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FOR DISCUSSION ONLY

# UNIFORM ENTITY TRANSACTIONS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEAR  
WASHINGTON, DC  
AUGUST 1-7, 2003

# UNIFORM ENTITY TRANSACTIONS ACT

{with Style edits of 9/6/03 from Peter Dykman, as reviewed and incorporated}  
{text in square brackets and struck-out was deleted from 2003 annual meeting draft, underlined  
text was added at the 2003 Annual Meeting, text highlighted was added in the style edit, text in  
bold text was added in response to style edit}

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**UNIFORM ENTITY TRANSACTIONS ACT**

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1 become a domestic business corporation. The transactions addressed in Chapter 9 of the *MBCA*  
2 include: (1) *domestication* (a procedure in which a corporation may change its state of incorporation,  
3 either domestic to foreign or foreign to domestic); (2) *nonprofit conversion* (a procedure that permits  
4 a domestic business corporation to become either a domestic nonprofit corporation or a foreign  
5 nonprofit corporation); (3) *foreign nonprofit domestication and conversion* (a procedure that permits  
6 a foreign nonprofit corporation to become a domestic business corporation); and (4) *entity*  
7 *conversion* (procedures that authorize a domestic business corporation to become a domestic or  
8 foreign other entity or that permit a foreign other entity to become a domestic business corporation).  
9 Because Chapter 9 of the *MBCA* anticipates only those transactions that involve a *domestic business*  
10 *corporation* either at the outset or at the termination of the transaction, the ABA has constituted a  
11 second project to deal with nonprofit corporations as a constituent party to the foregoing  
12 transactions. The second project will thus likely focus on the same types of transactions as Chapter  
13 9 of the *MBCA* but for inclusion instead within the Model Nonprofit Corporation Act. To date, an  
14 exposure draft of the Model Nonprofit Corporation Act amendments has not been circulated for  
15 review. The third project is one spearheaded by the ABA Business Section Law Section Ad-Hoc  
16 Committee on Entity Rationalization (“Ad-Hoc Committee”). The Ad-Hoc Committee was charged  
17 with drafting a model act that addresses mergers, conversions and entity interest exchanges of  
18 *different forms* of business entities. For a period of several weeks in January and February, 2002,  
19 weekly two-hour conference calls were held to review the 2001 draft of *MITA*. Several participants  
20 in the Drafting Committee, including ABA advisors George Coleman, Bill Clark, Bob Keatinge and  
21 Barry Nekritz and Reporter of the NCCUSL project, Ann Anker, participated in each of these calls.  
22 The Model Act was released as the Model Inter-Entity Transactions Act (“*MITA*”) 57 Bus. Law 1569  
23 (Aug. 2002). Unlike Chapter 9 of the *MBCA*, *MITA* addresses only those transactions that involve  
24 *different forms of entities*. Thus, because a domestication does not involve a change of form,  
25 domestications are not covered by *MITA*. Rather, reference would only be made to *MITA* only for  
26 cross-form transactions. *MITA* also anticipates the *repeal and/or amendment* of all cross-form  
27 provisions in *RUPA*, *ULLCA* and *Re-RULPA* as well as existing cross-form provisions of corporation  
28 acts and the Prototype Limited Liability Company Act. The only provisions of *RUPA*, *RULPA*,  
29 *ULLCA*, and *ReRULPA* (the “Uniform Unincorporated Acts”) that would not be affected would be  
30 those involving transactions between the same type of business (*e.g.*, mergers between same-form  
31 partnerships or between limited liability companies). Further, *MITA* would *add* entity interest  
32 exchanges and domestications to the Uniform Unincorporated Acts and thereafter set forth all voting  
33 procedures for both domestications and exchanging entities in interest exchanges to that necessary  
34 for a merger.

35  
36 This [Act], in its present state, is drafted as a free-standing, “junction-box” statute that will:  
37 (1) *repeal* all existing merger and conversion provisions in all Uniform Unincorporated Acts; (2)  
38 *replace* those provisions with new, broader merger and conversion provisions; and (3) *add* the new  
39 transactions of divisions, entity interest exchanges and domestications. This [Act] also defines the  
40 necessary approvals for each of these transactions. With this [Act] repealer, therefore, a practitioner  
41 need only review this [Act] to locate the substantive rules for all domestic alternative entity mergers,  
42 divisions, entity interest exchanges, conversions and domestications. In sum, this [Act] will *enable*  
43 cross-form and same-form mergers, divisions, conversions and entity interest exchanges— as well as

1 to domestications – for unincorporated entities. This [Act] will permit a domestic incorporated entity  
2 to use the Act only if the organic law and organic rules governing the domestic incorporated entity  
3 permit the transaction. Foreign entities – unincorporated or incorporated – may use this [Act] if the  
4 organic law and organic rules of the foreign entity do not prohibit the transaction.  
5

6 The three ABA projects are at varying degrees of completion but the work of each clearly  
7 overlaps, to some degree, with the scope and purpose of this [Act]. The NCCUSL Drafting  
8 Committee, its Chair, Reporter and ABA advisors are working closely with the Chair of the *MBCA*  
9 junction-box and division projects as well as the Co-Chairs of the Ad-Hoc Committee.  
10

11 The present draft of this [Act] contains seven Articles. The first Article sets forth: (1) name;  
12 (2) definitions; (3) the relationship of regulatory law to the transaction authorized, (4) provisions on  
13 filings, and (5) a special rule where an owner will undertake personal liability for the obligations of  
14 the owner as a result of the transaction. The definitional section utilizes generic terminology  
15 intended to encompass both corporate and unincorporated (“cross-species”) transactions.  
16

17 Article 2 governs mergers. Article 2 is derived in large part from existing corporate and  
18 unincorporated laws. Certain provisions dealing with necessary approvals, information required in  
19 the plan of merger and some filing requirements represent an amalgamation of existing law.  
20

21 Article 3 governs divisions. The division is a special type of merger that permits a dividing  
22 entity to subdivide itself into two or more separate and distinct entities. The division presently does  
23 not exist in any uniform unincorporated act. The ABA, on the other hand, is reviewing a proposed  
24 addition to the *MBCA* regarding divisions. *MITA* reserves a chapter for divisions, but no provisions  
25 have yet been proposed. The division provisions of Article 3 reflect the unique nature of the  
26 contractual allocation of assets and liabilities that result from a division.  
27

28 Article 4 governs the entity interest exchange. The entity interest exchange is derived from  
29 the share exchange in corporate law and reflected in Chapters 11 and 13 of the *MBCA*. The entity  
30 interest exchange does not presently exist in separate form in any Uniform Unincorporated Act. The  
31 Drafting Committee, at its first meeting in November, 2000, opted to include provisions for an entity  
32 interest exchange. Certain difficulties are presented by the entity interest exchange, including: (1)  
33 necessary default approvals; (2) informational requirements for a plan of entity interest exchange;  
34 and (3) filing requirements for the exchange. Each of these points is addressed in this draft.  
35

36 Article 5 governs conversions. Article 5 is intended to address traditional domestic and  
37 foreign “different-form conversions.” Article 5 also sets forth: (1) default approval rules; and (2)  
38 informational requirements for conversions.  
39

40 Article 6 governs domestications. Article 6 is intended to authorize a foreign entity to  
41 domesticate as a domestic unincorporated entity of the same type and to authorize a domestic  
42 unincorporated entity to domesticate as a foreign entity of the same type so long as the organic rules  
43 of the foreign jurisdiction permit the domestication and the organic law of the foreign entity does not

1 prohibit the domestication. Article 6 provides: (1) requirements for a plan of domestication; (2)  
2 approvals, including a default rule of approval; (3) necessary filings; and (4) effectiveness of a  
3 domestication.

4  
5 Article 7 sets out miscellaneous provisions, including: (1) severability; (2) effective date; (3)  
6 repeals of affected provisions in *RUPA*, *ULLCA* and *Re-RULPA*; (4) applicability; (5) savings clause;  
7 and (6) e-sign language.



1           [(8)](9) “Domestic entity” means a domestic incorporated entity [~~and a~~] **or** domestic  
2           unincorporated entity.

3           [(9)](10) “Domestic incorporated entity” means an incorporated entity created under or  
4           whose internal affairs are governed by the law of this [State] [state].

5           [(10)](11) “Domestic unincorporated entity” means an unincorporated entity created under  
6           or whose internal affairs are governed by the law of this [State] [state].

7           [(11)](12) “Domesticated entity” means the entity that continues in existence after a  
8           domestication.

9           [(12)](13) “Domesticating entity” means the entity that [~~adopts a plan of domestication and~~  
10          ~~that~~] files a statement or plan of domestication pursuant to [section] **Section 604 605**.

11          [(13)](14) “Domestication” means a transaction authorized by [Article] 6.

12          [(14)](15) [~~“Entity” means a person other than an individual. The term does not include an~~  
13          ~~estate, trust (other than a business or land trust), governmental, or quasi-governmental subdivision,~~  
14          ~~agency, or instrumentality.~~] **“Entity” means a person other than an individual, estate, trust other than**  
15          **a business trust or land trust, public corporation, or government, governmental subdivision, agency**  
16          **or instrumentality.**

17          [(15)](16) “Entity interest exchange” means a transaction authorized by [Article] 4.

18          [(16)](17) “Exchanging entity” means ~~the~~ **an** entity [all of [~~one or more of the classes or~~  
19          ~~series of which the~~] **whose** ownership ~~interests~~ or transferee interests **in one or more classes or**  
20          **series**] **of which all of one or more classes or services of its ownership or transferee interests**  
21          are exchanged in an entity interest exchange.

1           [(17)](18) “Filing entity” means an entity that is created by the filing of a public organic  
2 document.

3           [(18)](19) “Foreign entity” means an entity other than a domestic entity.

4           [(19)](20) “Merger” means a transaction authorized by [Article] 2.

5           [(20)](21) “Merging entity” means an entity that is a party to a merger, [and] exists  
6 immediately before the filing of the statement of merger, and does not survive the merger.

7           [(21)](22) “Nonfiling entity” means an entity other than a filing entity.

8           [(22)](23) “Nonqualified foreign entity” means a foreign entity that is not authorized to  
9 transact business in this [State] state [by an appropriate filing with the [Secretary of State]].

10           [(23)](24) “Organic law” means the [statute or body] of law that governs the internal affairs  
11 of an entity.

12           [(24)](25) “Organic rules” mean the rules, [adopted in accordance with and not prohibited  
13 by the organic law of an entity,] whether or not in a record, [that] which govern the internal affairs  
14 of an entity, adopted by the entity under its organic law.

15           [(25)](27) “Owner” means a person that is:

16           (A) with respect to a general or limited partnership, a partner;

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

18           (C) with respect to a business trust, the owner of a beneficial interest in the trust;

19           [(D)] with respect to a corporation, a shareholder, a member, [or the governing  
20 body of] [( )] with respect to a nonprofit corporation without members, its governing body;

21           [(E)] with respect to a nonprofit unincorporated entity, a member or, if there are no  
22 members, its governing body; [and] or

1 ~~\_\_\_\_\_ (F) with respect to any other entity, a person that has an ownership interest in the entity.]~~

2 (D) with respect to a corporation with shareholders, a shareholder;

3 (E) with respect to a corporation with members, a member;

4 (F) with respect to a corporation without either shareholders or members, its  
5 governing body;

6 (G) with respect to a nonprofit unincorporated entity with members, a member;

7 (H) with respect to a nonprofit unincorporated entity without members, its  
8 governing body;

9 ~~\_\_\_\_\_ (I) with respect to a cooperative, a member; and~~

10 (J) with respect to any other entity, a person that has an ownership interest in  
11 the entity.

12 [(26)](27) “Ownership interest” [means an owner’s proprietary interest in an entity] shall  
13 mean, with respect to an entity, the rights of an owner as set forth in the organic law of the  
14 entity.

15 [(27)](28) “Owner’s liability” means [personal] liability for debts, obligations, and liabilities  
16 of an entity which is imposed on [an owner] a person solely by reason of the person’s status as an  
17 owner [in] of the entity pursuant to the organic law or the organic rules of the entity.

18 [(28)](29) ~~“Party to a merger” means [any] the merging [entity] entities and the surviving~~  
19 ~~entity.]~~

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

1           ~~[(30)]~~ “Plan” means a plan of merger, division, entity interest exchange, conversion or  
2 domestication.]

3           ~~[(31)]~~(30) “Public organic document” means the public record, ~~[as well as all amendments~~  
4 ~~to those documents,]~~ the filing of which creates an entity, and any amendments to the record.

5           ~~[(32)]~~(31) “Qualified foreign entity” means a foreign entity that is authorized to transact  
6 business in this ~~[[State]]~~ state ~~[by an appropriate filing with the [Secretary of State]].~~

7           ~~[(33)]~~(32) “Record” means information that is inscribed on a tangible medium or that is  
8 stored in an electronic or other medium and is retrievable in perceivable form.

9  
10           

Should “regulatory law” be added as a defined term?

11           ~~[(34)]~~(33) “Resulting entity” means a dividing entity that continues in existence after, or an  
12 entity that is created by, a division.

13           ~~[(35)]~~(34) “Sign” means:

14           (A) to execute or adopt a tangible symbol with the present intent to authenticate a  
15 record; or

16           (B) to attach or logically associate an electronic symbol, sound, or process to or with  
17 a record with the present intent to authenticate the record.

18           ~~[(36)]~~(35) “State” means a ~~[State]~~ state of the United States, the District of Columbia,  
19 Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the  
20 jurisdiction of the United States.

21           ~~[(37)]~~(36) “Surviving entity” means the entity ~~or entities~~ that continues ~~or continue~~ in  
22 existence after or ~~are~~ is created by a merger.



1 by the converting entity (§ 102(4)) while it is the converted entity (§ 102(3)) that survives the  
2 transaction.

3  
4 **“Dividing entity” [(6)]** - “Dividing entity” is used in this [Act] to define the domestic or foreign  
5 entity that is to be subdivided into separate and distinct entities. The dividing entity may or may not  
6 be a resulting entity.

7  
8 **“Division” [(7)]** - The term “division” is used to define a type of merger whereby a domestic  
9 unincorporated entity may “divide” itself into: (1) two or more domestic entities; (2) the dividing  
10 entity and one or more domestic entities or one or more foreign entities; (3) one or more domestic  
11 entities and one or more foreign entities; or (4) two or more foreign entities. A division also includes  
12 the procedure whereby a foreign entity is divided into: (1) two or more domestic unincorporated  
13 entities; (2) the dividing entity and one or more domestic unincorporated entities; or (3) one or more  
14 domestic unincorporated entities and one or more foreign entities of any type. *See, e.g.,* 15 Pa.C.S.  
15 § 8961 *et seq.* (2001)(division of domestic LLC); 15 Pa.C.S. § 8576 *et seq.* (2001)(division of  
16 domestic limited partnership); 15 Pa.C.S. § 1951 *et seq.* (2001)(division of domestic corporation).  
17 In general, a division permits a dividing entity to contractually allocate assets and liabilities among  
18 new or existing entities. The liabilities may be allocated among surviving entities in any manner so  
19 long as the allocation does not constitute a fraudulent conveyance. Presently, Pennsylvania only  
20 allows a division to new entities whereas Texas permits a division to an existing or new surviving  
21 entity.

22  
23 **“Domestic entity” [(9 8)]** - The term “domestic entity” in this [Act] refers to domestic  
24 incorporated and unincorporated entities created under or whose internal affairs are governed by the  
25 organic laws of an adopting jurisdiction.

26  
27 In most instances, this provision will direct itself to the jurisdiction of organization, however,  
28 the law of at least two jurisdictions, California and New York, provides that, notwithstanding that  
29 an entity is formed under the laws of another jurisdiction, that entity will be deemed to be governed  
30 by the entity law of California or New York if the entity has sufficient contacts in that jurisdiction.  
31 The ostensible purpose of the California rule is to grant cumulative voting rights to shareholders of  
32 Delaware corporations where the Delaware entity is engaging in business and has minimum contacts  
33 in California. If California courts were bound to apply Delaware law, the shareholders would have  
34 only cumulative voting rights if the certificate of incorporation so provided.

35  
36 **“Domestic incorporated entity” [(10 9)]** - The term “domestic incorporated entity” is used  
37 throughout this [Act]: (1) to distinguish the domestic entities that are *authorized* to engage in a  
38 merger, conversion, entity interest exchange or domestication *pursuant to this [Act]* with any other  
39 entity; and (2) to make clear that a domestic *incorporated* entity may “elect” to engage in a  
40 transaction with a domestic *unincorporated* entity governed by this [Act] if the organic rules and  
41 organic law governing the incorporated entity do not prohibit the transaction. Because jurisdictions  
42 vary in their description of incorporated entities, states should conform this section accordingly.

1           **“Domestic unincorporated entity [(11 10)]** - The term “domestic unincorporated entity” is used  
2 throughout this [Act] to describe the entities for which this [Act] was intended to apply. The listing  
3 is not intended to be exhaustive and an adopting [state] should conform this section accordingly.  
4

5           **“Domestication” [(14 13)]** - The term “domestication” in this [Act] authorizes a domestic  
6 unincorporated entity to change its *jurisdiction* of formation *but not its type* so long as the organic  
7 law of the foreign jurisdiction permits the domestication. The legal effect of the domestication out  
8 of an adopting [state] likely would be governed by the laws of the *domesticated* entity. There is,  
9 however, some concern that the “effectiveness” of a domestication could be governed by the organic  
10 law of the *domesticating* entity. Of course, there is no uncertainty regarding “effectiveness” if the  
11 organic law of the domesticating and domesticated entities is the same.  
12

13           The term “domestication” also authorizes the procedure whereby a foreign unincorporated entity  
14 becomes a domestic unincorporated entity of the same type. The legal effect of the latter transaction  
15 is likely governed by the laws of the jurisdiction adopting this [Act], subject, of course, to the above  
16 commentary.  
17

18           **“Entity” [(154)]** - The definition of the term “entity” is intended to be broad but also to reflect  
19 the unique nature of certain types of incorporated and unincorporated entities. For example, in some  
20 jurisdictions corporations are created under special acts, special corporation acts or for special  
21 purposes. Also, many jurisdictions have entities that are unique to specific forums. In those  
22 jurisdictions, the definition should be conformed according to what the [State] wishes to include or  
23 exclude from the scope of this [Act]. The present definition also specifically includes nonprofit  
24 entities. The definition excludes sole proprietorships but includes general partnerships under both  
25 *UPA* and *RUPA*.  
26

27           The defining characteristic of an “entity,” like that in *MITA* and some states that have considered  
28 the issue includes all forms of organization regardless of whether organized for profit.  
29

30           The definition of entity was changed from “sue and be sued” to “acquire an interest in real  
31 property in its own name” in order to make it uniform with incorporated acts. It also appears to be  
32 a broader definition than that adopted by the Drafting Committee up to this point. *See MITA and*  
33 *Commentary thereto*.  
34

35           The definition of “entity” was redrafted to reflect the Committee’s decision in New Orleans,  
36 2001 to specifically exclude estates, trusts (other than business or land trusts) and, governmental or  
37 quasi-governmental entities, agencies or subdivisions. Further, an individual is not a sole  
38 proprietorship under this [Act].  
39

40           **“Foreign Entity” [(18)]** - The term “foreign entity” includes any non-domestic entity of any  
41 type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing.  
42 A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual  
43 question whether a general partnership whose internal affairs are governed by *UPA* (1916) is a

1 domestic or foreign partnership. Likely, a *UPA* partnership will be deemed to be a domestic entity  
2 where the greatest nexus of contacts are found. The domestic or foreign characterization of *RUPA*  
3 partnerships that have not registered as limited liability partnerships will be governed by *RUPA* §  
4 106(a).

5  
6 **“Merger” [(19)]** The term “merger” in this [Act] includes the transaction known as a  
7 consolidation in which a new entity results from the combination of two or more pre-existing  
8 entities. The term “merger” also includes the traditional two-party merger in which one party does  
9 not survive the transaction. “Merger” also includes a forward or reverse triangular merger where a  
10 third, subsidiary, entity is formed to effect the transaction on behalf of one of the constituent entities  
11 to the merger.

12  
13 **“Nonfiling entity” [(21)]** - A “nonfiling entity” is one that is not formed by the filing of a public  
14 document. The term includes general partnerships (including limited liability partnerships),  
15 unincorporated nonprofit associations and [business trusts]. On the other hand, an LLP requires the  
16 filing of a statement of qualification *for the purpose of gaining a limited liability shield*. The  
17 statement of qualification does not create the entity, but rather the partnership is formed by the  
18 agreement of the partners and merely changes the vicarious liability of the partners. *RUPA* §  
19 1001(a).

20  
21 **“Organic law” [(23)]** - The term “organic law” reflects the position of the Committee that  
22 “organic law” should be linked to the enforceability and interpretation of the “organic rules” that  
23 govern the internal affairs of an entity. Where the statute provides for a transaction’s being  
24 permissible is “authorized by the organic law,” such authorization may be in the organic rules of the  
25 entity adopted in conformity with the entity’s organic law.

26  
27 **“Organic rules” [(24)]** - The term “organic rules” is intended to include all governing rules of  
28 an entity whether or not in written form. The term is intended to include agreements in “record”  
29 form as defined in *ULLCA* at § 101 (16) (“information that is inscribed on a tangible medium or that  
30 is stored in an electronic or other medium and is retrievable in perceivable form.”) as well as oral  
31 partnership agreements and oral operating agreements among LLC members. “Organic rules”  
32 represent either the parties’ *actual, negotiated* agreement *or, in a default situation, what the law*  
33 *deems* the parties’ agreement to be. Thus, references to the organic rules in this [Act] include  
34 references to the organic law to the extent of: (1) nonwaivable provisions of the organic law, and (2)  
35 matters not addressed in the written or unwritten agreement of the parties. For example, assume in  
36 an LLC that three members agree to profit-sharing but do not specify managerial rights. In this  
37 circumstance, the parties’ *actual agreement* reflects rights to receive profits that may be different  
38 from those provided for by statute. Further, the parties’ agreement regarding management *is imposed*  
39 *by law*. Both the actual and “constructive” (default) agreements constitute the “organic rules” of the  
40 entity.

41  
42 **“Owner” [(25)]** - The term “owner” provides a listing of the types of persons who are considered  
43 to have an economic or other proprietary right in a for-profit or not-for-profit entity.

1 The present language is that suggested by the Committee in December of 2001. The language  
2 is taken largely from ~~Re-Rutpa~~ *Re-RULPA* § 1101 (8). An accompanying definition for “ownership  
3 interest” was added at § 102(26) to clarify the meaning of § 102 (235)(E). Subsection (D) has been  
4 modified to reflect for-profit and nonprofit corporations and the differing “ownership” interests of  
5 each. Also, a new subsection (E) has been added regarding ownership interests in nonprofit entities.  
6 Subsection (F) is intended to exclude sole proprietorships.

7  
8 **“Ownership interest” [(26)]** - An “ownership interest” includes a partnership interest in a  
9 general partnership (including a limited liability partnership), a partnership interest in a limited  
10 partnership (including a limited liability limited partnership), a membership interest in a limited  
11 liability company, a share in a corporation, a membership interest in a nonprofit corporation, a  
12 membership interest in an unincorporated association, and a beneficial interest in a business trust.  
13 Where nonprofit entities have no membership interests, the ownership interest would include the  
14 interest held by the entity’s governing body.

15  
16 **“Owner’s liability” [(27)]** - “Owner’s liability” is used in this [Act] to make clear that personal  
17 liability of an owner will be preserved in transactions governed by the [Act]. Personal liabilities, as  
18 anticipated by this [Act], are those imposed on an owner *by the organic law or by any organic rule*  
19 *of the entity*.

20  
21 **“Person” [(29)]** The term “person” is taken from *ULLCA* § 101(14). The drafting committee  
22 considered using the definition of “person” from Article 1 of the *UCC*. After consideration of the  
23 Article 1 definition, the drafting committee concluded that the *ULLCA* definition reflects the intent  
24 of this [Act].

25  
26 **“Public organic document” [(31)]** - A “public organic document” is a document that is filed  
27 of public record to *create* an entity. A “public organic document” includes a certificate of limited  
28 partnership, the articles of organization for a limited liability company, the articles of incorporation  
29 for a nonprofit or for-profit corporation, the articles of association for an unincorporated nonprofit  
30 association, or a deed of trust of a business trust. “Public organic document” does not include *a*  
31 *statement of partnership authority* filed pursuant to § 303 of *RUPA* or *a statement of qualification*  
32 *for an LLP or LLLP*. With regard to the filing of a statement of qualification for an LLP or LLLP,  
33 such a filing *does not constitute the filing that creates the entity*. Rather, an LLP is an *already-*  
34 *formed general partnership* that has filed a statement of qualification for the purpose of gaining  
35 limited liability for its partners. As to an LLLP, the underlying entity (the LP) is formed by filing a  
36 certificate of formation followed by or simultaneous with the filing of a statement of qualification  
37 (in those jurisdictions that permit an LLLP). (*Re-RULPA* permits the creation of an LLLP by the  
38 inclusion of the necessary LLLP language in the certificate of formation limited partnership thereby  
39 eliminating the second filing.)

40  
41 **“Qualified foreign entity” [(32)]** - General partnerships are not intended to be included within  
42 the entity filing regime for “qualified foreign entities.”  
43

1           **“Record” [(33)]** - The term “record” is intended to include the broadest degree of information  
2 so long as the information is retrievable in a “perceivable” form. This language is taken from  
3 *ULLCA* § 101 (16) and *Re-RULPA* § 102 (20).  
4

5           **“Resulting entity” [(34)]** - The term “resulting entity” refers to the entity in a division that either  
6 continues in existence or is created by a division. As such, the resulting entity closely parallels that  
7 of the surviving entity in a merger.  
8

9           **“Transaction” [(39)]** - The term “transaction” is intended to refer the fundamental entity  
10 changes that may be effected under this [Act].  
11

12           **“Transferee” [(41)]** - The term “transferee” means a person to whom an owner has transferred  
13 her rights, in whole or in part, to receive profits, losses, and distributions of an entity. A transferee  
14 has no rights to participate in management or conduct of an entity, to demand access to information  
15 concerning the entity, or to inspect or copy entity books or records. *See RUPA* § 503 (1997); *Re-*  
16 *Rulpa* § 702 (2001); *ULLCA* §§ 502, 503 (1995)(“distributional interest” that may be transferred).  
17 A transferable interest may be subject to a charging order in appropriate circumstances. *See RUPA*  
18 § 504 (1997); *Re-Rulpa* § 703; *ULLCA* § 504 (1995). No Uniform Unincorporated Act presently  
19 grants, by statute, a right to a transferee to bring a direct or derivative suit against an entity to enforce  
20 rights granted in a transfer. *See, e.g., Re-Rulpa* (2001) § 1001 (direct action may be brought by a  
21 “partner”); § 1002 (a “partner” may bring a derivative action) and *ULLCA* (1995) § 1101 (a  
22 “member” may bring a derivative action). Whether a provision such as § 104 of *RUPA* (stating that  
23 “the principles of law and equity supplement this [Act], unless displaced by particular provisions of  
24 the Act”) would grant recourse to a transferee to sue non-transferor/owners for breach of contractual  
25 or fiduciary duties would be subject to interpretation by a court. *But see U-H Acquisitions Co. v.*  
26 *Barbo*, 1994 Del.Ch. Lexis 9 (holding that assignee of limited partnership interest had no standing  
27 to sue for a breach of fiduciary duty in allegedly interested transaction by general partner); *Kellis v.*  
28 *Ring*, 92 Cal.App. 3d 854 (1979) (holding that “mere assignee” of limited partnership interest lacked  
29 standing to bring fiduciary claim against general partner); *Bauer v. Bloomfield Co/Holden Joint*  
30 *Venture*, 849 P.2d 1365 (Al. 1993)(holding that assignee of general partnership interest had no claim  
31 against partnership for allegedly wrongful business decision to withhold distributions; in dicta, court  
32 further stated that: “We are unwilling to hold that partners owe a duty of good faith and fair dealing  
33 to assignees of a partner’s interest.”).  
34  
35

### 36           **SECTION 103. GOVERNING LAW.**

37           ~~[(a) — [Following] After a transaction authorized by this [Act] [act], the organic law of [a]~~  
38 ~~the surviving entity, resulting entity, exchanging entity, converted entity, or domesticated entity~~  
39 ~~continues to govern the entity.]~~  
40



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

4 (3) If a transaction under this [Act] is enjoined or reversed because of a violation of a  
5 regulatory law after the filing that effected the transaction shall have become effective, the enjoining  
6 or reversal of the transaction shall not affect the valid existence of the surviving, resulting,  
7 exchanging, converted, or domesticated entity which shall be reinstated upon the filing with the  
8 [Secretary of State] by any interested party of a final order not subject to appeal enjoining or  
9 reversing the transaction.

10 (4) Any document filed by the [Secretary of State] or any action taken by any person  
11 under the authority of this [Act] in violation of any regulatory law shall be ineffective as against this  
12 [State], including the departments, agencies, boards and commissions thereof, unless and until the  
13 violation is cured.

14 (c) If and to the extent that a regulatory law sets forth provisions relating to the government  
15 and regulation of the affairs of an entity that are inconsistent with the provisions of this [Act] on the  
16 same subject, the provisions of the regulatory law shall control.

17  
18 Significant style comments, some of which would as well impact the substance, were made on  
19 § 104. These comments are not reflected in this draft as it is necessary to make a final  
20 determination on the substantive direction of this provision and the language to effect same before  
21 style is considered.

### 22 Preliminary Comments

23  
24  
25 **Section 104** - This section loosely corresponds to *MITA* § 103. *MITA* § 104 provides an optional  
26 provision under which the transaction may not proceed without the prior approval of the regulatory  
27 agency, this [Act] like *MITA* § 103, addresses the consequences of a failure to have such authority.  
28 Because of the inclusion of corporate transactions within this [Act], the Reporter added this section

1 back for discussion purposes only. Great concern was expressed regarding regulated transactions  
2 and creditor rights during and after the Annual Meeting in Arizona so it seemed appropriate to look  
3 at such a provision another time before a final reading of the Act.  
4

5 Finally, in those jurisdiction where certain professions are limited in their use of limited liability  
6 entities, those statutes should be conformed accordingly. *See, e.g.,* R.I.Gen.Laws § 7-5.1-3  
7 (restricting the corporate practice of certain professions to domestic corporations only). *But see*  
8 R.I.Gen.Laws § 7-12-31.1(b)(3)(permitting foreign limited liability partnerships to practice law) and  
9 Article II, Rule 10 of the Rhode Island Supreme Court Rules (permitting foreign corporations and  
10 partnerships to practice law through appropriately licensed attorneys).  
11

12 **Section 104(b)(4)** - Section 104(b)(4) is new and was added by committee agreement. It is  
13 patterned after MITA.  
14

15 **Section 104(c)** – Section 104(c) is an ~~Optional~~ provision taken from section 103(d) of *MITA*.  
16 At its June 6, 2003 meeting the Committee requested that it be included for consideration.  
17  
18

19 ~~[SECTION 105] 205. CONSENT OF OWNER WITH RESPECT TO OWNER'S~~  
20 ~~LIABILITY. [In addition to the approvals required by Sections 203, 204, 303, 304, 403, 404, 503,~~  
21 ~~504, 603, or 604,] [if] **If** a person would have owner's liability with respect to an unincorporated~~  
22 ~~surviving[, resulting, exchanging, converted, or domesticated] entity, [approval and amendment of~~  
23 ~~a merger, division, entity interest exchange, conversion, or domestication are not effective without]~~  
24 ~~the person must consent to the merger in a record [of the person], unless:~~

25 ——— (1) the organic rules of the entity provide for [such] **the** approval or amendment **of a**  
26 **merger** with consent of fewer than all **of the** owners; and

27 ——— (2) the person has consented in a record to [that] **the** provision of the organic rules [that]  
28 **which** contains [that] **the** provision[, ] or became an owner [subsequent to] **after** the adoption of [that]  
29 **the** provision [in the organic rules].]  
30

1  
2  
3 **Preliminary Comments**

4 At the June 2003 meeting the Drafting Committee determined to include a single provision  
5 dealing with a situation in which an owner incurs owner’s liability in any type of transactions are  
6 subject to approval by the person who will become subject to owner liability. These are *ex ante*  
7 provisions that are intended to anticipate and facilitate a transaction that will result in an unshielded  
8 entity by a vote of fewer than all the owners. This section is, therefore, intended to release an owner  
9 from liability if the owner did not consent in a record to the organic rules that contain the provision  
10 that imposes liability with a vote of less than all the owners. As such, any attempt to modify an  
11 operating agreement *to add* such a provision would require consent in a record by the requisite  
12 number of owners. The record requirement thus cannot be avoided by *ex post* oral modifications.

13 Section 105(2) is derived from MITA regarding consent by persons who become owners after  
14 the adoption of the provision in the organic rules permitting imposition of owner’s liability with a  
15 vote of fewer than all owners. The argument apparently is that of disclosure and consent which  
16 could be attacked on any number of contractual grounds (status, duress, mistake, misrepresentation,  
17 public policy, unconscionability, etc).

18  
19 **SECTION 106. FILINGS.**

20  
21 (a) A filing under this ~~[[Act]]~~ **[act]** by a domestic entity ~~[shall have the status of a filing~~  
22 ~~under the entity’s organic law for purposes of a provision of that law that makes a filing with the~~  
23 ~~[Secretary of State]]~~ **is** a part of the public organic document of the entity.

24 (b) ~~[A provision of this [Act] that requires a document filed with the [Secretary of State] to~~  
25 ~~set forth an address shall be construed to require the furnishing of an actual street address or rural~~  
26 ~~route box number.]~~ The [Secretary of State] ~~[shall refuse to]~~ **may not** file ~~[any]~~ **a** document that ~~[sets~~  
27 ~~forth only]~~ **contains** a post office box **number that does not contain an** address.

28 (c) ~~[Filings]~~ **A filing** with the [Secretary of State] under this ~~[[Act]]~~ **[act]** ~~[shall be]~~ **is** subject  
29 to ~~[the provisions of]~~ \_\_\_\_\_.

30 (d) **A requirement that a plan be adopted or a statement signed by a party to a**  
31 **transaction under this act will not apply to an entity created by the transaction.**

1 **Preliminary Comments**

2  
3 **Section 106** - Section 106 is new and is intended to help integrate corporate provisions into this  
4 [Act]. Section 106 is taken from *MITA*. Section 106 is included for discussion purpose only.  
5

6 **Section 106(a)** - Section 106(a) deals with the status of domestic filings. Given the differing  
7 scope provisions for domestic incorporated entities, the following status arguments could be made.  
8 Assume, for example, that Mississippi adopts this [Act] and its corporate law permits a conversion  
9 from a corporation to an LLC. The filing by the corporate entity has the status of a filing under the  
10 corporate law of Mississippi. Assume, on the other hand, that Tennessee adopts this [Act] and the  
11 corporate provisions are silent as to the conversion of a domestic corporation to a domestic LLC.  
12 Here, the corporation can “elect” into this [Act] and the status of the filing is governed by this [Act]  
13 as will the internal affairs of the converting LLC.  
14

15 **Section 106(b)** - Section 106(b) deals only with addresses in filings. Section 106(b) directs  
16 filing authorities to refuse filings that identify only post office box addresses.  
17

18 **Section 106(c)** – Possible provision could include provisions similar to the *MBCA* such as:  
19 Correcting Filed Document (§ 1.24); Filing Duty of Secretary of State (§ 1.25); Appeal From  
20 Secretary of State’s Refusal to File Document (§ 1.26); and Penalty for Signing False Document (§  
21 1.29).  
22

23 Some states may wish to include a provision that requires a tax clearance before granting  
24 effectiveness to entity transactions that result in the removal of an entity from the state.  
25

26 **SECTION 107. FILING FEES.** The [Secretary of State] shall collect the following fees when  
27 the documents described are delivered for filing:

28	(1) Statement of merger .....	\$.....
29	(2) Statement of amendment or abandonment of merger.....	\$.....
30	(3) Statement of division.....	\$.....
31	(4) Statement of amendment or abandonment of division..	\$.....
32	(5) Statement of entity interest exchange.....	\$.....
33	(6) Statement of amendment or abandonment of interest exchange	\$.....
34	(7) Statement of conversion .....	\$.....

1	(8) Statement of amendment or abandonment of conversion ...	\$.....
2	(9) Statement of domestication .....	\$.....
3	(10) Statement of amendment or abandonment of domestication	\$.....
4	<del>[(11) Statement of surrender of articles of incorporation..</del>	<del>\$.....]</del>
5	<del>[(12) Application for withdrawal of authority.....</del>	<del>\$.....</del>
6	<del>(13) Application for transfer of authority .....</del>	<del>\$.....]</del>

**Preliminary Comments**

**Section 107** - Section 107 and sets forth a list of the types of filings and resulting fees that a [Secretary of State] might anticipate in transactions under this act. States may choose to include these fees within this [Act] or in a separate fees bill. States should also conform the list to differentiate between corporate filings (usually referred to as “articles”) and unincorporated filings (usually referred to as “statements” or “certificates”).

**SECTION 108. Excluded Entities and Transactions. [OPTIONAL]**

(a) Domestic entities of the following types shall not have the power to participate in a transaction under this [Act]:

- (1)
- (2)

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

(1) converts an insurance company organized on the mutual principle to one organized on a stock-share basis;

- (2)
- (3)

1  
2  
3 **Preliminary Comments**

4 **Section 108.** Section 108 is an optional provision that may be used to exclude certain types  
5 of entities or transactions from the scope of this [Act]. This Act does not contain a general provision  
6 authorizing domestic entities to engage in transactions under the Act because the provisions dealing  
7 with each specific type of transaction supply that authority.

8 Nonprofit entities may participate in transactions under this Act with for-profit entities,  
9 subject to compliance with section 104(b). If a state desires, however, to exclude nonprofit entities  
10 from the scope of the Act, that may be done in subsection (a).

11  
12 Subsection (a) is limited to domestic entities because a restriction on the power of a foreign  
13 entity to engage in a merger, interest exchange or conversion is more properly placed in the organic  
14 law of the foreign entity. More limited provisions that exclude certain types of domestic entities just  
15 from certain provisions of this Act are set forth in Sections 201(c) (mergers), 301(e) (entity interest  
16 exchanges) and 401(e) (conversions).

17  
18 A state should use subsection (b) to list those situations in which the state has enacted  
19 specific legislation governing certain types of transactions. Conversion a mutual insurance company  
20 to a stock insurance company has been listed in subsection (b)(1) as one example of such a  
21 transaction.

22  
23 Subsection (b) is patterned after *MBCA* § 9.01.]

24  
25 **[SECTION 109. APPRAISAL RIGHTS. [OPTIONAL]]**

26  
27 [Reserved]

28  
29 **Preliminary Comments**

30  
31 **Section 109** – Section 109 is an optional provision dealing with appraisal rights. The  
32 committee determined not to provide appraisal or dissenters’ rights in this [Act] but rather to leave  
33 the issue to the organic laws of the participants. Some states presently provide appraisal rights for  
34 unincorporated entity. Those states may wish to include those provisions with in this act. Other  
35 states may wish to enact such provisions. The Committee recommends placing such a provision here  
36 if it is to apply to more than one type of transaction.  
37  
38

1 [ARTICLE] 2

2  
3 MERGER

4  
5 SECTION 201. MERGER.

6 (a) By complying with ~~[the provisions of]~~ this ~~[[Article]]~~ [article] and subject to  
7 subsections (b) and (c):~~;~~

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

10 (2) two or more foreign entities may merge into a domestic surviving unincorporated  
11 entity.

12 (b) ~~[A]~~ By complying with this [article] and subject to subsection (a), a domestic  
13 incorporated entity may merge with one or more domestic unincorporated entities into a domestic  
14 surviving entity, or may be created in such a merger, if ~~[the]~~ such a merger is not expressly  
15 prohibited by the ~~[organic]~~ law of this state or the organic rules of the domestic incorporated entity.

16 (c) A foreign entity may merge with a domestic unincorporated entity, or may be created  
17 in such a merger, if the merger is authorized by the organic law of the foreign entity.

18  
19 Preliminary Comments

20  
21 The statutory merger contemplated by this [Act] involves the combination of one or more  
22 domestic unincorporated entities with or into one or more other domestic or foreign entities. It also  
23 contemplates the consolidation of two or more foreign entities into a single domestic unincorporated  
24 domestic entity. Upon the effective date of the merger, all the assets and liabilities of the constituent  
25 entities vest in the surviving entity as a matter of law. As such, mergers require the existence of at  
26 least two separate entities before the transaction and may have only one entity survive the merger.  
27 If independent existence of the constituent entities is favored at the conclusion of the transaction, a  
28 merger may not be the optimal vehicle to accomplish the statutory transfer of assets and liabilities.  
29 Independent existence could be better accomplished through an entity interest exchange pursuant to  
30 Article 3.

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

9  
10           Further, the vote necessary to accomplish a merger likely will vary depending upon the nature  
11 of the constituent entities, *e.g.* majority vote for corporate entities and either unanimity or a  
12 contracted-for threshold for unincorporated entities (presuming a default voting requirement). *Id.*  
13 Whether “adoption” or “approval” by managers is required is dependent upon the nature of the  
14 constituent entity as well as the private organic documents of that entity. For example, a limited  
15 partnership may require approval by the general partner/s, voting or not as a class. Likewise, a  
16 manager-managed limited liability company may require approval or adoption by the manager/s.  
17 Board approval by a domestic corporation would be governed by the organic law of the corporate  
18 entity.

19  
20           In a recent study conducted by Bill Clark, ABA Advisor to the Drafting Committee, 22  
21 jurisdictions require a unanimous vote of the members of an LLC to approve a merger; 26  
22 jurisdictions require some form of majority vote of the members; and 3 states require a 2/3 vote of  
23 the members. As to limited partnerships, 18 jurisdictions have no provisions authorizing mergers  
24 in their LP law. Of the 33 jurisdictions that address mergers of LPs, only 6 (AZ, KS, KY, OH, VT  
25 and VA) require unanimity of general and limited partners; 8 jurisdictions (CO, GA, IN, KS, MS,  
26 MO, SC, and TX) authorize a merger based upon a provision in a partnership agreement without  
27 providing a default rule; and 17 jurisdictions require unanimous vote of the general partners but only  
28 a majority vote of the limited partners. *See* William H. Clark, Jr., Memorandum, *Required Approval*  
29 *for Cross-entity Mergers*, December 26, 2002.

30  
31           Finally, the availability of fiduciary duties (or the contractual modification of these duties)  
32 to redress unfairness in statutory mergers may depend upon the “corporateness,” or lack thereof, of  
33 the entities participating in the merger. *Id.*

34  
35           **Section 201(a)** - Section 201(a) provides for mergers between the same or different types of  
36 domestic unincorporated entities and between domestic unincorporated entities and domestic or  
37 foreign incorporated entities. Thus, a merger between two domestic limited partnerships would be  
38 governed by this Act as would a merger between a domestic limited partnership and a domestic  
39 limited liability company. If the merger involves a domestic general partnership and a domestic  
40 corporation, this Act would govern the general partnership and the organic law of the domestic  
41 corporate entity would govern the corporation if the organic law of the corporation authorized the  
42 transaction. If the merger were between two domestic corporations into a domestic unincorporated

1 entity and the organic law of the incorporated entities were silent as to the merger, this [Act] would  
2 apply if the domestic corporations so “elected.”  
3

4 Section 201(a) only speaks to the domestic side of a merger. For example, if the organic law  
5 of a foreign entity that is to merge with a domestic unincorporated entity authorizes the transaction,  
6 this [Act] will also “authorize” the transaction for the foreign entity. Thus, in order to assure that  
7 these transactions take place with ease across state lines, uniformity of law is required. This [Act]  
8 is intended to *enable the targeted transactions as to domestic unincorporated entities only*. There  
9 is some limited extraterritorial effect to this [Act] under § 201(c) as to foreign entities whose organic  
10 law and rules *are silent* regarding the transaction. In those circumstances, it may fairly be said that  
11 some degree of risk is involved in giving an unconditional legal opinion as to the effect of a  
12 transaction involving a foreign entity from a “silent” jurisdiction.  
13

14 **Section 201(b)** - Section 201(b) authorizes mergers involving domestic incorporated entities  
15 where the organic law or organic rules of the incorporated entity do not expressly prohibit this type  
16 of merger. It is important to remember that for purposes of this [Act] “merger” is defined to exclude  
17 traditional mergers that include only corporations. It is also important to note that if the merger is  
18 only prohibited by the organic rules, it may be possible to amend those rules under the Organic law  
19 to remove the proscription, in which case the merger would be permitted under this [Article].  
20

21 **Section 201(c)** - Section 201(c) enables a foreign entity to be a party to a merger with a  
22 domestic unincorporated entity where the organic law of the foreign entity authorizes the merger.  
23

24  
25 Responding to a point raised from the floor, add a statement regarding the fact that this act  
26 authorizes a merger for state law purposes, and that federal and state law will independently  
27 determine whether the transaction will be treated as a (tax free) merger or otherwise for tax  
28 purposes

29  
30 **SECTION 202. PLAN OF MERGER.**

31 (a) A domestic entity may [~~be~~] **become** a party to a merger by approving a plan of  
32 merger.

33 (b) A plan of merger must be in a record and [~~must state or~~] contain:

34 (1) as to each merging and the **proposed** surviving entity, its name, jurisdiction of  
35 formation and type of organization;

36 (2) the terms and conditions of the merger;

1 (3) the manner and basis of converting the ownership or transferee interests in each  
2 party to the merger of which interests the entity has knowledge into ownership or transferee interests,  
3 securities, obligations, rights to acquire ownership or transferee interests[;] or securities, cash, or  
4 other property, or any combination of the foregoing;

5 (4) if the surviving entity is to be created by the merger, its proposed public organic  
6 document, if any, and the full text of its organic rules that are proposed to be in a record;

7 (5) if the surviving entity exists before the merger, any proposed amendments to its  
8 public organic document or to its organic rules [as] which are in a record; and

9 (6) any other provision required by the organic law or organic rules of each merging  
10 entity.

11 (c) In addition to the provisions required by subsection (b), a [A] plan of merger may  
12 [state or] contain any other provision.

13 (d) Any [of the] [provisions] provision of the plan of merger may be made dependent  
14 upon facts ascertainable outside of the plan, if the manner in which the facts will operate upon the  
15 [provisions of the plan] provision is [set forth] contained in the plan.

## 16 Preliminary Comments

17 Section 202(a) - The requirements for the approval of the plan of merger are set forth in §  
18 203.

19  
20 **Section 202(b)(1)** - Section 202(b)(1) requires that the plan of merger identify the parties to  
21 the merger. The name of the merging entity is the name in its jurisdiction of organization.  
22

23 **Section 202(b)(3)** - Section 202(b)(3) enables constituent organizations to provide for  
24 continuing interests in a surviving entity for some equity holders and the payment of some other form  
25 of consideration for other equity participants. In addition, constituent entities may use a merger to  
26 reorganize the capital structure of the surviving entity. Because § 202(b)(3) ostensibly permits the  
27 non-uniform treatment of equity holders in a merger, some concern has been raised as to whether

1 the language of section 202(b)(3) should be modified to either *enable, limit or eliminate* an “equity  
2 shuffle” in a merger. *See Ann E. Conaway Anker, Restructuring (or “Shuffling”) Equity Interests*  
3 *in Cross-Form Mergers and Conversions*, Inter-Entity Mergers and Conversions, presented by the  
4 Committee on Taxation and Committee on Partnerships and Unincorporated Business Organizations,  
5 Chicago, August 2001. As presently drafted, a non-uniform “equity shuffle” may be accomplished  
6 in a merger involving an unincorporated entity and the minority owners of the unincorporated entity  
7 will not necessarily be entitled to the statutory appraisal right currently afforded to minority  
8 stockholders in merging corporate entities. Arguably, any perceived “unfairness” in the “shuffle”  
9 may be resolved under the guise of fiduciary duties, assuming, of course, that such duties have not  
10 been contractually modified or eliminated.

11  
12 **Section 202(b)(3)** - The inclusion of transferee interests in § 202(b)(3) is not intended *to*  
13 *create* a requirement that any particular transferee interest be contained in a plan. It is also not  
14 intended to create rights in a transferee that do not otherwise exist: (1) in the organic law governing  
15 the affected entity; or (2) in a contract to which the entity is a party. Rather, § 202(b)(3) is  
16 *permissive only* and should be read to include only those transferee interest *of which the entity has*  
17 *notice*. For example, assume an Alabama general partnership is to merge with a Texas LLC.  
18 Assume also that the partnership has three partners and one partner has assigned her economic rights  
19 to her adult child. If the partnership has knowledge of the merger, the adult child’s transferee interest  
20 *may, and arguably should,* be taken into account in the merger. If, on the other hand, the partnership  
21 has no knowledge of the transfer, § 202(b)(3) *does not create the obligation to include the transferee*  
22 *interest nor does it create standing to sue for its absence in the plan*. The prior draft of the [Act]  
23 contained a provision defining “knowledge and notice.” That section was omitted on the theory that  
24 the organic law of participating entities contain these provisions.

25  
26 **Section 202(b)(4) and (5)** - Sections 202(b)(4) and (5) were added after the drafting  
27 committee’s meeting in March, 2002. Concern was expressed that parties contemplating a merger  
28 may approve a plan without having reviewed the *actual text of a new entity’s public organic*  
29 *documents or organic rules or an existing entity’s amendments to its public organic documents or*  
30 *organic rules*. The “organic rules” that are referenced here include the default rules of the entity to  
31 the extent they were not contractually modified by the parties.

32  
33 **Section 202(c)** - Section 202(c) provides the statutory authority for a merging party to include  
34 information in a plan of merger that is not specifically listed in § 202(b). One such possibility is that  
35 of appraisal rights. Few state statutes provide for appraisal rights for minority dissenting owners of  
36 unincorporated entities. A merging entity, could, however, negotiate such a dissenter’s right and  
37 thereafter articulate the right pursuant to § 202(c). Whether the so-called “appraisal right” is that  
38 anticipated in corporate law (which, in some states, does not include in the appraisal any element for  
39 breach of fiduciary duty) or, in the alternative, that of the “buyout” right of *RUPA* would be  
40 jurisdiction-dependent. Likewise, the appropriate degree of judicial scrutiny would depend upon the  
41 applicable jurisdiction.  
42

1           **Section 202(d)** - Section 202 (d) is new and is patterned after 15 *Pa.C.S.* § 8962(B)(2001)  
2 and similar language found in the *MBCA* and in *MITA* § 111(1).  
3  
4

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

6           (a) Subject to Section 205 [~~105 of this [Act]~~], a plan of merger

7                   (1) involving a domestic unincorporated entity must be approved:

8                           (A) by [~~a domestic unincorporated~~] the entity in accordance with its [~~according~~  
9 to applicable procedures for approval of a merger in the entity's] organic rules; or[;]

10                           (B) [~~if none, then~~] if the entity does not have procedures for approval of a plan  
11 of merger in its organic rules, by all [~~the~~] owners of the [~~domestic unincorporated~~] entity;[;]

12                   (2) involving a domestic incorporated entity must be approved by the entity in  
13 accordance with the law of this state.

14           (b) Subject to Section 205 [~~105 of this [Act]~~], a plan of merger involving a foreign entity  
15 must be approved by [~~a domestic incorporated~~] the entity in accordance with its [~~according to a~~  
16 applicable provisions for merger in the entity's organic rules or] organic law.

17           [~~(c) — A plan of merger must be approved by each foreign entity according to the entity's~~  
18 organic law].

19   **Preliminary Comments**

20           **Section 203 – Generally** –Section 203 sets forth the approval required for approval of  
21 mergers as defined in this [Act], i.e., mergers involving different types of entities. For domestic  
22 entities, a merger may be approved as provided in the entity's organic rules dealing with mergers.  
23 For domestic *incorporated* entities and for foreign entities of all types, Section 203 also provides for  
24 approval as provided in the entity's organic law. There is no reference to approval in accordance  
25 with organic law for domestic unincorporated entities, because this [Act] will supplant any provision  
26 of the entity. For domestic unincorporated entities and foreign entities, the approval will generally  
27 be done in accordance with provisions of organic rules (*see* the definition of “organic law” which  
28 includes organic rules adopted pursuant to organic law).

1 Approval under § 203 is intended to include whatever managerial decision is required by  
2 either the organic law or the organic rules to effectuate the merger (*e.g.* manager consent in a  
3 manager-managed LLC if the organic rules of the LLC require managerial approval). For example,  
4 if the organic rules of an entity require a procedure for the *proposal, adoption and/or approval* of  
5 the merger, the term “approval” includes conformance to all of those rules. See § 102(2). If the  
6 organic statute or organic rules require only the *approval* of the requisite vote of owners or only the  
7 *adoption and approval*, then § 203 mandates only that required by the organic rules, nothing more.  
8 Approval also contemplates any additional requirements attendant to the proposal, adoption and  
9 approval of an action by the entity approving the merger. This in the case of some incorporated  
10 entities it will include rules applicable to voting and records that apply to shareholder votes. On the  
11 other hand, § 203 is not intended to impose any greater requirements for effecting a merger than  
12 those required by the applicable organic rules or organic law of the entity.  
13

14 **Section 203(a)** - Section 203(a) provides the substantive rule applicable to the approval of  
15 mergers by *domestic unincorporated entities* under this [Act]. Section 203(a) sets out an alternative  
16 two-part test: first, approval follows any provision in the entity’s organic rules that is *specific to*  
17 *mergers*; and, second, if the organic rules do not mention mergers, the necessary vote becomes  
18 unanimous approval by the owners of the domestic unincorporated entity. In essence, § 203 allows  
19 the parties to *specifically* prescribe merger approval or, in the alternative, defaults to unanimity. A  
20 third alternative is also available for the approval of a merger, *i.e., the number specified for the*  
21 *amendment of the operating agreement of the entity*. For example, consider an LLC that wishes to  
22 merge with a corporation. Assume that the operating agreement of the LLC is silent regarding  
23 approval of mergers but provides for amendment of the operating agreement by a 2/3 vote. Section  
24 203(a) provides that because no *specific provision for merger appears in the operating agreement,*  
25 *the default rule is unanimity*. Yet, because this [Act] does not repeal any substantive provisions  
26 regarding the internal operation or governance of the unincorporated entity (with the exception of  
27 the “transactional” provisions of the underlying acts), the entity is entitled to amend its operating  
28 agreement to *add a specific provision for merger*. For example, in the case of an LLC, *see, e.g.,*  
29 *ULLCA* §§ 404(a)(2) (“except as otherwise provided in subsection (c), any matter relating to the  
30 business of the company may be decided by a majority of the members”); 404(c)(1) (“the only  
31 matters of a member or manager-managed company’s business requiring the consent of all of the  
32 members are: (1) the amendment of the operating agreement under Section 103 ...”); and § 103 (the  
33 operating agreement prevails over the “default” rules of the *ULLCA* with *the exception of those*  
34 *enumerated in § 103(b)*) which does not prohibit the amendment of § 404(c)(1) requiring unanimous  
35 consent for the amendment of the operating agreement). Section 203 of the Act looks first to *an*  
36 *existing provision for approval of mergers* and in the absence of such a provision, provides a gap-  
37 filler of unanimity. In this instance, the organic rules of the LLC provide a third alternative of  
38 amendment of the operating agreement by a 2/3 vote to *add a specific merger provision at a number*  
39 *fewer than all in order to trump the unanimity default rule*. The third alternative was not included  
40 within the text of this [Article] because of its redundancy in relation to existing entity law.  
41

42 **Section 203(b)** - Section 203(b) defers to the organic rules or organic law for domestic  
43 incorporated entities, and does not provide a gap-filler if there is no provision addressing a merger.

1 Unlike § 203(a), § 203(b) also provides for approval in accordance with the organic law governing  
2 the domestic entity.

3  
4 **Section 203(c)** - As to foreign entities, § 203(c) requires approval satisfying the organic law  
5 governing the foreign entity. Thus, if the organic law governing the foreign entity permitted  
6 modification of the approval requirement in the organic rules, the foreign entity would satisfy §  
7 203(c) by complying with those organic rules.

8  
9  
10 **SECTION 204. AMENDMENT ~~[AND]~~ OR ABANDONMENT OF PLAN OF**  
11 **MERGER.**

12 (a) Subject to Section 205 ~~[105 of this [Act]], [a] an approved~~ plan of merger may be  
13 amended or abandoned by:

14 (1) a domestic unincorporated entity:

15 ~~[(+)](A)~~ as provided in the plan; or

16 ~~[(2)](B)~~ unless prohibited by the plan, by a ~~[the same]~~ consent **equivalent to**  
17 **the consent** ~~[as was]~~ required to approve the plan~~[-]; and~~

18 ~~[(b)]—Subject to Section 105 of this [Act], a plan of merger may be amended or~~  
19 ~~abandoned by]~~

20 (2) a domestic incorporated entity in accordance with the ~~[entity's organic]~~ law **of**  
21 **this state.**

22 ~~[(e)](b)~~ A plan of merger may be amended or abandoned by a foreign entity in  
23 accordance with the entity's organic law.

24 **SECTION 205. CONSENT OF OWNER WITH RESPECT TO OWNER'S**  
25 **LIABILITY.** **If a person would have owner's liability with respect to an unincorporated surviving**  
26 **entity, the person must consent to the merger in a record, unless:**

1 (1) The organic rules of the entity provide for the approval or amendment of a merger with  
2 consent of fewer than all of the owners; and

3 (2) The person has consented in a record to the provision of the organic rules which contains  
4 the provision, or became an owner after the adoption of the provision.

### 5 6 Preliminary Comments 7

8 Section 204 permits abandonment or termination for a domestic unincorporated entity  
9 according to a provision in a plan of merger or, unless prohibited by the plan of merger, by the same  
10 consent as required to approve the plan.  
11

### 12 SECTION ~~205~~ 206. STATEMENT OF MERGER.

13 (a) A statement of merger must be signed by each ~~[party to the merger]~~ merging entity  
14 and filed with the [Secretary of State].

15 (b) ~~[The]~~ A statement of merger must contain:

16 (1) the name, jurisdiction of ~~[formation]~~ its organic law and type of organization of  
17 each merging entity, and the name, as ~~[approved]~~ authorized by the surviving entity's organic law,  
18 jurisdiction of formation and type of organization of the surviving entity;

19 (2) if the merger is not ~~[to be]~~ effective upon the filing of the statement of merger,  
20 the ~~[future]~~ later date and time certain ~~[after the statement is delivered for filing to the [Secretary of~~  
21 ~~State]]~~ it will become effective;

22 (3) a statement as to each merging entity that the merger was approved as required  
23 by ~~[section]~~ Section 203;

24 (4) if the surviving entity is ~~[to be]~~ created by the merger, a copy of the entity's  
25 proposed public organic document, if any;

1 (5) if the surviving entity is required to maintain a registered agent and registered  
2 office **in this state**, **the name of** its registered agent and **address of its** registered office in this ~~[[State]]~~  
3 **state**;

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

6 (7) if the surviving entity ~~[is a foreign entity]~~:

7 ~~[(A) — is a foreign entity, the address to which service of process made on the~~  
8 ~~[Secretary of State] may be mailed; [and]]~~

9 ~~[(B)](A)~~ **(A)** ~~[if it]~~ is a qualified foreign entity, **the name of** its registered agent and  
10 **address of its** registered office in this ~~[[State]]~~ **state**; or

11 ~~[(B)]~~**[(C)] (B)** ~~[if it]~~ is a nonqualified foreign entity, the ~~[street]~~ address of  
12 its chief executive office or principal place of business;

13 (8) if the surviving entity exists before the merger, any **proposed** amendments to its  
14 public organic document ~~[that]~~ **which** are ~~[stated or]~~ contained in the plan of merger; and

15 (9) any other information required by the organic law or organic rules of **each of** the  
16 **merging** parties. ~~[to the merger]~~

17 (c) ~~[A]~~ **In addition to the provisions required by subsection (b), a** statement of merger  
18 may ~~[state or]~~ contain any other provision.

19 (d) If a merger is ~~[abandoned or]~~ amended **or abandoned** after a statement of merger is  
20 filed with the [Secretary of State] ~~[but]~~ **and** before the merger becomes effective, a statement that  
21 the merger has been **amended or** abandoned in accordance with this section, signed on behalf of any  
22 of the merging entities, ~~[shall]~~ **must** be ~~[delivered to]~~ **filed with** the [Secretary of State] ~~[for filing]~~

1 prior to the] before [it] becomes effective [date of the merger]. ]The] A statement of amendment  
2 takes effect upon filing. A statement of abandonment takes [shall take] effect upon filing and  
3 thereupon the merger is abandoned and [shall] does not become effective.

4  
6 **Section 207. Effective Date of Merger.**

7  
8 ~~[(e) — The]~~ A merger becomes effective pursuant to this [~~Article~~] [article] upon the  
9 [~~later of: (1) — the]~~ date and time of filing of the statement of merger[;], or [~~(2) — a future]~~ later date  
10 and time certain specified in the statement of merger.

11  
12 **Preliminary Comments**

13  
14 **Section 205(a)** - Section 205(a) states the general rule that the statement of merger must be  
15 signed by each party to the merger and thereafter filed with the office of the [Secretary of State].

16  
17 **Section 205(b)(5)** - Section 205(b)(5) is taken from *MITA*.

18  
19 **Sections 205(b)(6), (b)(7)(B)** - Sections 205(b)(6) and (b)(7)(B) require a nonfiling domestic  
20 or foreign entity to provide a *street address* for the entity’s chief executive office or principal place  
21 of business. A post office box would not satisfy the address mandate of either section. The chief  
22 executive office or principal place of business of the domestic nonfiling entity need not be within  
23 the jurisdiction of formation of the domestic nonfiling entity. The purpose and intent of §§ 205(b)(6)  
24 and 205 (b)(7)(B) is to give notice of a specific place at which the nonfiling entity may be found for  
25 all purposes, including that of service of process. Section 205(b)(3) requires that all entities satisfy  
26 the approval requirements of § 203 so there is no need for a section that conforms to *MBCA* §  
27 11.06(a)(5) (expressly stating that the foreign entity has complied with all requirements of its organic  
28 law. New subsection (b) mandates that the statement of merger contain the address required by  
29 207(d).

30  
31 **Section 205(d)** - Section 205(e) has been changed to reflect the language of *RUPA*.

32  
33 **Section 205(e)** - Section 205(e) is taken from *MITA* § 204(a)(2)(ii).

34  
35  
36 **SECTION ~~206~~ 208. EFFECT OF MERGER.**

37 (a) When a merger becomes effective[~~, the following rules apply~~]:

- 1 (1) ~~[The]~~ **the** surviving entity continues or comes into existence[-:];
- 2 (2) ~~[The existence as a separate entity of each merging ceases.]~~ **each merging entity**
- 3 **ceases to exist;**
- 4 (3) ~~[All]~~ **any** property owned and ~~[every]~~ contract ~~[right]~~ **rights** possessed by each
- 5 merging entity ~~[vests]~~ **vest** in the surviving entity without reversion or impairment[-:];
- 6 (4) ~~[All]~~ **any** debts, liabilities, and ~~[other]~~ obligations of each merging entity
- 7 ~~[continue as]~~ **become the** debts, liabilities, and obligations of the surviving entity[-:];
- 8 (5) ~~[The]~~ **the** name of the surviving entity may~~[-, but need not]~~ be[-:] substituted in any
- 9 pending **action or** proceeding for the name of any merging entity[-:];
- 10 (6) All of the rights, privileges, immunities, powers and purposes of each merging
- 11 entity vest in the surviving entity[-:];
- 12 (7) ~~[Unless]~~ **unless** otherwise provided by the organic law of a merging entity, the
- 13 merger does not require the dissolution of ~~[a]~~ **the** merging entity[-:];
- 14 (8) ~~[If]~~ **if** a surviving entity exists before the merger, its public organic document, if
- 15 any, and its organic rules[-:] are amended to the extent provided in the plan of merger and are binding
- 16 upon the owners of the surviving entity[-:];
- 17 (9) ~~[If]~~ **if** a surviving entity is created by the merger, its public organic document, if
- 18 any, and its organic rules[-:] become effective and are binding upon the owners of the surviving
- 19 entity[-:];
- 20 (10) ~~[The]~~ **the** ownership or transferee interests ~~[in]~~ **of** each party to the merger ~~[that]~~
- 21 **which** are to be converted in the merger are converted, and the former owners or transferees of those

1 interests are entitled to the rights provided to them under the plan of merger and to any rights they  
2 hold under the organic law or organic rules of the merging entity.

3 (b) A person that becomes subject to owner's liability with respect to a surviving entity  
4 as a result of a merger has owner's liability only to the extent provided [in] by the organic law of the  
5 surviving entity and only for those debts, obligations, and liabilities that are incurred after the merger  
6 becomes effective.

7 (c) The effect of a merger on the owner's liability of a person [that] which is incurred  
8 before the [~~effective date of a~~] merger becomes effective is as follows:

9 (1) The merger does not discharge an owner's liability under the organic law of the  
10 merging entity in which the person was an owner to the extent [~~any such~~] that owner's liability was  
11 incurred before the merger becomes effective.

12 (2) The person does not have owner's liability under the organic law of the merging  
13 entity in which the person was an owner before the merger for any [~~debts~~] debt, [~~obligations~~]  
14 obligation, or [~~liabilities~~] liability that are incurred after the merger becomes effective.

15 (3) The organic law of the merging entity continues to apply to the collection or  
16 discharge of an owner's liability preserved by paragraph (1)[;] as if the merger had not occurred.

17 (4) The person has a right [rights] of contribution from any other [persons] person  
18 as provided by the organic law or organic rules of the merging entity with respect to an owner's  
19 liability preserved by paragraph (1)[;] as if the merger had not occurred.

20 (d) A foreign entity that is [~~the~~] a surviving entity [~~is deemed to~~]:

1 (1) [~~agree that it~~] may be served with process in this [~~State~~] state for the collection  
2 and enforcement of any debts, obligations, and other liabilities of any merging domestic [merging]  
3 entity in the merger; [~~and~~]

4 (2) appoints the [Secretary of State] as its agent for service of process for the purpose  
5 of collecting or enforcing those debts, obligations and other liabilities; and

6 (3) agrees to provide to the [Secretary of State] the address to which a copy of [~~such~~]  
7 the process may be mailed to the surviving entity.

8 (e) [~~The~~] When a merger becomes effective, the certificate of authority or other [~~type of~~]  
9 foreign qualification of any merging foreign entity is [~~shall be~~] canceled. [~~automatically at the~~  
10 effective time of the merger.]

11 (f) After a merger authorized by this act, the organic law of the surviving entity governs the  
12 surviving entity.

### 13 Preliminary Comments

14  
15 **Section 206(a)** - Section 206(a) is intended to reflect the general understanding that in a  
16 merger, the assets, contract rights, and liabilities of the merging entities automatically vest in the  
17 surviving entity. As such, the surviving entity becomes the owner of all real and personal property  
18 of the merged entities and is subject to all debts, obligations and liabilities of the merging entities.  
19 Further, § 206(a)(7) is intended to make clear that the merger does not trigger the dissolution of the  
20 merging entities, and that they are thus not required to windup and liquidate their businesses. As a  
21 result, a merger should not constitute a transfer, assignment or conveyance of any property held by  
22 the merging entities prior to the merger. Claims of reverter or impairment of title otherwise  
23 applicable should not be triggered by the merger.

24  
25 **Section 206(a)(4)** – Liabilities include state and local taxes.

26  
27 **Section 206(a)(5)** – Section 206(a)(5) is based upon *MBCA* § 11.07(5) with certain changes  
28 to take advantage of the more efficient definitional system of this [Act]. As to actions or claims  
29 pending against merging entities that are not to survive the merger, such claims may proceed under  
30 § 206(a)(5) as if the merger had not occurred. The surviving entity may, but need not, be substituted  
31 in any claim or proceeding that is continued after the merger. Substitution of the surviving entity's

1 name in any continued proceeding has no effect on the substantive rights of the claimants in the  
2 continued action.

3  
4 **Section 206(b)** - Section 206(b) states the rule of *future owner's liability*. Section 205(b)  
5 sets forth the general rule that an owner in a *surviving entity* shall be personally liable only for the  
6 debts and obligations of the surviving entity that *arise after* the effective date of a merger.

7  
8 **Section 206(c)** - Section 206(c) states the rule of *past owner's liability*. Section 206(c) has  
9 four parts: (1) *an owner in a merging entity* who had personal liability for the debts and obligations  
10 of the merging entity under the entity's organic law *is not discharged* from those debts *if the debts*  
11 *arose before the effective date of the merger*; (2) *an owner in a merging entity shall not have owner's*  
12 *liability* for the debts and obligations of the surviving entity *if those debts arose after the effective*  
13 *date of the merger*, (3) *the organic law governing the merging entity continues* in effect for the  
14 *purpose of preserving the owner's liability of subsection (1)* despite the nonexistence of the merging  
15 entity after the merger; and (4) *the organic law of the merging entity continues* to apply for the  
16 *purpose of any contribution rights* that may attach to liabilities preserved under subsection (1), again  
17 notwithstanding the nonexistence of the merging entity after the merger.

18  
19 **Sections 206(b) and (c)** - Sections 206 (c) and (d) *do not address* the circumstance where  
20 an owner has owner's liability for an entity *both before and after a merger*. For example, assume  
21 a corporation merges into an existing limited partnership with a sole GP. Assume also that the LP  
22 is the surviving entity. Because the GP had personal liability both before and after the merger, it is  
23 assumed that the organic law governing the LP would determine the GP's past and future liability.  
24 The same assumption would apply where a GP merges into an LP and a former partner in the GP  
25 becomes the sole GP in the surviving LP.

26  
27 **Section 205(d)** – Section 205(d) is based in part on DRULPA § 17-211(c)(7). The mailing  
28 address required by 205(d)(2) is required in the statement of merger by 204(b)(7)(B).  
29

1 [ARTICLE] 3

2  
3 DIVISION

4  
5  
6 SECTION 301. DIVISION.

7  
8 (a) By complying with ~~[the provisions of]~~ this ~~[Article]~~ [article] and subject to  
9 subsections (b) and (c), a domestic unincorporated entity may divide into:

- 10 (1) two or more domestic entities;
- 11 (2) the dividing entity and one or more domestic or foreign entities;
- 12 (3) one or more domestic entities and one or more foreign entities; or
- 13 (4) two or more foreign entities.

14 (b) By complying with this [article] and subject to subsections (a) ~~[and (c)]~~, ~~[If a]~~ if such  
15 division is not expressly prohibited by the ~~[organic]~~ law of this state (why not just amend current law  
16 of this state to remove with insert prohibition?) or the organic rules of the domestic incorporated  
17 entity, a domestic incorporated entity may divide into:

- 18 (1) two or more domestic unincorporated entities;
- 19 (2) the dividing entity and one or more domestic unincorporated entities;
- 20 (3) the dividing entity and one or more domestic unincorporated entities and one or  
21 more domestic incorporated entities;
- 22 (4) one or more domestic unincorporated entities and one or more domestic  
23 incorporated or unincorporated entities; or
- 24 (5) one or more domestic unincorporated entities and one or more foreign  
25 incorporated or unincorporated entities.

1 (c) If [a] such division is authorized by the organic law of a foreign entity, the [a] foreign  
2 entity may divide into:

3 (1) two or more domestic unincorporated entities;

4 (2) one or more domestic unincorporated entities and one or more domestic  
5 incorporated entities;

6 (3) the dividing entity and one or more domestic unincorporated entities<sup>[5]</sup>;

7 (4) the dividing entity and one or more domestic unincorporated entities and one or  
8 more domestic incorporated entities; or

9 (5) one or more foreign entities and one or more domestic unincorporated entities.

10 (d) If any debt security, note or similar evidence of indebtedness for money borrowed,  
11 whether secured or unsecured, or a contract of any kind, issued, incurred, or executed by an entity  
12 before the effective date of this ~~[[Act]]~~ [act] ~~[by an entity]~~ contains a provision that applies  
13 [applying] to a merger of [such] the entity but ~~[which agreement]~~ does not refer to a division, [such]  
14 the provision is presumed to be applicable to any division to which [such] the entity is a party.

### 15 Preliminary Comments

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17  
18 Article 3 is new. At its December, 2001 meeting, the Committee charged the Reporter with  
19 gathering information concerning the division. Presently, Pennsylvania has the most explicit  
20 provisions for divisions of domestic corporations, LLCs and LPs. *See, e.g.*, 15 Pa.C.S. § 8961 *et seq.*  
21 (2001)(division of domestic LLC); 15 Pa.C.S. § 8576 *et seq.* (2001)(division of domestic limited  
22 partnership); 15 Pa.C.S. § 1951 *et seq.* (2001)(division of domestic corporation). In general, the  
23 Pennsylvania statutes permit a single dividing entity to contractually allocate its assets and liabilities  
24 to new entities. The allocation of liabilities is, by statute, subject to a test of fraud on owners or  
25 fraud in the conveyance of assets. The Pennsylvania division provisions first appeared in 1972 for  
26 nonprofit entities. The statutes have since been broadened to include for-profit corporations, LPs  
27 and LLCs. Pennsylvania does not, at present, provide for a division of a general partnership.  
28

1 Texas, by contrast, implicitly permits a division in its merger statutes by providing that an  
2 entity can merge into more than one other entity. Presumably Texas will permit a division into an  
3 existing as well as a new entity. (Point of information - in a recent European Union directive to  
4 member states, all members of the EU *must* contain provisions authorizing divisions in their  
5 statutory laws.)  
6

7 In the Committee's first discussions of the division at its meeting in March, 2002, some  
8 points of concern were raised and vetted at length. The first issue was that of the *novation* of  
9 contractual obligations between the dividing entity and its creditors. The concern of the committee  
10 was that prior language in the statute permitted a novation *by operation of law*. That language was  
11 removed with the understanding that a creditor whose claim was compromised or impaired by a  
12 division retained defenses against the allocation (*e.g.*, fraud on owners or creditors, fraudulent  
13 conveyance or fraudulent transfer law, or transfers in violation of law).  
14

15 Another issued that spawned considerable discussion was that of title to real estate held by  
16 surviving entities. Some committee members felt that a title company would not insure title where  
17 real property was "divided" according to a plan and statement of division. Others felt that the filing  
18 of the plan of division within the county of the location of affected property would be sufficient.  
19 Memoranda were circulated by the ABA advisor from the Real Estate Committee of Business Law  
20 Section (Barry Nekritz) to various title companies for their opinion on the issue. The committee  
21 is awaiting further information. Section 305 and the Reporter's Notes thereto address this concern.  
22

23 A third issue that was raised and discussed by the committee was that of requiring a special  
24 consent to accomplish a division. The theory underlying a requirement of special consent was the  
25 unique nature of the division and the contractual allocation of assets and liabilities that the division  
26 permits. The committee, at its first discussion on the issue, rejected a special consent requirement  
27 on the theory that the transaction is being accomplished today in the form of a spin-off or  
28 reorganization without a "special consent." The division, like the spin-off or reorganization, permits  
29 the contractual "removal" of assets and liabilities through lengthy, complicated, highly-lawyered  
30 agreements. Therefore, in the interest of efficiency of transactions, the special consent idea was  
31 rejected and the division remained in its present form.  
32

33 A final discussion point was that of abuse of choice-of-law for the entity. The point was  
34 raised that a division could be utilized by the owners of a dividing entity to allocate assets and/or  
35 corresponding liabilities into jurisdictions more favorable to debtors. While abuse of choice-of-law  
36 is possible with the division, it was agreed by the committee that equity, if not other law, would  
37 unwind an "unfair" or "inequitable" allocation. Other committee members noted that a change in  
38 organic law of an entity could as easily be accomplished through a merger, conversion or  
39 domestication. As such, the division remained in its present form for consideration by the committee  
40 of the whole.  
41

42 **Section 301(c)** - Section 301(c) is the result of the Committee's November, 2002 meeting  
43 in which the Committee unanimously agreed to integrate corporate provisions within this [Act].

1 Section 301(c) as drafted would have a domestic corporation act under its own organic law if the law  
2 authorizes the division. If the organic law is silent, the domestic corporation may “elect” into this  
3 [Act] to accomplish the division.  
4

5 **Section 301(d)** - Section 301(d) was added back after the Committee’s meeting in November  
6 2002. The reasons for adding this creditor protection provision included: enactability; the  
7 presumption is rebuttable only; and the division is already being accomplished through costly asset  
8 transfers and stock distributions. **Query: Should this protective provision continue after the**  
9 **parties have amended the agreement that contains the transactional covenant? In addition,**  
10 **it is important to determine whether the reference to “merger” in the document relates to**  
11 **mergers or entities of different types (i.e., “mergers” as defined in this [Act] or to traditional**  
12 **mergers.**  
13  
14

15 **SECTION 302. PLAN OF DIVISION.**

16 (a) A domestic entity may [~~be~~] **become** a party to a division by approving a plan of  
17 division.

18 (b) A plan of division must be in a record and [~~must state or~~] contain:

19 (1) as to the dividing entity and each resulting **proposed** entity, its name, jurisdiction  
20 of formation, and type of entity;

21 (2) the terms and conditions of the division;

22 (3) the manner and basis of:

23 [(i)](A) converting the ownership or transferee interests of the dividing entity  
24 into ownership or transferee interests, securities, obligations, rights to acquire ownership or  
25 transferee interests of the resulting entities[;] **or** securities, cash[;] **or** other property, or any  
26 combination of the foregoing;

27 [(i)](B) the disposition of the ownership or transferee interests of which the  
28 dividing entity **has knowledge** into interests, securities, obligations, rights to acquire ownership or

1 transferee interests[;] **or** securities, cash[;] **or** other property, or any combination of the foregoing,  
2 of the **resulting** entities [~~resulting from the division~~]; and

3 ~~(iii)~~**(C)** the allocation of the assets and liabilities of the dividing entity between  
4 [~~and~~] **or** among the resulting entities;

5 (4) a statement [~~that~~] **whether** the dividing entity will [~~or will not~~] continue after the  
6 division;

7 (5) if a resulting entity is [~~to be~~] created by the division, its proposed public organic  
8 document, if any, and the full text of its organic rules that are proposed to be in a record;

9 (6) if a resulting entity exists before the division, any **proposed** amendments to its  
10 public organic document or organic rules [~~as~~] [~~that~~] **which** are in a record; and

11 (7) any **other** provision required by the organic law or organic rules of the dividing  
12 **entity** or a resulting [~~entities~~] **entity**.

13 (c) [~~A~~] **In addition to the provisions required by subsection (b),** a plan of division may  
14 [~~state or~~] contain any other provision.

15 (d) Any [~~of the provisions~~] **provision** of the plan **of division** may be made dependent  
16 upon facts ascertainable outside of the plan, if the manner in which the facts will operate upon the  
17 [~~terms of the plan~~] **provision** is [~~set forth~~] **contained** in the plan.

### 18 Preliminary Comments

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21 Section 302 is new and is patterned in substantial part on the Pennsylvania division statutes  
22 as well as Chapter 12, Subchapter B of the *MBCA*. Transferee interests are specifically referenced  
23 for possible inclusion as consideration in a division. Section 302 is redrafted to be parallel to § 202  
24 relating to the plan of merger.

25  
26 **Section 302(a)** - The requirements for the approval of a plan of division are set forth in § 303.



1           **SECTION 304. AMENDMENT ~~[AND]~~ OR ABANDONMENT OF PLAN OF**  
2 **DIVISION.**

3           (a) Subject to Section 305 ~~[105 of this [Act]]~~, [a] **an approved** plan of division may be  
4 amended or abandoned by:

5                   **(1)** a domestic unincorporated entity:

6                           ~~[(1)]~~**(A)** as provided in the plan; or

7                           ~~[(2)]~~**(B)** unless prohibited by the plan, by ~~[the same]~~ **a** consent ~~[as was]~~  
8 **equivalent to the consent** required to approve the plan~~[-]~~; **and**

9                           ~~[(b)]~~**(2)** ~~[Subject to Section 105 of this [Act], a plan of division may be amended~~  
10 ~~or abandoned by]~~ a domestic incorporated entity in accordance with the ~~[entity's organic]~~ **organic**  
11 law **[of this state]**.

12                   ~~[(e)]~~**(b)** A plan of division ~~[merger]~~ may be amended or abandoned by a foreign entity  
13 in accordance with the entity's organic law.

14                   ~~[(e)]~~**(c)** If a division is ~~[abandoned or]~~ amended **or abandoned** after a statement of  
15 division is filed with the [Secretary of State] ~~[but]~~ **and** before the division becomes effective, a  
16 statement that the division has been ~~[abandoned or]~~ amended **or abandoned** in accordance with this  
17 section, signed on behalf of the dividing entity ~~[and any of the resulting entities]~~, ~~[shall]~~ **must** be  
18 ~~[delivered to]~~ **filed with** the [Secretary of State] ~~[for filing prior to the effective date of]~~ **before** the  
19 division **becomes effective**. ~~[The]~~ **A** statement ~~[shall take]~~ **of amendment takes** effect upon filing.  
20 ~~[and]~~ **A statement of abandonment takes effect upon filing and thereupon** the division is abandoned  
21 and ~~[shall]~~ **does** not become effective.

1 **Preliminary Comments**

2 Section 304 follows the approach of Section 204.

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4  
5 **SECTION 305. CONSENT OF OWNER WITH RESPECT TO OWNER'S**  
6 **LIABILITY IN A DIVISION.** If a person would have owner's liability with respect to an  
7 unincorporated resulting entity, the person must consent to the division in a record, unless:

8 (1) The organic rules of the entity provide for the approval or amendment of a division with  
9 consent of fewer than all of the owners; and

10 (2) The person has consented in a record to the provision of the organic rules which contains  
11 the provision, or became an owner after the adoption of the provision.

12  
13 **Preliminary Comments**

14 Section 305 permits abandonment or termination for a domestic unincorporated entity  
15 according to a provision in a plan of merger or, unless prohibited by the plan of merger, by the same  
16 consent as required to approve the plan.

17  
18 **SECTION ~~305~~ 306. STATEMENT OF DIVISION; ~~EFFECTIVE DATE.~~**

19 (a) A statement of division must be signed by ~~[each party to the division]~~ the dividing  
20 entity and filed with the [Secretary of State].

21 (b) ~~The~~ A statement of division must contain:

22 (1) the name, jurisdiction of ~~[formation]~~ its organic law, and type of organization of  
23 the dividing entity, and the name, as ~~[approved]~~ authorized by the resulting entity's organic law,  
24 jurisdiction of ~~[formation]~~ its organic law, and type of organization of each resulting entity;

1 (2) if the division is not ~~[to be]~~ effective upon the filing of the statement of division  
2 ~~[pursuant to subsection (a),]~~ the ~~[future]~~ later date and time certain ~~[, after the statement is delivered~~  
3  ~~for filing to the [Secretary of State]]~~ it will become effective;

4 (3) a statement as to the dividing entity that the plan of division was approved as  
5 required by ~~[section]~~ Section 303;

6 (4) a statement ~~[that]~~ whether the dividing entity will ~~[or will not]~~ survive the  
7 division;

8 (5) with respect to any resulting entity ~~[to be]~~ created by the division, a copy of the  
9 entity's public organic document, if any;

10 (6) if the resulting entity is required to maintain a registered agent and registered  
11 office in this state, the name of its registered agent and address of its registered office in this ~~[State]~~  
12 state;

13 (7) if a resulting entity is a domestic nonfiling entity, the ~~[street]~~ address of its chief  
14 executive office or principal place of business;

15 (8) if a resulting entity ~~[is a foreign entity]~~:

16 ~~[(A) — is a foreign entity, the address to which service of process made on the~~  
17 ~~[Secretary of State] may be mailed; [and]]~~

18 ~~[(B)] (A)~~ [if it] is a qualified foreign entity, the name of its registered agent and  
19 address of its registered office in this ~~[State]~~ state; or

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

1 (9) if a resulting entity exists before the division, any **proposed** amendments to its  
2 public organic document ~~[that]~~ **which** are ~~[stated or]~~ contained in the plan of division;

3 [(10) a statement regarding the allocation of any fee ~~[interest]~~ or **any** other interest  
4 in real property having a remaining term of [30 years] or more by a dividing entity and, if no such  
5 statement is made, a statement that the interests in real property owned by the dividing entity vest  
6 in all resulting entities equally;] and

7 (11) any **other** information required by the organic law or organic rules of **each of** the  
8 **dividing entity and each resulting entity** ~~[parties to the division].~~

9 ~~[(d)]~~(c) **In addition to the provisions required by subsection (b), a** [A] statement of  
10 division may contain any other provision.

11 ~~[(e)]~~—If a division is abandoned or amended after a statement of division is filed with  
12 the [Secretary of State] but before the division becomes effective, a statement that the division has  
13 been abandoned or amended in accordance with this section, signed on behalf of the dividing entity  
14 and any of the resulting entities, shall be delivered to the [Secretary of State] for filing prior to the  
15 effective date of the division. ~~The statement shall take effect upon filing and the division is  
16 abandoned and shall not become effective.]~~

### 17 Preliminary Comments

18 Section [305] **306** is drafted to mirror the filing requirements of mergers in Section 205.  
19 Certain modifications were made to reflect the unique nature the division.  
20  
21  
22  
23

24 **SECTION 307. EFFECTIVE DATE OF DIVISION.** A ~~[(f) The]~~ division becomes effective  
25 pursuant to this ~~[Article]~~ **[article]** upon ~~[the later of: (1)]~~ the date and time of filing of the

1 statement of division[;] or [(2)] a [future] later date and time certain specified in the statement  
2 division.

3 **SECTION [306] 308. EFFECT OF DIVISION.**  
4

5 (a) When a division becomes effective[; ~~the following rules apply~~]:

6 (1) [~~The~~] the dividing entity is divided into the two or more entities [as are] named  
7 in the plan of division[; ~~one of which may be the dividing entity.~~];

8 (2) If the dividing entity is not to survive the division, the [existence of the] dividing  
9 entity [as a separate entity] ceases to exist[;]

10 (3) If the dividing entity survives the division, the [existence of the] dividing entity  
11 continues to exist[;]

12 (4) [~~The~~] the resulting entities continue to exist or come into existence[;]

13 (5) [~~All~~] any property owned and contract rights [owned] possessed by the dividing  
14 entity [are]:

15 (A) are allocated [Allocated] to and [vested] vest in the resulting entities as  
16 specified in the plan of division;

17 (B) If no allocation is made and the dividing entity survives the division, [all] the  
18 unallocated property owned and unallocated contract rights possessed vest [vests] in the dividing  
19 entity; [or] and

20 (C) If no allocation as to property owned or contract rights is made and the  
21 dividing entity does not survive the division, [all] the unallocated property [owned and unallocated]  
22 and contract rights [possessed] vest [vests] equally [as tenants in common] [among] in the resulting  
23 entities as tenants in common without reversion or impairment[;]

1 (6) An action or proceeding pending by or against a dividing entity that ceases to exist  
2 continues by or against the resulting entities equally as co-owners as if the division had not occurred.

3 (7) ~~Liens~~ liens upon the property of the dividing entity are not impaired by the  
4 division[-];

5 (8) ~~The~~ any debts, obligations, and liabilities of the dividing entity become the  
6 debts, obligations, and liabilities of the resulting entities subject to section 307[-];

7 (9) ~~If~~ a debt, obligation, or liability is not allocated:

8 (A) If the dividing entity survives the division, the unallocated debt[s],  
9 obligation[s] ~~and~~ or ~~liabilities~~ liability ~~remain~~ remains in the dividing entity; or

10 (B) If the dividing entity does not survive the division, the resulting entities are  
11 jointly and severally liable for any unallocated debt[s], obligation[s] ~~and~~ or ~~liabilities~~ liability[-];

12 (10) ~~Each~~ each dividing or other resulting entity holds any property and contract  
13 rights and is liable for any debts, obligations, and liabilities allocated to it as the successor to the  
14 dividing entity, and the property and contract rights and debts, obligations, and liabilities are not  
15 deemed to have been assigned to the dividing entity or the other resulting entity in any manner,  
16 whether directly or indirectly or by operation of law[-];

17 (11) ~~If~~ a dividing entity ~~continues after~~ survives the division, its public organic  
18 document, if any, and its organic rules[-] are amended to the extent provided in the plan of division  
19 and are binding on the owners of the dividing entity or resulting entities[-];

20 (12) ~~For~~ for each resulting entity created by the division, its public organic  
21 document, if any, and its organic rules[-] become effective and are binding upon the owners of the  
22 resulting entity[-]; and

1 (13) ~~The~~ **the** ownership or transferee interests of the dividing entity ~~that~~ **which** are  
2 to be converted in the division are converted, and the former owners or transferees of those interests  
3 are entitled **[, by virtue of their ownership or transferee interests,]** to the rights provided to them under  
4 the plan of division ~~[, by virtue of their ownership or transferee interests,]~~ and to any rights they hold  
5 under the organic law or organic rules of the dividing **entity** or **each** resulting entity.

6 (b) A person that becomes subject to owner's liability with respect to a resulting  
7 entity as a result of a division has owner's liability only to the extent provided ~~in~~ **by** the organic law  
8 of the entity **in which the person was an owner** and only for those debts, obligations, and liabilities  
9 that are incurred after the division becomes effective.

10 (c) The effect of a division on the owner's liability of a person ~~that ceases to have~~  
11 ~~owner's liability as a result of a division~~ **which is incurred before the division becomes effective**  
12 is as follows:

13 (1) The division does not discharge an owner's liability under the ~~organic law of the~~  
14 ~~dividing entity~~ **law of this state** in which the person was an owner to the extent ~~any such~~ **the**  
15 owner's liability was incurred before the division becomes effective[;].

16 (2) The person does not have owner's liability under the organic law of the dividing  
17 entity in which the person was an owner before the division for any ~~debts~~ **debt**, ~~obligations~~  
18 **obligation**, or ~~liabilities~~ **liability** that ~~are~~ **is** incurred after the division becomes effective[;].

19 (3) The organic law of the dividing entity continues to apply to the collection or  
20 discharge of an owner's liability preserved by paragraph (1)[;] as if the division had not occurred.[;]  
21 **and]**

1 (4) The person has a [rights] right of contribution from any other [persons] person  
2 as provided by the organic law or organic rules of the dividing entity with respect to an owner's  
3 liability preserved by paragraph (1)[;] as if the division had not occurred.

4 (d) A foreign entity that is a resulting entity [is deemed to]:

5 (1) [agree that it] may be served with process in this [[State]] state for the collection  
6 and enforcement of any debts, obligations, and liabilities of the dividing entity to which it is subject  
7 of each dividing entity;

8 (2) appoints the [Secretary of State] as its agent for service of process for the purpose  
9 of collecting and enforcing those debts, obligations, and liabilities; and

10 (3) agrees to provide to the [Secretary of State] the address to which a copy of [such  
11 the] process may be mailed to the surviving entity.

12 ~~[(e) — [If any] when a division becomes effective, dividing of any foreign entity that is  
13 not a resulting entity but is a qualified foreign entity, [its] the certificate of authority or other [type  
14 of] foreign qualification [shall be] is canceled [automatically at the] [effective time of the division].]~~

15 (f) Solely for purposes of this [Section] section, an allocation of assets or liabilities is  
16 deemed a transfer for purposes of fraudulent conveyance law and wrongful distributions to owners.

17 (g) When a division becomes effective, [The] the certificate of authority or other [type  
18 of] foreign qualification of [any] a dividing foreign entity that is not a resulting entity [shall be] is  
19 canceled [automatically at the effective time of the division].

20 (h) After a division authorized by this act, the organic law of the resulting entity governs  
21 the resulting entity.

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## Preliminary Comments

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

**Sections 305(a)(1) - (a)(4)** - Sections 305 (a)(1)- (a)(4) state the general rules that the division results in the subdivision of a single entity into two or more new or existing entities. The rules also anticipate that the filing of a statement of division may either terminate the dividing entity and create two or more new entities or continue the existence of the dividing entity and recognize the new or continuing existence of one or more other entities.

**Section 305(a)(5)** - Section 305(a)(5) provides that the property, rights and causes of action of the dividing entity may be allocated to the surviving entities without reversion or impairment in any manner stated in the plan. If the plan is silent as to the allocation of these rights and property, the dividing entity retains the rights if it survives the division otherwise the surviving entities take the property on a per capita basis as tenants in common. The allocation is, of course, subject to the challenges of fraud, fraudulent conveyances and violation of law.

**Section 305(a)(7)** - Section 305(a)(7) states the general rules concerning liens. However, practitioners should be aware that under Article 9 of the UCC a creditor might have to re-file a security interest. Section 305(a)(7) is not intended to “trump” Article 9's creditor protections.

**Sections 305(a)(8) and (9)** - Section 305(a)(8) and (9) concern the allocation of the liabilities of the dividing entity. The rule of § 305(a)(8) is that the liabilities of the dividing entity may be allocated among surviving entities in any manner. The liabilities so allocated become the liability of the receiving/surviving entity. Liabilities include state and local taxes. The exception is section 305(9) where no allocation is made. In that circumstance, the liabilities first go to a surviving dividing entity. If the dividing does not survive the division, the liabilities go equally to the resulting entities equally as co-owners.

**Section 305(a)(10)** - Section 305(a)(10) is intended to “transfer” the dividing entity’s assets and liabilities without an “assignment.” As with a merger, a division should not trigger “assignment” or “conveyance” clauses. The Committee may wish to consider re-working the present language.

**Section 305(b)** - Section 305(b) is intended to prevent the use of a division to avoid real estate transfer taxes. An adopting jurisdiction may wish *to require the filing of a plan of division* in the county where “divided” real estate or property is located. California, for instance, permits the recording of a plan and title companies are thereafter entitled to rely upon the plan regarding title.

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

1           **Section 305(f)** The Drafting Committee determined to leave determination of the liability  
2 of resulting entities and the owners thereof to other law such as the Uniform Fraudulent Conveyance  
3 Act and the organic laws dealing with wrongful distributions.

1 [ARTICLE] 4

2  
3 ENTITY INTEREST EXCHANGE

4  
5 SECTION 401. ENTITY INTEREST EXCHANGE.

6 (a) By complying with ~~[the provisions of]~~ this ~~[[Section]]~~ [article] and subject to  
7 subsections (b) and (c), in an entity interest exchange:

8 (1) a domestic unincorporated entity may acquire all of one or more classes or series  
9 of ownership or transferee interests of which the exchanging entity has knowledge of another  
10 domestic or foreign entity in exchange for ownership or transferee interests, securities, obligations,  
11 rights to acquire ownership or transferee interests[, or securities, cash[, or other property], or any  
12 combination of the foregoing; or

13 (2) another domestic entity or foreign entity may acquire all of one or more classes  
14 or series of ownership or transferee interests of which the acquiring entity has knowledge ~~[of a  
15 domestic unincorporated entity may be acquired by another domestic entity or by a foreign entity]~~  
16 in exchange for ownership or transferee interests, securities, obligations, rights to acquire ownership  
17 or transferee interests[, or securities, cash[, or other property], or any combination of the foregoing.

18 (b) ~~[A]~~ By complying with this [article] and subject to subsections (a), a domestic  
19 incorporated entity may be a party to an entity interest exchange with a domestic unincorporated  
20 entity, if ~~[the]~~ such an entity interest exchange is not expressly prohibited by the law of this state or  
21 the domestic incorporated entity's organic ~~[law and organic]~~ rules.

22 (c) A foreign entity may be a party to an entity interest exchange with a domestic  
23 unincorporated entity, if ~~[the]~~ such an entity interest exchange is authorized by the organic law of  
24 the foreign entity.

1 (d) If any debt security, note, or similar evidence of indebtedness for money  
2 borrowed, whether secured or unsecured, or a contract [or] of any kind, issued, incurred, or executed  
3 by an entity before the effective date of this [Act] [act] [by an entity] contains a provision  
4 [applying] that applies to a merger of [such] the entity[, which agreement] but does not refer to an  
5 entity interest exchange, [such] the provision is presumed to be applicable to any entity interest  
6 exchange to which [such] the entity is a party.

### 7 8 Preliminary Comments 9

10 An entity interest exchange is the same transaction as the share exchange provided for in  
11 Section 11.03 of the *MBCA*. The entity interest exchange anticipated by Article 4 permits a business  
12 combination between one or more domestic unincorporated entities or between a domestic  
13 unincorporated entity and a domestic incorporated or foreign entity of any type. The effect of the  
14 entity interest exchange is that: (1) the separate existence of one or more of the exchanging entities  
15 does not cease; and (2) the acquiring entity acquires all of the ownership interests of one or more  
16 classes of the exchanging entities and, as a result of the exchange, becomes the controlling entity.  
17 This same result, that of two or more independent entities, may be accomplished by a reverse  
18 triangular merger wherein a new third entity is formed to effectuate the combination while  
19 simultaneously preserving the independent existence of the principal parties. The entity interest  
20 exchange provides a *direct method* to achieve the *indirect method* of a triangular merger. The entity  
21 interest exchange also allows an *indirect* acquisition method through the use of consideration in the  
22 exchange that is not provided by the acquiring entity (e.g., consideration from another or related  
23 entity).

24  
25 **Section 401** - Section 401 is intended to make applicable any appraisal rights that may attach  
26 by virtue of the organic law of the entities to the entity interest exchange. It is also intended to  
27 enable any appropriate procedure for terminating or abandoning an entity interest exchange after it  
28 has been approved by the appropriate interest holders but prior to the effectuation of the entity  
29 interest exchange.

30  
31 It may be noted that neither the share nor entity interest exchange is universally recognized  
32 in corporate or alternative entity law. To date, jurisdictions adopting the *MBCA* provide for a share  
33 exchange within their corporate law. Non-*MBCA* jurisdictions are not uniform in their acceptance  
34 of share exchanges. For example, Delaware does not permit share exchanges.

35  
36 Many states have not provided for an entity interest exchange within their alternative entity  
37 law. For those jurisdictions that do provide for entity interest exchanges *see Texas Business*

1 *Corporation Act, Article 5.02 and Texas Revised Partnership Act, Article 6132b-9,03* (Texas  
2 provides for both the share and entity interest exchange); and *NRS Chapter 92A* (permitting an entity  
3 interest exchange).  
4

5 To illustrate the problem presented by a lack of uniformity regarding share or interest  
6 exchanges, consider the following. In a recent acquisition involving a Delaware corporation by a  
7 Spanish corporation, the laws of Spain would not permit a triangular merger to effectuate the  
8 transaction. Because the parties to the transaction desired independent, wholly-owned entities at the  
9 end of the acquisition, the transaction had to be structured as a share exchange (a transaction that  
10 Spanish law would permit). Delaware law does not authorize share exchanges. As a consequence,  
11 the Delaware corporation was reincorporated in Virginia (Virginia permits share exchanges) via a  
12 merger and the Spanish acquisition was then effected by a share exchange with the reincorporated  
13 Virginia entity.  
14

15 **Section 401(a)** - Section 401(a) provides for an entity interest exchange between a domestic  
16 unincorporated entity and a domestic incorporated entity or a foreign entity of any type. Section  
17 401(a) also enables an entity interest exchange among domestic unincorporated entities of the same  
18 or different types. The entity interest exchange of § 401(a) allows an acquiring entity to acquire *all*  
19 of the ownership or transferee interests *of one or more classes of which the entity has notice*. The  
20 entity interest exchange does not require the acquisition of *all of the ownership* or transferee interests  
21 of the exchanging entity. For example, assume that an LLC with three classes of membership  
22 interests enters into an entity interest exchange with another LLC. The acquiring entity need only  
23 acquire all of the ownership interests of *one or more classes* of the LLC membership interests.  
24

25 Further, § 401(a) limits the application of the provision to transferee interests *of which the*  
26 *entity has notice*. As drafted, § 401(a) is not intended to grant any rights in transferees greater than  
27 those available under statutory or common law. Section 401(a) is permissive only.  
28

29 **Section 401(b)** - As with section 201(b), section 401(b) enables a domestic incorporated  
30 entity to be a party to an entity interest exchange with a domestic unincorporated entity if the organic  
31 law and organic rules of the incorporated entity do not expressly prohibit the entity interest exchange.  
32 In this case, the domestic incorporated entity acts under its organic law and organic rules. The  
33 default rule of § 401(b) permits a domestic incorporated entity to “elect” into this [Act] if the organic  
34 law of the domestic corporation is silent as to the entity interest exchange with a domestic  
35 unincorporated entity. In the latter circumstance, the domestic corporation acts under this [Act] to  
36 accomplish the exchange. The internal affairs, however, of the domestic corporation continue to be  
37 governed by the organic law under which the corporation was created.  
38

39 **Section 401(c)** - Section 401(b) allows a foreign entity to effectuate an entity interest  
40 exchange with a domestic unincorporated entity if the entity interest exchange is authorized by the  
41 organic law of the foreign entity. *See Reporter’s Notes to § 201(c) regarding potential legal issues*  
42 *arising under § 401(a).*  
43

1           **Section 401(d)** - Section 401(d) is the creditor’s rights provision that the Committee voted  
2 in insert at its meeting in November, 2002. **Query whether this rule should remain in effect after**  
3 **the parties have actually negotiated an amendment to the agreement? Further Query, is**  
4 **“merger” a better analogy or should an equity interest exchange be analogized with change**  
5 **of control provisions?**  
6

7           **SECTION 402. PLAN OF ENTITY INTEREST EXCHANGE.**

8           (a) A domestic entity may [~~be~~] **become** a party to an entity interest exchange by  
9 approving a plan of entity interest exchange.

10          (b) A plan of entity interest exchange must be in a record and [~~must~~] contain:

11               (1) as to the exchanging entity and the acquiring entity, [~~an~~] its name, jurisdiction of  
12 formation, and its type **and its type of organization**;

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

14               (3) the manner and basis of converting the ownership or transferee interests of the  
15 exchanging entity of which **interests** the entity has knowledge into ownership or transferee interests,  
16 securities, obligations, rights to acquire ownership or transferee interests[;] **or** securities, cash[;] **or**  
17 other property, or any combination of the foregoing;

18               (4) any **proposed** amendments to the public organic document or organic rules of the  
19 exchanging entity **which are in a record** ; and

20               (5) any **other** provision required by the organic law or organic rules of each party to  
21 the entity interest exchange.

22          (c) [~~A~~] **In addition to the provisions required by subsection (b),** a plan of entity interest  
23 exchange may contain any other provision.

1 (d) Any ~~[of the]~~ provision[s] of the plan **of entity interest exchange** may be made  
2 dependent upon facts ascertainable outside of the plan, if the manner in which the facts will operate  
3 upon the provision~~s of the plan~~ is ~~[set forth]~~ **contained** in the plan.

#### 4 **Preliminary Comments**

5 **Section 402(a)** - Section 402(a) states the general intent that, for this [Article] to apply, one  
6 of the constituent entities must be a domestic unincorporated entity. The requirements for the  
7 approval of the plan of entity interest exchange are set forth in § 403.  
8

9 **Section 402 (b)(3)** - Section 402 (b)(3) poses the same “shuffling” issue as § 202(b)(3). One  
10 difference in § 402(b)(3) is that the two entities to the interest exchange will remain after the  
11 transaction whereas § 202 anticipates the possible non-survival of one of the parties to a merger. In  
12 any event, § 402(b)(3) ostensibly permits the non-uniform elimination or modification of ownership  
13 or transferee rights in an entity interest exchange  
14

15 **Section 402(c)** - Section 402(c), as with § 202(c), permits an exchanging entity to include  
16 information in the plan of entity interest exchange that otherwise would not be mandated by the  
17 organic law or organic rules of the entity. Section 402(c) was included to create the statutory  
18 authority for entities to include this information despite its absence in § 403. One type of provision  
19 that might be added is that for contractual appraisal rights. As stated in the Reporter’s Notes to §  
20 202, most jurisdictions do not provide for appraisal rights for dissenting owners in unincorporated  
21 entities. If, however, an exchanging entity were to negotiate such a contractual right and thereafter  
22 wished to include that right in the plan of interest exchange, § 402(c) would permit its inclusion.  
23  
24

#### 25 **SECTION 403. APPROVAL OF **PLAN OF** ENTITY INTEREST EXCHANGE.**

26 (a) Subject to Section **405** ~~[105 of this [Act]]~~, a plan of entity interest exchange:

27 **(1) involving a domestic unincorporated exchanging entity** must be approved by:

28 (A) ~~[a domestic unincorporated exchanging]~~ **the** entity ~~[according to the~~  
29 ~~applicable procedures for an for entity interest exchange in the entity’s]~~ **in accordance with its**  
30 **organic rules;** or

1 (B) [~~if none, then~~] if the entity does not have procedures for approval of a  
2 plan of entity interest exchange in its organic rules, by all [the] owners of the domestic  
3 unincorporated exchanging entity.

4 (2) involving a domestic incorporated entity must be approved by the entity in  
5 accordance with the law of this state.

6 (b) Subject to Section 405 [~~105 of this [Act]~~], a plan of entity interest exchange involving  
7 a foreign entity must be approved by a [~~domestic incorporated entity according to applicable~~  
8 procedures for entity interest exchange in] the [entity's] entity in accordance with its organic [rules  
9 or organic] law.

10 [~~(c) A plan of entity interest exchange must be approved by each foreign entity according~~  
11 to the entity's organic law.]

## 12 Preliminary Comments

13 **Section 403(a)** - Section 403(a) states the general rule that a domestic unincorporated entity  
14 may be an acquiring or exchanging entity in an entity interest exchange. As such, section 403(a) *will*  
15 *become the substantive law which enables this transaction for domestic unincorporated entities.*  
16 Section 403(a), in this regard, is altering present unincorporated entity law since no uniform  
17 unincorporated act currently allows for an entity interest exchange. In addition, § 403(a) permits a  
18 domestic unincorporated entity to be a party to an entity interest exchange with another domestic  
19 incorporated entity or a foreign entity of any type. Section 403(a) does not enable an entity interest  
20 exchange between two domestic incorporated entities.

21  
22 Section 403(a), like its counterpart in section 203 (a), provides alternative approval tests.  
23 These alternative tests defer to the parties' *specific intent* first, then to *unanimity*.

24  
25 **Section 403(b)** - Section 403(b) permits abandonment according to a bargained-for provision  
26 to that effect in a plan of entity interest exchange or with the same consent as was necessary to  
27 approve the transaction for unincorporated entities.

28  
29 **Section 403(c)** - Section 403(c) presently defers to the parties' specific intent first, then to  
30 the approval required under the entity's organic law regarding entity interest exchanges, and finally  
31 defaults to the approval necessary to effect a merger under the entity's organic law (incorporated

1 entities likely will default to the number in the entity’s organic rules for merger or to a majority vote  
2 and unincorporated entities likely will default to the number specified for merger in the entity’s  
3 organic rules for merger or to unanimity). The final default rule will permit an entity interest  
4 exchange by the vote necessary to accomplish a *merger if the organic law of the entity is silent*  
5 *regarding entity interest exchanges*. As with the same default rule in § 303(b), the policy underlying  
6 the § 403(b) default rule is efficiency of transactions where the same end result could be effected  
7 through a series of mergers.  
8  
9

10 **SECTION 404. AMENDMENT ~~[AND]~~ OR ABANDONMENT OF ~~PLAN OF~~ ENTITY**

11 **INTEREST EXCHANGE.**

12 (a) Subject to Section 405 ~~[105 of this [Act]], [a]~~ **an approved** plan of entity interest  
13 exchange may be amended or abandoned by:

14 **(1)** a domestic unincorporated entity:

15 ~~[(1)]~~**(A)** as provided in the plan; or

16 ~~[(2)]~~**(B)** unless prohibited by the plan, by ~~[the same]~~ **a consent equivalent to**  
17 **the consent** ~~[as was]~~ required to approve the plan~~[-]; and~~

18 ~~[(b)]~~**(2)** ~~[Subject to Section 105 of this [Act], a plan of entity interest exchange~~  
19 ~~may be amended or abandoned by]~~ a domestic incorporated entity in accordance with the ~~[entity’s~~  
20 ~~organic]~~ law **of this state**.

21 ~~[(c)]~~**(b)** A plan of entity interest exchange may be amended or abandoned by a foreign  
22 entity in accordance with the entity’s organic law.

23 (c) If an entity interest exchange is amended or abandoned after a statement of entity  
24 interest exchange is filed with the [Secretary of State] and before the entity interest exchange  
25 becomes effective, a statement that the entity interest exchange has been amended or abandoned in  
26 accordance with this section, signed on behalf of any of the parties to the exchange, must be filed

1 with the [Secretary of State] before the entity interest exchange becomes effective. A statement of  
2 amendment takes effect upon filing. A statement of abandonment takes effect upon filing and  
3 thereupon the entity interest exchange is abandoned and does not become effective.

4 **Preliminary Comments**

5 Section 404 permits abandonment or termination for a domestic unincorporated entity  
6 according to a provision in a plan of merger or, unless prohibited by the plan of merger, by the same  
7 consent as required to approve the plan.  
8  
9

10 **SECTION 405. CONSENT OF OWNER WITH RESPECT TO OWNER'S**  
11 **LIABILITY IN AN ENTITY INTEREST EXCHANGE.** If a person would have owner's liability  
12 with respect to an entity participating in an entity interest exchange, the person must consent to the  
13 entity interest exchange in a record, unless:

14 (1) The organic rules of the entity provide for the approval or amendment of an entity interest  
15 exchange with consent of fewer than all of the owners; and

16 (2) The person has consented in a record to the provision or the organic rules which contains  
17 the provision, or became an owner after the adoption of the provision.

18 **Preliminary Comments**

19 Section 405 permits abandonment or termination for a domestic unincorporated entity  
20 according to a provision in a plan of merger or, unless prohibited by the plan of merger, by the same  
21 consent as required to approve the plan.  
22  
23

24 **SECTION [405] 406. STATEMENT OF ENTITY INTEREST EXCHANGE[;**  
25 **EFFECTIVE DATE].**

26  
27 (a) A statement of entity interest exchange must be signed by each party to the entity  
28 interest exchange and filed with the [Secretary of State].

1 (b) ~~[The]~~ A statement of entity interest exchange must contain:

2 (1) the name, jurisdiction of ~~[formation]~~ its organic law, and type of organization of  
3 the exchanging entity, and the name, jurisdiction of ~~[formation]~~ its organic law, and type of  
4 organization of the acquiring entity;

5 (2) if the entity interest exchange is not ~~[to be]~~ effective upon the filing of the  
6 statement of entity interest exchange pursuant to subsection (b) (a), the ~~[future]~~ later date and time  
7 certain ~~[after the statement or plan is delivered for filing to the [Secretary of State]]~~ on which the  
8 entity share exchange will be effective it will become effective;

9 (3) a statement as to the exchanging entity that the plan of entity interest exchange  
10 was approved as required by ~~[section]~~ Section 403;

11 (4) any proposed amendments to the public organic document of the exchanging  
12 entity ~~[that]~~ are ~~[stated or]~~ contained in the plan of entity interest exchange;

13 (5) if the acquiring entity ~~[is a foreign entity]~~:

14 (A) is a foreign entity, the address to which service of process made on the  
15 [Secretary of State] may be mailed; ~~[and]~~

16 (B) ~~[if it]~~ is a qualified foreign entity, the name of its registered agent and address  
17 of its registered office in this ~~[State]~~ state; or

18 (C) ~~[if it]~~ is a nonqualified foreign entity, the ~~[street]~~ address of its chief executive  
19 office or principal place of business; and

20 ~~[(7)]~~(6) any other information required by the organic law or organic rules of each  
21 of the parties to the entity interest exchange.

1 (c) [A] In addition to the provisions required by subsection (b), a statement of entity  
2 interest exchange [or plan of entity interest exchange] may [state or] contain any other provision.

3 [~~(d) If an entity interest exchange is abandoned or amended after a statement of entity  
4 interest exchange is filed with the [Secretary of State] but before the entity interest exchange  
5 becomes effective, a statement that the entity interest exchange has been abandoned or amended in  
6 accordance with this section, signed on behalf of any of the parties to the exchange, shall be  
7 delivered to the [Secretary of State] for filing prior to the effective date of the entity interest  
8 exchange. The statement shall take effect upon filing and the merger is abandoned and shall not  
9 become effective.~~]

10 [~~(e) The entity interest exchange becomes effective pursuant to this [Article] upon the  
11 later of:~~

12 ~~—(1) the date and time of filing of the statement of entity interest exchange; or~~

13 ~~—(2) a future date and time certain specified in the statement of division.]~~

## 14 Preliminary Comments

15 **Section 405** - Section 405 does not require that the plan of entity interest exchange be filed  
16 of public record. It is the intent of the committee that a plan of entity interest exchange could be  
17 used as a substitute for the statement of entity interest exchange so long as the plan is appropriately  
18 approved and reflects all the information required to be contained in the statement under section 405.  
19 It is the intent of section 405 that a plan could serve as the appropriate public filing and that the filing  
20 of the plan would have the same legal effect as the filing of the statement of entity interest exchange.  
21 Section 405(b) provides the statutory authority for the filing of a plan in substitution of a statement.  
22  
23  
24

25 The information required to be filed in the statement under section 404 is intentionally less  
26 burdensome than that required for a merger under section 204. The present draft adopts a minimalist  
27 filing philosophy because: (1) a filing as to the *transaction* will be required by any domestic  
28 unincorporated acquiring or exchanging entity; (2) both the acquiring and the exchanging entity  
29 *remain in existence* after the exchange (although arguably in a reorganized or recapitalized form);  
30 and (3) the terms and conditions of the exchange or any resulting restructuring or recapitalization

1 will have been approved by the owners under section 403. Section 404 thus omits a reference to  
2 *terms and conditions* because owner approval has already been met (assuming, also, that where  
3 approval is defective, the owners have recourse under contract or alternative entity law). A filing  
4 as to the *transaction* allows at least some minimal protection for secured lenders who have loaned  
5 against collateral that may have “shifted” in some manner in an exchange which results in a  
6 recapitalization or restructuring. Also, in light of new Article 9, it seemed advisable to provide for  
7 a *notice* filing regarding the *transaction* and to thereafter leave the secured lenders to police their  
8 collateral and a possible new debtor accordingly.  
9

10 **Section 404(b)(4)** - Section 404(b)(4) is drafted to reflect certain differences in the organic  
11 laws of incorporated and unincorporated entities. For example, where an entity interest exchange  
12 is used for the purpose of recapitalizing an unincorporated entity, alternative entity law does not  
13 require an amendment to a public organic document in order to protect creditors. Corporate law,  
14 conversely, would require an amendment to a corporation’s certificate of incorporation where  
15 authorized capital has been increased or otherwise modified. Therefore, if an entity interest  
16 exchange is between only unincorporated entities and the private organic documents of the  
17 exchanging and acquiring entities permit the transaction, an argument could be made that no filing  
18 is necessary. Conversely, if the exchange is between an unincorporated entity and an incorporated  
19 organization, the filing for the corporate entity could be effected simply by an amendment to the  
20 corporation’s certificate of incorporation rather than a filing of an entity interest exchange. At  
21 present, the draft adopts a minimalist compromise.  
22

23 **SECTION 407. EFFECTIVE DATE OF EQUITY INTEREST EXCHANGE.** An [(e)  
24 —The] entity interest exchange becomes effective pursuant to this [{Article}] [article] upon [the  
25 later of: (1)] the date and time of filing of the statement of entity interest exchange[;], or [(2)] a  
26 [future] later date and time certain specified in the statement of [division] entity interest exchange.

27 **SECTION [406] 408. EFFECT OF ENTITY INTEREST EXCHANGE.**

28 (a) When an entity interest exchange becomes effective[, the following rules apply]:

29 (1) [The] the ownership and transferee interests of the exchanging entity [that] which  
30 were to be converted or exchanged in the entity interest exchange [shall] either [cease] ceases to exist  
31 or are [to be] converted or exchanged[. The] and the former owners or transferees of those interests  
32 are entitled to the rights provided to them under the plan of entity interest exchange and to any rights

1 they hold under the organic law or organic rules of the **exchanging** entity [~~to the entity interest~~  
2 ~~exchange~~];

3 (2) [~~The~~] **the** acquiring entity becomes the holder of the ownership or transferee  
4 interests in the exchanging entity as [~~stated~~] in the plan of entity interest exchange[~~;~~]; **and**

5 (3) [~~The~~] **the** public organic document and organic rules of **each of** the [~~entities~~]  
6 **parties** to the entity interest exchange are amended to the extent provided in the plan of entity interest  
7 exchange and under the organic law of the entities to the exchange and are binding upon the owners  
8 of the [~~entities~~] **parties** to the exchange.

9 (b) A person that becomes subject to owner's liability with respect to an acquiring entity  
10 as a result of an entity interest exchange has owner's liability only to the extent provided [~~in~~] **by** the  
11 organic law of the entity **in which the person was an owner** and only for those debts, obligations, and  
12 liabilities that are incurred after the entity interest exchange becomes effective.

13 (c) The effect of an entity interest exchange on the owner's liability of a person [~~that~~]  
14 **which is incurred before** [~~ceases to have owner's liability for the exchanging entity as a result of the~~]  
15 **an** entity interest exchange [~~is~~] **becomes effective** as follows:

16 (1) The entity interest exchange does not discharge an owner's liability under the  
17 organic law of the entity in which the person was an owner to the extent [~~any such~~] the owner's  
18 liability was incurred before the entity interest exchange becomes effective[~~;~~].

19 (2) The person does not have owner's liability under the organic law of the entity in  
20 which the person was an owner before the entity interest exchange for any [~~debts~~] **debt**, [~~obligations~~]  
21 **obligation**, or [~~liabilities~~] **liability** that [~~are~~] **is** incurred after the entity interest exchange becomes  
22 effective[~~;~~].

1 (3) The organic law of an entity continues to apply to the collection or discharge of  
2 an owner's liability preserved by paragraph (1)[;] as if the entity interest exchange had not occurred[;  
3 and].

4 (4) The person has a right [rights] of contribution from any other [persons] as  
5 provided by the organic law or organic rules of the acquiring entity with respect to an owner's  
6 liability preserved by paragraph (1)[;] as if the entity interest exchange had not occurred.

7 (d) A foreign entity that is the acquiring entity [~~is deemed to~~]:

8 (1) [~~agree that it~~] may be served with process in this [~~State~~] state for the collection  
9 and enforcement of any debts, [~~obligation~~] obligations, and liabilities of any domestic exchanging  
10 entity [~~of~~] in the [~~exchanging~~] entity interest exchange; [~~and~~]

11 (2) [~~appoint~~] appoints the [Secretary of State] as its agent for service of process for  
12 the purpose of collecting and enforcing those debts, obligations, and liabilities; and

13 (3) agrees to provide to the [Secretary of State] the address to which a copy of [~~such~~]  
14 the process may be mailed to the acquiring entity.

15 (e) After an entity interest exchange authorized by this act, the organic law of the  
16 jurisdiction of the organic law of each party to the entity interest exchange shall govern each party  
17 to the entity interest exchange.

## 18 Preliminary Comments

19 **Section 406(a)** - Section 406(a) has been redrafted since the meeting of March 2001. At  
20 present, section 406(a) attempts to make clear four points - that after the entity interest exchange  
21 becomes effective: (1) the *entity interest of the exchanging entity* are exchanged, converted or  
22 canceled as provided in the plan; (2) the *only rights of the former holders* of the exchanging entity  
23 are those received as consideration for the exchange, conversion or cancellation; (3) the *acquiring*  
24 *entity* becomes the *owner* of the exchanging entity's ownership or transferee interests (and thus the  
25 controlling entity); and (4) the *organic documents of the parties are amended* by the entity interest

1 exchange filing, thus obviating the need for repetitive filings (*i.e.*, a filing as to the *entity interest*  
2 *exchange* and another filing to reflect *amendments to public organic documents* as required by the  
3 laws governing the respective entities.).  
4

5 **Section 406(b)** - Section 406(b) states the rule for *future owner's liability*. Section 406(b)  
6 provides that an owner *in an acquiring entity* that arise *after the effective date* of the exchange. This  
7 section parallels analogous provisions in Articles 2 (mergers), 3 (divisions), 5 (conversion) and 6  
8 (domestications).  
9

10 **Section 406(c)** - Section 406(c) states the rule for past owner's liability. Section 406(c) is  
11 drafted in four parts: (1) an *owner in an exchanging entity* who had personal liability for the debts  
12 and obligations of the exchanging entity under the entity's organic law *is not discharged* from those  
13 debts and obligations *if the debts arose before the effective date* of the exchange; (2) an *owner in an*  
14 *exchanging entity shall not have owner's liability* for the debts and obligations of the *acquiring*  
15 *entity* if those *debts arose after the effective date* of the exchange; (3) the *organic law* or the  
16 *exchanging entity continue to apply* for any *past owner's liability that is preserved* under subsection  
17 (1); and (4) the *organic law of the exchanging entity continue to apply regarding any contribution*  
18 *rights among owners* that were preserved under subsection (1).  
19

20 **Sections 406(b) and (c)** - Sections **406(b)** and (c) do not address the issue of continuing  
21 owner liability. *See* Reporter's Notes at §§ 205(b) and(c).  
22

23 **Section 406(d) – Query, is this an appropriate rule? Normally the purchaser of all the**  
24 **interests of an entity does not thereby become subject to the laws of the entity's jurisdiction.**  
25 **In addition, the acquiring entity should not ordinarily be subject to service of process,**  
26 **creditors may still serve the exchanging entity.**  
27

1 [ARTICLE] 5

2 CONVERSION

3 SECTION 501. CONVERSION.

4 (a) By complying with this ~~[[Article]]~~ [article] and subject to subsections (b) and (c),  
5 a domestic unincorporated entity may:

6 (1) convert to a different type of domestic entity; or

7 (2) become a foreign entity of a different type of organization, if the conversion is  
8 authorized by the organic law ~~[rules]~~ of the foreign entity.

9 (b) ~~[A]~~ By complying with this [article] and subject to subsections (a), a domestic  
10 incorporated entity may convert to a domestic unincorporated entity, if ~~[the]~~ such an \_\_\_? conversion  
11 is not expressly prohibited by the ~~[organic]~~ law ~~[and]~~ of this state or ~~[organic rules of]~~ the domestic  
12 incorporated entity's organic rules.

13 (c) A foreign entity may convert to a domestic unincorporated entity of a different type  
14 of organization if ~~[the]~~ such a conversion is authorized by the organic law of the foreign entity.

15 (d) If any ~~[debt security]~~ obligation, note, or similar evidence of indebtedness for money  
16 borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred, or executed by  
17 an entity before the effective date of this ~~[[Act]]~~ [act] ~~[by an entity]~~ contains a provision ~~[applying]~~  
18 that applies to a merger of ~~[such]~~ the entity ~~[, which agreement]~~ but does not refer to a conversion,  
19 ~~[such]~~ the provision is presumed to be applicable to any conversion to which ~~[such]~~ the entity is a  
20 party.

1 **Preliminary Comments**

2 The conversion contemplated by Article 5 involves the transformation of one type of  
3 organization into a different type of organization. The conversion, like the merger of Article 2,  
4 transfers all the property, rights, privileges, title, debts, obligations, liabilities and duties of the  
5 converting entity to the converted entity by operation of law. Unlike a merger, however, a  
6 conversion involves a *single entity* which, after the conversion, is considered to be the *same entity*  
7 as before the conversion. The conversion, therefore, provides a *direct method* to accomplish what  
8 before required the creation of *two entities* followed by a merger of the entities. Because a  
9 conversion involves only a change of form, it should not constitute a “sale” or “conveyance” under  
10 state law or applicable contract provisions.  
11

12 The conversion is a relatively recent transaction. For example, the first appearance of a  
13 conversion in uniform unincorporated law occurred in 1994 with *RUPA*. It was followed in 1995  
14 with *ULLCA* and in 2001 with *Re-RULPA (RULPA 1976, with 1985 amendments*, is silent as to  
15 conversions; however, due to linkage, *RULPA* could be interpreted to permit the same conversions  
16 anticipated by *RUPA*). The conversion provisions of *RUPA* are limited to conversions by general  
17 partnerships to limited partnerships and vice versa. This Act, therefore, greatly expands the scope  
18 of the conversion provisions of *RUPA*. See §§ 902-904.  
19

20 By comparison, *ULLCA* (1995) permits conversions between partnerships, limited  
21 partnerships and LLCs. This Act would, as with *RUPA*, greatly expand the conversion provisions  
22 of *ULLCA*. See §§ 902, 903.  
23

24 *Re-RULPA* (2001) contains the broadest provisions regarding conversions in uniform  
25 unincorporated law. *Re-RULPA*, for the first time, permits cross-form conversions. This Act would  
26 replace the conversion provisions of *Re-RULPA* and thus create a “junction-box” for *all* uniform  
27 unincorporated entities.  
28

29 With regard to incorporated entities, the most recent version of the *MBCA*, for the first time,  
30 permits cross-form conversions so long as one party to the conversion is a domestic corporation.  
31 These provisions were published in the October version of the *Business Lawyer* (2001).  
32

33 **Section 501(a)** - Section 501(a) states the substantive rule for conversions involving  
34 domestic unincorporated entities. Section 501(a)(1) permits a conversion of a domestic  
35 unincorporated entity to a different type of domestic entity. For example, § 501(a) permits the  
36 conversion of a domestic general partnership to a domestic limited partnership and vice versa.  
37 Section 501(a)(1) would also permit a conversion from an LLC to a general or limited partnership.  
38 Section 501(a)(2) would enables a conversion of a domestic unincorporated entity to a foreign entity  
39 of a different type so long as the conversion is authorized by the organic law of the foreign entity.  
40 For example, § 501(a)(2) enables a South Carolina general partnership (the domestic entity) to  
41 convert to a North Carolina limited partnership if the organic law of North Carolina authorizes the  
42 conversion.

1           **Section 501(b)** - Section 501(b) states the rule for conversions between domestic  
2 incorporated and domestic unincorporated entities. Section 501(b) allows a domestic incorporated  
3 entity to use this provision to effect a conversion with a domestic unincorporated entity if the organic  
4 law and organic rules of the domestic incorporated entity do not prohibit the conversion.  
5

6           **Section 501(c)** - Section 501(c) enables a conversion of foreign entity to a domestic  
7 unincorporated entity of a different type so long as the organic law and organic rules of the foreign  
8 entity authorize the conversion. For example, a foreign LLC could convert to a domestic partnership  
9 or limited partnership pursuant to § 501(c). Section 501(c) would not enable a conversion of a  
10 foreign LLC to a domestic LLC - such a transaction would be governed by the domestication  
11 provisions of Article 6. In addition, as stated in the Reporter's Notes to § 201(c), filing problems  
12 could occur for the foreign entity if the recording authority in that jurisdiction is not empowered to  
13 accept the conversion filing.  
14

15           **Section 501(d)** - Section 501(d) is new and was added as of the Committee's meeting of  
16 November, 2002. This is a creditor's rights provision. **The same query posed in §§ 301(d)**  
17 **(divisions), 401(d) (entity interest exchanges) and 601(d) (domestications) is applicable here**  
18 **as well.**  
19  
20

## 21           **SECTION 502. PLAN OF CONVERSION.**

22           (a) A domestic entity may convert by approving a plan of conversion.

23           (b) A plan of conversion must be in a record and [must] contain:

24                   (1) as to each converting and converted entity, [the] its name, [the] jurisdiction of  
25 formation, and its type of organization;

26                   (2) the terms and conditions of the conversion;

27                   (3) the manner and basis of converting the ownership or transferee interests of the  
28 converting entity of which interests the entity has knowledge into ownership or transferee interests,  
29 securities, obligations[;], rights to acquire ownership or transferee interests[;] or securities, cash[;]  
30 or other property, or any combination of the foregoing;

31                   (4) if the proposed converted entity is a filing entity, a copy of the entity's proposed  
32 public organic document and the full text of its organic rules [that] which are in a record;

1 (5) if the proposed converted entity is a nonfiling entity, the full text of the entity's  
2 proposed organic rules [as] which are [contained] in a record; and

3 (6) any other provision required by the organic law or organic rules of the converting  
4 entity.

5 (c) [A] In addition to the provisions required by subsection (b), a plan of conversion may  
6 contain any other provision.

7 (d) Any [of the] [provisions] provision of the plan of conversion may be made dependent  
8 upon facts ascertainable outside of the plan, if the manner in which the facts will operate upon the  
9 [provisions of the plan] provision is [set forth] contained in the plan.

#### 10 Preliminary Comments

11  
12 Section 502(a) - The requirements for the approval of the plan of conversion are set forth in  
13 § 503.

14  
15 **Section 502(a) – Query, should the section provide that “An entity may adopt” to take**  
16 **into consideration the fact that a foreign entity may adopt a plan of conversion allowing it to**  
17 **convert to a domestic unincorporated entity?**

18  
19 **Section 502(b)** - Section 502(b) tracks the provisions of §§ 203 (mergers), 303 (divisions)  
20 and 403 (entity interest exchanges) relating to plans for mergers, divisions and entity interest  
21 exchanges. Certain modifications have been made to reflect the differing nature of conversions.

22  
23 **Section 502(b)(3)** - Section 502(b)(3), like its counterparts in the merger, division and entity  
24 interest exchange sections, appears to enable a restructuring or “shuffling” of entity interests upon  
25 a conversion. *See* Reporter’s Notes to analogous sections.

#### 26 27 28 **SECTION 503. APPROVAL OF PLAN OF CONVERSION.**

29 (a) Subject to Section 505 [105 of this [Act]], a plan of conversion

30 (1) involving a domestic unincorporated entity must be approved by:

1 (A) [~~a domestic unincorporated~~] **the** entity [~~according to applicable procedures~~  
2 for approval of conversion or, if none, then] **in accordance with its organic rules; or**

3 (B) **if the entity does not have procedures for approval of a plan of conversion**  
4 **in its organic rules,** by all [~~the~~] owners of the domestic unincorporated entity.

5 (2) **involving a domestic incorporated entity must be approved by the entity in**  
6 **accordance with the law of this state.**

7 (b) Subject to Section 505 [~~105 of this [Act]],~~ a plan of conversion **involving a foreign**  
8 **entity** must be approved by [~~a domestic incorporated entity according applicable procedures for~~  
9 conversion in] the entity[~~'s organic rules or~~] **in accordance with its** organic law.

10 [~~(c) A plan of conversion must be approved a foreign entity according to the entity's organic~~  
11 ~~law.~~]

## 12 Preliminary Comments

13  
14 **Section 503(a)** - Section 503(a) states the substantive rule for approval of a conversion by  
15 a domestic unincorporated entity. Section 503(a) thus repeals all existing approval provisions for  
16 conversions in *RUPA*, *Re-RULPA* and *ULLCA* and replaces them with section 503(a). According  
17 to section 503(a), approval for a conversion, subject only to the rules for assumption of owner's  
18 liability, is alternatively: (1) the number specified for conversion in the entity's organic rules; or (2)  
19 if no number is designated for conversion, then by all the owners of the converting entity. This  
20 hierarchy of approvals defers *first* to the converting entity's *specific intent* regarding conversions and  
21 defaults thereafter to *a rule of unanimity*. This hierarchy of approvals mirrors that of mergers,  
22 divisions and entity interest exchanges.

23  
24 **Section 503(b)** - Section 503(b) states an approval rule of deference. Under section  
25 503(b)(1), therefore, a plan of conversion for a domestic incorporated entity or a foreign entity of any  
26 type shall be approved according to the applicable procedures in the domestic incorporated entity's  
27 organic rules or organic law.

28  
29 **Section 503(c)** - Section 503(c) states that a foreign entity must approve a plan of conversion  
30 in accordance with its organic law.



1           **SECTION 505. CONSENT OF OWNER WITH RESPECT TO OWNER'S**  
2 **LIABILITY IN A CONVERSION.** If a person would have owner's liability with respect to an  
3 unincorporated converted entity, the person must consent to the conversion in a record, unless:

4           (1) The organic rules of the entity provide for the approval or amendment of a conversion  
5 with consent of fewer than all of the owners; and

6           (2) The person has consented in a record to the provision or the organic rules which contains  
7 the provision, or became an owner after the adoption of the provision.

8  
9           **SECTION [505] 506. STATEMENT OF CONVERSION[; ~~EFFECTIVE DATE~~].**

10           (a) A statement of conversion must be signed by the converting entity and filed with the  
11 [Secretary of State].

12           (b) ~~The~~ A statement of conversion must contain:

13           (1) the name, jurisdiction of [formation] its organic law, and type of organization of  
14 the converting entity, and the name, if it is to be changed, jurisdiction of [formation] its organic law,  
15 and type of organization of the converted entity;

16           (2) if the conversion is not ~~to be~~ effective upon the filing of the statement of  
17 conversion pursuant to subsection (a), the ~~future~~ later date ~~or~~ and time, ~~if any, on which~~ certain  
18 after the statement is delivered for filing to the [Secretary of State] on which it will ~~be~~ become  
19 effective;

20           (3) a statement that the plan of conversion was approved as required by ~~section~~  
21 Section 503;

1 (4) if the converted entity is a domestic filing entity, a copy of the entity's proposed  
2 public organic document, if any;

3 (5) if the converted entity is required to maintain a registered agent and registered  
4 office, the name of its registered agent and address of its registered office in this [[State]] state;

5 (6) if the converted entity is a domestic nonfiling entity, the [street] address of its  
6 chief executive office or principal place of business; and

7 (7) if the converted entity [is a foreign entity, either]:

8 (A) [if it] is a qualified foreign entity, the name of its registered agent and address  
9 of its registered office in this [[State]] state; or

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

12 (8) any other information required by the organic law or organic rules of each of the  
13 parties to the conversion.

14 (d) [A] In addition to the provisions required by subsection (b), a statement of conversion  
15 may [state or] contain any other provision.

16 [~~—— (e) If a conversion is abandoned or amended after a statement of conversion is filed with  
17 the [Secretary of State] but before the conversion becomes effective, a statement that the conversion  
18 has been abandoned or amended in accordance with this section, signed on behalf of the converting  
19 entity, shall be delivered to the [Secretary of State] for filing prior to the effective date of the  
20 conversion. The statement shall take effect upon filing and the conversion is abandoned and shall  
21 not become effective.~~]



1           **Section 505(f)** - Section 504(f) is new and reflects the integration of corporate principles into  
2 this [Act]

3  
4  
5           **SECTION [506] 508. EFFECT OF CONVERSION.**

6           (a) When a conversion becomes effective [~~pursuant to this [Article]~~], the following rules  
7 ~~apply~~:

8           (1) [~~The~~] **the** converted entity is deemed to:

9                   [(i)](A) be organized under and subject to the organic law of the converted  
10 entity for all purposes;

11                   [(ii)](B) be the same entity without interruption or dissolution as the converting  
12 entity;

13                   [(iii)](C) have been organized on the date **and time** that the converting entity was  
14 originally organized;

15           (2) ~~[A] a signed statement of charter surrender or certificate of cancellation is~~  
16 ~~effective and all other public documents filed with the [Secretary of State] by a domestic converting~~  
17 ~~entity are no longer effective.~~

18           (32) [All] **any** property owned and [every] contract [right] **rights** possessed by the  
19 converting entity [~~vests~~] **vest** in the converted entity without reversion or impairment[-];

20           (43) [All] **any** debts, [~~liabilities and other~~] obligations, **and other liabilities** of the  
21 converting entity continue as debts, [~~liabilities and~~] obligations, **and other liabilities** of the converted  
22 entity[-];

23           (54) [~~The~~] **the** name of the converted entity may [~~, but need not~~] be[-] substituted  
24 in any pending **action or** proceeding for the name of the converting entity[-];

1           (65) [~~Unless~~ unless prohibited by law other than this [~~Act~~] act], all of the rights,  
2 privileges, immunities, powers, and purposes of the converting entity remain in the converted  
3 entity[.];

4           (76) [~~Unless~~ unless otherwise provided by the organic law of the converting entity,  
5 the conversion does not require the dissolution of the converting entity[.];

6           (87) [~~If~~ if a converted entity is a filing entity, the statement of conversion, its  
7 public organic document, and its organic rules[~~, as are stated or~~ that are contained in the plan of  
8 conversion], become effective and are binding upon the owners of the converted entity[.];

9           (98) [~~If~~ if a converted entity is a nonfiling entity, its organic rules[~~, as are stated~~  
10 or] that are contained in the plan of conversion[.] become effective and are binding upon the owners  
11 of the converted entity[.]; and

12           (109) [~~The~~ the ownership or transferee interests of the converting entity [that] which  
13 are to be converted in the conversion are converted and the former owners or transferees of those  
14 interests are entitled to the rights provided to them under the plan of conversion and to any rights  
15 they hold under the organic law or organic rules of the converting entity.

16           (b) A person that becomes subject to owner's liability with respect to a converted entity  
17 as a result of a conversion has owner's liability only to the extent provided [in] by the organic law  
18 of the entity and only for those debts, obligations, and liabilities that are incurred after the conversion  
19 becomes effective.

20           (c) The effect of a conversion on the owner's liability of a person [that] which is incurred  
21 before [~~the effective date of~~] a conversion becomes effective is as follows:

1 (1) The conversion does not discharge an owner's liability under the organic law of  
2 the converting entity in which the person was an owner to the extent [~~any such~~] **the** owner's liability  
3 was incurred before the conversion becomes effective.

4 (2) The person does not have owner's liability under the organic law of the converting  
5 entity in which the person was an owner before the conversion for any [~~debts~~] **debt**, [~~obligations~~]  
6 **obligation**, or [~~liabilities~~] **liability** that [~~are~~] **is** incurred after the conversion becomes effective.

7 (3) The organic law of the converting entity continues to apply to the collection or  
8 discharge of an owner's liability preserved by paragraph (1)[;] as if the conversion had not occurred.

9 (4) The person has **a right** [~~rights~~] of contribution from **any** other [~~persons~~] **person**  
10 **as** provided by the organic law or organic rules of the converting entity with respect to an owner's  
11 liability preserved by paragraph (1)[;] as if the conversion had not occurred.

12 (d) A foreign entity that is the converted entity [~~is deemed to~~]:

13 (1) [~~agree that it~~] may be served with process in this [~~State~~] **state** for the **collection**  
14 **and** enforcement of any **debts, obligations, and liabilities** of any domestic merging entity; [~~and~~]

15 (2) [~~appoint~~] **appoints** the [Secretary of State] as its agent for service of process for  
16 the purpose of **collecting and** enforcing those **debts, obligations, and liabilities**; and

17 (3) **agree** to provide to the [Secretary of State] the address to which a copy of [~~such~~]  
18 **the** process may be mailed to the converted entity.

19 (e) [~~If the~~] **When a conversion becomes effective**, [~~converting entity is a qualified foreign~~  
20 ~~entity~~], [~~its~~] **the** certificate of authority or other [~~type of~~] foreign qualification **of any converting**  
21 **entity that is a qualified foreign entity** [~~shall be~~] **is** canceled [~~automatically at the effective time of~~  
22 ~~the conversion~~].

1 **Preliminary Comments**

2 **Section 506(a)** - Section 506(a) governs the *legal effect of a conversion where the converted*  
3 *entity is a domestic entity*. For example, section 505(a) regulates the effect of a conversion of a  
4 foreign entity to a domestic entity or the conversion of a domestic entity of one type to a domestic  
5 entity of another type. Section 506(a) provides an exhaustive list of the effect of a conversion where  
6 the converted entity is a domestic entity. First, under section 506(a), the converting entity ceases to  
7 exist and the public organic documents under which the converting entity operated are no longer  
8 effective. Second, the converted entity becomes subject to the organic laws of the jurisdiction of  
9 conversion and the converted entity is deemed to have come into existence at the time the converting  
10 entity was formed, created or otherwise came into being. Third, all actions or proceedings, rights  
11 and privileges, and debts and obligations of the converting entity vest in the converted entity  
12 unimpaired as if the conversion had not occurred. For this purposes, “liabilities” includes state and  
13 local taxes. Fourth, all owner interests in the converting entity shall be reclassified as provided in  
14 the plan of conversion and all rights of the owners in the converted entity become effective as stated  
15 in the plan. Finally, sections 506(a)(8) and (9) provide the filing effect of the statement of  
16 conversion for a converted filing and nonfiling entity.

17  
18 **Section 506(b)** - Section 506(b) provides the rule for *future owner’s liability*. Section 506(b)  
19 states the general rule that an *owner in a converted entity* shall be personally liable only for the debts  
20 and obligations of the *converted entity* that *are incurred after the effective date* of the conversion.  
21

22 **Section 506(c)** - Section 506(c) provides the rule for *past owner’s liability*. Section 506(c)  
23 has four parts: (1) an *owner in a converting entity* who had personal liability for the debts of the  
24 converting entity under the entity’s organic law *is not discharged* from those debts if the *debts arose*  
25 *before the effective date* of the conversion; (2) an *owner in a converting entity* shall not have owner’s  
26 liability for the *debts of the converted entity* if those *debts arose after the effective date* of the  
27 conversion; (3) the *organic laws of the converting entity continue* to apply for any past owner’s  
28 liability preserved under section 506(c)(1)(past personal liability regarding the converting entity);  
29 and (4) the *organic laws of the converting entity* relative to *rights of contribution* among owners in  
30 the converting entity continue to apply for owner’s liabilities preserved under section  
31 506(c)(1)(contribution rights among owners in a converting entity). Sections 506(b) and (c) do not  
32 address the circumstance where owner’s liability exists before and after a conversion.  
33

34 **Section 506(d)** - Section 506(d) states the rule governing the *legal effect of a conversion*  
35 *where the converted entity is a foreign entity*. According to § 506(d), a foreign converted entity: (1)  
36 is deemed to appoint the [Secretary of State] as its agent for service of process to enforce any rights  
37 of owners or transferees in the domestic converting entity; and (2) agrees to pay any amount owed  
38 to the owners of the converted entity arising either in contract or from the organic laws of the  
39 converting entity. Section 506(d) is intended to protect creditors where the converting entity can no  
40 longer be found in the domestic jurisdiction for purpose of service of process. Likewise, § 506(b)  
41 protects owners and transferees in the domestic converting entity who have not received payment  
42 of whatever consideration was owed to them in the conversion. The converted foreign entity in the

1 latter circumstance not only agrees to pay those claims but also is deemed to appoint the [Secretary  
2 of State] as its agent for service of process.

1 [ARTICLE] 6

2  
3 DOMESTICATION

4  
5 SECTION 601. DOMESTICATION.

6 (a) By complying with this [~~Article~~] [article] and subject to subsections (b) and (c), a  
7 domestic unincorporated entity may domesticate as a foreign unincorporated entity of the same type  
8 of organization.

9 (b) [~~A~~] A foreign unincorporated entity may domesticate as a domestic unincorporated  
10 entity of the same type, if the] such a domestication is authorized by the organic law of the foreign  
11 entity.

12 (c) If any [~~debt security~~] obligation, note, or similar evidence of indebtedness for money  
13 borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred, or executed by  
14 an entity before the effective date of this [~~Act~~] [act] [~~by an entity~~] contains a provision [applying]  
15 that applied to a merger of [such] the entity[;] [~~which agreement~~] but does not refer to a  
16 domestication, [such] the provision is presumed to be applicable to any domestication to which  
17 [such] the entity is a party.

18  
19 Preliminary Comments

20  
21 Article 6 authorizes a foreign unincorporated entity to become a domestic unincorporated  
22 entity of the same type and also authorizes a domestic unincorporated entity to become a foreign  
23 unincorporated entity of the same type. Article 6 arguably governs the legal effect of a foreign entity  
24 domesticating in a jurisdiction adopting this [Act]. Likewise, the organic laws of a foreign  
25 jurisdiction, and not Article 6, would arguably govern the legal effect of a domestic unincorporated  
26 entity that domesticates in another jurisdiction. In the latter scenario, Article 6 serves as to  
27 statutorily enable a domestic unincorporated entity to domesticate to a foreign jurisdiction. [Article  
28 6 does not create a right in the domestic entity to be received in the foreign jurisdiction. Section 601  
29 does not provide that a foreign incorporated entity to become a domestic incorporated entity] The

1 bracketed material is now in question depending upon what the Committee wishes to do with the  
2 default rule regarding domestications..  
3

4 The domestication authorized by Article 6 differs from a conversion in that a domestication  
5 requires that the domesticating entity be the same type as the domesticated entity. In a conversion,  
6 the converting entity must change its type. A domestication likewise differs from a merger because  
7 a merger requires two existing entities - a domestication and conversion involve the same entity. As  
8 with a conversion, all rights and privileges, debts and liabilities, actions or proceedings of a  
9 domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale,  
10 transfer, assignment or conveyance and does not give rise to a claim of reverter or impairment of  
11 title.  
12

13 **Section 601(c)** - Section 601(c) is the creditors' rights covenant that has presently been added  
14 to all transactions with the exception of mergers. **The same query posed in §§ 301(d) (divisions),**  
15 **401(d) (entity interest exchanges) and 501(d) (conversions) is applicable here as well.**  
16  
17

## 18 SECTION 602. PLAN OF DOMESTICATION.

19 (a) A domestic **unincorporated** entity may domesticate by approving a plan of  
20 domestication.

21 (b) A plan of domestication must be in a record and **[must]** contain:

22 (1) as to each domesticating and domesticated entity, its name, jurisdiction of  
23 formation, and type of **[entity] organization;**

24 (2) the terms and conditions of the domestication;

25 (3) the manner and basis of converting the ownership or transferee interests of the  
26 converting entity of which **interests** the entity has knowledge into ownership or transferee interests,  
27 securities, obligations<sup>[;]</sup> rights to acquire ownership or transferee interests<sup>[-]</sup> **or** securities, cash<sup>[-]</sup>  
28 **or** other property, or any combination of the foregoing;

29 (4) if the **proposed** domesticated entity is a filing entity, a copy of the **proposed**  
30 entity's public organic document and the full text of its organic rules **[that] which** are in a record;

1 (5) if the proposed domesticated entity is a nonfiling entity, the full text of the entity's  
2 proposed organic rules [as] which are [contained] in a record; and

3 (6) any other provision required by the organic law or organic rules of the  
4 domesticating (?) entity.

5 (c) [A] In addition to the provisions required by subsection (b), a plan of domestication  
6 may [state or] contain any other provision.

7 (d) Any [of the] provision[s] of the plan of domestication may be made dependent upon  
8 facts ascertainable outside of the plan, if the manner in which the facts will operate upon the  
9 provision[s] of the plan is set forth contained in the plan.

#### 10 Preliminary Comments

11 Subject to section 103(a), for this [Article to apply], the domesticating (and hence the  
12 domesticated) entity must be an unincorporated entity.

13  
14 Section 602(a) - The requirements for the approval of the plan of domestication are set forth  
15 in § 603.

16  
17 **Section 602(b)(1)** - Section 602(b)(1) is drafted slightly differently from prior language  
18 relating to information required to be contained in a plan of merger, division, conversion or entity  
19 interest exchange. Section 602(b)(1) requires disclosure of the name of the domesticated entity if  
20 the name has changed and does not require the disclosure of domesticated entity's type of  
21 organization. These changes reflect the intrinsic attributes of a domestication, *i.e.*, that the entity is,  
22 by definition, the *same type of organization* and likely will be continuing in business under its  
23 original name. If, however, the entity were to change its name, that modification would be required  
24 to be disclosed under § 602(a)(1). **Query – Should this read “an unincorporated entity may**  
25 **adopt a plan of domestication” to take into consideration a domestication initiated in another**  
26 **jurisdiction?**

27  
28 **Section 602(b)(3)** - The language of section 602(b)(3) is identical to that found in Articles  
29 2 (mergers), 3 (divisions), 4 (entity interest exchanges) and 5 (conversions). Previous Reporter's  
30 Notes raised for the Committee the issue of “shuffling” entity interests in the foregoing transactions.  
31 As was stated in those notes, the language of the parallel provisions could be interpreted to allow an  
32 “equity shuffle” notwithstanding the absence of “appraisal” rights for owners in unincorporated  
33 entities. Further, for the foregoing transactions that involve both an incorporated and an

1 unincorporated entity, the present provisions of Chapter 13 of the *MBCA* would grant appraisal rights  
2 to owners in the incorporated entity. In the current draft of Chapter 9 of the *MBCA* (entitled  
3 Domestication and Conversion), however, the conforming amendments to Chapter 13 with respect  
4 to domestication do *not* permit an appraisal right for shareholders in a domestication.  
5  
6

7 **SECTION 603. APPROVAL OF PLAN OF DOMESTICATION.**

8 (a) Subject to Section 605 [~~105 of this [Act]~~], a plan of domestication [~~must be approved~~  
9 by] involving a domestic unincorporated entity [~~according to applicable procedures for approval of~~  
10 domestication in the entity's] must be approved by:

11 (1) by the entity in accordance with its organic rules; or[;]

12 (2) [~~if none, then~~] if the entity does not have procedures for approval of a plan of  
13 domestication in its organic rules, by all [~~the~~] owners of the domestic unincorporated entity.

14 (b) Subject to Section 605, a [~~A~~] plan of domestication involving a foreign entity must  
15 be approved by each foreign entity [~~according to~~] in accordance with the entity's organic law.

16 **Preliminary Comments**  
17

18 **Section 603(a)** - Section 603(a) states the substantive rule for approval of a domestication  
19 by a domestic unincorporated entity. Section 603(a) thus repeals all existing approval provisions for  
20 domestication in *RUPA*, *Re-RULPA* and *ULLCA* to the extent that any such provisions appear  
21 (normally in the form of a conversion involving a foreign entity) and replaces them with section  
22 603(a). According to section 603(a), approval for a domestication, subject only to the rules for  
23 assumption of owner's liability, is alternatively: (1) the number specified for domestication in the  
24 entity's organic rules; or (2) if no number is designated for domestication, then by all the owners of  
25 the domesticating entity. This hierarchy of approvals defers *first* to the ~~domesticating entity's~~  
26 domesticating entity's specific intent regarding domestications and defaults thereafter to *a rule of*  
27 *unanimity*. This hierarchy of approvals mirrors that of mergers, divisions, entity interest exchanges,  
28 and conversions.  
29  
30

1           **SECTION 604. AMENDMENT ~~[AND]~~ OR ABANDONMENT OF PLAN OF**  
2 **DOMESTICATION.**

3           (a) Subject to Section 605 ~~[105 of this [Act]], [a]~~ **an approved** plan of domestication may  
4 be amended or abandoned by a domestic unincorporated entity:

5                   (1) as provided in the plan; or

6                   (2) unless prohibited by the plan, by ~~[the same]~~ **a** consent ~~[as was]~~ **equivalent to the**  
7 **consent** required to approve the plan.

8           (b) A plan of domestication may be amended or abandoned by a foreign entity in  
9 accordance with the entity's organic law.

10           (c) **If a domestication is amended or abandoned after a statement of domestication is filed**  
11 **with the [Secretary of State] and before the domestication becomes effective, a statement that the**  
12 **domestication has been amended or abandoned in accordance with this section, signed on behalf of**  
13 **the converting entity, must be filed with the [Secretary of State] before the domestication becomes**  
14 **effective. A statement of amendment takes effect upon filing. A statement of abandonment takes**  
15 **effect upon filing and thereupon the domestication is abandoned and does not become effective.**

16                                   **Preliminary Comments**

17           Section 604 permits abandonment or termination for a domestic unincorporated entity  
18 according to a provision in a plan of domestication or, unless prohibited by the plan of  
19 domestication, by the same consent as required to approve the plan.  
20

21                                   **SECTION 605. CONSENT OF OWNER WITH RESPECT TO OWNER'S**  
22 **LIABILITY IN A DOMESTICATION.** **If a person would have owner's liability with respect to**  
23 **an unincorporated domesticated entity, the person must consent to the domestication, unless:**  
24

1 (1) The organic rules of the entity provide for the approval or amendment of a domestication  
2 with consent of fewer than all of the owners; and

3 (2) The person has consented in a record to the provision or the organic rules which contains  
4 the provision, or became an owner after the adoption of the provision.

5  
6 **SECTION 606 [605]. STATEMENT OF DOMESTICATION; [EFFECTIVE DATE].**

7 (a) A statement of domestication must be signed by the domesticating entity and filed  
8 with the [Secretary of State].

9 (b) [The] A statement of domestication must contain:

10 (1) the name, jurisdiction of [formation] its organic law, and type of organization of  
11 the domesticating entity, and the name, if it is to be changed, jurisdiction of [formation] its organic  
12 law and type of organization of the domesticated entity;

13 (2) if the domestication is not [to be] effective upon the filing of the statement of  
14 domestication, pursuant to subsection (a), the [future] later date [or] and time[, if any, on which]  
15 certain after the statement is delivered for filing to the [Secretary of State] on which the  
16 domestication will [be] become effective;

17 (3) a statement that the plan of domestication was approved as required by [section]  
18 Section 603;

19 (4) if the domesticated entity is a domestic filing entity, a copy of the entity's  
20 proposed public organic document, if any;

1 (5) if the proposed domesticated entity is required to maintain a registered agent and  
2 registered office in this state, the name of its registered agent and address of its registered office [in  
3 this [State]];

4 (6) if the proposed domesticated entity is a domestic nonfiling entity, the [street]  
5 address of its chief executive office or principal place of business;

6 (7) if the proposed domesticated entity [is a foreign entity]:

7 (A) [if it] is a qualified foreign entity, the name of its registered agent and address  
8 of its registered office in this [[State]] state; or

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

11 (8) any other information required by the organic law or organic rules of each of the  
12 parties to the domestication.

13 (d) [A] In addition to the provisions required by subsection (b), a statement of  
14 domestication may contain any other provision.

15 ~~[(e) If a domestication is abandoned or amended after a statement of domestication~~  
16 ~~is filed with the [Secretary of State] but before the domestication becomes effective, a statement that~~  
17 ~~the domestication has been abandoned or amended in accordance with this section, signed on behalf~~  
18 ~~of the converting entity, shall be delivered to the [Secretary of State] for filing prior to the effective~~  
19 ~~date of the domestication. The statement shall take effect upon filing and the domestication is~~  
20 ~~abandoned and shall not become effective.]~~

1  
2  
3 **Preliminary Comments**

4 **Section 605** - Section 605 states the substantive filing requirements for domesticating  
5 unincorporated entities. The specific filing requirements are stated in section 604(b). These  
6 requirements generally mirror those of the transactions set forth in this [Act].

7 **Section 604(c)(4)** - Section 504(c)(4) allows a domesticated entity that is a domestic filing  
8 entity to either: (1) contain all information to be required to organize the domesticated entity in the  
9 statement of domestication; or (2) attach a copy of the domestic domesticated entity’s public organic  
10 documents to the domestication filing. The intent of § 604(c)(4) is efficiency in filings as well as  
11 public notice regarding the transaction.

12  
13 **Section 604(c)(6)** - Section 604(c)(6) requires a domesticated entity that is a domestic  
14 nonfiling entity to provide the *street address* of the domesticated entity’s chief executive office or  
15 principal place of business. A post office box would not satisfy § 604(b)(6). The intent of  
16 § 604(b)(5) is to provide notice of the place at which the domesticated entity may be found for all  
17 purposes, including that of service of process. The chief executive office or principal place of  
18 business is not required to be located within the domesticated entity’s jurisdiction of formation.

19  
20 **Section 605(c)(7)** - Section 605(c)(7) imposes on domesticated foreign entities a filing  
21 requirement that includes information of either: (1) a registered agent and registered office for a  
22 qualified foreign entity in the converting entity’s jurisdiction of formation; or (2) a *street address*  
23 of its chief executive office or principal place of business for a nonqualified foreign entity. As with  
24 section 605(c)(6), a post office box would not satisfy the policy or intent of the section. Section  
25 605(c)(7) provides notice of a place at which the foreign entity may be found for all purposes,  
26 including service of process.

27  
28 **Section 605(f)** - Section 604(f) sets out the general rule that the domestication becomes  
29 effective upon the later of filing or a date or time specified in the statement of domestication.

30  
31  
32 **SECTION 607. EFFECTIVE DATE OF DOMESTICATION.**

33 [~~(f)~~—~~The~~] domestication becomes effective pursuant to this [~~Article~~] **article** upon  
34 [~~the later of:~~] [~~(1)~~] the date and time of filing of the statement of domestication[;], or [~~(2)~~] a **later**  
35 date and time certain specified in the statement of domestication.

1                   **SECTION 608 [606]. EFFECT OF DOMESTICATION.**

2                   (a) When a domestication becomes effective [~~pursuant to this [Article],~~ the following  
3 ~~rules apply~~]:

4                   (1) [~~The~~ **the** domesticated entity is deemed to:

5                    (i) **(A)** be organized under and subject to the organic law of the domesticated  
6 entity for all purposes;

7                    (ii) **(B)** be the same entity without interruption or dissolution as the  
8 domesticating entity; **and**

9                    (iii) **(C)** have been organized on the date **and time** that the domesticating entity  
10 was originally organized;

11                   (2) [~~A~~ **a** signed statement of charter surrender or certificate of cancellation [~~is~~  
12 **becomes** effective, and all other public documents filed with the [Secretary of State] by a domestic  
13 domesticating entity are no longer effective[-];

14                   (3) [~~All~~ **any** property owned and [~~every~~ contract [~~right~~ **rights** possessed by the  
15 domesticating entity [~~vests~~ **vest** in the domesticated entity without reversion or impairment[-];

16                   (4) [~~All~~ **any** debts, [~~liabilities and other~~ obligations, **and liabilities** of the  
17 domesticating entity continue as debts, [~~liabilities and~~ obligations, **and liabilities** of the domesticated  
18 entity[-];

19                   (5) [~~The~~ **the** name of the [~~surviving~~ entity may [~~but need not~~ be[-] substituted in  
20 any pending **action or** proceeding for the name of [~~any merging~~ **the domesticating** entity[-];

1 (6) [~~Unless~~ unless prohibited by law other than this [~~Act~~] act], all of the rights,  
2 privileges, immunities, powers, and purposes of the domesticating entity remain in the domesticated  
3 entity[.];

4 (7) [~~Unless~~ unless otherwise provided by the organic law of the domesticating entity,  
5 the domestication does not require the dissolution [~~of the assets~~] of the domesticating entity[.];

6 (8) [~~If~~ if a domesticated entity is a filing entity, the statement of domestication, its  
7 public organic document, and its organic rules[~~, as are stated or~~ that are contained in the plan of  
8 domestication, become effective and are binding upon the owners of the domesticated entity[.];

9 (9) [~~If~~ if a domesticated entity is a nonfiling entity, its organic rules[~~, as are stated  
10 or~~] contained in the plan of domestication, become effective and are binding upon the owners of the  
11 domesticated entity[.]; and

12 (10) [~~The~~ the ownership or transferee interests of the domesticating entity [~~that~~  
13 which are to be converted in the domestication are converted and the former owners or transferees  
14 of those interests are entitled to the rights provided to them under the plan of domestication and to  
15 any rights they hold under the organic law or organic rules of the domesticating entity.

16 (b) A person that becomes subject to owner's liability with respect to a domesticated  
17 entity as a result of a domestication has owner's liability only to the extent provided [~~in~~] by the  
18 organic law of the domesticated entity and only for those debts, obligations, and liabilities that are  
19 incurred after the domestication becomes effective.

20 (c) The effect of a domestication on the owner's liability of a person [~~that~~] which is  
21 incurred before [~~the effective date of~~] a domestication becomes effective is as follows:

1 (1) The domestication does not discharge an owner’s liability under the organic law  
2 of the domesticating entity in which the person was an owner to the extent [~~any such~~] **the** owner’s  
3 liability was incurred before the domestication becomes effective.

4 (2) The person does not have owner’s liability under the organic law of the  
5 domesticating entity in which the person was an owner before the domestication for any [~~debts~~] **debt**,  
6 [~~obligations~~] **obligation**, or [~~liabilities~~] **liability** that [~~are~~] **is** incurred after the domestication becomes  
7 effective.

8 (3) The organic law of the domesticating entity continues to apply to the collection  
9 or discharge of an owner’s liability preserved by paragraph (1)[;] as if the domestication had not  
10 occurred.

11 (4) The person has **a right** [~~rights~~] of contribution from **any** other [~~persons~~] **person**  
12 **as** provided by the organic law or organic rules of the domesticating entity with respect to an owner’s  
13 liability preserved by paragraph (1)[;] as if the domestication had not occurred.

14 (d) A foreign entity that is the domesticated entity [~~is deemed to~~]:

15 (1) [~~agree that it~~] may be served with process in this [~~State~~] **state** for the **collection**  
16 **and** enforcement of any **debts**, [~~obligation~~] **obligations, and liabilities** of any domestic domesticating  
17 entity **in the domestication**; [~~and~~]

18 (2) [~~appoint~~] **appoints** the [Secretary of State] as its agent for service of process for  
19 the purpose of **collecting and** enforcing those [~~rights~~] **debts, obligations, and liabilities**; and

20 (3) [~~agree~~] **agrees** to provide the [Secretary of State] the address to which a copy of  
21 [~~such~~] **the** process may be mailed to the domesticated entity.

1 (e) [The] **When a domestication becomes effective, the** certificate of authority or other  
2 [type] of foreign qualification of the domesticating entity [~~shall be~~] **is** canceled. [~~automatically at the~~  
3 ~~effective time of the domestication~~].

#### 4 Preliminary Comments

5 **Section 606(a)** - Section 606(a) governs the *legal effect of a domestication where the*  
6 *domesticated entity is a domestic entity*. If a domestic entity domesticates into a foreign jurisdiction,  
7 the legal effect of the domestication would arguably be governed by the organic laws of the foreign  
8 jurisdiction.

9  
10 Section 606 is intended to set forth an exhaustive list. Section 606(a)(3) states the general  
11 proposition that the domesticated entity is deemed to have begun its existence at the time the  
12 domesticating entity was first formed or otherwise created. As such, the domesticated entity is the  
13 same entity whose existence relates back to the creation of the domesticating entity. Sections  
14 606(a)(4), (5), (6) and (7) preserve all actions or proceedings, rights and privileges and creditor  
15 claims and liens pending against the domesticating entity unimpaired. A domestication, therefore,  
16 is not a sale, conveyance, transfer or assignment and does not give rise to claims of reverter or  
17 impairment of title that may be based on a prohibition on transfer, assignment or conveyance.  
18 Section 606(a)(10) states the rule that the ownership or transferee interests of the domesticating  
19 entity are reclassified into whatever rights were negotiated in the domestication and that the owners  
20 or transferees of the domesticating entity are entitled to those rights. Sections 606(a)(7) and (8)  
21 address the effect of the filing of a statement of domestication on a filing and nonfiling domesticated  
22 entity. Finally, Section 605(a)(9), on its face, allows certain owners in the domesticating entity to  
23 be entitled to a continuing equity interest in the domesticated entity whereas other owners in the  
24 domesticating entity may be cashed out as a result of the transaction. (As previously noted, this  
25 transaction is one for which the *MBCA* does not grant dissenter's rights.)

26  
27 **Section 606(b)** - Section 606(b) states the rule for *future owner's liability*. Section 606(b)  
28 provides that an owner in a domesticated entity shall be personally liable only for the debts and  
29 obligations of the domesticated entity that arise after the effective date of the domestication. This  
30 rule is not extraterritorial because it seeks to limit liability to actions that occur after the  
31 domestication.

32  
33 **Section 606(c)** - Section 606(c) addresses past owner liability. To the extent that these rules  
34 address the *legal effect of owner liability after a domestication*, they are more properly the subject  
35 of the organic law of the foreign jurisdiction. This section was bracketed in prior drafts. **Query**  
36 **whether § 605(d) should be included since whatever owner's liability existed before the**  
37 **domestication will continue after the transaction as well.**

1           **Section 606(d)** - Section 605(d) states a rule for domestic entities that domesticate into a  
2 foreign jurisdiction. Section 606(d) parallels analogous provisions in Articles 2 (mergers), 3  
3 (divisions), 4 (entity interest exchanges) and 5 (conversions).

1 [ARTICLE] 7

2 MISCELLANEOUS PROVISIONS

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

6  
7 SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND  
8 NATIONAL COMMERCE ACT. This [Act] modifies, limits, and supersedes the federal  
9 Electronic Signatures in Global and National Commerce Act [and] (15 U.S.C. Section 7001, et seq.),  
10 but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001 (c)) or  
11 authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C.  
12 Section 7003 [7001] (b)).

13  
14 [SECTION 703. SEVERABILITY [CLAUSE]. If any provision of this [[Act]] [act] or  
15 its application to any person or circumstance is held invalid, the invalidity does not affect other  
16 provisions or applications of this [[Act]] [act] which can be given effect without the invalid  
17 provision or application, and to this end the provisions of [the [Act]] this [act] are severable.]

18  
19 SECTION 704. EFFECTIVE DATE. This [Act] takes effect [January 1, 200\_\_.]

20  
21 SECTION 705. REPEALS. Except as otherwise provided in Section 706 [705] effective  
22 [January 1, 20\_\_] [drag-in-date], the following [[Acts] and parts of [Acts]] are repealed:

1 (1) [Sections 901 through 908 of the [f]Revised Uniform Partnership Act];

2 (2) [Sections 1101 through 1113 of the [f]Revised Uniform Limited Partnership Act  
3 (2001)];

4 (3) [Sections 907 and 1001 through 1009 of the [f]Limited Liability Company Act].

### 5 Preliminary Comments

6 Section 908 of RUPA, Section 1113 of ULPA (2001) and Section 907 of ULLCA (1995) are  
7 the sections referring to the nonexclusive way to accomplish mergers and conversions under these  
8 acts. These sections are repealed. However, it is the intent of this [Act] that other business  
9 transactions can be accomplished *through other means but that the transactions covered within this*  
10 *act can only be accomplished through the provisions provided for in this [Act].*  
11  
12

### 13 SECTION 706. APPLICABILITY.

14 (a) Before January 1, 20\_\_ [drag-in-date], this [fAct] [act] governs only:

15 (1)

16 (2)

17 (b) Except as otherwise provided in subsection (c), beginning January 1, 20\_\_, [drag-in-  
18 date], this [fAct] [act] governs all [domestic unincorporated and {electing} foreign entities].

19 (c) [~~Each of the following provisions~~] [sections] [Sections] 901 through 908 of the  
20 [f]Revised Uniform Partnership Act]; [sections] [Sections] 1101 through 1113 of the [f]Revised  
21 Uniform Limited Partnership Act (2001)]; and [sections] [Sections] 1001 through 1009 of the  
22 [f]Uniform Limited Liability Company Act] continue to apply after [January 1, 20\_\_ [200] ] [drag-  
23 in-date], except as otherwise provided as follows:

24 (1)

25 (2)

1           **SECTION 707. SAVINGS CLAUSE.** This ~~[[Act]]~~ **[act]** does not affect an action or  
2 proceeding commenced or right accrued before the effective date of this **[act]** ~~[[Act]]~~.

3

4