ATTACHMENT 1

**[ARTICLE] 6**
**DIVISION**

**SECTION 601. DIVISION AUTHORIZED .**

(a) Except as otherwise provided in this section, by complying with this [Article], a domestic entity may divide into:

(1) the dividing entity, and one or more new entities whether domestic or foreign; or

(2) two or more new entities whether domestic or foreign.

(b) A foreign entity may be created by the division of a domestic entity only if the division is authorized by the law of the foreign entity's jurisdiction of organization.

(c) Except as otherwise provided in this section, if the division is authorized by the law of the foreign entity's jurisdiction of organization, one or more of the resulting entities created in a division of a foreign entity may be a domestic entity.

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

[(e) The following entities may not divide or be created in a division:

(1)

(2)]

***Legislative Note:*** *Very few state entity laws currently authorize divisions. As pointed out in the Legislative Note to Appendix 2, in those few states that do have division provisions, it is recommended that they be amended to apply only to divisions where the dividing entity and the resulting entities are all of the same type, for example a transaction where a corporation is divided into two or more corporations. In addition, a new subsection should be added to this section analogous to Sections 201(c) and 301(c) stating:*

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

*(1)*

*(2)*

*The statutes listed in that added subsection would be the existing division provisions as amended.*

*Alternatively, the existing division provisions could be repealed and then Article 6 would apply to all same-type and cross-type divisions. A third alternative is to add same-type division provisions to all of a state's existing entity statutes so that Article 6 would only apply to divisions where one or more of the resulting entities is of a different type from the dividing entity or the other resulting entities; but this alternative would be quite cumbersome to implement given the absence of division provisions in most existing entity statutes.*

## Comment

1. **In General –** The division transaction authorized by this article is the reverse of a merger. Instead of two or more entities being merged into one entity, in a division one existing entity is divided into two or more resulting entities. The dividing entity may or may not survive the division, and one or more of the resulting entities may be foreign entities if the laws of each resulting foreign entity's jurisdiction of organization permit the division. As part of the division, the assets and liabilities of the dividing entity are allocated to the resulting entities as provided in the plan of division to the extent permitted by this article.

Restructurings that divide a business into more than one entity have become increasingly popular in recent years. One prominent example is the transaction in which, as part of a settlement of antitrust litigation, the telephone assets of AT&T were divided among the seven so-called "Baby Bells" and the stock of the Baby Bells was distributed to the AT&T shareholders in what is known as a spin-off division. Another example is the split-off by General Motors of one of its major subsidiaries, Electronic Data Systems, where GM distributed EDS stock to the holders of its Class E stock. A third type of division, known as a split-up, is sometimes used in closely held businesses to resolve protracted dissension among the equity owners. For example, if the entity operates two distinct businesses, it may be possible to resolve dissension between two groups of owners by distributing the equity interests in one to one faction and the equity interests in the second to the other faction. As a result, unlike spin-off and split-off divisions where the distributing entity continues in existence, there will be two new entities and the distributing entity ceases to exist.

In addition to being a non-judicial remedy for resolving dissension, there are many other business reasons for using divisions, including: separating conflicting businesses or businesses having different capital requirements or operating characteristics, freeing a parent company of underperforming businesses, unlocking value in a portion of the business operations that is expected to have greater market value operating as a separate business, and disposing of an unwanted business to facilitate a buy-out of the rest of the business enterprise.

This article does not authorize a domestic dividing entity that survives the division to change its jurisdiction of organization as part of the division. That result may be accomplished, however, by subsequently domesticating the dividing entity in a new jurisdiction of organization under the procedure in Article 5.

If the organic law of a foreign entity authorizes a division of that entity into one or more resulting entities incorporated or organized under the laws of another state, subsection (c) permits those resulting entities to be incorporated or organized in this state.

2. **Nonstatutory Divisions –** This article does not apply to a division in which an existing subsidiary is distributed to the dividing entity's equity holders, unless the assets and liabilities of the existing subsidiary need to be changed in preparation for the division transaction, in which case this article may be useful. See Sections 602(a)(4)(B) and 606(a)(4).

3. **Tax Considerations –** This article authorizes a division for state law purposes. Federal and state tax laws will independently determine how a division transaction will be taxed.

4. **Protection of Creditors and Other Persons –** Because the assets and liabilities of a dividing entity are allocated among the resulting entities in a division transaction governed by this article, there is a legitimate concern that the rights of creditors and equity owners of the dividing entity are not illegally curtailed by the division. Since this Act only deals with the types of transactions within its scope and the procedures for approval and the effect of these transactions, law other than this Act will govern any potential illegal allocation in a division. *See* Section 103. This other law includes: fraudulent conveyance and bankruptcy law, fiduciary duty principles, illegal distribution statutes, oppression law, securities laws and other federal and state regulatory law (*e.g.*, regulation of transactions by charitable organizations). *See* Richard M. Cieri, Lyle G. Ganke and Heather Lennox, "Breaking Up Is Hard To Do: Avoiding the Solvency-Related Pitfalls in Spinoff Transactions," 54 Bus. Law 533 (1999); Edward S. Adams and Arijit Mukherji, "Spin-offs, Fiduciary Duty and the Law," 68 Ford. L. Rev. 15 (1999); F. Hodge O'Neal and Robert B. Thompson, O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members, Sections 5:28-5:32 and 7:1-7:43 (2nd Rev. Ed. 2004). Section 355 of the Internal Code also serves as a deterrent to abusive corporate divisions because a division can only qualify as a nontaxable dividend distribution if the division has an "independent business purpose," which requires that there must be a real and substantial non-federal tax purpose germane to the business of the entities. *See* Adams and Mukherji, *supra* at 20-26. *See* also Section 607 and the Comments thereto.

5. **Section 601(d) –** *See* Comment 4 to Section 301.

6. **Section 601(e) –** Section 601(e) is an optional provision that may be used to exclude certain types of entities from the scope of this article. A provision that excludes certain types of entities from the Act generally is set forth in Section 110.

**SECTION 602. PLAN OF DIVISION** .

(a) A domestic entity may divide under this [Article] by approving a plan of division. The plan of division must be in a record and contain:

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

(2) a statement whether the dividing entity will survive the division;

(3) the name, jurisdiction of organization, and type of each new resulting entity;

(4) the manner of:

(A) converting the interests of the dividing entity into interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing;

(B) allocating between or among the resulting entities those assets of the dividing entity that will not be owned by all of the resulting entities as tenants in common pursuant to Section 606(a)(4) and those liabilities of the dividing entity as to which not all of the resulting entities will be liable jointly and severally pursuant to Section 607(a)(3); and

(C) distributing the interests of the resulting entities created in the division;

(5) the proposed public organic document, if any, of each new resulting entity and the full text of its private organic rules that will be in a record;

(6) if the dividing entity will survive the division, any proposed amendments to its public organic document or to its private organic rules that are, or will be, in a record;

(7) the other terms and conditions of the division; and

(8) any other provision required by law of this state other than this [Act] or the organic rules of the dividing entity.

(b) A plan of division may contain any other provision not prohibited by law.

**Comment**

This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications). Section 602(a)(4)(B) is different from the other analogous provisions, however, because in a division some or all of the assets and liabilities are allocated between the dividing entity and the resulting entities, which does not occur in the other types of transactions authorized by this Act.

**SECTION 603. APPROVAL OF DIVISION .**

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

(1) by a domestic dividing entity:

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

(B) if its organic rules do not provide for approval of a division, in accordance with the requirements, if any, in its organic law and organic rules for approval of a transaction that has the effect of a merger as if the division were that type of transaction; or

(C) if neither its organic law nor organic rules provide for approval of a division or a transaction that has the effect of a merger, by all of the interest holders of the entity entitled to vote on or consent to any matter; and

(2) in a record, by each interest holder of a domestic dividing entity that will have interest holder liability for liabilities that arise after the division becomes effective, unless:

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

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

(b) A division of a foreign entity in which one or more of the resulting entities is a domestic entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization.

**Comment**

1. **In general**. – As is the case with the other types of transactions authorized by this Act, there are three possible ways to obtain approval (defined in Section 102(3)) of a division of a domestic entity. The first is to determine if the organic rules (defined in Section 102(27)) of the dividing entity contain specific approval provisions for divisions. If they exist, then those provisions apply to approval of the plan of division. *See* Section 603(a)(1)(A). If there are no provisions in the organic rules for approval of a division, then the provisions for approval of a merger in either the organic law (defined in Section 102(24)) or organic rules of the entity will apply. Section 603(a)(1)(B). If there are no approval provisions for divisions in the entity's organic rules and no approval provisions for divisions in the entity's organic law or organic rules, then unanimous consent of all the entity's interests holders is required. Section 603(a)(1)(C).

The phrase "transaction that has the effect of a merger" used in subsection (a)(1)(B) and (C) is explained in the Comment to the definition of "merger" in Section 102(24).

If approval of a division occurs under subsection (a)(1)(B), the approval provisions for mergers that will apply will not include provisions on "short-form" mergers. A short-form merger involves a merger between a subsidiary and a parent that controls a large majority of the interests in the subsidiary (typically at least 80 or 90%). In those cases, the parent is permitted to merge with the subsidiary without the need for the governors or interest holders of the subsidiary to approve the merger. Because there is only one party to a division transaction at the time it is approved, short-form merger procedures are inapposite and it was not considered necessary to confirm that expressly in the statutory text (unlike in the case of interest exchanges, which are two-party transactions – *see* Section 303(d)).

2. **Section 603(a)(2) –** *See* Comment 2 to Section 203 for an explanation of this interest holder liability provision.

3. **Section 603(b) –** Where a foreign entity is the dividing entity, subsection (b) defers to the laws of the foreign entity's jurisdiction of organization for the requirements for approval of the division by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws, such as this Act (or any applicable regulatory law) if it has been adopted in the foreign jurisdiction. The laws of the foreign jurisdiction will also control the application of any special approval requirements found in the organic rules of the foreign entity.

## SECTION 604. AMENDMENT OR ABANDONMENT OF PLAN OF DIVISION .

(a) A plan of division of a domestic dividing entity may be amended:

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

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

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

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

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

(b) After a plan of division has been approved by a domestic dividing entity and before a statement of division becomes effective, the plan may be abandoned:

(1) as provided in the plan; or

(2) unless prohibited by the plan, in the same manner as the plan was approved.

(c) If a plan of division is abandoned after a statement of division has been filed with the [Secretary of State] and before the filing becomes effective, a statement of abandonment, signed on behalf of the dividing entity, must be filed with the [Secretary of State] before the time the statement of division becomes effective. The statement of abandonment takes effect upon filing, and the division is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the dividing entity;

(2) the date on which the statement of division was filed; and

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

**Comment**

This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications).

**SECTION 605. STATEMENT OF DIVISION; EFFECTIVE DATE .**

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

(b) A statement of division must contain:

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

(2) a statement as to whether the dividing entity will survive the division;

(3) the name, jurisdiction of organization, and type of each resulting entity created by the division;

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

(5) if the dividing entity is a domestic entity, a statement that the plan of division was approved in accordance with this [Article] or, if the dividing entity is a foreign entity, a statement that the division was approved by the foreign dividing entity in accordance with the law of its jurisdiction of organization;

(6) if the dividing entity is a domestic filing entity and survives the division, any amendment to its public organic document approved as part of the plan of division;

(7) for each domestic resulting entity created by the division, its public organic document, if any, as an attachment; and

(8) for each resulting entity created by the division that is a domestic limited liability partnership, its [statement of qualification], as an attachment.

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

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

(e) A plan of division that is signed on behalf of a domestic dividing entity and meets all of the requirements of subsection (b) may be filed with the [Secretary of State] instead of a statement of division and upon filing has the same effect. If a plan of division is filed as provided in this subsection, references in this [Act] to a statement of division refer to the plan of division filed under this subsection.

(f) A statement of division becomes effective upon the date and time of filing or the later date and time specified in the statement of division.

**Comment**

1. **In General –** The filing of a statement of division makes the transaction a matter of public record. The mandatory requirements for a statement of division are set forth in subsection (b). They are essentially the same as the requirements for a statement of merger in Section 205.

2. **Section 605(b)(4) and (f) –** The effective date and time of a statement of division are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of division is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 605(b)(4).

3. **Section 605(e) –** A plan of division can be used as a substitute for the statement of division so long as the plan satisfies the requirements in subsection (e).

**SECTION 606. EFFECT OF DIVISION .**

(a) When a division becomes effective:

(1) if the dividing entity is to survive the division, the dividing entity continues to exist;

(2) if the dividing entity is not to survive the division, the dividing entity ceases to exist;

(3) the resulting entities created in the division come into existence;

(4) property of the dividing entity:

(A) is allocated to and vests in the resulting entities created in the division, or remains vested in the dividing entity, in each case without assignment, reversion, or impairment, to the extent specified in the plan of division;

(B) not allocated by the plan of division remains vested in the dividing entity if the dividing entity survives the division; and

(C) not allocated by the plan of division is allocated to and vests equally in the resulting entities as tenants in common without assignment, reversion, or impairment if the dividing entity does not survive the division;

(5) a resulting entity to which a cause of action is allocated as provided in paragraph (4) may be substituted or added in any pending action or proceeding to which the dividing entity is a party at the effective time of the division;

(6) the liabilities of the dividing entity are allocated between or among the resulting entities as provided in Section 607;

(7) each resulting entity created in the division holds any property allocated to it as the successor to the dividing entity, and not by assignment, whether directly or indirectly, or by operation of law;

(8) if the dividing entity survives the division:

(A) its public organic document, if any, is amended as provided in the statement of division and remains binding on its interest holders; and

(B) its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of division and remain binding on its interest holders;

(9) the public organic document, if any, and the organic rules of each resulting entity created by the division become effective and are binding upon the interest holders of the resulting entity; and

(10) the interests in the dividing entity that are to be converted in the division are converted, and the interest holders of those interests are entitled only to the rights

provided to them under the plan of division [and to any appraisal rights they may have under Section 109].

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

(c) When a division becomes effective, a person that did not have interest holder liability with respect to the dividing entity and that becomes subject to interest holder liability with respect to a domestic resulting entity as a result of the division has interest holder liability only to the extent provided by the organic law of the resulting entity and only for those liabilities that arise after the division becomes effective.

(d) When a division becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic dividing entity with respect to which the person had interest holder liability is as follows:

(1) the division does not discharge any interest holder liability under the organic law of the domestic dividing entity to the extent the interest holder liability arose before the division became effective;

(2) the person does not have interest holder liability under the organic law of the domestic dividing entity for any liability that arises after the division becomes effective;

(3) the organic law of the domestic dividing entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the division had not occurred; and

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

(e) When a division becomes effective, the certificate of authority or other foreign qualification of a foreign dividing entity that does not survive the division is canceled.

(f) A person does not have constructive notice of an allocation of an interest in real estate in a division until the allocation is recorded in compliance with the requirements for recording of interests in real estate in the state where the real property is located.

## Comment

1. **In General –** With the exception of subsections (a)(4) and (a)(6), which are necessary because only in a division are assets and liabilities allocated among various entities, and subsection (f), which is discussed in Comment 2, this section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications).

2. **Effect of Division on Record Title to Real Estate. –** If interests in real property are allocated to a resulting entity as part of a division governed by Article 6, title to these real estate interests automatically passes to the resulting entity, as between the dividing entity and the resulting entity. *See* Section 606(a)(7). Record title to the transferred real estate, however, is governed by the real estate recording acts of the states in which the real estate is located. The resulting entity will, therefore, have to file a deed (or whatever other document may be necessary under the recording acts of the state where the real estate is located) in order to prevail against third parties who obtain the real property from the dividing entity without knowledge of the transfer. Subsection (f) reflects this concept and also makes it clear that the filing of the statement of division in the Secretary of State's office is not constructive notice of the change of record title (as opposed to legal title) to the resulting entity. Failure to file confirmatory deeds containing appropriate legal descriptions of the property, however, has no impact on the validity and enforceability of the division as between the dividing and the resulting entities.

In most cases, the resulting entity will want to file confirmatory deeds at the time the division is effective in order to protect itself from being trumped by a bona fide purchaser who obtains the real property from the dividing entity. There may be situations, however, where the dividing entity does not have legal descriptions available for all of its real property at the time of the division and the plan of division will simply state that the dividing entity is transferring to the dividing entity all of its real estate, *e.g.*, "in the State of Arkansas" or "west of the Mississippi River."

Whether real estate deed transfer taxes will be payable at the time a confirmatory deed is filed is a question to be determined by the laws of the state and county where the real estate is located. In some states, a division will be treated the same as a merger. In other states the division will be treated as a partial or complete liquidation transaction. The question of who will pay the cost of any deed taxes or recording fees that may be imposed should be dealt with in the plan of division. In the absence of an applicable provision, this cost will be the responsibility of the resulting entity that receives the real estate in the division.

3. **Section 606(c)** - Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 6 (divisions). *See* Comment 6 to Section 206.

4. **Section 606(d)** - Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 6 (divisions). *See* Comment 7 to Section 206.

**SECTION 607. ALLOCATION OF LIABILITIES IN DIVISION .**

(a) Subject to subsections (b) and (c), when a division becomes effective, each resulting entity is responsible:

(1) individually for the liabilities the entity undertakes or incurs in its own name after the division;

(2) individually for the liabilities of the dividing entity that are allocated to or remain the liability of the resulting entity to the extent specified in the plan of division; and

(3) jointly and severally with the other resulting entities for the liabilities of the dividing entity that are not allocated by the plan of division.

(b) Allocation of a liability in a plan of division is ineffective, and the liability becomes a liability of all of the resulting entities, jointly and severally, if:

(1) the division materially increases the risk of nonpayment to a creditor on the liability or the risk of nonperformance to a person owed performance of the liability; or

(2) the allocation of assets and liabilities in the division is ineffective or voidable under law other than this [Act].

(c) If the division breaches a contractual obligation or other liability of the dividing entity, the dividing entity, if it survives the division, and each of the resulting entities allocated the contractual obligation or other liability or any assets associated with performance of the contractual obligation or other liability, is liable, jointly and severally, for the breach.

(d) In applying the law governing fraudulent transfers to the division:

(1) the dividing entity:

(A) if it does not survive the division, is not subject to that law; or

(B) if it survives the division, is subject to that law only in its capacity as a resulting entity;

(2) with regard to each resulting entity:

(A) the entity is treated as a debtor;

(B) the liabilities allocated to that entity are treated as an obligation incurred by the debtor;

(C) the entity is treated as not having received a reasonably equivalent value in exchange for incurring the obligation; and

(D) the assets allocated to the entity are treated as remaining assets.

(e) In applying the provisions of the organic law of the dividing entity on dividends or other distributions to the division:

(1) distributions of interests are disregarded;

(2) if the division was approved by the governors of the dividing entity, the solvency of the resulting entities is considered only as it appeared to the governors in their good faith judgment as of:

(A) if the statement of division takes effect on or before 120 days after the date the governors approved the division, the date of that approval; or

(B) if the statement of division takes effect more than 120 days after the date the governors approved the division, the date the statement of division takes effect; and

(3) if the division was approved by the interest holders of the dividing entity without approval by its governors, the solvency of the resulting entities is considered only as of the date the statement of division takes effect.

(f) Liens, security interests, and other charges upon the property of the dividing entity are not impaired by the division, notwithstanding any otherwise enforceable allocation of liabilities of the dividing entity.

(g) If the dividing entity is bound by a security agreement governed by Article 9 of the Uniform Commercial Code as enacted in any jurisdiction and the security agreement provides that the security interest attaches to after-acquired collateral, each resulting entity is bound by the security agreement.

## Comment

1. **In general –** The purpose of Section 607 is to set out in detail how liabilities are allocated in a division between the dividing and resulting entities and which of the entities are responsible for those liabilities. The basic rule is that those liabilities are the responsibility of the entity to which they have been allocated, but the resulting entities are jointly and severally liable for any liabilities that are not specifically allocated. The resulting entities will also be jointly and severally liable for a liability, even if allocated in the plan, where:

(1) the division materially increases the risk of nonpayment to a creditor or the risk of nonperformance to a person owed performance, or

(2) the allocation or assets and liabilities is ineffective or voidable under fraudulent transfer statutes or other law.

The intent of Section 607 is to keep existing creditors of the dividing entity at the time of the division in no worse a position than they would have had if the division had not taken place.

With respect to a liability incurred after the division is effective, the entity that undertakes or incurs the liability is liable for that liability, absent an agreement to the contrary.

2. **Section 607(d) –** Subsection (d) provides a set of rules that explain how fraudulent transfer law applies to a division.

3. **Section 607(e) –** Since a division may have the effect of a distribution by the dividing entity, subsection (e) provides rules on how the limitations on distributions in the organic law of the dividing entity apply to the division.

4. **Section 607(g) –** Where a dividing entity has granted a security interest in after-acquired property, the effect of subsection (g) is that the resulting entities will have the status of "new debtors" under UCC Article 9.

ATTACHMENT 2

# [ARTICLE] 1
# GENERAL PROVISIONS

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

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

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

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

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

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

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

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

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

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

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

(7) "Dividing entity" means a domestic entity that approves a plan of division pursuant to Section 603 or a foreign entity that approves a division pursuant to the law of its jurisdiction of organization.

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

(9) "Domestic entity" means an entity whose internal affairs are governed by the law of this state.

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

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

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

(13) "Entity" means a person that has a separate legal existence or has the power to acquire an interest in real property in its own name other than:

(A) an individual;

(B) a testamentary, inter vivos, or charitable trust, with the exception of a business trust or similar trust;

(C) an association or relationship that is not a partnership by reason of [Section 202(c) of the Uniform Partnership Act (1997)] or a similar provision of the law of any other jurisdiction;

(D) a decedent’s estate; or

(E) a government, a governmental subdivision, agency, or instrumentality, or a quasi-governmental instrumentality.

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

(15) “Foreign entity” means an entity other than a domestic entity.

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

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

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

(C) receive notice of or vote on any or all issues involving the internal affairs of the entity.

(17) “Governor” means a person by or under whose authority the powers of an entity are exercised and under whose direction the business and affairs of the entity are managed pursuant to the organic law and organic rules of the entity.

(18) “Interest” means:

(A) a governance interest in an unincorporated entity;

(B) a transferable interest in an unincorporated entity; or

(C) a share or membership in a corporation.

(19) “Interest exchange” means a transaction authorized by [Article] 3.

(20) “Interest holder” means a direct holder of an interest.

(21) “Interest holder liability” means personal liability for a liability of an entity that is imposed on a person:

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

(B) by the organic rules of the entity pursuant to a provision of the organic law authorizing the organic rules to make one or more specified interest holders or categories of interest holders liable in their capacity as interest holders for all or specified liabilities of the entity.

(22) “Jurisdiction of organization” of an entity means the jurisdiction whose law includes the organic law of the entity.

(23) “Liability” means a debt, obligation, or any other liability arising in any manner, whether or not it is secured.

(24) “Merger” means a transaction authorized by [Article] 2.

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

(26) “Organic law” means the statutes, if any, other than this [Act], governing the internal affairs of an entity.

(27) “Organic rules” means the public organic document and private organic rules of an entity.

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

(29) “Plan” means a plan of merger, interest exchange, conversion, domestication, or division.

(30) "Private organic rules" mean the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all of its interest holders, and are not part of its public organic document, if any.

(31) "Protected agreement" means:

(A) a debt security, note, or similar evidence of indebtedness for money borrowed, whether secured or unsecured, issued or signed by an entity which is unpaid, in whole or in part, on the effective date of this [Act];

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

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

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

(32) "Public organic document" means the public record the filing of which creates an entity, and any amendment to or restatement of that record.

(33) "Qualified foreign entity" means a foreign entity that is authorized to transact business in this state pursuant to a filing with the [Secretary of State].

(34) "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.

(35) "Resulting entity" means an entity that continues in existence after, or is created by, a division.

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

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

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

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

(38) "Transferable interest" means the right under an entity's organic law to receive distributions from the entity.

(39) "Type," with regard to an entity, means a generic form of entity:

(A) recognized at common law; or

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

## Comment

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

**“Acquired entity” [(1)] –** This definition recognizes that an interest exchange may involve only the acquisition of a particular “class” or “series” of interests in an entity. Model Business Corporation Act § 6.01 does not expressly define “classes” or “series.” Because the interests of members in an unincorporated business organization often tend to be distinctive, it may be that each member’s interest will comprise a separate class or series.

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

**“Approve” [(3)] -** The term “approve” encompasses all of the steps necessary for an entity to propose a transaction, adopt and approve the terms and conditions of the transaction, and obtain the necessary action on the transaction by the governors and interest holders of the entity. The term includes procedural requirements such as notice to interest holders, preparation of voting lists, etc.

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

**“Converted entity” [(5)]** - This term is used in Article 4 to describe the entity that results from a conversion.

**“Converting entity” [(6)]** – A converting entity is the entity that becomes the converted entity under Article 4. This definition is patterned in part after Model Business Corporation Act § 9.50(f)(1) (“converting entity”).

**“Dividing Entity” [(7)] –** In a “division” [Section 102(8)], there will be one or more “resulting entities” [Section 102(35)] that are created from the “dividing entity.” The dividing entity may or may not survive. It will survive in what are known as a spin-off or split-off division but will not survive after a split-up division. *See* the Comment to Section 601.

**“Division” [(8)] –** *See* the Comment to Section 102(7).

**“Domestic entity” [(9)] -** The term “domestic entity” in this Act means an entity whose internal affairs are governed by the organic laws of the adopting jurisdiction. Except in the case of general partnerships, this will mean an entity that is formed, organized, or incorporated under domestic law. In the case of a general partnership organized under the Uniform Partnership Act (1997) (“RUPA”), it will mean a general partnership whose governing law under RUPA § 106 is the law of the adopting state. Under RUPA § 106 the governing law is determined by the location of the partnership’s chief executive office, except for limited liability partnerships where the governing law is the state where the statement of qualification is filed.

**“Domesticated entity” [(10)] –** This term is used in Article 5 and means the entity that is domesticated pursuant to Article 5. By its nature, the domesticated entity will be of the same type as the domesticating entity.

**“Domesticating entity” [(11)] –** This term is used in Article 5 and means the entity that is domesticated pursant to Article 5.

**“Domestication” [(12)] -** The term “domestication” means a transaction of the kind authorized by Article 5 pursuant to which an entity may change its *jurisdiction* of formation *but not its type* so long as the laws of the foreign jurisdiction permit the domestication. The legal effect of the domestication of an entity out of an adopting state will be governed by the laws of both the adopting state and the foreign jurisdiction. Some statutes include what is described in this Act as “domestication” in their definition of a “conversion.” See, e.g., Colo. Rev. Stat § 7-90-201(2) and (3). It is intended that the domestication provisions of this Act will apply to a transaction that may be characterized under another act as a “conversion” if it meets the definition of “domestication” under this Act.

**“Entity” [(13)] -** This definition determines the overall scope of the Act because only an “entity” may participate in the transactions authorized by Articles 2, 3, 4, 5, and 6. *See* Sections 201, 301, 401, 501, and 601.

The term “entity” includes:

- Business corporation.
- Business trust.
- General partnership, whether or not a limited liability partnership.
- Limited liability company.
- Limited partnership, whether or not a limited liability limited partnership.
- Nonprofit corporation.
- Unincorporated nonprofit association.

The term does not include a sole proprietorship.

This definition is intended to include all forms of private organizations, regardless of whether organized for profit, and artificial legal persons other than those excluded by paragraphs (A) through (E). Thus, this definition is broader than the definition of “business entity” in e.g., Code of Ala. § 10-15-2(2) which does not include nonprofit entities. This definition does not exclude regulated entities such as public utilities, banks and insurance companies. Should a state desire to exclude certain types of regulated entities from participating in transactions permitted by the Act for policy reasons, that may be done by listing those types of entities in Section 110(a), or by permitting those type of entities to engage in transactions under this Act generally but prohibiting certain types of transactions by listing those transactions in Section 110(b).

Inter vivos and testamentary trusts are treated in many states as having a separate legal existence, but they have been excluded from the definition of “entity” (and thus are not within the scope of this Act) because of a decision that for public policy reasons they should not be able to engage in transactions under this Act. Trusts that carry on a business, however, such as a

Massachusetts trust, real estate investment trust, Illinois land trust, or other common law or statutory business trusts are “entities.”

Section 4 of the Uniform Unincorporated Nonprofit Association Act gives an unincorporated nonprofit association the power to acquire an estate in real property and thus an unincorporated nonprofit association organized in a state that has adopted that act will be an “entity.” At common law, an unincorporated nonprofit association was not a legal entity and did not have the power to acquire real property. Most states that have not adopted the Uniform Act have nonetheless modified the common law rule, but states that have not adopted the Uniform Act should analyze whether they should modify the definition of “entity” to add an express reference to unincorporated nonprofit associations.

There is some question as to whether a partnership subject to the Uniform Partnership Act (1914) (“UPA”) is an entity or merely an aggregation of its partners. That question has been resolved by Section 201 of the Uniform Partnership Act (1997) (“RUPA”), which makes clear that a general partnership is an entity with its own separate legal existence. Section 8 of UPA gives partnerships subject to it the power to acquire estates in real property and thus such a partnership will be an “entity.” As a result, all general partnerships will be “entities” regardless of whether the state in which they are organized has adopted RUPA.

Paragraph (C) of this definition excludes from the concept of an “entity” any form of co-ownership of property or sharing of returns from property that is not a partnership under RUPA. In that connection, Section 202(c) of RUPA provides in part:

In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

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

**“Filing entity” [(14)]** - Whether an entity is a filing entity is determined by reference to whether its legal existence is attributable to the filing of a document with the state filing officer. While the statute refers to an entity that is “created,” it is intended to encompass corporations which are “incorporated,” limited liability companies which are “organized,” and limited partnerships which are “formed” by a filing required by the organic law governing the entity. Business trusts present a special problem. In some states, for example, a business trust is a filing entity, while in other states business trusts are recognized only by common law.

The term does not include a limited liability partnership because an election filed by a general partnership claiming that status (*e.g.*, a statement of qualification under Uniform Partnership Act (1997), § 1001) does not create the entity. A limited liability limited partnership, on the other hand, is a filing entity because the underlying limited partnership is created by filing a certificate of limited partnership.

This definition is patterned after Model Business Corporation Act § 1.40(9A) ("filing entity").

**"Foreign Entity" [(15)]** - The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by the Uniform Partnership Act (1914) ("UPA") is a domestic or foreign partnership. A UPA partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of partnerships under the Uniform Partnership Act (1997) ("RUPA") that have not registered as limited liability partnerships will be governed by RUPA § 106(a) ("state where the partnership's chief executive office is located").

**"Governance interest" [(16)]** - A governance interest is typically only part of the interest that a person will hold in an entity and is usually coupled with a transferable interest (or economic rights). However, memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests and in others may not include either governance interests or transferable interests. In some unincorporated business entities, there is a more limited right to transfer governance interests than there is to transfer transferable interests. An interest holder in such an unincorporated business entity who transfers only a transferable interest and retains the governance interest will also retain the status of an interest holder. Whether a transferee who acquires only a transferable interest will acquire the status of an interest holder is determined by the definition of "interest holder."

Shares in a business corporation that are nonvoting nonetheless have a governance interest because they entitle the holder to certain rights of access to information and to certain statutory voting rights on amendments of the articles of incorporation.

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

**"Governor" [(17)]** - This term has been chosen to provide a way of referring to a person who has the authority under an entity's organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of entities. *Compare* Colo. § 7-90-102(35.7) which uses the term "manager" to refer to this concept, even though "manager" is also a term of art in connection with limited liability companies. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

Except as described above, the term "governor" includes:

- Director of a business corporation.
- Director or trustee of a nonprofit corporation.
- General partner of a general partnership.
- General partner of a limited partnership.
- Manager of a limited liability company.
- Member of a member-managed limited liability company.
- Trustee of a business trust.

**"Interest" [(18)] -** In the usual case, the interest held by an interest holder will include both a governance interest and a transferable interest (or economic rights). Members in certain nonprofit corporations or unincorporated nonprofit associations generally do not have any transferable interest because they may not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders under this Act. An interest holder in an unincorporated business entity may transfer all or part of the interest holder's transferable interest without the transferee's acquiring the governance interest of the transferor. In that case, whether the transferor will retain the status of an interest holder will be determined by the applicable organic law and the transferee will have the status of an interest holder under paragraph (B) of this definition. That paragraph will also apply to subsequent transferees from the original transferee.

The term "interest" includes:

- Beneficial interest in a business trust.
- Membership in a nonprofit corporation.
- Membership in an unincorporated nonprofit association.
- Membership interest in a limited liability company.
- Partnership interest in a general partnership.
- Partnership interest in a limited partnership.
- Shares in a business corporation.

**"Interest exchange" [(19)] –** The term "interest exchange" means a transaction authorized by Article 3 pursuant to which an entity may acquire interests in another entity. The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself. *See* Section 301(a).

**“Interest holder” [(20)]** - This Act does not refer to “equity” interests or “equity” owners or holders because the term “equity” could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but only have a right to vote on its internal affairs. *Compare* Code of Ala. § 10-15-2(4) (“equity owner”).

The term “interest holder” includes:

- Beneficiary of a business trust.
- General partner of a general partnership.
- General partner of a limited partnership.
- Limited partner of a limited partnership.
- Member of a limited liability company.
- Member of a nonprofit corporation.
- Member of an unincorporated nonprofit association.
- Shareholder of a business corporation.

This definition has been patterned after Model Business Corporation Act § 1.40(13B) (“interest holder”).

**“Interest holder liability” [(21)]** - This term is used to describe the vicarious liability of an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term includes only personal liability of an interest holder for a debt of the entity imposed on the interest holder either by statute or by the organic rules to the extent authorized pursuant to the organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder liabilities for purposes of this Act. Thus, for example, if a state’s business corporation law makes shareholders personally liable for unpaid wages because of their status as shareholders, that liability would be an “interest holder liability.” If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an “interest holder liability” because it is a direct liability and not based on the status of being a shareholder. Similarly, the liability to make contributions to the entity or to return an improper distribution is not an interest holder liability because it is a direct liability of the interest holder even though creditors of the entity might be able to recover from the interest holder.

This definition is patterned after Model Business Corporation Act § 1.40(15C) (“owner liability”). *See also* Uniform Limited Partnership Act (2001), § 1101(11) (“personal liability”).

**“Jurisdiction of organization” [(22)]** - The term “jurisdiction of organization” refers to the jurisdiction whose laws include the organic law of the entity. The scope of this Act is not limited to United States jurisdictions, although for practical purposes that will largely be the case since a transaction that impinges on a foreign country may be conducted under this Act only if the laws of the foreign country authorize the transaction. *See* Sections 201(b), 301(b), 401(b), 501(b), and 601(b) and (c).

**“Liability” [(23)]** - The term “liability” is intended to be all-inclusive and includes all obligations of whatever description or kind.

**“Merger” [(24)]** - The term means a transaction authorized by Article 2 pursuant to which two or more entities are combined into a single entity. 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.

Because the term “merger” is defined with reference only to transactions authorized by Article 2, it has a more limited meaning than the usual usage of the term. Thus, references in this Act to a “merger” refer only to a transaction under Article 2. But a reference in the organic rules of an entity to a “merger” will include not only transactions under Article 2, but also similar transactions under the organic law of the entity, for example a merger under Chapter 11 of the Model Business Corporation Act (“MBCA”). The limited scope of the term “merger” in this Act explains why the rules on approval of transactions in Sections 203, 303, 403, 503, and 603 refer to the rules for approval “of a transaction that has the effect of a merger” as found in the organic law or organic rules of an entity, rather than just to the rules for approval of a “merger.” Chapter 11 of the MBCA provides rules for approval of a merger transaction, using the term “merger” within its meaning under the MBCA, but not within its meaning under this Act. The rules in Chapter 11 of the MBCA, however, will apply under Section 203, 303, 403, 503, and 603 because a transaction under that Chapter has the effect of a transaction under Article 2.

The phrase “transaction that has the effect of a merger” should be read narrowly to refer only to a transaction in which more than one entity is combined into a single entity as a result of a statutorily required public filing. The acquisition of the assets and liabilities of one company by another company has the effect of merging the businesses of the companies, but that type of transaction is not what is contemplated by this Act when it uses the phrase “transaction that has the effect of a merger.”

**“Merging entity” [(25)]** - The term “merging entity” refers to each entity that is in existence immediately before a merger and is a party to the merger. It will include the surviving entity if the surviving entity exists before the merger becomes effective. It does not include an entity that provides consideration to be received by interest holders if that entity is not a party to the merger.

**“Organic law” [(26)] –** Organic law includes statutes other than this Act that govern the internal affairs of an entity. To the extent these other statutes should be applicable to a transaction under this Act, their effect is preserved by Section 103.

Entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.*, Cal. Gen. Corp. Law § 2115, N.Y. N-PCL §§ 1318-1321, 15 Pa.C.S. § 6145. Such a “sticky fingers” law is included within the definition of “organic law” for purposes of this Act.

**“Organic rules” [(27)]** - The term “organic rules” means an entity’s public organic document and the private organic rules. The organic rules, together with this Act, the organic law, and the common law provide the rules governing the internal affairs of the entity.

**“Person” [(28)] –** The term “person” has the standard meaning of that term in uniform acts.

**“Plan” [(29)]** - The term “plan” refers to the plan of merger, interest exchange, conversion, domestication, or division, as the case may be, depending on which form of transaction is taking place. *See* Sections 202, 302, 402, 502, and 602.

**“Private organic rules” [(30)]** - The term private “organic rules” is intended to include all governing rules of an entity that are binding on all of its interest holders, whether or not in written form, except for the provisions of the entity’s public organic document, if any. The term is intended to include agreements in “record” form as well as oral partnership agreements and oral operating agreements among LLC members. Where private organic rules have been amended or restated, the term means the private organic rules as last amended or restated.

The term “private organic rules” includes:

- Bylaws of a business corporation.
- Bylaws of a business trust.
- Bylaws of a nonprofit corporation.
- Constitution and bylaws of an unincorporated nonprofit association.
- Operating agreement of a limited liability company.
- Partnership agreement of a general partnership.
- Partnership agreement of a limited partnership.

**“Protected agreement” [(31)]** - The term “protected agreement” refers to agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of the Act. Thus a revolving line of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of the Act. If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, domestication, or division transaction even though the agreement does not mention those other types of transactions. *See* Sections 301(d), 401(c), 501(d) and 601(d).

**“Public organic document” [(32)]** - A “public organic document” is a document that is filed of public record to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of partnership authority filed under Section 303 of the Uniform Partnership Act (1997) or any of the other statements that may be filed under that act since those statements do not create a new entity. A limited liability partnership is the same entity as the partnership that files the statement. For the same reason, the term also does not include a statement of qualification filed under Section 1001 of that act to become a limited liability partnership. Similarly, the term does not include a statement of authority filed under Section 5 of the Uniform Unincorporated Nonprofit Association Act or a statement appointing an agent filed under Section 10 of that act. Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

The term “public organic document” includes:

- Articles of incorporation of a business corporation.

- Articles of incorporation of a nonprofit corporation.
- Certificate of limited partnership.
- Certificate of organization of a limited liability company.

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

**"Qualified foreign entity" [(33)]** - The term "qualified foreign entity" refers to an entity that is authorized to transact business in this state pursuant to a public filing.

**"Record" [(34)] –** The term "record" is taken from the Uniform Electronic Transactions Act. It is intended to apply broadly and include all information so long as the information is retrievable in a "perceivable" form.

**"Resulting Entity" [(35)] –** *See* the Comment to Section 102(7).

**"Sign" [(36)] –** The term "sign" and its derivations is taken from the Uniform Electronic Transactions Act. In the case of filed documents, it should be noted that some state statutes no longer require filed documents to be "signed" in order to facilitate electronic filing. *See, e.g,*, Colorado Rev. Stat. § 7-90-301 *et seq.* In such cases, this Act should be modified to delete the references to filings being "signed" and merely refer to being filed (or accepted for filing).

**"Surviving entity" [(37)]** - The term "surviving entity" refers to either a merging entity that survives the merger or the new entity created by the merger.

**"Transferable interest" [(38)]** - The term "transferable interest" is taken from Section 102(22) of the Uniform Limited Partnership Act (2001).

**"Type" [(39)]** - The term "type" has been developed in an attempt to distinguish different legal forms of entities. It is sometimes difficult to decide whether one is dealing with a different form of entity or a variation of the same form. For example, a limited partnership, although it has been defined as a partnership, is a different type of entity from a general partnership, while a limited liability partnership is not a different type of entity from a general partnership. In some states cooperative corporations are categories of business corporations or nonprofit corporations, while in other states cooperatives are a separate type of entity.

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

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

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

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

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

(2) if the corporation survives the transaction, the approval of the plan is sufficient to create or impair the right or obligation directly under the provision.

**Comment**

1. **Section 103(a) –** Section 103(a) is a standard provision in uniform and model acts and has been included to make clear that unless a particular provision of this Act displaces "other law," the principles of law and equity continue to apply, including with respect to the rights of creditors, transferees, assignees, or other similar parties. Thus subsection (a) preserves case law regarding common law fraud; the rights of creditors following leveraged buyouts, spinoffs, asset purchases, or other similar transactions; the liability of corporate directors for distributions to executives or shareholders while the corporation is insolvent, or operating in the vicinity of "insolvency"; creditor claims under GAAP; and creditor rights arising under the various organic laws of unincorporated entities, including when the right to partner contribution arises and the liability of an unincorporated entity for unlawful distributions during or resulting in insolvency of the entity.

2. **Section 103(b) –** Subsection (b) preserves existing regulatory law in an adopting state in general terms. Adopting states should consider more carefully integrating this Act with their various regulatory laws. For example, in some states certain professions are limited in their use of limited liability entities. *See also* Section 104.

Laws other than this Act that will apply to transactions under the Act include, for example, the various uniform fraudulent transfer and fraudulent conveyance acts; state insolvency statutes; federal bankruptcy law; and Articles 8 and 9 of the UCC.

3. **Section 103(c) –** Many states have enacted "antitakeover" statutes intended to make it more difficult to acquire control of a publicly-traded corporation. Those statutes often provide that their application to a particular corporation cannot be changed unless the corporation obtains certain specified approvals, such as a vote of disinterested directors or a supermajority vote by the shareholders. The purpose of the special requirements in subsection (c) on varying the application of an antitakeover statute is to protect against a hostile acquirer or group of shareholders seeking to use the Act to avoid the application of the antitakeover statute.

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

ATTACHMENT 3

# MODEL ENTITY TRANSACTIONS ACT

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ATTACHMENT 4

# MODEL ENTITY TRANSACTIONS ACT

## Prefatory Note

### 1. Development of the Act

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

For over 90 years, the Conference has prepared and periodically revised uniform laws governing unincorporated entities, such as general partnerships, limited partnerships, and limited liability companies. Similarly, for over 50 years committees of the ABA have prepared and periodically revised model laws for the incorporation of business corporations and nonprofit corporations.

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

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

After beginning their independent drafting projects, both the Conference and the ABA realized that combining their respective areas of expertise would produce the best product for enactment by the states. They have accordingly combined their efforts so that the Model Entity Transactions Act (2005) draws on the expertise of the Conference in the law of unincorporated entities and of the ABA in the law of corporations.

Prior to the development of this Act, state business organization statutes (both incorporated and unincorporated) varied in their approach to same-type and cross-type mergers, consolidations, divisions, conversions, share/interest exchanges, and domestications by or among domestic and foreign for-profit and nonprofit entities. The dissimilarities in state statutes included: (1) which transactions were authorized; (2) whether entities of more than one type could be parties to the same transaction; (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. For example, The Uniform Partnership Act (1997) ("RUPA") authorized the conversion or merger of partnerships or limited partnerships. RUPA did not, however, anticipate the conversion or merger of types of business entities other than partnerships or limited partnerships nor did it address divisions, interest exchanges, or domestications. The Uniform Limited Partnership Act (1976 with 1985 amendments) ("RULPA") is silent regarding mergers and any form of cross-type transaction. A RULPA limited partnership could, however, effect a conversion or merger by "linking back" to the limited RUPA merger or conversion provisions. The Uniform Limited Partnership Act (2001) ("Re-RULPA") anticipated for-profit and nonprofit cross-type conversions and mergers, but not cross or same-type interest exchanges, divisions, or domestications. The Uniform Limited Liability Company Act (1996) ("ULLCA") authorized cross-type mergers and conversions but was silent regarding for-profit and nonprofit cross or same-type interest exchanges, divisions, and domestications.

New Chapter 9 of the Revised Model Business Corporation Act ("MBCA"), approved in 2003, authorized a domestic business corporation to become a different type of entity and permitted a non-domestic business entity to become a domestic business corporation. The transactions addressed in 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). Chapter 9 of the MBCA authorized only those transactions that involve a domestic business corporation either at the outset or at the termination of the transaction.

## 2. Scope of the Act

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

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

Article 3 governs interest exchanges. The interest exchange transaction is derived from the share exchange in corporate law and reflected in Chapter 11 of the MBCA. Interest exchanges are not authorized as a separate form of transaction in any uniform unincorporated entity act.

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

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

Article 6 governs the division of an entity. The effect of a division is the reverse of a merger. A division permits the dividing entity to subdivide itself into two or more separate and distinct entities.

Article 7 sets out certain miscellaneous provisions, including: (1) consistency of application; (2) e-sign language; (3) effective date; and (4) savings clause.

Appendix 1 is an optional set of provisions relating to the processing of filings under the Act by the Secretary of State. Enacting these provisions will only be necessary if a state's existing filing provisions cannot easily be made applicable to filings under META.

Appendix 2 is a series of amendments and repeals to the various model, uniform, and prototype entity laws that show an adopting state how to integrate this Act and those entity laws into one coherent statutory system. Because of the incompleteness and diversity of existing entity statutes with respect to the five types of restructuring transactions dealt with in META, it is extremely important that an enacting state thoroughly review the legislative guide in Appendix 2 as well as the state's existing entity statutory framework before a bill incorporating META is drafted. In most cases, several amendments to existing entity statutes will have to be made in order to avoid gaps and possible conflicts with META. Where a potential conflict exists, the enacting state will have to determine whether to continue the existing rule or to adopt the META rule and draft the bill accordingly.

### 3. Approach of the Act

Mergers of two or more corporations into a surviving corporation have been an accepted part of corporation law for a long time and are found in all state corporation laws. On the other hand, mergers are a more recent development in unincorporated entity laws. Following the lead of the MBCA, some states have begun to authorize cross-type mergers in their corporation laws. States that have adopted RUPA, Re-RULPA, or ULLCA also have provisions on cross-type mergers and conversions in those laws. This Act is drafted on the assumption that states will not be comfortable repealing mergers completely out of their corporation laws or those unincorporated entity laws where merger provisions have begun to appear. To create a consistent pattern across their various entity laws, it is recommended that states limit the existing provisions on mergers in their entity laws to same-type mergers and add provisions on same-type mergers to those entity laws where they are currently missing. It is not necessary, however, for a state to add same-type merger provisions to those entity laws that do not already contain them because this Act has been drafted to authorize same-type mergers for those entities not currently authorized to engage in such mergers. *See* Section 201.

The same approach taken with respect to mergers is incorporated into the design of the interest exchange and division provisions in this Act. It is therefore recommended that enacting states limit their existing statutory provisions for these types of transactions to same-type transactions. It will not be necessary, however, for an enacting state to add same-type provisions to interest exchange and division statutes that do not already contain such provisions since this Act contains default rules that will cover same-type as well as cross-type transactions. *See* Sections 301 and 601.

A different approach is taken with respect to domestications. A domestication is a same-type transaction where an existing entity moves its jurisdiction of organization to another state but retains whatever form it had before the domestication. *See* Section 501. Only a limited number of states currently have domestications statutes. Therefore, in order to avoid having to enact separate domestication provisions for all of the various entity statutes in virtually every state, META includes a separate chapter governing domestications. It is recommended that states repealing existing domestication provisions. *See* Appendix 2.

Conversions are by definition cross-type transactions. Thus any conversion provisions outside of META should be repealed, leaving META as a state's only general entity conversion statute. Many states have specialized conversion statutes such as, for example, converting a mutual insurance company to a stock company. Those special conversion statutes should be preserved. *See* Section 110.

Finally, because merger statutes have stood the test of time and business lawyers are used to working with these provisions, a policy decision was made to incorporate basically the same requirements and substantive law rules in the chapters dealing with interest exchanges, conversions, domestications, and divisions. Thus, although there are differences because of the different nature of each type of transaction, the provisions in Sections 302 – 306 (interest exchanges), 402 – 406 (conversions), 502 – 506 (domestications), and 602 – 606 (divisions) are patterned after and look quite similar to Sections 202 – 206 (mergers).

ATTACHMENT 5

**SECTION A2-5. UNIFORM LIMITED LIABILITY COMPANY ACT .**

(a) Sections 101, 404, and 601 of the [Uniform Limited Liability Company Act] are amended as follows:

§ 101. Definitions.

In this [Act]:

* * *

(9) “Limited liability company” or “domestic limited liability company” means a limited liability company organized under this [Act].

* * *

§ 404. Management of limited liability company.

* * *

(c) The only matters of a member or manager-managed company’s business requiring the consent of all of the members are:

* * *

(11) **[the consent of members to merge]** a merger with another **[entity]** domestic or foreign limited liability company under Section 904(c)(1) or with any other form of entity under [the Model Entity Transactions Act]; **[and]**

(12) an interest exchange in which the company is the acquired entity or a conversion or domestication of the company under [the Model Entity Transactions Act]; and

* * *

§ 601. Events causing member’s dissociation.

A member is dissociated from a limited liability company upon the occurrence of any of the following events:

* * *

(10) in the case of a member that is an estate or is acting as a member by virtue of being a personal representative of an estate, distribution of the estate’s entire rights to receive distributions from the company, but not merely the substitution of a successor personal representative; **[or]**

(11) termination of the existence of a member if the member is not an individual, estate, or trust other than a business trust; or

(12) the participation of the limited liability company in a transaction under [the Model Entity Transaction Act], if the company:

(A) does not survive the transaction; or

(B) does survive the transaction, but as a result of the transaction, the person ceases to be a member.

(b) Sections 901 (definitions), 902 (conversion of partnership or limited partnership to limited liability company), and 903 (effect of conversion; entity unchanged) of the [Uniform Limited Liability Company Act] are repealed.

(c) Sections 904, 905 and 906 of the [Uniform Limited Liability Company Act] are amended as follows:

§ 904. Merger of **[entities]** limited liability companies.

(a) Pursuant to a plan of merger approved under subsection (c), a domestic limited liability company may be merged with or into one or more domestic limited liability companies**[,]** or foreign limited liability companies**[, corporations, foreign corporations, partnerships, foreign partnerships, limited partnerships, foreign limited partnerships, or other domestic or foreign entities]**, and two or more foreign limited liability companies may be merged into a domestic limited liability company that is created in the merger.

(b) A plan of merger must set forth:

(1) the name of each **[entity]** domestic or foreign limited liability company that is a party to the merger;

(2) the name of the surviving **[entity]** domestic or foreign limited liability company into which the other **[entities]** parties will merge, which may be created in the merger;

(3) **[the type of organization of the surviving entity;]** (Repealed.)

(4) the terms and conditions of the merger;

(5) the manner and basis for converting the interests of each limited liability company that is a party to the merger into interests or obligations of the surviving **[entity]** limited liability company, interests or obligations of any other entity, or into money or other property in whole or in part**[; and]**.

**[(6) the street address of the surviving entity's principal place of business.]**

(c) A plan of merger must be approved:

(1) in the case of a domestic limited liability company that is a party to the merger, by all of the members or by a number or percentage of members specified in the operating agreement; and

(2) in the case of a foreign limited liability company that is a party to the merger, by the vote required for approval of a merger by the law of the State or foreign jurisdiction in which the foreign limited liability company is organized**[;**

**(3) in the case of a partnership or domestic limited partnership that is a party to the merger, by the vote required for approval of a conversion under Section 902(b); and**

**(4) in the case of any other entities that are parties to the merger, by the vote required for approval of a merger by the law of this State or of the State or foreign jurisdiction in which the entity is organized and, in the absence of such a requirement, by all the owners of interests in the entity]**.

(d) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

(e) The merger is effective upon the filing of the articles of merger with the [Secretary of State], or at such later date as the articles may provide.

(f) A merger in which a limited liability company and another form of entity are parties is governed by [the Model Entity Transactions Act].

§ 905. Articles of merger.

(a) After approval of the plan of merger under Section 904(c), unless the merger is abandoned under Section 904(d), articles of merger must be signed on behalf of each domestic or foreign limited liability company **[and other entity]** that is a party to the merger and delivered to the [Secretary of State] for filing. The articles must set forth:

(1) the name and jurisdiction of **[formation or]** organization of each of the domestic or foreign limited liability companies **[and other entities that are parties]** that is a party to the merger;
(2) for each domestic limited liability company that is to merge, the date its articles of organization were filed with the [Secretary of State];
(3) that a plan of merger has been approved **[and signed]** by each domestic or foreign limited liability company **[and other entity]** that is to merge;
(4) the name and address of the surviving domestic or foreign limited liability company **[or other surviving entity]**;
(5) the effective date of the merger;
(6) if a domestic limited liability company is the surviving **[entity]** limited liability company, such changes in its articles of organization as are necessary by reason of the merger;
(7) if a party to **[a]** the merger is a foreign limited liability company, the jurisdiction and date of filing of its initial articles of organization and the date when its application for authority was filed by the [Secretary of State] or, if an application has not been filed, a statement to that effect; and
(8) if the surviving entity is not a domestic limited liability company, an agreement that the surviving **[entity]** limited liability company may be served with process in this State and is subject to liability in any action or proceeding for the enforcement of any liability or obligation of any limited liability company previously subject to suit in this State which is to merge, and for the enforcement, as provided in this [Act], of the right of members of any limited liability company to receive payment for their interest against the surviving entity.

(b) If a foreign limited liability company is the surviving **[entity of a merger]** limited liability company, it may not do business in this State until an application for that authority is filed with the [Secretary of State].

(c) The surviving limited liability company **[or other entity]** shall furnish a copy of the plan of merger, on request and without cost, to any member of any domestic limited liability company **[or any person holding an interest in any other entity]** that is to merge.

(d) Articles of merger operate as an amendment to **[the]** a surviving domestic limited liability company's articles of organization.

§ 906. Effect of merger.

(a) When a merger takes effect:
(1) the separate existence of each **[limited liability company and other entity that is a]** party to the merger, other than the surviving **[entity]** domestic or foreign limited liability company, terminates;
(2) all property owned by each **[of the limited liability companies and other entities that are]** party to the merger vests in the surviving **[entity]** domestic or foreign limited liability company;
(3) all debts, liabilities, and other obligations of each **[limited liability company and other entity that is]** party to the merger **[become]** are the obligations of the surviving **[entity]** domestic or foreign limited liability company;
(4) an action or proceeding pending by or against a **[limited liability company or other]** party to **[a]** the merger may be continued as if the merger had not occurred or the

surviving **[entity]** domestic or foreign limited liability company may be substituted as a party to the action or proceeding; and

(5) except as prohibited by other law, all the rights, privileges, immunities, powers, and purposes of every limited liability company **[and other entity]** that is a party to **[a]** the merger vest in the surviving **[entity]** domestic or foreign limited liability company.

(b) The [Secretary of State] is an agent for service of process in an action or proceeding against **[the]** a surviving foreign **[entity]** limited liability company to enforce an obligation of any party to a merger if the surviving foreign **[entity]** limited liability company fails to appoint or maintain an agent designated for service of process in this State or the agent for service of process cannot with reasonable diligence be found at the designated office. Upon receipt of process, the [Secretary of State] shall send a copy of the process by registered or certified mail, return receipt requested, to the surviving **[entity]** foreign limited liability company at the address set forth in the articles of merger. Service is effected under this subsection at the earliest of:

(1) the date the company receives the process, notice, or demand;

(2) the date shown on the return receipt, if signed on behalf of the company; or

(3) five days after its deposit in the mail, if mailed postpaid **[and correctly addressed]**.

(c) **[A member of the surviving limited liability company is liable for all obligations of a party to the merger for which the member was personally liable before the merger.]** (Repealed.)

(d) Unless otherwise agreed, a merger of a limited liability company that is not the surviving **[entity]** limited liability company in the merger does not require the limited liability company to wind up its business under this [Act] or pay its liabilities and distribute its assets pursuant to this [Act].

(e) Articles of merger serve as articles of dissolution for a limited liability company that is not the surviving **[entity]** limited liability company in the merger.

(d) Section 907 ([article] not exclusive) of the [Uniform Limited Liability Company Act] is repealed.

**Comment**

In addition to making the amendments described in the Introductory Comment to Appendix 2, the foregoing amendments to the Uniform Limited Liability Company Act also make clear that (i) limited liability companies may be parties to triangular mergers in which an entity that is not a limited liability company and is not a party to the merger provides the merger consideration, (ii) limited liability companies may be parties to consolidations in which the surviving limited liability company is created in the transaction, and (iii) the survivor of a merger of limited liability companies may be either a domestic or foreign limited liability company (see § 101(9) which limits the term “limited liability company” to domestic limited liability companies).