests or securities, cash, other property, or any combination of the foregoing;

(4) that a plan of domestication has been approved and executed by the domesticating entity;

(5) the future effective date or time (which shall be a date or time certain) of the domestication if it is not to be effective upon filing;

(5) any provisions required by the organic laws under which the domesticating entity is organized; and

(6) any other provisions relating to the domestication that may be desired.

Reporter's Notes

Subject to section 104(b), for this [Article to apply], the domesticating (and hence the domesticated) entity must be an unincorporated entity. As stated in prior Reporter's Notes, the Committee may decide to broaden the scope of the current default rule to include domestic incorporated entities as well as foreign entities where the organic laws governing the domestic incorporated and foreign entities of any type are silent regarding the domestication. If the default rule were to be expanded, this [Article] could theoretically permit re-incorporations so long as the domesticated entity were a domestic organization.

Section 502(b)(1) - Section 502(b)(1) is drafted slightly differently from prior language relating to information required to be contained in a plan of merger, conversion or entity interest exchange. Section 502(b)(1) requires disclosure of the name of the domesticated entity if the name has changed and does not require the disclosure of domesticated entity's type of organization**.** These changes reflect the intrinsic attributes of a domestication, *i.e.,* that the entity is, by definition, the *same type of organization* and likely will be continuing in business under its original name. If, however, the entity were to change its name, that modification would be required to be disclosed under section 502(b)(1).

Section 502(b)(3) - The language of section 502(b)(3) is identical to that found in Articles 2 (mergers), 3 (entity interest exchanges) and 4 (conversions). Previous Reporter's Notes raised for the Committee the issue of **"**shuffling**"** entity interests in the foregoing transactions. As was stated in those notes, the language of the parallel provisions could be interpreted to allow an "equity shuffle" notwithstanding the absence of "appraisal" rights for owners in unincorporated entities. Further, for the foregoing transactions that involve both an incorporated and an unincorporated entity, the present provisions of Chapter 13 of the *MBCA* would grant appraisal rights to owners in the incorporated entity. In the current draft of Chapter 9 of the *MBCA* (entitled Domestication and Conversion), however, the conforming amendments to Chapter 13 with respect to domestication do *not* permit an appraisal right for shareholders in a domestication.

Query whether the plan should be in record form?

SECTION 503. ACTION ON PLAN OF DOMESTICATION.

(a) Subject to section 503(c) and (d), a plan of domestication for an unincorporated

entity shall be approved according to a provision for domestication in the entity's private organic documents or, if there is no applicable provision in the private organic documents, then by [the number specified to amend the entity's private organic documents or, if there is no designated requirement for amendment, then by] all the owners of the domestic unincorporated entity.

(b) Subject to section 503(c) and (d):

(1) a plan of domestication for a foreign entity shall be approved according to a provision for domestication in the entity's private organic documents or, if there is no applicable provision in the private organic documents, [then by the number specified to amend the entity's private organic documents], or, if there is no designated requirement for amendment, then in accordance with the organic laws of the entity; or

(2) if the organic laws of a domestic incorporated entity are silent regarding a domestication, then the plan of domestication shall be approved by [the number designated for amendment of the domestic incorporated entity's certificate of incorporation or, if there is no designated requirement for amendment, then by all the owners of the domestic incorporated entity].

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

(1) the private organic documents of the entity provide for the approval of the domestication with consent of less than all owners; and

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

(d) A person does not give the assent required by subsection (c) merely by assenting to a provision of the private organic documents which permit the entity to be modified or converted with the consent of less than all owners.]

(e) Subject to sections 502(c) and(d) and any applicable organic law of the domesticating entity, a plan of domestication may be terminated or amended:

(1) as provided in the plan; and

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

Reporter's Notes

Section 503(a) - Section 503(a) sets out the substantive rule of approval for a domestication by a domestic unincorporated entity. The approvals anticipated by section 503(a) follow: (1) first, the parties *specific intent* regarding the approval necessary to effect a domestication; (2) second, the parties *general intent* regarding the number necessary to amend the entity's private organic documents in anticipation of approving a domestication or other fundamental change to the entity; and (3) finally, imposition of a *default rule of unanimity* by the owners of the domesticating entity. The hierarchy of approvals in section 503 mirror those for approvals of domestic unincorporated entities engaging in mergers, entity interest exchanges and conversions.

Section 503(b)(1) - Section 503(b)(1) provides an approval rule of deference for a foreign domesticating entity. The rules of deference state: (1) first, that the foreign entity's *specific intent* (as provided in the entity's private organic documents) relative to domestication governs; (2) second, that if the foreign entity's private organic documents do not contain a provision for domestication, then the approval shall be the *general number* specified in the entity's private organic documents for amendment; and (3) finally, that in the absence of specific or general intent, then approval, *by default*, is the number specified for domestication in the organic laws governing the foreign entity.

Section 503(b)(2) - Section 503(b)(2) provides the approval rules for an "electing" domestic incorporated entity. Because a domestication involves entities of the *same type*, the language of section 503(b)(2) has been altered to accommodate the peculiar nature of the domestication. As noted in the Reporter's Notes to section 501, the approvals in section 503(b)(2) necessarily involve a corporate-to-corporate transaction. In each of the other Articles, the default

rule could be constructed to involve at least one unincorporated entity. Section 503(b)(2) does not. This scope issue is one that the Committee may wish to specifically address in Article 5.

As to the approval anticipated by section 503(b)(2), a rule of deference allows a domestication: (1) first, by the *general intent* of the domestic incorporated entity as reflected by the number necessary to amend the entity's certificate of incorporation; and (2) second, in a pure *default mode*, by unanimous approval of the owners of the incorporated entity. Unanimity here reflects the fact that the organic laws governing the "electing" entity do not address a domestication. An alternative default rule could tie approval for a domestication to the same approval required for a domestic incorporated entity that is engaged in a *merger*. In the latter circumstance, the default rule likely will be majority consent rather than unanimity. If unanimity prevails, then arguably Article 5 would only be available for closely-held incorporated entities "electing" under this [Act].

Section 503(c) - Section 503(c) limits the approvals of sections 503 (a) and (b). According to section 503(c), if a person will have owner's liability in the domesticated entity, the general approval rules of sections 503 (a) and (b) will be ineffective without the written consent of the person having owner's liability. The impact of section 503 (c) is somewhat different than in previous Articles. For example, if a Delaware limited partnership domesticated into Texas, the entity is of the same type and the owner's liability of any general (or limited) partner arguably has not changed (assuming that the case precedent in the jurisdiction of the domesticated entity is substantially the same as that of the domesticating entity). Likewise, if an Iowa general partnership domesticated into Minnesota, the personal liability of the general partners arguably remains the same. In this sense, section 503(c) could create a veto power in an owner even where the nature of the entity (and, consequently, owners' liability) remains unchanged.

Section 503(d) - Section 503(d) provides protection against less-than-unanimous consent where a private organic document of the domesticating entity allows modification, and hence, a fundamental change to the entity, without unanimous consent. Section 503(d), therefore, should be construed together with section 503(c) to provide that "consent" to owner's liability is only effective where an owner assents to a particular provision relating to domestication.

Section 503(e) - Section 503(e), like its counterparts in Articles 2 (mergers), 3 (entity interest exchanges) and 4 (conversions), allows termination or abandonment of a plan of domestication only according to a provision for termination or abandonment in the plan and then only by the same consent as was necessary to approve the plan. Prior Reporter's Notes suggested that the Committee may wish to extend the circumstance in which termination or abandonment may be accomplished. The suggestions included permitting: (1) "managerial decisions" reflecting an adverse and unforeseen change of market conditions; or (2) "implicit owner power" regarding abandonment or termination so long as the owner vote to abandon is the same or greater than that required to approve the plan. Either of the suggestions would allow maximum flexibility in owners and "managers" of unincorporated entities to adapt to unpredictable market fluctuations. As an example, consider a publicly-traded limited partnership that has adopted and approved a

plan of domestication. Assume further that the plan is to be effective within a week. In the time following the approval, market conditions change unexpectedly and in a manner detrimental to the anticipated domestication by the limited partnership. According to section 503(e), it would appear that the plan will become effective despite these market changes if the parties did not draft a termination or abandonment clause. Further, even assuming such a clause were present, the general partners of the limited partnership may well not have sufficient time to solicit the limited partners to abandon the plan. In these circumstances, the general partners could, assuming an extension of the rule of section 503(c), abandon the plan without limited partner approval. Any adverse consequence of the abandonment would be redressed in an action by the limited partners against the general partners for breach of fiduciary duty.

SECTION 504. FILINGS REQUIRED FOR DOMESTICATION; EFFECTIVE DATE.

(a) A statement of domestication shall be signed on behalf of the domesticating entity and filed with the [Secretary of State].

(b) The statement of domestication shall include:

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

(2) the future effective date or time (which shall be a date or time certain) of the domestication if ti is not to be effective upon the filing of the statement of domestication;

(3) a statement that the domestication was approved and executed as required by the entity's organic law;

(4) if the domesticated entity is a qualified foreign entity, its registered agent and registered office; or

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

(c) A statement of domestication becomes effective under this [Article] upon:

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

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

Reporter's Notes

Section 504 - Section 504 states the substantive filing requirements for domestic unincorporated entities or, if the Committee decides, "electing" domestic incorporated entities that domesticate to another jurisdiction. Specific filing mandates are set forth in section 504 (b). Section 504 generally mirror that of the filing requirements in Articles 2 (mergers), 3 (entity interest exchanges) and 4 (conversions). All modifications are noted in the Reporter's comments.

Section 504(b)(1) - Section 504(b)(1) is modified to reflect the unique nature of the domestication. Sections 504(b0(1) therefore requires only the name, jurisdiction and type of organization of the domesticating entity and the name, if changed, and jurisdiction of the domesticated entity. These modifications reflect that the domesticated will be the same as the domesticating entity and that the entity may well continue in business under the same name. Where a name change occurs, section 504(b)(1) requires disclosure of that fact.

Sections 504(b)(4) and (5) - Sections 504(b)(4) and (5) required notice of where the domesticated entity may be found for all purposes, including that of service of process. Section 504(b)(4) relates to a qualified foreign entity. As to this domesticated entity, disclosure will include the name and address of its registered agent within the jurisdiction of the domesticating entity. Section 504(b)(5) requires notice of where a nonqualified foreign entity may be found. Section 504(b0(5) therefore requires disclosure of the street address of the entity's executive office or principal place of business. Unlike section 504(b)(4), this section does not require a "presence" by the foreign entity in the jurisdiction of the domesticating entity. Both sections protect creditors who wish to pursue claims against the domesticating entity.

Section 504(c)(1) - Section 504(c)(1) alters somewhat the articulation of the effective date of the filing of the statement of domestication. Section 504(c)(1), as with the analogous provisions in the other Articles, attempts to make clear that the effectiveness of a "filing" will be fact- and jurisdiction-dependent. A statement of domestication filed under this Article would, therefore, be governed by this [Act] in addition to the local rules for recording and filing documents with the appropriate [Secretary of State]. For example, if the Kansas Secretary of State "files" documents upon docketing and California upon date stamping, effectiveness would

be governed by the practices of the local recording officials. Section 504(c)(1) makes no attempt to impose an omnibus filing date.

SECTION 505. EFFECT OF DOMESTICATION.

(a) When a domestication of a foreign entity into this [state] becomes effective:

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

(2) the domesticated entity shall become subject to the organic laws of this [state];

(3) the domesticated entity's existence shall be deemed to have commenced on the date the domesticating entity commenced its existence in the jurisdiction in which the domesticating entity was first created, formed, incorporated or otherwise came into being;

(4) any action or proceeding pending against the domesticating entity shall be continued against the domesticated entity as if the domestication had not occurred;

(5) all rights, privileges and powers of the domesticating entity, and all property, real, personal and mixed, and all debts due to the domesticating entity, shall vest in the domesticated entity and the title to any real property vested by deed or otherwise in the domesticating entity shall not revert or be in any way impaired by reason of this [Article];

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

(7) the entity interests of the domesticating entity are reclassified into entity

interests, securities, obligations, rights to acquire entity interests or securities, cash or other property in accordance with the plan of domestication; and the owners of the entity interests of the domesticating entity are entitled only to the rights provided in the plan of domestication or to any other rights they may have under the organic law of the domesticating entity;

(8) in the case of a domesticated entity that is a filing entity, the statement of domestication, or the public organic document attached to the statement of domestication, constitutes the public organic document of the domesticated entity; and

(9) in the case of domesticated entity that is a nonfiling entity, the private organic document provided for in the plan of domestication constitutes the private organic document of the domesticated entity.

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

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

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

(c) An owner who becomes subject to owner's liability for some or all of the debts, obligations or liabilities of a domesticated entity shall be personally liable only for those debts, obligations or liabilities of the domesticated entity that arise after the effective date f the statement of domestication.

[(d) The owner's liability of an owner in a domesticated entity for the debts,

obligations and liabilities of the domesticating entity shall be as follows:

(1) the domestication does not discharge any owner's liability under the organic law of the domesticating entity to the extent such owner's liability arose before the effective date of the statement of domestication;

(2) the owner shall not have owner's liability under the organic law of the domesticating entity for any debt, obligation or liability of the domesticated entity that arises after the effective date of the statement of domestication;

(3) the provision of the organic law of the domesticating entity shall continue to apply to the collection or discharge of any owner's liability preserved by subsection (1) as if the domestication had not occurred and the domesticated entity were still the domesticating entity; and

(4) an owner shall have whatever rights of contribution from other owners as are provided by the organic law of the domesticating entity with respect to any owner' liability preserved by subsection (1) as if the domestication had not occurred and the domesticated entity were still the domesticating entity.]

Reporter's Notes

Section 505(a) - Section 505(a) governs the *legal effect of a domestication where the domesticated entity is a domestic entity*. If a domestic entity domesticates into a foreign jurisdiction, the legal effect of the domestication would be governed by the organic laws of the foreign jurisdiction.

Section 505 is intended to set forth an exhaustive list of the legal effect of a domestication of a foreign entity to a domestic entity. First, section 505(a)(1) and (2) provide that the legal existence of the foreign domesticating entity shall cease and the foreign entity will become subject to the organic laws of the domesticated entity. In addition, section 505(a)(3) states the general proposition that the domesticated entity is deemed to have begun its existence at the time the

domesticating entity was first formed or otherwise created. As such, the domesticated entity is the same entity whose existence relates back to the creation of the domesticating entity. Sections 505(a)(4), (5) and (6) preserve all actions or proceedings, rights and privileges and creditor claims and liens pending against the domesticating entity unimpaired. A domestication, therefore, is not a sale, conveyance, transfer or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment or conveyance. Section 505(a)(7) states the rule that the entity interest of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and that the owners of the domesticating entity are entitled to theses rights only. Section 505(a)(7), on its face, allows certain owners in the domesticating entity to be entitled to a continuing equity interest in the domesticated entity whereas other owners in the domesticating entity may be cashed out as a result of the transaction. (As previously noted, this transaction is one for which the MBCA does not grant dissenter's rights.) Finally, sections 505(a)(8) and (9) address the effect of a filing of a statement of domestication on a filing and nonfiling domesticated entity. The intent of these sections is to allow the filing regarding the *domestication* to constitute the filing of a public organic document for a filing entity or the effectiveness of a private organic document for a nonfiling entity without additional filings or actions by the owners of the domesticated entity.

Section 505(b) - Section 505(b) states a rule for domestic entities that domesticate into a foreign jurisdiction. Sections 505(b)(1) and (2) require the domesticating entity to appoint the Secretary of State as its agent for purposes of service of process and to agree to pay any amounts which may be owing to the owners of the domesticating entity. This section parallels analogous provisions in Articles 2 (mergers), 3 (entity interest exchanges) and 4 (conversions).

Section 505(c) - Section 505(c) states the rule for *future owner's liability*. Section 505(c) provides that an owner in a domesticated entity shall be personally liable only for the debts and obligations of the domesticated entity that arise after the effective date of the domestication. This rule is not extraterritorial because it seeks to limit liability to actions that occur after the domestication.

Section 505(d) - Section 505(d) addresses past owner liability. To the extent that these rules address the *legal effect of owner liability after a domestication*, they are more properly the subject of the organic law of the foreign jurisdiction. This section, therefore, appears in brackets.

SECTION 506. CONTRACTUAL APPRAISAL RIGHTS.

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

Reporter's Notes

Section 506 - Section 506 does not create an "appraisal" right in the owners of a domesticating entity. Instead, the intent of section 506 is to statutorily recognize rights that were created in contract. AS previously noted in the Reporter's comments on analogous provisions in the other Articles, this section does not alter the existing substantive law of unincorporated entities. It does, however, provide an adopting jurisdiction the opportunity to directly address the issue of buyout rights for unincorporated entities. It also provides an adopting jurisdiction the chance to consider where to vest jurisdiction of the consideration of contractual claims arising from a domestication versus claims arising from statutory or common law fiduciary duties.

Again, the terminology of section 506 is suggestive only. In some jurisdictions, alternative terminology may be necessary to "de-link" any negative corporate precedent incident to an appraisal.

ARTICLE [6]

MISCELLANEOUS PROVISIONS

SECTION 501. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Uniform Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 502. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of the [Act] are severable.

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

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

SECTION 505. APPLICABILITY.

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

(1)

(2)

(b) Except as provided in subsection (c), beginning January 1, 20___, [drag-in-date], this [Act] governs all [domestic and foreign entities, whether or not organized for profit].

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

(1)

(2)

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