DRAFT

FOR DISCUSSION ONLY

UNIFORM
[~~MERGER AND CONVERSION~~ENTITY TRANSACTIONS ACT]

WITH REPORTER'S NOTES

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

March 2002 Draft

This is a "compare" draft, which shows both strike and score simultaneously in some Sections in order to show the recent history of the additions and deletions.

UNIFORM [~~MERGER AND CONVERSION~~ENTITY TRANSACTIONS ACT]

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PREFATORY NOTE

Scope and Approach of the Uniform Entity Transactions Act

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

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

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

anticipated by Chapter 9 of the MBCA include: (1) *domestication* (a procedure in which a corporation may change its state of incorporation, either domestic to foreign or foreign to domestic); (2) *nonprofit conversion* (a procedure that permits a domestic business corporation to become either a domestic nonprofit corporation or a foreign nonprofit corporation); (3) *foreign nonprofit domestication and conversion* (a procedure that permits a foreign nonprofit corporation to become a domestic business corporation); and (4) *entity conversion* (procedures that authorize a domestic business corporation to become a domestic or foreign other entity or that permit a foreign other entity to become a domestic business corporation). Because Chapter 9 of the *MBCA* anticipates only those transactions that involve a *domestic business corporation* either at the outset or at the termination of the transaction, the ABA has constituted a second project to deal with nonprofit corporations as a constituent party to the foregoing transactions. The second project will thus likely focus on the same types of transactions as Chapter 9 of the *MBCA* but for inclusion instead within the Model Nonprofit Corporation Act. To date, an exposure draft of the Model Nonprofit Corporation Act amendments has not been circulated for review. The third project is one spearheaded by a Joint Task Force of the Committee on Corporate Laws and the Committee on Partnerships and Unincorporated Business Organizations of the Business Law Section ("Joint Task Force") of the ABA. The Joint Task Force is charged with drafting a model act that addresses mergers, conversions and entity interest exchanges of *different forms* of business entities. The Model Act is presently entitled the Model Inter-Entity Transactions Act (draft of 3-02)("*MITA*"). *MITA* has been circulated for review and comment. In addition, for a period of several weeks in January and February, 2002, weekly two-hour conference calls were held to review the 2001 draft of *MITA*. Several members of the ABA Committee, including ABA advisors George Coleman, Bill Clark, Bob Keatinge and Barry Nekritz and Reporter of the NCCUSL project, Ann Anker, participated in each of these calls. An updated draft of 2002 resulted. Unlike Chapter 9 of the *MBCA, MITA* addresses only those transactions that involve *different forms of entities.* Thus, because a domestication does not indicate a change of form, domestications are not covered by *MITA*. Reference would only be made to *MITA* for cross-form transactions. *MITA* also anticipates the *repeal and/or amendment of* all cross-form provisions in *RUPA, ULLCA and Re-RULPA*. The only provisions of the Uniform Unincorporated Acts that would not be affected would be those involving the same type of business (*e.g.*, mergers between same-form partnerships or between limited liability companies). Further, *MITA* would *add* entity interest exchanges and domestications to uniform unincorporated law and thereafter tie all voting requirements for both domestications and exchanging entities in interest exchanges to that necessary for a merger. *MITA* would also not require approval by an acquiring entity in an interest exchange. The fourth project is being undertaken by the ABA Committee on Corporate Laws. The focus of the fourth project is to draft provisions regarding divisions for inclusion in the *MBCA* and thereafter in *MITA*. As of April, 2002, a proposed draft for a new Chapter 12, Subchapter B on Division will be presented to the Corporate Laws Committee. Once those additions are approved, the repealer and amendment sections of *MITA* would add divisions to uniform unincorporated law.

The Uniform Act, in its present state, is drafted as a free-standing, "junction-box" statute that will: (1) *repeal* all existing merger and conversion provisions in all Uniform Unincorporated Acts; (2) *replace* those provisions with new, broader merger and conversion provisions; and (3)

add the new transactions of divisions, entity interest exchanges and domestications. The Uniform Act also sets forth the necessary approvals for each of these transactions. With the Uniform Act repealer, therefore, a practitioner need only review the Uniform Act to locate the substantive rules for all alternative entity mergers, divisions, entity interest exchanges, conversions and domestications. In sum, the Uniform Act will *enable* cross-form and same-form mergers, divisions, conversions and entity interest exchanges in addition to domestications for unincorporated entities. The Uniform Act will permit a domestic incorporated entity to use the Act only if the organic law governing the domestic incorporated entity permits the transaction. Foreign entities may use the Uniform Act if the organic rules of the foreign entity permit the transaction and the organic law governing the entity does not prohibit the transaction.

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

The present draft of the Uniform Act is presented in seven Articles. The first Article sets forth: (1) name; (2) definitions; (3) notice; and (4) scope. The definitional section utilizes generic terminology intended to encompass both corporate and unincorporated ("cross-species") transactions.

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

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

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

Article 5 governs conversion. Article 5 is intended to address traditional intrastate and foreign "different-form conversions." Article 4 also sets forth: (1) default approval rules; and (2)

informational requirements for conversions. In addition, Article 5 acknowledges the possibility of contractual appraisal rights for certain owners and/or transferees in the conversions authorized under Article 5.

Article 6 governs domestications. Article 6 is intended to authorize a foreign entity to domesticate as an domestic unincorporated entity of the same type and to authorize a domestic unincorporated entity to domesticate as a foreign entity of the same type so long as the organic rules of the foreign jurisdiction permit the domestication and the organic law of the foreign entity does not prohibit the domestication. Article 6 provides: (1) requirements for a plan of domestication; (2) approvals, including a default rule of approval; (3) necessary filings; (4) effectiveness of a foreign entity domesticating as a domestic entity of the same type; and (5) contractual appraisal rights.

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

UNIFORM [~~MERGER AND CONVERSION~~ENTITY TRANSACTIONS ACT]

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [Act]:

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

(2) "Business" means any lawful activity, whether or not carried on for profit.

(~~2~~3) "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~~4) "Converted entity" means the entity that continues in existence after a conversion.

(~~4~~5) "Converting entity" means the entity that adopts a plan of conversion and that files a statement of conversion.

(6) "Dividing entity" means the domestic or foreign entity that is to be divided in the manner permitted by this [Act].

(7) "Division" means the procedure authorized by this [Act] in which:

(A) a domestic unincorporated entity may be divided into two or more domestic entities or into the dividing entity and one or more domestic entities or one or more foreign entities or into one or more domestic entities and one or more foreign entities or into two or more foreign entities; or

(B) a foreign entity may be divided into two or more domestic unincorporated entities or into the dividing entity and one or more domestic unincorporated entities or into one or more domestic unincorporated entities and one or more foreign entities of any type.

~~(5) "Domestic corporate~~incorporated ~~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~~8~~) "Domestic incorporated entity" means ~~an~~ana corporation or any other incorporated entity ~~created under~~a domestic unincorporated~~under~~ ~~or~~ whose internal affairs are governed by the laws of this [State].

(79) "Domestic ~~incorporated~~entity" means a domestic incorporated or unincorporated entity.

~~(7) "Domestic~~ created under or whose internal affairs are governed by the laws of this [State].

(810) "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~~annon-corporateany unincorporated entity created

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

(~~8~~8911) "Domesticated entity" means the entity that continues in existence after a domestication.

(~~9~~9102) "Domesticating entity" means the entity that adopts a plan of domestication and that files a statement of domestication.

(~~10~~10~~11~~0~~10~~13) "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~~14) "Entity" means a person other than an individual, whether or not organized for profit, that either ~~possesses~~has its own separate legal existence or has the power to sue in its own name.~~-~~ The term does not include ~~an~~ estates, trusts or ~~a~~ governmental or quasi-governmental ~~entity~~entities, agencies or subdivisions.

(~~12~~15) "Entity interest exchange" means the procedure authorized by this [Act] in which:

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

(B) all of the ownership or transferee 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~~ownership or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee interests or securities, cash, other property, or any combination of the foregoing.

(~~13~~16) "Exchanging entity" means the entity that exchanges one or more of the ~~classes~~ownership or ~~series of entity~~transferee interests in an entity interest exchange.

(~~14~~1414517) "Filing entity" means an entity that is created by the filing of a public organic document.

(~~15~~18) "Foreign entity" means ~~an~~any~~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~~any entity other than a domestic entity.

(179) "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.

(~~171717~~820) "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~~21) "Nonfiling entity" means ~~an~~anyany entity ~~that is not created by theother than athe filing of a public organic document.~~

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

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

(23) "Organic ~~document" means any~~document"rules" means ~~a~~the set of private ~~oral agreement~~or public rules, ~~a private agreement, whether~~agreementwhether or not in record form, ~~or a~~that govern the internal affairs of a ~~public organic document.~~

~~(2021) "Nonqualified foreign entity"~~"Organic law" means a foreign entity~~the law that is not authorized to transact business in this [State] by an appropriate filing with the [Secretary~~provides~~document~~ n entity.

(224) "Organic law" means the statute or body of law that ~~provides for the creation of State]~~an entity or that governs its internal affairs.

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

~~(22) "Organic law" means~~"Owner", to the greatest extent, governs the enforceability and interpretation of the organic rules of the entity.

(235) "Owner" means a person who:

(A) ~~[holds of record] an~~ with respect to a general or limited partnership, a partner;

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

(C) with respect to a business trust, the owner of a beneficial interest in the ~~profits or assets of an entity in the law that provides for the creation of~~ordinary~~ordinary~~

course or upon liquidation other than as an entityassignee; or that governs its

(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.

(23 governed. trust;

(D) with respect to a corporation, a shareholder; and

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

(246) "Ownership interest" means the economic or voting interest in an entity held by an owner.

(2324) "Owner""Owner's liability" means a person whopersonal liability for a debt, obligation, or liability of an entity that is imposed on an owner:

(A) [holds of record] an interest in the profits or assets of an entity in the ordinary course or upon liquidation other thansolely by reason of the person's status as an assigneeowner in an entity; or

(B) is entitled to voteby a public or private organic document of an entity that imposes liability on issues involving an entity's internal affairs under its organic lawsan owner for all or its organic documents except as an agentspecified debts, assignee, proxy,obligations 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 governedliabilities of the entity.~~

~~(24)~~

~~(25the~~an owner's proprietary interest in ~~an entity held by an owner~~a business organization..

(257) "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 or the organic rules of an entity that impose~~s~~ liability on an owner for all or specified debts, obligations or liabilities of the entity.

(268) "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, governmental subdivision, agency, or instrumentality, 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~~28729) "Public organic document" means the document filed of public record that creates an entity.

(~~29~~29830) "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.~~

~~(312~~931) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(3~~1~~02) "Surviving entity" means the entity that continues in existence following a merger or division or the new entity that is created by a merger.

~~(2625) "Person" means an individual, corporation, business trust, estate, trust, partnership,~~

(31 or division.

(33) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance and gift.

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

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

(36) "Type" means:

(A) with respect to entities of the same type, general and limited liability ~~partnership,~~partnerships and limited ~~partnership,~~and limited liability limited ~~partnership, limited liability company, association, joint venture or any other legal or commercial entity.~~

~~(2726) "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.~~

~~(2827) "Public organic document" means the document filed of public record that creates an entity.~~

~~(2928) "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].~~

~~(3029) "Subsidiary entity" mans an entity whose ownership interests are owned at least 90 percent (90%) or more by another entity.~~

~~(3130) "Surviving entity" means the entity that continues in existence following a merger or the new entity that is created by a merger.~~partnerships; and

(B) with respect to entities of a different type, any incorporated or unincorporated entities not specified in (A) above.

Reporter's Notes

"Business" [(2)] - The term "business" is added to make clear that the use of "business" throughout the [Act] means for profit and not-for-profit entities.

"Conversion" [(~~2~~3)] - 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 "unincorporated" in paragraph (3)(A) was deleted as being unnecessary. As read, a domestic incorporated entity could convert to a domestic unincorporated entity and a domestic unincorporated entity could convert to a domestic or foreign entity of another type.

"Dividing entity" [(6)] - "Dividing entity" is used in this [Act] to define the domestic or foreign entity that is to be subdivided into separate and distinct entities.

"Division" [(7)] - The term "division" is used to define a type of merger whereby an entity may "divide" itself into two or more domestic entities, one or more domestic entities and one or more foreign entities or two or more foreign entities. *See, e.g.*, 15 *Pa.C.S.* § 8961 *et seq*.

(2001)(division of domestic LLC); 15 *Pa.C.S.* § 8576 *et seq*. (2001)(division of domestic limited partnership); 15 *Pa.C.S.* § 1951 *et seq*. (2001)(division of domestic corporation). In general, a division permits a dividing entity to contractually allocate assets and liabilities among new or existing entities. The liabilities may be allocated among surviving entities in any manner so long as the allocation does not constitute a fraudulent conveyance. Presently, Pennsylvania only allows a division to new entities whereas Texas permits a division to an existing or new surviving entity.

"Domestic incorporated entity" [6(8)] - The term "domestic ~~corporate~~incorporated entity" is used throughout this [Act] ~~to~~: (1) to distinguish the domestic entities that are ~~permitted~~authorized to engage in a merger, conversion, entity interest exchange or domestication pursuant to this [Act] with any other entity; and (2) ~~enable the "election" by~~to make clear that a domestic corporate entity ~~of the use of this [Act] where~~may engage in a transaction with a domestic unincorporated entity governed by this [Act] only if the organic law governing the incorporated entity ~~is silent regarding~~permits the transaction. Because jurisdictions vary in their description of incorporated entities, states should conform this section accordingly.

The note to "domestic corporate entity" has been modified to reflect the decision of the Committee at its December meeting in New Orleans, 2001 to delete the default rule regarding use by corporations of this [Act] where the law governing the corporate entity is silent as to the transaction.

"Domestic entity" [(~~6~~79)] - The term "domestic entity" in this [Act] refers to domestic incorporated and unincorporated entities created under or whose internal affairs are governed by the organic laws of an adopting jurisdiction.

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

"Domestic unincorporated entity [(~~7~~810)] - 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" [(1~~0~~13)] - The term "domestication" in this [Act] authorizes a domestic unincorporated entity to change its jurisdiction of formation but not its type so long as the organic law of the foreign jurisdiction permits the domestication. The legal effect of the domestication out of an adopting [state] 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 unincorporated entity of the same type. The legal effect of the latter transaction is governed by the laws of the jurisdiction adopting this [Act]. The definition of a "type" of entity is found at § 102 (31).

"Entity" [(11~~24~~)] - 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 but includes general partnerships under both *UPA* and *RUPA*..

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

"Foreign Entity" [(158)] - The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is factual question whether a general partnership whose internal affairs are governed by *UPA* (1916) is a domestic or foreign partnership. Likely, a *UPA* partnership will be deemed to be a domestic entity where the greatest nexus of contacts are found.

"Merger" [(1679)] - The term "merger" in this [Act] includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities. The term "merger" also includes the traditional two-party merger in which one party does not survive the transaction. "Merger" also includes a forward or reverse triangular merger where a third, subsidiary entity is formed to effect the transaction on behalf of one of the constituent entities to the merger.

"Nonfiling entity" [(~~18~~1921)] - 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"~~rules" [(213)] - The term "organic ~~document"~~rules" is intended to include all governing ~~documents~~rules 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~~ as well as oral partnership agreements and oral operating agreements among LLC members.

As directed by the Committee in New Orleans, 2001, the prior term "private 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.~~

documents" has been changed to reflect the Committee's discussions that "documents" does not accurately capture oral and written operating agreements. The language of this draft was provided by Jon Hirschoff, Bob Keatinge, Chip Lion and George Coleman.

"Organic law" [(224) - The term "organic law" has been modified to reflect the Committee discussions of December 2001. The present language clarifies the position of the Committee that "organic law" should be linked to the enforceability and interpretation of the "organic rules" that govern the internal affairs of an entity. As with the modifications to "organic rules" at § 102 (21), the modified language was provided by Jon Hirschoff, Bob Keatinge, Chip Lion and George Coleman.

"Owner" [(25)] - The term "owner" ~~includes~~provides 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.~~ listing of the types of persons who are considered to have an economic or other proprietary right in a for-profit or not-for-profit entity.

The present language is that suggested by the Committee in December of 2001. The language is taken from *Re-Rulpa* § 1101 (8). An accompanying definition for "ownership interest" was added at § 102 to clarify the meaning of § 102 (23)(E).

"Ownership interest" [(246)] - 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.

"Owner's liability" [(257)] - "Owner's liability" is used in this [Act] to make clear that personal liability of an owner will be preserved in transactions governed by the [Act]. Personal liabilities, as anticipated by this [Act], are those imposed on an owner by statute or by any public or private organic rule.

"Person" [(268)] - 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.~~ At its December meeting, 2001, the Committee decided to include the prior omitted language.

"Public organic document" [(2879)] - 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 § 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~~**"Record" [(2931)]** - The term "record" is intended to the broadest degree of information so long as the information is retrievable in a "perceivable" form. This language is taken from *ULLCA* § 101 (16) and *Re-Rulpa* § 102 (20).

"Transferee" [(34)] - The term transferee means a person to whom an owner has transferred her rights, in whole or in part, to receive profits and losses or distributions of an entity. A transferee has no rights to participate in management or conduct of an entity, to demand access to information concerning the entity, or to inspect or copy entity books or records. *See RUPA* § 503 (1997); *Re-Rulpa* § 702 (2001); *ULLCA* §§ 502, 503 (1995)("distributional interest" that may be transferred). A transferable interest may be subject to a charging order in appropriate circumstances. *See RUPA* § 504 (1997); *Re-Rulpa* § 703; *ULLCA* § 504 (1995). No Uniform Unincorporated Act presently grants, by statute, a right to a transferee to bring a direct or derivative suit against an entity to enforce rights granted in a transfer. *See, e.g.*, *Re-Rulpa* (2001) § 1001 (direct action may be brought by a "partner"); § 1002 (a "partner" may bring a derivative action) and *ULLCA* (1995) § 1101 (a "member" may bring a derivative action). Whether a provision such as § 104 of *RUPA* (stating that "the principles of law and equity supplement this [Act], unless displaced by particular provisions of the Act") would grant recourse to a transferee to sue non-transferor/owners for breach of contractual or fiduciary duties would be subject to interpretation by a court. *But see U-H Acquisitions Co. v. Barbo*, 1994 Del.Ch. Lexis 9 (holding that assignee of limited partnership interest had no standing to sue for a breach of fiduciary duty in allegedly interested transaction by general partner); *Kellis v. Ring*, 92 Cal.App. 3d 854 (1979) (holding that "mere assignee" of limited

partnership interest lacked standing to bring fiduciary claim against general partner); *Bauer v. Bloomfield Co/Holden Joint Venture*, 849 P.2d 1365 (Al. 1993)(holding that assignee of general partnership interest had no claim against partnership for allegedly wrongful business decision to withhold distributions; in dicta, court further stated that: "We are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest.").

"Type" [(316)] - At its meeting in December, 2001, the Committee decided to include a definition of "type" in order to make clear that a general partnership is the same "type" of entity as a limited liability partnership. Likewise, a limited partnership and limited liability limited partnership are of the same "type" of entity.

SECTION 103. KNOWLEDGE AND NOTICE

(a) A person knows a fact if the person has actual knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;

(2) has received a notification of it; or

(3) has reason to know it exists from all of the facts known to the person at the time in question.

(c) A person notifies or gives a notification to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it.

(d) A person receives a notification when the notification:

(1) comes to the person's attention; or

(2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(e) An entity knows, has notice, or receives a notification of a transfer of an 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.]

interest in an entity when the individual supervising the business knows, has notice, or receives a notification of the transfer, or in any event when the transfer would have been brought to the individual's attention if the entity had exercised reasonable diligence. An entity exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual supervising the business for the entity and there is reasonable compliance with the routines.

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~~

Section 103 - Section 103 was added as a result of the Committee's discussions in December, 2001 regarding transferee interests. The sense of the Committee was that transferee interests could be "recognized or acknowledged" in a plan of merger, division, conversion, interest exchange ~~involving a nonprofit entity where the result of the transaction is the diversion of trust or charitable property to another purpose.~~

or domestication *if there were notice of the transfer*. Section 103 has been adapted from *Re-Rulpa* § 103. Significant modifications were made to the analogous provision of *Re-Rulpa* in order to recognize the limited scope for the use of notice in this Act. Based upon significant research efforts by the Reporter, (*see* note to § 102(32) "transferee" for a sampling of cases concerning rights of assignees) which has revealed *no case* recognizing either a fiduciary duty or a contractual duty of good faith and fair dealing in favor of a transferee, the notice provisions here should arguably be stringent.

SECTION 104. SCOPE.

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

(b) ~~Domestic incorporated entities shall not~~A foreign entity may effect a merger, division, conversion, domestication or entity interest exchange ~~[with a domestic unincorporated entity] under this [Act] unless~~, only if:

(1) the transaction is permitted by the organic rules governing the entity; and

(2) the transaction is not prohibited by the organic law~~s under which~~ of the entity.

(c) A domestic incorporated entity ~~was formed have no provision governing~~may effect a merger, division, conversion or entity interest exchange under this [Act] only if the transaction ~~and~~is permitted by the ~~[~~organic law governing 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, division, 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, divisions, 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] will *enables* ~~s~~ the previously omitted transaction. If a transaction involves a domestic unincorporated entity and a domestic corporation, this Act will govern~~s~~ 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~~permit the transaction~~, in part or in whole~~, the domestic corporate entity may elect to ~~enable~~accomplish the transaction with a~~n~~ 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~~If a transaction involves a domestic corporate entity and 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~~ or any type of foreign entity, *this Act will not govern.*

A foreign entity may use this Act to effect any of the named transactions if the organic rules governing the foreign entity ~~are~~permit the transaction and the transaction is not prohibited by the organic law of the foreign entity. For example, if the organic law of the foreign entity is silent regarding a division but the private operating agreement of the entity permits the transaction, the foreign entity may accomplish the division by means of an unincorporated entity governed by this [Act]. The necessary filing in the foreign jurisdiction regarding the division may be problematic to the extent the [Secretary of State] in the foreign jurisdiction may not be empowered to accept the division filing. In addition, if the filing in the "silent" jurisdiction indicates that the foreign entity is dissolving and the organic law of the resulting domestic entity provides that the "dividing" entity is not dissolved, an uncertainty is created regarding the legal

effect of the division. A court could logically conclude that the "dissolution" filing in the foreign jurisdiction accomplishes the statutory transfer of the assets and liabilities of the dividing entity (without a dissolution) as provided by the terms of this [Act]. Finally, it is anticipated that a domestication of a foreign entity pursuant to this [Act] must involve a an unincorporated entity.

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

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

The issue of regulatory approvals was vigorously discussed in January and February of 2002 by members of the ABA Committee on Entity Rationalization for the Model Inter-Entity Transactions Act (*MITA*). Unlike the NCCUSL Drafting Committee, the ABA Committee chose to retain *two provisions*: (1) § 103, "Subordination of [Act] to regulatory laws;" and (2) § 104, "Required approvals." The ABA committee discussions on § 103 generated the greatest discussions. Consider the following hypothetical. Assume a regulated entity chooses to convert to a non-regulated form of entity. Assume further that the ~~State of Montana does not~~regulated entity has not obtained the necessary agency approvals but has caused a filing regarding the conversion to appear on the records of the [Secretary of State]. 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.~~
the converted and/or converting entity possess valid legal existence as reflected on the public records notwithstanding the converting entity's noncompliance with regulatory requirements. It was the opinion of the ABA committee that both the converted *and* converting entities should possess valid legal existence, subject, arguably, to rescission or injunction by a court or appropriate regulatory agency as well as potential loss of any benefit that accrued to the regulated entity by virtue of its regulated status. The following language appears in MITA

(2002):

103. Subordination of [Act] to regulatory laws.

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

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

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

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

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

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

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

[ARTICLE] 2

MERGER

SECTION 201. MERGER.

(a) One or more domestic unincorporated entities may ~~be a party to a~~ merge~~r~~ 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].~~

~~(~~epursuant to a plan of merger.

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

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

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

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

.

(c) A domestic incorporated entity may be a party to a merger with a domestic unincorporated entity only if the merger is permitted by the organic law of the domestic incorporated entity.

Reporter's Notes

The statutory merger contemplated by this [~~Article~~Act] 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~~types 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~~foreign entity to be a party to a merger with a domestic unincorporated entity ~~*only in a default posture, i.e., whereupon two conditions:*~~ (1) where the *organic rules of the foreign entity permit the merger*; and (2) where the *merger is not prohibited by 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.*~~

- *foreign entity*. As previously stated in the Reporter's Notes to § 103(c)(3), use of this Act by a foreign entity could raise questions as to the validity or legal effect of the transaction in the foreign jurisdiction. Yet, as presently drafted, the merger could occur without specific statutory direction in the foreign jurisdiction, subject, of course, to a legal opinion by counsel.

Section 201(c) - Section 201(c) ~~prohibits~~authorizes mergers involving ~~foreign~~domestic incorporated entities where the organic laws of the ~~foreign~~incorporated 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~~.

At its December, 2001 meeting, the Committee ~~may wish to broaden section 201(c) to permit a foreign entity to use this [Act] to accomplish a merger~~voted to delete the default rule with respect to domestic incorporated entities. As such, § 201(c) only allows a merger of a domestic incorporated entity with a domestic unincorporated entity where the organic ~~laws of the foreign entity are silent on~~law governing the corporate entity permits the merger. The prior draft permitted a domestic corporation to "elect" to be governed by this Act if the organic law of the corporation were silent as to 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 must be in record form and shall state:

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

(2) the terms and conditions of the merger;

(3) the manner and basis of converting ~~one~~each ownership or ~~more classes or groups of entity~~transferee interests~~s~~ of each merging entity into ~~entity~~ownership or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee 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 law~~s~~ under which any ~~party~~merging entity to the merger is organized; and

(7) any other provisions relating to the merger that the parties may desire~~.~~, including a provision recognizing the rights of transferees in a merging or surviving entity of which the parties have notice.

(b) Any of the terms of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan. Such facts may include, without limitation, actions or events within the control of or determinations made by a party to a merger.

Reporter's Notes

Subject to§ 104-(b~~a~~), 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~~must be a domestic unincorporated entity.

Section 202(~~b~~a)(3) - Section 202(~~b~~a)(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~~a)(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~~a)(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(a)(7)** - Section 203(a)(7) is not intended to create a requirement that any particular transferee interest be contained in a plan. It is also not intended to create rights in a transferee that otherwise do not exist: (1) in the organic law governing an affected entity; or (2) in a contract to which the entity is a party. Rather, § 203(a)(7) is permissive only and should be read together with § 103 regarding knowledge and notice.

At its December, 2001 meeting, the committee considered adding a notice requirement to participants to a merger. The motion to add a notice provision was rejected: (1) in part due to concern as to an appropriate penalty for failure to provide the statutory notice; and (2) in part because of disclosure requirements presently presumed by fiduciary or contract law.

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

SECTION 203. ACTION ON PLAN OF MERGER.

(a) Subject to sections 203(c)~~ and (d)~~, a plan of merger ~~for~~shall be approved by a domestic unincorporated entity~~ shall be approved~~ according to a provision for merger in the entity's ~~private~~ organic ~~documents~~rules 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]~~rules, then by all the owners of the domestic unincorporated entity.

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

~~(1)~~, a plan of merger ~~for~~shall be approved by 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]~~law of the 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 in record form of that person, ~~[~~unless:

(1) the ~~private~~ organic ~~documents~~rules of the entity provide for the approval of the merger where owner's liability would result 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.]~~

~~(~~erules.

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

(1) as provided in the plan; ~~and~~or

(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~~two-part test: first, approval follows any provision in the entity's ~~private~~ organic ~~documents~~rules that is *specific to mergers*; and, second, if the ~~private~~ organic ~~documents~~rules 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~~defaults to unanimity. 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~~rules of the LLC require managerial approval).

At its December, 2001 meeting, the Committee voted to delete a third alternative for approval - that is, the number or percentage specified for amendment of the organic rules of the entity. The committee's decision is in general accord with the basic default rule of unanimity unincorporated entities. However, as with § 103(a) in *RUPA*, the provisions regarding approval, including unanimity as a default rule, may be modified by the organic rules governing the entity.

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~~

At its December, 2001 meeting, the Committee decided to omit an alternative rule for

approval by domestic incorporated entities and foreign entities of any type. The prior draft provided a descending order for approval: (1) by the number specified in the entity's organic rules for merger; (2) then by the number necessary to amend the entity's ~~certificate of incorporation, or,~~governing charter; an~~a default mode~~d (3) finally, 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~~record form 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~~c) further provides that any non-unanimous consent ~~and a person assuming owner's liability has consented to that particular provision.~~provision should specifically anticipate a merger *where owner liability could result.* Hence, a general provision for a less-than-unanimous vote alone will likely not be sufficient under § 203(c). Prior § 203(d) was omitted as being unnecessary since the contractual defense of lack of consent is always available. *Query whether § 203(c)(2) is also unnecessary.*

Section 203(~~e~~d) - Section 203(~~e~~d) permits abandonment or termination ~~only~~ according to a provision in a plan of merger ~~and then only~~or 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 203(d) defers to the organic rules or organic law governing termination or abandonment for incorporated entities.

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

(~~b~~c) 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) 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 chief 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 in this [State]; or

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

(8) if 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, including a provision recognizing the rights of transferees in a merging or surviving entity of which the parties have notice.

(~~c~~d) 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) as specified in the statement of merger.

Reporter's Notes

Section ~~204~~ 204(a) - Section 204(a) does not require the plan of merger to be filed with the statement of merger. ~~However, if the~~At the suggestion of Melissa Wangeman, and in consideration of the Committee's determination that, in appropriate circumstances, a plan of merger ~~contains~~may substitute for a statement of merger, § 204(b) was added to grant to recording authorities the power to accept a plan for filing. Section 204(b) requires that a plan in substitution for a statement contain all the information required by the statement of merger~~, the plan may be filed as a substitute for the statement~~ and ~~the~~be signed by an appropriate person. A merger becomes effective under ~~section~~ § 204-(~~e~~d) as if a statement of merger had been filed.

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

Sections 204(~~b~~c)(6) and (7)(B) - Sections 204(~~b~~c)(6) and (7)(B) require a nonfiling domestic or foreign entity to provide a *street address* for the entity's chief executive office or principal place of business. A post office box would not satisfy the address mandate of either section. The chief executive office or principal place of business of the domestic nonfiling entity need not be within the jurisdiction of formation of the domestic nonfiling entity. The purpose and intent of 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(~~e~~d) - 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~~ solution was ~~considered is~~ that of the "California" approach. In the California statutes regarding mergers of ~~limited liability companies~~LLCs, § 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~~ The California approach was, in substantial part, circulated by Melissa 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~~for comment. The sense of the responding members was that the California statute created confusion in the public records. In its December, 2001 meeting, the Committee accepted the language reflected in the draft.

Section 204(d)(1) - Section 204(d)(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 204(c)(2) - Section 204(c)(2) caps a later effective date to 90 days after the certificate is delivered to the [Secretary of State] for filing.

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, including all state and local taxes, 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~~rules 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~~rules become effective;

(10) the ownership or transferee 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~~law or organic rules of the merging entity.

(b) A person who becomes subject to owner's liability for ~~some or all of the debts, obligations or liabilities of the~~a surviving entity as a result of a merger shall have owner's liability only to the extent provided in the organic law~~s~~ of ~~the surviving~~that 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's liability of a person who ceases to ha~~d~~ve owner's liability ~~for some or all of the debts, obligations or liabilities of a merging entity~~as a result of a merger shall be as follows:

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

(2) the person shall not have owner's liability under the organic law~~s~~ 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 law~~s~~ of the merging entity shall continue to apply to the collection or discharge of any owner's 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's 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 or transferee 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 or transferees of each domestic entity that is a party to a merger is entitled under the merging entity's organic ~~laws~~law or organic rules.

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.

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

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

~~**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

The Committee decided at its December, 2001 to delete the provision for 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 amergers due to its concern that the 90% threshold for the 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.~~ undercut the default rule of unanimity.

SECTION 206. CONTRACTUAL APPRAISAL RIGHTS.

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

Reporter's Notes

Section 20~~7~~6 - Section 20~~7~~6 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 anticipate~~d~~ 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 20~~7~~6 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 20~~7~~6, 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**~~

Section 206 has been amended to permit appraisal rights for transferee interests. This issue was not presented to the Committee in December, 2001 and may, therefore, not reflect the Committee's view.

[ARTICLE] 3

DIVISION

SECTION 301. DIVISION.

(a) A domestic unincorporated entity may be divided into two or more domestic entities or the dividing entity and into one or more domestic or foreign entities or into one or more domestic entities and one or more foreign entities or into two or more foreign entities.

(b) A foreign entity may be divided into two or more domestic unincorporated entities or into the dividing entity and one or more domestic unincorporated entities or into one or more foreign entities and one or more domestic unincorporated entities, only if:

(1) this type of division is permitted by the organic rules of the foreign entity; and

(2) this type of division is not prohibited by the organic law of the foreign entity.

(c) A domestic incorporated entity may be divided into two or more domestic unincorporated entities or into one or more domestic unincorporated entities and one or more domestic incorporated entities or into one or more domestic unincorporated entities and one or more foreign entities only if the division is permitted by the organic law of the domestic incorporated entity.

Reporter's Notes

Article 3 is new. At its December, 2001 meeting, the Committee charged the Reporter with gathering information concerning the division. Presently, Pennsylvania has the most explicit provisions for divisions of domestic corporations, LLCs and LPs. *See, e.g.*, 15 Pa.C.S. § 8961 *et seq*. (2001)(division of domestic LLC); 15 *Pa.C.S.* § 8576 *et seq*. (2001)(division of domestic limited partnership); 15 *Pa.C.S.* § 1951 *et seq*. (2001)(division of domestic corporation). In general, the Pennsylvania statutes permit a single dividing entity to contractually allocate its assets and liabilities to new entities. The allocation of liabilities is, by statute, subject to a test of fraud on owners or fraud in the conveyance of assets. The Pennsylvania division provisions first appeared in 1972 for nonprofit entities. The statutes have

since been broadened to include for-profit corporations, LPs and LLCs. Pennsylvania does not, at present, provide for a division of a general partnership.

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

The transitional rule regarding protection of creditors doing business with entities engaging in "new" transactions has been omitted as a result of the Committee's decision in December, 2001 to delete this rule for conversions, domestications and entity interest exchanges. One could argue that the transitional rule is particularly appropriate to the division given the contractual basis of the allocation of assets and liabilities by a dividing entity as well as its relative novelty in most jurisdictions. Point of information - the ABA committee on corporate laws will be reviewing a proposed draft of new Chapter 12, Subchapter 12 on Division in April for inclusion in the *MBCA* as well as in *MITA.*

In discussions with practitioners around the country as to the "best" manner in which to deal with divisions, the Reporter chose to borrow from Pennsylvania because of its completeness. The draft language is for discussion purposes only.

SECTION 302. PLAN OF DIVISION.

(a) A plan of division must be in record form and shall state:

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

(2) the terms and conditions of the division;

(3) the manner and basis of:

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

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

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

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

(5) that the plan of division has been approved;

(6) any changes desired to made in the public organic documents of the dividing or surviving entities;

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

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

(9) any other provisions relating to the division that the parties may desire, including a provision recognizing rights of transferees of which the dividing or surviving entity has notice.

(b) Any of the terms of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan. Such facts may include, without limitation, actions or events within the control of or determinations made by the dividing entity.

Reporter's Notes

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

referenced for possible inclusion as consideration in a division.

SECTION 303. ACTION ON A PLAN OF DIVISION.

(a) Subject to sections 303(c), a plan of division shall be approved by a domestic unincorporated entity according to a provision for division in the entity's organic rules or, if there is no applicable provision for division in the entity's organic rules, then by all the owners of the domestic unincorporated entity.

(b) Subject to sections 303(c), a plan of division shall be approved by a domestic incorporated entity or a foreign entity in accordance with the organic law of the entity.

(c) If a person will have owner's liability with respect to a surviving entity, approval and amendment of a plan of division are ineffective without the consent in record form of that person, unless;

(1) the organic rules of the entity provide for the approval of a division where owner's liability would result with consent of less than all owners; and

(2) that person has assented to that provision in the organic rules of the entity.

(d) Subject to section 303(c) and any applicable organic law of the unincorporated dividing entity, a plan of division may be terminated or amended:

(1) as provided in the plan; or

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

Reporter's Notes

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

SECTION 304. FILINGS REQUIRED FOR DIVISION; EFFECTIVE DATE.

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

(b) A plan of division that contains all the information required by § 304(c) may be signed and filed with the [Secretary of State] in substitution of a statement of division.

(c) The statement of division shall include:

(1) the name, jurisdiction and type of organization of the dividing 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) of the division if it is not to be effective upon the filing of the statement of division;

(3) a statement as to the dividing entity and to each surviving entity that the division was approved;

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

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

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

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

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

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

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

(9) any other information relating to the division that the parties may desire, including a provision recognizing the rights of transferees of which the parties have notice.

(d) A statement of division becomes effective under this [Article] upon:

(1) the date and time of filing of the statement of division, 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]} as specified in the statement of division.

Reporter's Notes

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

SECTION 305. EFFECT OF DIVISION.

(a) When a division becomes effective:

(1) the dividing entity shall be subdivided into the distinct and independent surviving entities named in the plan of division;

(2) if the dividing entity is not to survive the division, the existence of the dividing entity shall cease;

(3) the surviving entities continue or come into existence, as the case may be;

(4) all the property, real, personal and mixed, of the dividing entity and all debts due on whatever account to it, including contract rights and other causes of action belonging to it, are allocated to and vested in the surviving entities on such a manner and basis and with such effect as is specified in the plan, or per capita among the surviving entities, as tenants in common, if no specification is made in the plan; and the title to any real estate, or interest therein, vested in the dividing entity does not revert and is not in any way impaired by reason of the division;

(5) upon the division becoming effective, the surviving entities shall each thereafter be responsible as separate and distinct entities only for such liabilities as each surviving entity undertakes or incurs in its own name, except that they shall also be liable for the liabilities of the dividing entity in the manner and on the basis provided in subsections (7) and (8);

(6) liens upon the property of the dividing entity are impaired by the division;

(7) to the extent allocations of liabilities are contemplated by the plan of division, the liabilities of the dividing entity shall be deemed without further action to be allocated to and become the liabilities of the surviving entities on such a manner and basis and with such effect as is specified in the plan, or per capita among the surviving entities, as tenants in common, if no specification is made in the plan; and one or more, but less that all, of the surviving entities shall be free of each individual liability of the dividing entity to the extent, if any, specified in the plan, if in either case:

(A) no fraud on owners [or transferees?];

(B) no violation of law shall be effected thereby; and

(C) the plan does not constitute a fraudulent transfer under [*cite state fraudulent transfer/conveyance act*];

(8) if the conditions in subsection (7) for freeing one or more of the surviving entities from the liabilities of the dividing entity, or for allocating some or all of the liabilities of the dividing entity are not satisfied, the liabilities of the dividing entity as to which those conditions are not satisfied not affected by the division and the rights of creditors thereunder are not impaired by the division, and any claim existing or action or proceeding pending by or against the dividing entity with respect to those liabilities may be prosecuted to judgment as if the division had not taken place, or the surviving entities may be proceeded against or substituted in place of the dividing entity as joint and several obligors on those liabilities, regardless of any provision of the plan of division allocating the liabilities of the dividing entity;

(9) each surviving entity holds any assets and liabilities allocated to it as

the successor to the dividing entity, and those assets and liabilities are not deemed to have been assigned to the new entity in any manner, whether directly or indirectly or by operation of law;

(10) any taxes, interest, penalties and public accounts of [this State] claimed against the dividing entity that are settled, assessed or determined prior to or after the division are the liability of all of the resulting entities and, together with interest thereon, are a lien against the franchises and property, both real and personal, of all the resulting entities. [*Provide for release of tax claims against less than all of the resulting entities to the extent and as permitted, if at all, in the adopting state.*]

(11) the public organic document of any surviving entity shall be deemed to be amended to the extent, if any, that changes in the documents are stated in the plan of division. (b) The allocation of any fee or freehold interest or leasehold having a remaining term of [30 years] or more in any tract or parcel of real property situate in this [State] owned by a dividing entity (including property owned by a foreign business entity dividing solely unde the law of another jurisdiction) to a new entity surviving the division shall not be effective until one of the following documents is filed in the [office for the recording of deeds] in which the tract or parcel is situated:

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

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

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

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

adopting state].

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

(c) The effect of a division on the owner's liability of a person who cease to have owner's liability as a result of a division shall be as follows:

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

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

(3) the organic law of the dividing entity shall continue to apply to the collection or discharge of any owner's liability preserved by subsection 305(d)(1), as if the division had not occurred; and

(4) the person shall have whatever rights of contribution from other persons as provided by the organic law of the dividing entity with respect to any owner's liability preserved by subsection 305(d)(1), as if the division had not occurred.

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

(1) appoint the [Secretary of State] as its agent for service of process for

the purpose of enforcing the rights of holders of ownership or transferee interests of each domestic entity that is a party to the division; and

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

Reporter's Notes

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

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

Section 305(a)(4) - Section 305(a)(4) provides that the property, rights and causes of action of the dividing entity may be allocated to the surviving entities without reversion or impairment in any manner stated in the plan. If the plan is silent as to the allocation of these rights and property, the surviving entities take the property on a per capita basis as tenants in common.

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

Section 305(a)(7) - Section 305(a)(7) concerns the allocation of the liabilities of the dividing entity. The rule of § 305(a)(7) is that the liabilities of the dividing entity may be allocated among surviving entities in any manner. The liabilities so allocated become the liability of the receiving/surviving entity. The exception to the allocation of liabilities ("freeing of liabilities") is where the allocation results in "fraud on owners," "violation of law" or "fraudulent conveyances." In these cases, the allocation fails and the surviving entities are jointly and severally liable for the failed allocation. For example, assume a corporation is to be divided into four LLCs. The plan of division can allocate particular assets and liabilities to each LLC. Assume that one LLC is to receive a piece of equipment with a fair market value of $5,000. Assume further that the same LLC is allocated an account payable of $20,000. Because the asset value far exceeds the liability so allocated, the account payable may be deemed to be fraudulent with the result that the allocation fails. The account payable thereafter becomes the liability of all four LLCs, jointly and severally. If the account payable were $3,000, the

allocation would seem to be enforceable with the result that the other 3 LLCs are "free" of that liability.

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

Section 305(b) - Section 305(b) is intended to prevent the use of a division to avoid real estate transfer taxes. The section should be conformed to local practice.

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

[ARTICLE] 4

ENTITY INTEREST EXCHANGE

SECTION ~~301~~401. ENTITY INTEREST EXCHANGE.

(a) Through an entity interest exchange:

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

(2) all of the ~~entity~~ownership or transferee 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~~ownership or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee 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.~~

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

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

(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 organic laws of 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~~.

(c) A domestic incorporated entity may be a party to an entity interest exchange ~~of the exchanging entity until such time as the provision is amended subsequent to that date.~~ with a domestic unincorporated entity only if the entity interest exchange is permitted by the organic law of the domestic incorporated entity.

Reporter's Notes

An entity interest exchange is the same transaction as the share exchange provided for in Section 11.03 of the *MBCA*. The entity interest exchange anticipated by Article ~~3~~4 permits a business combination between one or more domestic unincorporated entities or between a domestic unincorporated entity and a domestic incorporated or foreign entity of any type. The effect of the entity interest exchange is that: (1) the separate existence of one or more of the exchanging entities does not cease; and (2) the acquiring entity acquires 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~~401 - Section ~~301~~401 is intended to make applicable any appraisal rights that may attach by virtue of the organic law of the entities to the entity interest exchange. It is also intended to enable any appropriate procedure for terminating or abandoning an entity interest exchange after it has been approved by the appropriate interest holders but prior to the effectuation of the entity interest exchange.

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

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

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

Section ~~301~~401(a) - Section ~~301~~401(a) provides for an entity interest exchange between a domestic unincorporated entity and a domestic incorporated entity or a foreign entity of any type. Section ~~301~~401(a) also enables an entity interest exchange among domestic unincorporated entities of the same or different types.

Section ~~301~~401(b) - Section ~~301~~401(b), as presently drafted, allows a ~~domestic incorporated~~foreign 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~~ only if the organic rules of the foreign entity permit the exchange and the organic law governing the foreign entity does not prohibit the transaction. As with its analogous provision in § 201(b), filing problems could arise in the foreign jurisdiction where the 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**~~is not expressly authorized. *See* Reporter's Notes to § 201(b).

Section 401(c) - As with section 201(c), section ~~301~~401(c) ~~could be drafted to~~ permits a ~~foreign~~domestic incorporated entity whose organic laws ~~do not *enable*~~*permit* 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**~~an exchange with a domestic unincorporated entity. The prior default rule regarding domestic incorporated entities was omitted based upon the Committee's decision in December, 2001.

Prior § 401(d) (the "transitional rule") was deleted as per the Committee decision in December, 2001.

SECTION 402. 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 must be in record form and shall state:

(1) the name, jurisdiction and type of organization of each exchanging entity whose ownership or transferee 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~~ownership or ~~more classes or series of entity~~transferee interests of the exchanging entity into ~~entity~~ownership

or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee 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 laws 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, including a provision recognizing the rights of transferees in an acquiring or exchanging entity of which the parties have notice.

Reporter's Notes

Section ~~302~~402 (a) - Section ~~302~~402(a) states the general intent that for this [Article] to apply, one of the constituent entities ~~should~~must 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~~402 (b)(3) - Section ~~302~~402 (b)(3) poses the same "reshuffling" issue as section 202(b)(3). One difference in section ~~302~~402 (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~~402(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~~403. ACTION ON PLAN OF ENTITY INTEREST EXCHANGE.

(a) Subject to the provisions of Section ~~303~~ 403(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~~rules 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]~~rules, then by all the owners of the acquiring or exchanging domestic unincorporated entity.

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

~~(1) a~~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.]~~ governing the 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 in record form of that person, ~~[~~unless:

(1) the ~~private~~ organic ~~documents~~rules of the entity provide for the approval of the entity interest exchange where owner liability would result 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.]~~

~~(~~erules.

(d) Subject to sections ~~303~~ 403(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~~or

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

Reporter's Notes

Section ~~303~~ 403(a) - Section ~~303~~ 403(a) states the general rule that a domestic unincorporated entity may be an acquiring or exchanging entity in an entity interest exchange. As such, section ~~303~~ 403(a) *will become the substantive law which enables this transaction for domestic unincorporated entities*. Section ~~303~~ 403(a), in this regard, is altering present unincorporated entity law since no uniform unincorporated act currently allows for an entity interest exchange. In addition, section ~~303~~ 403(a) permits a domestic unincorporated entity to be a party to an entity interest exchange with another domestic incorporated entity or a foreign entity of any type. Section ~~303~~ 403(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-.

Section 403(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 finallythen to *unanimity*.

Section 303-403(b)(1) - Section 303-403(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~~

Section 403(c) - Sections 403(c) adopts 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~~This section~~s~~ prohibits an entity interest exchange without the ~~written~~ consent in record form of any person who will incur owners' liability upon the effectiveness of the exchange.

Section ~~303~~ 403(e~~d~~) - Section ~~303~~ 403(e~~d~~) permits termination or abandonment ~~only~~ according to a bargained-for provision to that effect in a plan of exchange ~~and only~~or 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~~404. 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) A plan of entity interest exchange that contains all the information required by subsection (c) may be signed and filed with the [Secretary of State] in substitution of a statement of entity interest exchange.

(~~b~~c) 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) 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, including a provision recognizing the rights of transferees in an acquiring or exchanging entity of which the parties have notice.

(~~e~~d) 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) specified in the statement of entity interest exchange.

Reporter's Notes

Section ~~304~~404 - Section ~~304~~404 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~~404. It is the intent of section ~~304~~404 that a plan could serve as the appropriate public filing and that the filing of the plan would have the same legal effect as the filing of the statement of entity interest exchange. Section 404(b) provides the statutory authority for the filing of a plan in substitution of a statement.

The information required to be filed in the statement under section ~~304~~404 is intentionally less burdensome than that required for a merger under section 204. The present draft adopts a minimalist filing philosophy because: (1) a filing as to the *transaction* will be required by any domestic unincorporated acquiring or exchanging entity; (2) both the acquiring and the exchanging entity *remain in existence* after the exchange (although arguably in a reorganized or recapitalized form); and (3) the terms and conditions of the exchange or any resulting restructuring or recapitalization will have been approved by the owners under section ~~303~~403. Section ~~304~~404 thus omits a reference to *terms and conditions* because owner approval has already been met (assuming, also, that where approval is defective, the owners have recourse under contract or alternative entity law). A filing as to the *transaction* allows at least some minimal protection for secured lenders who have loaned against collateral that may have "shifted" in some manner in an exchange which results in a recapitalization or restructuring. Also, in light of new Article 9, it seemed advisable to provide for a *notice* filing regarding the *transaction* and to thereafter leave the secured lenders to police their collateral and a possible new debtor accordingly. [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~~404(b)(4) - Section ~~304~~404(b)(4) is drafted to reflect certain differences in the organic laws of incorporated and unincorporated entities. For example, where an entity interest exchange is used for the purpose of recapitalizing an unincorporated entity, alternative entity law does not require an amendment to a public organic document in order to protect creditors. Corporate law, conversely, would require an amendment to a corporation's certificate of incorporation where authorized capital has been increased or otherwise modified. Therefore, if an entity interest exchange is between only unincorporated entities and the private organic documents of the exchanging and acquiring entities permit the transaction, an argument could be

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

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

SECTION ~~305~~405. EFFECT OF ENTITY INTEREST EXCHANGE.

(a) When an entity interest exchange becomes effective, the ownership and transferee interests of each entity that are to be exchanged for ~~entity~~ownership or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee 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~~ownership and transferee 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 or organic rules governing the entities to the interest exchange. The acquiring entity shall become the holder of the ~~entity~~ownership or transferee interests in the exchanging entity as stated in the plan of entity interest exchange. The public organic documents and organic rules 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's 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's 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's liability of a person who ceases to hadve owner's liability ~~for some or all~~as a result 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's liability under the organic law of the entity in which the person was an owner to the extent any such owner's liability occurred before the effective date of the statement of entity interest exchange;

(2) the person shall not have owner's 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's liability before the entity interest exchange shall continue to apply to the collection or discharge of any owner's liability preserved by subsection ~~305~~405(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's liability with respect to any owner's liability preserved by subsection ~~305~~405(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 or transferees of each domestic entity that is a party to the entity interest exchange is entitled under the domestic entity's organic law~~.~~ or organic rules

Reporter's Notes

Section ~~305~~405(a) - Section ~~305~~405(a) has been redrafted since the meeting of March, 2001. At present, section ~~305~~405(a) attempts to make clear four points - that after the entity interest exchange becomes effective: (1) the *entity interests* of the *exchanging entity* are exchanged, converted or canceled as provided in the plan; (2) the *only rights* of the *former holders* of the exchanging entity are those received as consideration for the exchange, conversion or cancellation; (3) the *acquiring entity* becomes the *owner* of the exchanging entity's ownership 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~~405(b) - Section ~~305~~405(b) states the rule for *future owner's liability*. Section ~~305~~405(b) provides that an *owner in an acquiring entity* shall have *personal liability only for the debts and obligations of the acquiring entity* that arise *after the effective date* of the exchange. This section parallels analogous provisions in Articles 2 (mergers), 43 (divisions), 5 (conversions) and ~~5~~6 (domestications).

Section ~~305~~405(c) - Section ~~305~~405(c) states the rule for past owner's liability. Section ~~305~~405(c) is drafted in four parts: (1) an *owner in an exchanging entity* who had personal liability for the debts and obligations of the exchanging entity under the entity's organic law *is not discharged* from those debts and obligations *if the debts arose before the effective date* of the exchange; (2) an *owner in an exchanging entity shall not have owner's liability* for the debts and obligation of the *acquiring entity* if those *debts arose after the effective date* of the exchange; (3) the *organic laws* or the *exchanging entity continue to apply* for any *past owner's liability that is preserved* under subsection (1); and (4) the *organic laws of the exchanging entity continue to apply* regarding any *contribution rights* among owners that were *preserved under subsection (1).*

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

SECTION ~~306~~406. CONTRACTUAL APPRAISAL RIGHTS.

A plan of entity interest exchange may provide that contractual appraisal rights with respect to a~~n owner~~ ownership or transferee interests in an entity that is a party to an entity interest exchange shall be available for any ~~class or group of owners or~~ ownership or transferee 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~~406 - Section ~~306~~06, 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~~406, 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 20, 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.

Section 406 has been amended to include transferee interests within a contractual appraisal right.

[ARTICLE] 45

CONVERSION

SECTION ~~401~~501. 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~~rules of the foreign ~~jurisdiction~~entity permit the domestic entity to become an entity in that jurisdiction and the conversion is not prohibited by the organic law governing the foreign entity. [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~~c), a domestic incorporated entity may become a domestic unincorporated entity if the organic law~~s~~ governing the domestic incorporated entity ~~are silent regarding the conversion and the [entity] elects to be governed by this [Article].~~ permit the conversion. [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~~into a domestic unincorporated 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)~~].

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

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

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

~~(3) in effecting the conversion,~~organic law of 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~~5 involves the transformation of one ~~form~~type of business into a different ~~form~~type 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~~501(a) - Section ~~401~~501(a) states the substantive rule for conversions between domestic entities where one party to the transaction is a domestic unincorporated entity. Section ~~401~~501(a) would, for example, permit a conversion from a general partnership form to a limited partnership and vice versa. Section ~~401~~501(a) would also permit a conversion from an LLC to a general or limited partnership. Section ~~401~~501(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~~501(b) - Section ~~401~~501(b) enables a conversion of a domestic unincorporated entity to a foreign entity of a different type so long as the organic ~~laws~~rules governing the foreign entity permit the conversion and the conversion is not prohibited by the organic law governing the foreign entity. For example, a domestic LLC could convert to a foreign partnership, limited partnership or corporation pursuant to section ~~401~~501(b). Section ~~401~~501(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~~6. The laws of the foreign jurisdiction would govern the effect of conversion under ~~401~~501(b).

Section ~~401~~501(c) - Section ~~401~~501(c) states the default rule for conversions between domestic incorporated and unincorporated entities. Section ~~401~~501(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~~unincorporated entity ~~neither provide for nor prohibit~~permit the conversion. ~~The laws of the foreign jurisdiction would govern the effect of this conversion.~~

Section ~~401~~501(e) - Section ~~401~~501(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~~501(e) assumes that the organic ~~laws~~rules 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*~~ Filing problems could occur for 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**~~in its jurisdiction of formation if the recording authority in that jurisdiction is not empowered to accept the conversion filing.

Former sections 501 (d) and (f) were deleted at the direction of the Committee in its December, 2001 meeting.

An issue that needs direction by the Committee is that bracketed throughout § 501. In each of these circumstances, the statement is made that the law governing the legal effect of a conversion should be the law of the jurisdiction of the converted entity. In a series of discussions by members of the ABA Committee on Entity Rationalization regarding the Model Inter-Entity Transactions Act, various opinions were expressed on this point. It did not seem to be clear to those participating in the discussions that the statement regarding the applicable law was correct. For example, assume an Alabama LLC converts to a Kentucky LP. This draft assumes that the laws of Kentucky would govern the legal effect of the conversion. Some members of the ABA Committee felt that the laws of Alabama would govern. To the extent that those laws are inconsistent, it was determined that the draft should remain silent as to this issue.

SECTION 502. 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 be in record form and 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;

(32) the terms and conditions of the conversion;

(43) the manner and basis of converting onethe ownership or more classes or series of entitytransferee interests of the converting entity into entityownership or transferee interests, securities, obligations, rights to acquire entityownership or transferee interests or securities, cash, other property or any combination of the foregoing;

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

(65) 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;

(76) 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

(rules;

(7) any provisions required by the organic laws under which a converting entity is organized; and

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

, including a provision recognizing the rights of transferees in the converting entity of which the entity has notice.

(b) Any of the terms of the plan may be made dependent upon facts ascertainable

outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan. Such facts may include, without limitation, actions or events within the control of or determinations made by the converting entity.

Reporter's Notes

Sections ~~403~~503(a) - Section ~~403~~503(a) states the substantive rule governing domestic unincorporated entities pertaining to conversions. Section ~~403~~503(a) provides for a conversion between a domestic unincorporated entity and a different ~~form~~type of domestic unincorporated entity. Section ~~403~~503(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~~503(b) - Section ~~403~~503(b) tracks the provisions of ~~sections~~§§ 203, 303 and ~~303~~403 relating to plans for mergers, divisions and entity interest exchanges. Certain modifications have been made to reflect the differing nature of conversions.

Section ~~403~~503(b)(4) - Section ~~403~~503(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**~~Section 503 has been redrafted to include transferee interests.

SECTION 503. APPROVAL ON PLAN OF CONVERSION.

(a) Subject to sections ~~403~~503(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~~rules 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 provision for amendment, then by]~~rules, then by all owners of the converting entity.~~]~~

(b) Subject to sections ~~403~~ 503(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.]~~law of the 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 in record form of that person, ~~[~~unless:

(1) the ~~private~~ organic ~~documents~~rules of the converting entity provide for the approval of the conversion where owner's liability would result 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.]~~

~~(~~erules.

(d) Subject to section ~~403~~503(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~~or

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

Reporter's Notes

Section ~~403~~503(a) - Section ~~403~~503(a) states the substantive rule for approval of a conversion by a domestic unincorporated entity. Section ~~403~~503(a) thus repeals all existing approval provisions for conversions in *RUPA*, *Re-RULPA* and *ULLCA* and replaces them with section ~~403~~503(a). According to section ~~403~~503(a), approval for a conversion, subject only to the rules for assumption of owner's liability, is alternatively: (1) the number specified for conversion in the entity's ~~private~~ organic ~~documents~~rules; or (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~~ and defaults thereafter to *a rule of unanimity*. This hierarchy of approvals mirrors that of mergers, divisions and entity interest exchanges.

Section ~~403~~503(b)~~(1)~~ - Section ~~403~~503(b)~~(1~~) states an approval rule of deference. Under section ~~403~~503(b)(1), therefore, a plan of conversion for a ~~"non-electing"~~ domestic incorporated entity ~~and~~or 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**~~ This rule has been redrafted to reflect the Committee's decision in December, 2001 to eliminate any alternative approval methods.

Section 503(c) - Section ~~403~~503(c) provides a general exception for approvals of conversions. As such, section ~~403~~503(c) requires ~~written~~ consent in record form of all persons who will have owner's liability in a converted entity. The specific exception to ~~403~~503(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 that could result in owner's liability 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**~~Former § 503(d) was omitted as being unnecessary.

Section 503(e) - Section ~~403~~503(e) follows analogous termination and abandonment provisions in the merger, division 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~~504. 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) A plan of conversion that contains all the information required by subsection (c) may be signed and filed with the [Secretary of State] in substitution of a statement of conversion.

(~~b~~c) 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 that is not more than 90 days after the statement of conversion is delivered to the [Secretary of State]) 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 chief executive office or principal place of business; ~~and~~

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

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

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

(7) any other information relating to the conversion that may be desired, including a provision recognizing the rights of transferees of the converted entity of which the entity has notice.

(~~e~~d) 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) as specified in the statement of conversion.

Reporter's Notes

Section ~~404~~504 - Section ~~404~~504 states the substantive filing requirements for converting domestic unincorporated entities ~~and "electing" domestic incorporated entities~~. The specific filing requirements are stated in section ~~404~~504(b). These requirements generally mirror those of the ~~merger anticipated~~transactions set forth in ~~Article 2~~this [Act].

Section ~~404~~504(b)(4) - Section ~~404~~504(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~~504(b)(4) is efficiency in filings as well as public notice regarding the transaction.

Section ~~404~~504(b)(5) - Section ~~404~~504(b)(5) requires a converted entity that is a domestic nonfiling entity to provide the *street address* of the converted entity's chief executive office or principal place of business. A post office box would not satisfy section ~~404~~504(b)(5). The intent of section ~~404~~504(b)(5) is to provide notice of the place at which the converted entity may be found for all purposes, including that of service of process. The chief executive office or principal place of business is not required to be located within the converted entity's jurisdiction of formation.

Section 504(b) - Section 504(b) is new. The section was added at the suggestion of Melissa Wangeman who was concerned that recording authorities need statutory direction to accept certain documents for filing.

Section ~~404~~504(~~bc~~)(6) - Section ~~404~~504(~~bc~~)(6) imposes on converted foreign entities a filing requirement that includes information of either: (1) a registered agent and registered office for a qualified foreign entity in the converting entity's jurisdiction of formation; or (2) a *street address* of its chief executive office or principal place of business for a nonqualified foreign entity. As with section ~~404~~504(~~bc~~)(5), a post office box would not satisfy the policy or intent of the section. Section ~~404~~504(~~bc~~)(6) provides notice of a place at which the foreign entity may be found for all purposes, including service of process.

Section ~~404~~504(~~ed~~) - Section ~~404~~504(~~ed~~) 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~~504(~~e~~d)(1) states the intent that "filing" for purpose of determining the effectiveness of the conversion is to be determined by the *means normally used for filing* within each [jurisdiction] adopting this [Act].

SECTION ~~405~~505. 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~~ownership and transferee interests of the converting entity are reclassified into ~~entity~~ownership or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee interests or securities, cash or other property in accordance with the plan of conversion; and the owners of the ~~entity~~ownership or transferee 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 or organic rules 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~~rules provided for in the plan of conversion constitute~~s~~ the ~~private~~ organic ~~document~~rules 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 or transferees who exercise rights in connection with the conversion pursuant to the converting entity's organic law or organic rules; and

(2) agree that it will promptly pay the amount, if any, to which the owners or transferees 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~~are incurred after the effective date of the statement of conversion.

(d) The effect of a conversion on the owner's liability of a person who ceases to have owner's liability ~~of an owner in a converted entity for the debts, obligations and liabilities of the converting entity~~as a result of a conversion shall be as follows:

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

(2) the ~~owner~~person shall not have owner's liability under the organic laws of the converting entity in which the person was an owner prior to the conversion for any debt, obligation or liability ~~of the converted entity~~ that ~~arises~~was incurred after the effective ~~date~~time 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~~the person shall have whatever rights of contribution from other ~~owners~~persons as are provided by the organic law or organic rules 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~~.

(e) Upon a conversion of a domestic entity becoming effective, the converted foreign entity that continues in existence 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 or transferee interests in the converting domestic entity; and

(2) agree to promptly pay the amount, if any, to which the owners or transferee of the converting entity is entitled under the converting entity's organic law or organic rules.

Reporter's Notes

Section ~~405~~505(a) - Section ~~405~~505(a) governs the *legal effect of a conversion where the converted entity is a domestic entity*. For example, section ~~405~~505(a) regulates the effect of a conversion of a foreign entity to a domestic entity or the conversion of a domestic entity of one type to a domestic entity of another type.

Section ~~405~~505(a) provides an exhaustive list of the effect of a conversion where the converted entity is a domestic entity. First, under section ~~405~~505(a), the converting entity ceases to exist and the public organic documents under which the converting entity operated are no longer effective. Second, the converted entity becomes subject to the organic laws of the jurisdiction of conversion and the converted entity is deemed to have come into existence at the time the converting entity was formed, created or otherwise 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~~505(a)(8) and (9) provide the filing effect of the statement of conversion for a converted filing and nonfiling entity.

Section ~~405~~505(b) - Section ~~405~~505(b) states the rule governing the *legal effect of a conversion where the converted entity is a foreign entity*. According to section ~~405~~505(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 or transferees in the domestic converting entity; and (2) agrees to pay any amount owed to the owners of the converted entity arising either in contract or from the organic laws of the converting entity. Section ~~405~~505(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~~505(b) protects owners and transferees in the domestic converting entity who have not received payment of whatever consideration was owed to them in the conversion. The converted foreign entity in the latter circumstance not only agrees to pay those claims but also is deemed to appoint the [Secretary of State] as its agent for service of process.

Section ~~405~~505(c) - Section ~~405~~505(c) provides the rule for *future owner's liability*.

Section ~~405~~505(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*~~*are incurred after the effective date* of the conversion.

Section ~~405~~505(d) - Section ~~405~~505(d) provides the rule for *past owner's liability*. Section ~~405~~505(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). Sections 505(c) and (d) do not address the circumstance where owner's liability exists before and after a conversion.

SECTION ~~406~~506. CONTRACTUAL APPRAISAL RIGHTS.

A plan of conversion may provide that contractual appraisal rights with respect to an ~~owner~~ownership or transferee interest in a converting entity shall be available for any ~~class or group of owners or~~ ownership or transferee 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~~506 - Section ~~406~~606 is not intended to create any "appraisal" right for the owners of a domestic converting entity. Rather, section ~~406~~506 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. Section 506 has been amended to in specifically include transferee interests.

As noted before, a jurisdiction adopting this [Act] may wish to consider re-labeling the "appraisal" right of ~~406~~506 so as to de-link any "negative" corporate precedent.

ARTICLE [~~5~~6]

DOMESTICATION

SECTION ~~501~~601. 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~~rules 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 organic law of 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~~6 authorizes a foreign unincorporated entity to become a domestic unincorporated entity of the same type and also authorizes a domestic unincorporated entity to become a foreign unincorporated entity of the same type. Article ~~5~~6 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~~6, would arguably govern the legal effect of a domestic unincorporated entity that domesticates in another jurisdiction. In the latter scenario, Article ~~5~~6 serves as to statutorily *enable* a domestic unincorporated entity to domesticate to a foreign jurisdiction. Article ~~5~~6 does not create a right in the domestic entity to be received in the foreign jurisdiction. Section ~~501~~601

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

~~**Section 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**~~

SECTION 602. 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 must be in record form and 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~~the ownership or ~~more classes or series of entity~~transferee interests of the domesticating entity into ~~entity~~ownership or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee 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 ~~.~~, including a provision recognizing the rights of transferees in a domesticating entity of which the entity has notice.

(b) Any of the terms of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan. Such facts may include, without limitation, actions or events within the control of or determinations made by the domesticating entity.

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~~602(~~b~~a)(1) - Section ~~502~~602(~~b~~a)(1) is drafted slightly differently from prior language relating to information required to be contained in a plan of merger, division, conversion or entity interest exchange. Section ~~502~~602(~~b~~a)(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~~602(~~b~~a)(1).

Section ~~502~~602(~~b~~a)(3) - The language of section ~~5~~602(~~b~~a)(3) is identical to that found in Articles 2 (mergers), 3 (divisions), 4 (entity interest exchanges) and 45 (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~~603. ACTION ON PLAN OF DOMESTICATION.

(a) Subject to section ~~503~~603(c~~) and (d~~), a plan of domestication for ~~an~~a domestic unincorporated entity shall be approved according to a provision for domestication in the entity's ~~private~~ organic ~~documents~~rules 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]~~rules, 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].~~foreign 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 in record form of that person, ~~[~~unless:

(1) the ~~private~~ organic ~~documents~~rules 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~~rules.

(d) Subject to sections ~~502~~602(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~~or

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

approve the plan.

Reporter's Notes

Section ~~503~~603(a) - Section ~~503~~603(a) sets out the substantive rule of approval for a domestication by a domestic unincorporated entity. The approvals anticipated by section ~~503~~603(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~~ and (2) second, a *default rule of unanimity* by the owners of the domesticating entity. The hierarchy of approvals in section ~~503~~603 mirror those for approvals of domestic unincorporated entities engaging in mergers, divisions, entity interest exchanges and conversions.

Section ~~503~~603(b)(1) - Section ~~503~~603(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~~requires whatever approval is mandated by 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**~~

Section 603(c) - Section ~~503~~603(c) limits the approvals of sections ~~503~~603 (a) and (b). According to section ~~503~~603(c), if a person will have owner's liability in the domesticated entity, the general approval rules of section~~s 503~~ 603 (a~~) and (b~~) will be ineffective without the ~~written~~ consent in record form of the person having owner's liability. The impact of section ~~503~~603 (c) is somewhat different than in previous Articles. For example, if a Delaware limited partnership domesticated into Texas, the entity is of the same type and the owner's liability of any general (or limited) partner arguably has not changed (assuming that the case precedent in the jurisdiction of the domesticated entity is substantially the same as that of the domesticating entity). Likewise, if an Iowa general partnership domesticated into Minnesota, the personal liability of the general partners arguably remains the same. In this sense, section ~~503~~603(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~~ The Committee may wish to consider if this the rule desired given the fact that the nature of owner's liability will not change as a result 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~~603(~~ed~~) - Section ~~503~~603(~~e~~d), like its counterparts in Articles 2 (mergers), 3 (divisions), 4(entity interest exchanges) and 45 (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~~or 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 suggestion~~s~~ 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 t~~The suggestion~~s~~ 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~~603(~~e~~d), it would appear that the plan will become effective despite these market changes if the parties did not draft a termination or abandonment clause. Further, even assuming such a clause were present, the general partners of the limited partnership may well not have sufficient time to solicit the limited partners to abandon the plan. In these circumstances, the general partners could, assuming an extension of the rule of section ~~503~~603(~~e~~d), abandon the plan without limited partner approval. Any adverse consequence of the abandonment would be redressed in an action by the limited partners against the general partners for breach of fiduciary duty.

SECTION ~~504~~604. FILINGS REQUIRED FOR DOMESTICATION; EFFECTIVE DATE.

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

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

(~~b~~c) 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) 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 in this [State]; or

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

(~~c~~d) 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 that is not more than 90 days after the statement is delivered to the [Secretary of State]) as specified in the statement of domestication.

Reporter's Notes

Section ~~504~~604 - Section ~~504~~604 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~~604 (~~b~~c). Section ~~504~~604 generally mirror that of the filing requirements in Articles 2 (mergers), 3 (divisions), 4 (entity interest exchanges) and 45 (conversions). All modifications are noted in the Reporter's comments.

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

Section ~~504~~604(~~b~~c)(1) - Section ~~504~~604(~~b~~c)(1) is modified to reflect the unique nature of the domestication. Sections ~~504~~604(~~b0~~c)(1) therefore requires only the name, jurisdiction and type of organization of the domesticating entity and the name, if changed, and jurisdiction of the domesticated entity. These modifications reflect that the domesticated 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~~604(~~b~~c)(1) requires disclosure of that fact.

Sections ~~504~~604(~~b~~c)(4) and (5) - Sections ~~504~~604(~~b~~c)(4) and (5) required notice of where the domesticated entity may be found for all purposes, including that of service of process. Section ~~504~~604(~~b~~c)(4) relates to a qualified foreign entity. As to this domesticated entity, disclosure will include the name and address of its registered agent within the jurisdiction of the domesticating entity. Section ~~504~~604(~~b~~c)(5) requires notice of where a nonqualified foreign entity may be found. Section ~~504~~604(~~b0~~c)(5) therefore requires disclosure of the street address of the entity's chief executive office or principal place of business. Unlike section ~~504~~604(~~b~~c)(4), this section does not require a "presence" by the foreign entity in the jurisdiction of the domesticating entity. Both sections protect creditors who wish to pursue claims against the domesticating entity.

Section ~~504~~604(~~e~~d)(1) - Section ~~504~~604(~~e~~d)(1) alters somewhat the articulation of the effective date of the filing of the statement of domestication. Section ~~504~~604(~~e~~d)(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~~604(c)(1) makes no attempt to impose an omnibus filing date.

SECTION ~~505~~605. EFFECT OF DOMESTICATION.

(a) When a domestication of a foreign entity into this [~~s~~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 [~~s~~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~~ownership and transferee interests of the domesticating entity are reclassified into ~~entity~~ownership or transferee interests, securities, obligations, rights to acquire ~~entity~~ownership or transferee interests or securities, cash or other property in accordance with the plan of domestication; and the owners or transferees 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 or organic rules 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~~rules provided for in the plan of domestication constitute~~s~~ the ~~private~~ organic ~~document~~rules 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 or transferees who exercise rights in connection with the domestication pursuant to the domesticating entity's organic law or organic rules; and

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

(c) A~~n owner~~ person 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~~of 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~~605(a) - Section ~~505~~605(a) governs the *legal effect of a domestication where the domesticated entity is a domestic entity*. If a domestic entity domesticates into a foreign jurisdiction, the legal effect of the domestication would be governed by the organic laws of the foreign jurisdiction.

Section ~~505~~605 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~~605(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~~605(a)(3) states the general proposition that the domesticated entity is deemed to have begun its existence at the time the domesticating entity was first formed or otherwise created. As such, the domesticated entity is the same entity whose existence relates back to the creation of the domesticating entity. Sections ~~505~~605(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~~605(a)(7) states the rule that the ~~entity~~ownership or transferee interests of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and that the owners or transferees of the domesticating entity are entitled to theses rights only. Section ~~505~~605(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~~605(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~~605(b) - Section ~~505~~605(b) states a rule for domestic entities that domesticate into a foreign jurisdiction. Sections ~~505~~605(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 (divisions), 4 (entity interest exchanges) and 45 (conversions).

Section ~~505~~605(c) - Section ~~505~~605(c) states the rule for *future owner's liability.* Section ~~505~~605(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~~605(d) - Section ~~505~~605(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. Query whether § 605(d) since whatever owner's liability existed before the domestication will continue after the transaction as well.

SECTION ~~506~~606. CONTRACTUAL APPRAISAL RIGHTS.

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

Reporter's Notes

Section ~~506~~606 - Section ~~506~~606 does not create an "appraisal" right in the owners of a domesticating entity. Instead, the intent of section ~~506~~606 is to statutorily recognize rights that were created in contract. A~~S~~s 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~~606 is suggestive only. In some jurisdictions, alternative terminology may be necessary to "de-link" any negative corporate precedent incident to an appraisal.

ARTICLE [~~6~~7]

MISCELLANEOUS PROVISIONS

SECTION ~~501~~701. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Uniform Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION ~~502~~702. 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~~703. EFFECTIVE DATE. This [Act] takes effect January 1, 200___.

SECTION ~~504~~704. REPEALS. Except as otherwise provided in Section ~~505~~705 effective January 1, 20___ [drag-in-date], the following [Acts] and parts of [Acts] are repealed: [RUPA, §§ 901-908; Re-RULPA, §§ 1101-1113; and ULLCA, §§ 1001-1009].

SECTION ~~505~~705. 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~~706. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect.