THE PROPOSED MODEL INTER-ENTITY TRANSACTIONS ACT: A PROPOSAL TO RATIONALIZE CHANGES IN FORMS OF BUSINESS ORGANIZATIONS

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Editors' Synopsis: This Article provides an introduction to the Model Inter-Entity Transactions Act (MITA), a model statute that addresses mergers, statutory interest exchanges, and conversions between different types of entities. By way of example, the Article examines how MITA would affect an entity in one state that converts into a different type entity in another state. The Article may well aid state legislatures and other groups in beginning a broader public analysis of the issues created by the complexity of business forms.

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I. THE PROLIFERATION OF BUSINESS FORMS AND NEED FOR RATIONALIZATION

In recent years the number of business entity forms has doubled, adding limited liability companies ("LLCs"), limited liability partnerships, and limited liability limited partnerships to corporations, general partnerships, and limited partnerships. Not only has the number of business forms grown, but the structures that those organizations may take have also become more flexible. For example, under many statutes, including the Uniform Limited Partnership Act (2001) ("ReRULPA"), recently promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), a limited partner is no longer statutorily constrained from participating in the management of the organization.[1] Similarly, under the Uniform Partnership Act (1997) ("RUPA"), partners in a general partnership contractually may avoid dissolution upon the departure of a partner.[2]

With this increased flexibility in both form and structure, business planners have begun to view many of the business organization forms as interchangeable. Thus, for example, not only may an LLC elect to be treated as a corporation for federal tax purposes,[3] but it may even elect to be treated as an S corporation.[4] Against this background, many practitioners began to focus on the statutes governing different forms of business organization, study the differences between business forms, and call for a reexamination of the structure of the statutes governing business forms.[5]

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[1] UNIF. LTD. P'SHIP ACT § 303 (2001), http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

[2] UNIF. P'SHIP ACT §§ 103, 801 (1997), 6 U.L.A. 73, 179 (2001) (Section 103 allows general partners to modify section 801, the dissolution provision, by a contrary clause in the partnership agreement.).

[3] *See* Treas. Reg. § 301.7701-3(a) (1996).

[4] *See, e.g.*, Priv. Ltr. Rul. 2001-22-017 (Feb. 21, 2001).

[5] *See* Thomas F. Blackwell, *The Revolution Is Here: The Promise of a Unified Business Organization Law*, 24 J. CORP. L. 333, 334 (1999); William H. Clark, Jr., *What the Business World is Looking For in an Organizational Form: The Pennsylvania Experience*, 32 WAKE FOREST L. REV. 149, 165 (1997); Robert R. Keatinge, *Corporations, Unincorporated Organizations, and Unincorporations: Check the Box and the Balkanization of Business Organizations*, 1 J. SMALL & EMERGING BUS. L. 201, 203 (1997); Robert R. Keatinge, *Universal Business Organization Legislation: Will It Happen? Why and When*, 23 DEL. J. CORP. L. 29, 31 (1998); Mark J. Loewenstein, *A New Direction For State Corporate Codes*, 68 U. COLO. L. REV. 453 (1997); John H. Matheson & Brent A. Olsen, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1, 3 (1996); Dale A. Oesterle & Wayne M. Gazur, *What's in a Name?: An Argument for a Small Business "Limited Liability Entity" Statute (with Three Subsets of Default Rules)*, 32 WAKE FOREST

The study of business forms has focused on identifying true policy-based distinctions between forms and accidental differences (i.e., differences between statutes in which no substantive term is intended).[6]

The policy-based distinctions and accidental differences among the statutes governing different forms of business, sometimes referred to as "organic statutes," became more significant as business organizations sought to change forms through mergers and conversions. Business owners and their advisors, observing that many objectives could be obtained with more than one form of organization under state law, sought to transform corporations into limited partnerships to avoid state franchise tax, or into LLCs to obtain flexibility, or to transform unincorporated businesses into corporations in the expectation of making a public offering of securities. These transforming transactions forced practitioners to compare the differences among the organic statutes governing the different entities. Moreover, and significantly, with the federal move to purely elective tax status for unincorporated business organizations,[7] state statutory drafters wondered whether transporting this sort of rationality to other areas of the organic laws was possible. For example, Colorado began adopting statutes that would apply a single set of rules to all forms of organization.[8] Many states first applied this approach to conversions and mergers involving more than one form of organization.[9]

In 2000, in response to the diversification of laws governing business organizations, NCCUSL began a committee to draft an inter-entity merger statute. In August 2002, NCCUSL gave the first reading of the act, currently bearing the prolix title "Uniform Conversion or Merger of Different Types of Business Organizations Act." In addition, NCCUSL is considering the formation of a Business Organizations Code Study Committee to determine whether a drafting project should be undertaken to create a Uniform Business Organizations Code, which would encompass all uniform and model acts and possibly other statutes that govern profit and

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L. REV. 101, 104 (1997).

[6] A very mundane example existed under two Colorado statutes. *See* COLO. REV. STAT. § 7-90-501(5) (2002). One gave an organization two months to file a report after the mailing of a notice. However, another gave the organization sixty days. *See id.* § 7-90-310(3).

[7] *See* Treas. Reg. §§ 301.7701-2 (as amended in 1999) and 301.7701-3 (as amended in 2001).

[8] *See* Colorado Corporations and Associations Act, COLO. REV. STAT. § 7-90 (as amended 2002).

[9] *See, e.g., id.* §§ 201-206.

nonprofit business organizations. Finally, the American Bar Association ("ABA") Business Law Section Committee on Corporate Laws has drafted a new Article 9 to the Model Business Corporation Act ("MBCA") dealing with mergers with noncorporate organizations.

II. AN INTRODUCTION TO THE PROPOSED MODEL INTER-ENTITY TRANSACTIONS ACT

The proposed Model Inter-Entity Transactions Act ("MITA") is a project of the ABA Business Law Ad Hoc Committee on Entity Rationalization (the "Ad Hoc Committee") with input from members of the Real Property, Probate and Trust Law Section and members of other Business Law Section Committees.[10] As a joint project, the ABA Business Law Section Committees on Partnerships and Unincorporated Business Organizations and on Corporate Laws formed the Ad Hoc Committee about the same time that NCCUSL formed its drafting committee on the same subject. The Ad Hoc Committee became a Business Law Section Committee in its own right in 2001. Its purpose is to rationalize and harmonize the laws controlling the formation, operation, and dissolution of entities: profit and nonprofit, incorporated and unincorporated.

The first statute drafted by the Ad Hoc Committee is MITA. In 2002, the Ad Hoc Committee also released a Model Entity Governance Act ("MEGA"), which seeks to apply a single set of statutory provisions to all forms of business organizations.[11] Whether the various elements—MITA, MEGA, and other suggestions of the Ad Hoc Committee—will continue to be separate acts or whether they will be combined into a single act, such as the one in Colorado, is unclear.

III. AN OVERVIEW OF THE PROPOSED MODEL INTER-ENTITY TRANSACTIONS ACT

A. Scope, Structure, and Organization

MITA addresses only those organizational transactions that involve mergers, statutory interest exchanges, and conversions between different types of entities. It also proposes conforming amendments and repealers[12]

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[10] The first four chapters of MITA are provided in the Appendix following this Article.

[11] MODEL ENTITY GOVERNANCE ACT *at* http://www.abanet.org/buslaw/library/spr02.html (Sept. 26, 2002).

[12] *See* MITA at ch. 6.

to the Revised Model Business Corporation Act ("RMBCA"),[13] RUPA,[14] Re-RULPA,[15] the Prototype Limited Liability Company Act,[16] and the Uniform Limited Liability Company Act.[17] Importantly, MITA would govern transactions involving nonprofit corporations with other entities.[18] Thus, it contains provisions amending the Model Nonprofit Corporation Act.[19] While the transition rules and changes in the statutes governing particular forms of entity are important, in the interest of space and time, this Article and the attached provisions in the Appendix are limited to the substantive provisions of MITA.

The conforming amendments and repealers concerning all the different organization forms leave mergers involving a single form of organization to the organic statute governing that form of entity.[20] In this regard, a partnership is the same form of entity as a limited liability partnership, and a limited partnership is the same form as a limited liability limited partnership. As a result, for example, domestication (the relocation of the state of organization without a change in form) as contemplated by the statutory structure of MITA, would appear in the organic act governing the form of entity rather than in MITA because domestication is not a change in form of entity. An example of such a transaction would be a Nevada corporation becoming a Delaware corporation under the domestication provisions of MITA, which amend the RMBCA. MITA expressly excludes estates, trusts that are not business trusts, and "governmental or quasi-governmental subdivision[s], agenc[ies], or instrumentalit[ies]."[21]

MITA provides a discussion of the rules that will apply to an organization that is subject to state or federal regulation, and may be limited as to the form of entity in which it may conduct business such as a bank or insurance company. Although MITA includes regulated entities, it makes clear by its express terms that MITA does not usurp regulatory authority by negative implication.[22] Obviously, this provision requires

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[13] *See id.* § 601.

[14] *See id.* § 603 (revising UPA 1997, commonly referred to as the Revised Uniform Partnership Act as indicated in the bracketed material and §101 cmt.).

[15] *See id.* § 604 (revising ULPA 2001, commonly referred to as Re-RULPA).

[16] *See id.* § 605.

[17] *See id.* § 606.

[18] *See id.* § 602.

[19] *See id.*

[20] *See id.* § 101 cmt.

[21] *See id.* § 102 (defining "entity").

[22] *See id.* §§ 103, 104 (explaining that the section is an optional provision).

careful technical drafting and internal definitions to parse issues such as: "What is a regulatory law?" and "When does the regulatory law conflict with MITA?" MITA answers those questions within the statutory text by providing that if a statute prohibits an organization's merger or conversion with another organization of the same form without the approval of a regulator, the organization may not engage in that transaction under MITA without that approval.[23] In addition, MITA contains an optional provision under which the adopting state may list certain forms of entities that are not permitted to use MITA.

Finally, MITA is not available for use by sole proprietorships[24] or relationships that do not rise to the level of a partnership under RUPA, such as cotenancies.[25] MITA's definition of "entity" seems to allow its use by unincorporated nonprofit associations, and the comments indicate that the definition includes such associations.[26] It does not yet address division transactions, although it reserves a chapter for divisions.[27] MITA includes *inter*-entity mergers,[28] *inter*-entity exchanges,[29] and *inter*-entity conversions[30] and makes conforming amendments to other widely adopted organizational acts to allow for those *intra*-entity transactions, as well as domestication.[31]

Transactional lawyers find the organizational format of MITA familiar because it follows the general format used by other model, prototype, and uniform acts, beginning with a short title followed by a definitional section and, in turn, by substantive provisions governing each kind of transaction—mergers, exchanges, and conversions.[32] MITA then addresses conforming amendments and repealers for the existing law of the individual entities[33] and ends with "Miscellaneous Provisions," which include sections on severability and effective date.[34]

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[23] *See id.* § 103.
[24] *See id.* § 102 cmt.
[25] *See id.*
[26] *See id.*
[27] *See id.* at ch. 5. A division transaction occurs when one entity splits into two or more surviving entities.
[28] *See id.* at ch. 2.
[29] *See id.* at ch. 3.
[30] *See id.* at ch. 4.
[31] *See id.* at ch. 6.
[32] *Compare, e.g.*, MITA, *with* UNIF. LTD. LIAB. CO. ACT (as amended 1995), 6A U.L.A. 425 (Supp. 2002).
[33] *See* MITA at ch. 6.
[34] *See id.* at ch. 7.

A certain rhythm permeates the substantive provisions governing each kind of transaction because the issues raised in each transaction are similar. Thus, the chapters governing each kind of transaction contain sections on the authority to conduct the transaction, the plan of the transaction, required action on the plan, a statement of the action taken, the effect of the transaction, and abandonment of the transaction.[35] The only exception to the rhythm and to the parallel numbering of the sections within the chapters is the addition of a section captioned "Surrender of charter upon conversion" in chapter 4[36] and a subchapter concerning the qualification of foreign entities in the conversion transaction, also in chapter 4.[37]

B. A Walking Tour of MITA's Substantive Conversion Provisions

The rhythm and similarity between and among the provisions governing the different kinds of transactions make selecting any of the three transactions drafted with common provisions in MITA (mergers, interest exchanges, and conversions) appropriate for the introductory purposes of illustrating how the Act works. Moreover, selection of any of the kinds of transactions also illustrates the kinds of substantive and drafting issues common to the different transactions. The substantive provisions governing conversion are selected for illustrative use in this Article, however, because they most directly raise an issue generally not present in mergers and share exchanges. The additional issue is: What happens to the entity in State *A* when it is converted into another type of entity in State *B*? This issue is also raised directly in domestications that occur when a single form of entity simply finds a new legal home and governing law. Therefore, in that regard, the conversion chapter provides

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[35] *Compare, e.g.*, *id.* at ch. 2 (containing § 201, "Merger authorized;" § 202, "Plan of merger;" § 203, "Action on plan of merger;" § 204, "Statement of merger;" § 205, "Effect of merger;" and § 206 "Abandonment of merger"), *with id.* at ch. 3 (containing § 301, "Interest exchanges authorized;" § 302, "Plan of exchange;" § 303, "Action on plan of exchange;" § 304, "Statement of exchange;" § 305, "Effect of exchange;" and § 306, "Abandonment of exchange"). The organization of laws relating to entity transactions seems to exhibit some evolutionary convergence. *Compare, e.g.*, MODEL BUS. CORP. ACT ch. 11 (1984) (entitled "Mergers and Share Exchanges"), *with* MITA chs. 3, 4, and 5. The latest available draft of the Uniform Entity and Transactions Act (March 2002) also uses the same general format as the MBCA's merger provisions. For example, chapter 2 of the Draft Uniform Act (captioned "Mergers") contains the following sections: § 201, "Merger;" § 202, "Plan of Merger;" § 203, "Action on Plan of Merger;" § 204, "Statement of Merger;" and § 205, "Effect of Merger."

[36] *See* MITA § 405.

[37] *See id.* at ch. 4 subchapter B.

a more comprehensive look and feel for MITA than either one of its sister provisions on mergers or share exchanges.

Section 401 grants authority to convert entity forms as follows: "domestic entity to domestic entity," "domestic entity to foreign entity," and "foreign entity to domestic entity."[38] This section is important for illustrative purposes for four reasons. First, it clearly illustrates MITA's organization, which uses an approach based on the kind of transaction, rather than the form of entity, by using the defined term "entity" (although it sometimes uses the term "type of entity" to distinguish one form of entity from another) to drag the various entity types into the chapter on conversions. Second, the section clearly illustrates the meaning and scope of the Act's title, Model Inter-Entity Transactions Act, by authorizing a "domestic entity to domestic entity" conversion, which is defined elsewhere in MITA to mean an entity changing to a different form of entity.[39] Therefore, the important scope delineation is form of entity (partnership, corporation, or other entities) as opposed to the jurisdiction of the entities. Third, the operation of section 401 illustrates why domestication is contained in MITA's conforming amendments and repealer chapter rather than in the free-standing, common portions of the Act. The technical reason causing this treatment under the Act is that a domestication does not result in a different form of entity. Thus, even though the entity has changed jurisdictional organizational law in a domestication, the change is not an inter-entity transaction. Finally, section 401 demonstrates MITA's extensive reliance on novel defined terms.

Conversion is a relatively new concept in law and, as a result, MITA must contain transitional provisions for its application to existing entities.[40] Section 401 contains one such transitional provision.[41] It provides that the terms governing merger in any of the organic documents governing those preexisting entities will also govern conversions until that particular merger clause is amended.[42] Transitional provisions should be watched carefully. Such provisions are key to existing entities and practicing lawyers, but transitional provisions easily can "become the tail that wags the dog." Perhaps analysis of them should be delayed until MITA's more substantive provisions are vetted. This particular transitional provision is mentioned

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[38] *See id.* § 401(a)-(c).
[39] *See id.* § 102 (defining "conversion").
[40] *See, e.g.*, *id.* § 604(c) (amending RUPA to permit domestications).
[41] *See id.* § 401(d).
[42] *See id.*

here only as evidence of the comprehensive drafting of the Act.

Section 402 is captioned "Plan of conversion." In essence, it is a generic version of the MBCA section 9.51. The plan of conversion is a different document and serves a different purpose from the "statement of conversion" under section 404.[43] MITA requires only the filing of a statement of conversion with the secretary of state after the plan has been adopted and approved.[44] Predictably, the plan must include the type of entity being converted, the type of entity the "converting entity"[45] is proposed to become, and the jurisdiction under the laws of which the resultant "converted entity"[46] will be organized.[47] It also requires the terms and conditions of the conversion,[48] the manner and basis of converting the various interests,[49] and the "full text" of the "organic documents of the converted entity."[50]

MITA also contains a provision governing and generally limiting the scope and structure of any amendment clauses contained in the plan.[51] More particularly, the subsection governing plan amendment expressly permits the inclusion of amendment clauses in the plan of agreement. However, any amendment concerning specifically enumerated items requires a vote of the "interest holders."[52]

Section 402, and MITA more generally, by necessity retain the current law of entity transactions that the plan may not include any provision that violates the organic law[53] of either the converting or converted entity.[54] For

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[43] *See id.* § 404(a)(4), (b)(5). *Compare id.* § 402, *with* § 404.

[44] *See id.* § 404(c).

[45] *See id.* § 102 (defining "converting entity" as a foreign or domestic entity that adopts a plan of conversion).

[46] *See id.* § 102 (defining "converted entity" as the entity that results from the conversion and is analogous to a surviving entity under other law).

[47] *See id.* § 402(a)(1).

[48] *See id.* § 402(a)(2).

[49] *See id.* § 402(a)(3).

[50] *See id.* § 402(a)(4).

[51] *See id.* § 402(b).

[52] *See id.* "Interest holders" is a defined term meaning, "[a] person who holds of record of a governance interest." *Id.* § 102. In turn, an "interest" is defined as either or both (1) a transferable interest, defined as "the right under the organic law of an entity . . . to receive distributions from the entity either in the ordinary course or upon liquidation;" or (2) a governance interest, defined as the right under the organic law of an entity to receive notice or vote on issues involving the internal affairs of the entity, other than as an entity governor, agent, assignee or proxy. *Id.* Finally, the term "governor" is also a defined term. *See id.*

[53] *See id.* (defining "organic law" as "[t]he statute providing for the creation of an

example, the corporate law in some states continues to require a board of directors. If the converted entity is to be a corporation in one of those states, then the plan of conversion must contemplate a board of directors for the converted entity. These provisions are the only limitations placed on the plan of conversion. Thus, interests may be reclassified or, as in the cash-out merger, may be exchanged for cash. Conversion under MITA could replace triangular mergers under many practice scenarios. In the drafting and discussion of MITA and other proposals, this flexibility has been euphemistically called an "equity shuffle." The comments accompanying section 402 emphasize the broad flexibility of conversion under MITA:

> This chapter imposes virtually no restrictions or limitations on the terms or conditions of a conversion, except . . .[citation to specific subsection]. Interest holders in the converting entity may receive interests or other securities[,] . . . cash, or other property. The capitalization of the converted entity may be restructured in the conversion, and its organic documents may be amended in the conversion, in any way deemed appropriate.[55]

MITA section 403 controls approval of the plan of conversion, styled as "Action on plan of conversion." MITA declines the invitation to mandate a freestanding approval process for each possible type of converting entity.[56] Rather, MITA sets forth a default hierarchy of public and private law, first defaulting to the statutory merger provisions of the entity planning to convert.[57] For example, corporate appraisal rights are applicable if the converting entity is a corporation organized under a state corporate code allowing such rights without regard to the law of the entity and jurisdiction into which the corporation is converted. If no provision is available in the organic law under the first default rule, section 403 next defaults to the organic documents of the converting entity.[58] For example, this default rule would look to the limited partnership agreement of a limited partnership organized under the law of a state where the limited

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entity or principally governing its internal affairs" contrasted with "organic document," which is a public or private document governing or creating the entity, such as the articles of incorporation or a partnership agreement).

[54] *See id.* § 402(a)(2).

[55] *Id.* § 402 cmt.

[56] *See id.* § 403(a).

[57] *See id.*

[58] *See id.* § 403(b). *See* § 102 (defining organic law and organic documents).

partnership act does not address mergers. Section 403's comment further suggests that if the organic documents do not provide for merger, such a provision could "presumably be added by amendment in accordance with the applicable procedures for amending the organic documents."[59]

A quick and cursory reading of the default hierarchy might seem to imply a circularity problem which does not exist. Under a scenario in which the organic law and the organic document both contemplate merger, MITA would default to the organic law. In turn, if the particular organic law deferred in whole or in part to the organic document, and the procedures set forth in the organic document were consistent with that statutory deference, then the terms of the organic document would control the action process. As a matter of hierarchy, therefore, the provisions contained in the organic document would govern the situation through, and because of, the organic law, rather than trumping it. The distinction is important to understand the section and avoid statutory circularity.

Section 403(d) addresses the situation in which an interest holder[60] does not have general liability for the debts and obligations of the converting entity, but will have general personal liability for the debts and obligations of the converted entity. An example of such a situation is when a limited partner in a converting limited partnership will become a general partner in a general partnership. Those cases require the interest holder (limited partner in the example) to give written consent unless the organic document of the converting entity (the limited partnership agreement in the example) specifically provides otherwise.[61]

The proposed law of conversions as drafted under chapter 4 of MITA also requires the filing of a public document, called a statement of conversion, in a manner similar to the articles of incorporation under the MBCA.[62] MITA also contemplates the public filing of a "statement of charter surrender."[63] These sections are necessary, as a practical matter, so that the public record clearly reflects both the status of the converting and converted entity when a public record search is conducted under the name of either entity. Only limited information must be included in these statements although they may contain "any other information" the respective entities desire to include.[64] The plan of conversion is not

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[59] *Id.* § 403 cmt.
[60] *See id.* § 102 (defining interest holder).
[61] *See id.* § 403(d).
[62] *See id.* § 404 and cmt.
[63] *See id.* § 405.
[64] *Id.* §§ 404(a)(5), (b)(6), 405(a)(7).

required to be filed. Similar to many other entity statutes, the statements become effective upon filing unless a delayed time of effectiveness is stated in the filing.[65]

Knowledge of the format of MITA and its context within the state law of entities is helpful to understand the filing sections of the Act. MITA is to be codified as state law of an individual state that may or may not have jurisdiction over both sides (entities) of the contemplated transaction. Stating or citing that the legislature of State *A* has no authority to dictate results in State *B*, is unnecessary. At a basic level State *A* simply cannot mandate filings in State *B*.[66] In addition, MITA's scope includes nonfiling entities such as general partnerships, which are not required to file with a state in order to exist.[67] MITA, therefore, must account for this context and provide governing law for each combinatorial permutation.

As a result, MITA expressly addresses the filing of a statement of conversion in two subsections of section 404. The first subsection applies when the plan of conversion calls for a domestic entity (for example, a corporation incorporated in State *A* and governed by MITA as adopted by State *A*) to convert into a "different form of a domestic entity"[68] (for example, a limited partnership to be organized under, and governed by, State *A*'s version of RULPA). Under this scenario, MITA requires a statement of conversion to be filed (domestically in State *A* in the parenthetical example) "[a]fter the conversion . . . has been duly proposed, adopted and approved."[69] If the entity on the back of the transaction, the "converted entity,"[70] is a "filing entity"[71] (such as the limited partnership in the example), the statement of conversion must contain all the information required to be stated in its "public organic document"[72] (the certificate of limited partnership in the example). A statement of conversion apparently must be filed regardless of whether the entity on either or both sides of the

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[65] *See id.* § 405 cmt.

[66] This topic implicates questions in areas far beyond the scope of this introductory article, such as comity and, more generally, conflict of laws. *See* Thomas E. Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part I)*, 37 S.D. L. REV. 44, 90 n. 383 (1992) (containing an introductory research footnote on this topic in another context).

[67] *See, e.g.*, RUPA § 202, 6 U.L.A. 92 (1997).

[68] MITA § 404(a).

[69] *Id.*

[70] *See id.* § 102 (defining "converted entity").

[71] *See id.* § 102 (defining "filing entity" as "[a]n entity that is created by filing a public organic document").

[72] *See id.* § 102 (defining "public organic document").

transaction is a nonfiling entity, such as a general partnership.[73] The same construction that requires a nonfiling entity to file a statement of conversion also applies in the second subsection of section 404.[74]

The second subsection of section 404 applies when a foreign entity, organized and governed by the law of State *B*, is converting into a domestic entity, organized and governed by the law of State *A*. The timing of the filing of the statement of conversion is the same as in the prior subsection. In other words, the statement of conversion must be filed in the "domestic state," which is State *A*; the only state addressed by MITA, upon the approval of the plan of conversion[75] but, again, only if the resultant converted entity is a domestic entity.[76] The drafting committee comments to section 404 confirm a "separate public filing under the organic laws of the converting or surviving entity is not required."[77] As a matter of record administration, therefore, MITA seems to assume computerized indexing and record keeping by entity name, for example, "*XYZ L.L.C.*" and not by document function—a physical record of all statements of conversion—like a separate filing of LLC articles of organization in the *XYZ L.L.C.* example.

The foregoing sections on filing the statement of conversion are record evidence of the converted, new (but that term needs to be used advisedly) entity. Section 405, captioned "Surrender of charter upon conversion," is designed to provide record closure for the converting entity. Again, because MITA can only govern domestic entities, section 405 applies only when a domestic entity is converted into something else, regardless of the jurisdiction of the resultant converted entity.

Section 405 requires that the converting entity, which exists prior to conversion in a multi-entity conversion transaction, be terminated. This requirement has a subtle importance concerning the theory and scope of the entire Act because it has the effect of making "dual status" and "dual citizenship" entities impermissible under MITA. This limitation in scope greatly simplifies the drafting and use of MITA's provisions, even though it reduces its flexibility. By way of explanation and background, the concepts of dual status and dual citizenship are sometimes used in

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[73] *See generally id.* § 404(a) (containing no express exceptions for the filing of this statement and implying filing is required because the content of the statement depends upon whether the entity is a filing or nonfiling entity).

[74] *See generally id.* § 404(b).

[75] *See id.* § 404(b).

[76] *See id.*

[77] *Id.* § 404(b) cmt.

transnational planning when, for example, a German entity will file as a U.S. entity under the laws of a given U.S. state while retaining its German identity for purposes of its operation in Germany, often for regulatory or tax reasons. Such an entity has two different governing laws for purposes of its internal affairs. The concept could have been imported into MITA such that a single entity, for example, could be both a Delaware limited liability company and a South Dakota limited liability partnership. Allowing such dual identities would add a great deal of flexibility to transactional law and planning, but would also add a concomitant complexity to both drafting and interpreting MITA's provisions. It would also add a significant trap for the unwary when, for example, a surrender change is not filed through inadvertence.

The transactional lawyer may find MITA's section governing the effect of the conversion the most significant section of the conversion chapter. Section 406 governs the effect of the conversion, and it is patterned after MBCA section 9.55.[78] Although section 406 addresses several difficult practical issues, it is simple in concept. As summarized in various places of the comment to section 406:

> (a) The converted entity automatically becomes the owner of all real and personal property and becomes subject to all the liabilities, actual or contingent, of the converted entity. A conversion is not a conveyance, transfer or assignment[;]
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> . . . .
>
> (b) All pending proceedings involving the converting entity are continued[;] and
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> . . . .
>
> (c) [A] conversion cannot have the effect of making any interest holder subject to owner liability unless each such interest holder has executed a separate written consent . . . .[79]

The commentary about owner liability in (c), above, summarizes subsections 406(c) and (d), which track similar notions contained in the limited liability partnership provisions of RUPA[80] or, on an even more basic level,

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[78] *See id.* § 406 cmt.
[79] *Id.* § 406 ctm.
[80] *See* RUPA §§ 306(b), 1001, 6 U.L.A. 117, 239.

RUPA's provisions dealing with the liability of an incoming partner.[81] Thus, an interest holder who becomes personally liable for the debts and obligations of an entity as a result of a conversion becomes liable only for the "debts, obligations and liabilities that arise after the effective time of the statement of conversion."[82] Subsection 406(d), which concerns the liability of an interest holder who ceased to have liability for entity debts after the conversion, is simply the converse of the rule for those accepting future liability. Therefore, the mere fact that a conversion occurs does not discharge any owner liability for debts and obligations incurred prior to conversion.[83]

In summary, MITA's conversion chapter addresses the manner and method of perfecting a conversion, including the documents that need to be filed and the effect of conversion on the entities on both sides of the transaction and on interest holders in those entities. The transaction of conversion is similar to merger in other statutes, and MITA borrows rather heavily from the MBCA. Conversions under MITA do not include domestication; rather, domestications are included within the amendment and repealer provisions intended to be incorporated into the statutes governing specific entity types. Moreover, MITA conversions do not permit dual citizenship and dual status transactions.

The primary purpose of this walking tour of conversions was to use the topic of conversions to describe a macrocosm of the entire Act. Therefore, it illustrates the integration of the definitional section of MITA with a substantive provision, and it identifies some of the policy and drafting decisions implicit in MITA for purposes of better understanding MITA as a whole.

IV. MISCELLANEOUS OBSERVATIONS AND CONCLUSION

The purpose of this Article is to introduce MITA and, more generally, the rationalization of inter-entity transactions. Several institutions and groups of lawyers have undertaken this rationalization. This article aims to provide a historical backdrop to the various approaches, to identify a few of the issues involved in drafting such an act, and to describe the basic drafting framework and nomenclature used in MITA, which is the first such act to be completed and the most significant provisions of which are

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[81] *See* RUPA § 306(b), 6 U.L.A. 117.
[82] MITA § 406(c).
[83] *See id.* § 406(d).

reprinted in their entirety in the Appendix to this Article.

The topic of mergers, conversions, exchanges, domestications, and hosts of other entity transmogrifications[84] is important to the daily practice of transactional law, whether in dealing with entities originally established for estate planning purposes or in planning and unwinding special purpose entities in a real estate practice. Given the foregoing context, the authors hope this Article will aid in beginning a broader public analysis of this topic. A well-known quote by Winston Churchill is instructive concerning the evolutionary status of the law of inter-entity transactions: "This is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."[85] Nonetheless, perhaps as with a closing, legislation may seem to coalesce rather quickly given the preparatory work already completed. The completion of much thought, work, and drafting has created a strong momentum for change, and the law of inter-entity transactions is ripe for rationalization. Further, the substantive provisions of MITA apply to many different forms of entities, and, by necessity, MITA, as other statutes covering a variety of forms of organization, including MEGA,[86] must create a format and a nomenclature to apply across entity forms. Both the format and nomenclature of MITA therefore may provide a consolidated base for further rationalization and integration of entity law. As the area is continuing to evolve, MITA is not likely to be the final word on multiform statutes. Nonetheless, it provides much good thinking, which will be of great assistance as other groups and state legislatures seek to develop statutes to address the complex new issues created by the complexity and proliferation of business forms.

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[84] *See, e.g.*, BILL WATTERSON, THE AUTHORITATIVE CALVIN AND HOBBES 1-6 (1990) (stating that "transmogrification" is the name of the process by which to change Calvin, a character in the comic strip *Calvin and Hobbes*, into any other creature, for example, an elephant).

[85] Winston Churchill, Speech at the Lord's Mayor Luncheon (Nov. 10, 1942).

[86] *See supra* note 11.

APPENDIX
PROPOSED MODEL INTER-ENTITY TRANSACTIONS ACT

Ad Hoc Committee on Entity Rationalization*

The Ad Hoc Committee on Entity Rationalization (the "Committee") of the Section of Business Law has prepared a proposed model state statute that will facilitate transactions involving different forms of entities. The purposes of the model statute and the new procedures it provides are described below in the Comment to Section 101.

The Committee has approved publishing the model statute for comment by the bar and other interested persons. The Committee is particularly interested in receiving comments on the treatment of an assignee of an economic interest (referred to in the Act as a "transferee") in a transaction such as a merger, as opposed to the treatment in the same transaction of a full owner with both economic and governance rights. **Comments should be addressed to William H. Clark, Jr., Drinker Biddle & Reath LLP, One Logan Square, Philadelphia, PA 19103.** Following consideration of any comments received and further discussion by the Committee, a notice will be published by the Committee setting forth any changes to the proposed text below that are adopted by the Committee on final reading.

Model Inter-Entity Transactions Act

Chapter

1. Preliminary Provisions
2. Mergers
3. Exchanges
4. Conversions
5. Divisions (Reserved)
6. Conforming Amendments and Repeals
7. Miscellaneous Provisions

Chapter 1
Preliminary Provisions

Subchapter

A. General Provisions
B. Documents

Subchapter A
General Provisions

Section

101. Short title.
102. Definitions.
103. Relationship of [*Act*] to other laws.

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* William H. Clark, Jr. and George W. Coleman, Co-Chairs.

104. Required approvals. [*Optional*]
105. Scope. [*Optional*]

§ 101. Short title.

This [*Act*] shall be known and may be cited as the [*name of state*] Inter-Entity Transactions Act.

Comment:

This Act applies generally to private, as opposed to governmental or quasi-governmental entities. See the definition of "entity" in section 102. The Act provides a series of procedures by which an entity may engage in certain transactions involving either (i) a change in its form or (ii) one or more entities of another type. Those various types of procedures are as follows:

- Merger. The procedure in chapter 2 permits an entity to participate in a merger with one or more other entities, so long as at least one of the merging entities or the surviving entity is of a different type than the other entities. A merger in which all of the merging entities and the surviving entity are of the same type is not subject to this Act and will be governed instead by the organic law applicable to the type of entity involved. A triangular merger in which the merging entities and the surviving entity are all of the same type, but in which the entity providing the merger consideration is of a different type, will also be governed by the organic law applicable to the merging and surviving entities and not by this Act.
- Exchange. The procedure in chapter 3 permits an entity to acquire the interests of one or more classes or series of another entity of a different type. A transaction in which an entity acquires interests in an entity of the same type is not subject to this Act and will be governed instead by the organic law applicable to the type of entity involved.
- Conversion. The procedure in chapter 4 permits an entity to change to a different form of entity. A transaction in which an entity changes its jurisdiction of organization but does not change its form (often referred to as a "domestication") is not subject to this Act and will be governed instead by the organic law applicable to the type of entity involved.

This Act has been drafted generally with reference to the currently effective text of the various model, prototype and uniform entity acts that form the basis for most state entity laws. Thus, for example, this Act refers only to the Uniform Partnership Act (1997) (commonly referred to as "RUPA"), even though many states have not yet adopted the 1997 version of that act. Each state should make appropriate changes throughout this Act to reflect the actual laws in force in the state.

Chapter 5 of this Act has been reserved for the later addition of provisions permitting an entity to divide itself into two or more resulting entities, where at least one is of a different type.

Many existing state entity laws permit mergers and other transactions involving more than one form of entity. Chapter 6 of this Act sets forth a series of conforming amendments to the various model, prototype and uniform entity acts that integrate those acts with this Act. In general, the conforming amendments limit the merger and other similar provisions of those acts to transactions involving only one type of entity and add domestication and interest exchange provisions where they are not already present. Existing domestication provisions in those acts are not affected by this Act.

§ 102. Definitions.

"Acquiring entity." The entity that will acquire one or more of the classes or series of interests of the exchanging entity in an interest exchange.

"Conversion." The procedure authorized by this [*Act*] in which:

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

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

"Converted entity." The converting entity as it continues in existence following the conversion.

"Converting entity." The domestic entity that adopts a plan of conversion or the foreign entity that approves a conversion under its organic law.

"Domestic entity." An entity whose internal affairs are governed by the laws of this state.

"Entity." An organization or artificial legal person that either has a separate legal existence or has the power to acquire an estate in real property in its own name, and that is not:

(1) an association or relationship that is not a partnership by reason of [*Section 202(c) of the Uniform Partnership Act (1997)*];

(2) an estate;

(3) a trust that does not carry on a business; or

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

"Exchanging entity." The entity one or more of the classes or series of interests of which is to be acquired in an interest exchange.

"Filing entity." An entity that is created by filing a public organic document.

"Foreign entity." An entity whose internal affairs are governed by an organic law of a jurisdiction other than this state.

"Governance interest." The right under the organic law of an entity, other than as a governor, agent, assignee or proxy, to demand access to information concerning or records of the entity, or to receive notice of or vote on any or all issues involving the internal affairs of the entity.

"Governor." A person by or under whose authority the powers of an entity are exercised and under whose direction the business and affairs of the entity are managed pursuant to the entity's organic law.

"Interest." Either or both a governance interest and a transferable interest of an entity.

"Interest exchange" or "exchange." The procedure authorized by this [*Act*] in which:

(1) a domestic entity acquires all of the interests of one or more classes or series of interest holders of a domestic or foreign entity; or

(2) all of the interests of one or more classes or series of interest holders of a domestic entity are acquired by a foreign entity.

"Interest holder." A person who holds of record of a governance interest.

"Merger." The procedure authorized by this [*Act*] in which:

(1) a domestic entity is combined with one or more other domestic or foreign entities resulting in any one of those entities surviving the procedure or in the creation of a new domestic or foreign entity; or

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

"Merging entity." An entity that is a party to a merger and that is in existence immediately prior to the filing of the statement of merger.

"Nonfiling entity." An entity that is not created by filing a public organic document.

"Nonqualified foreign entity." A foreign entity that is not authorized to transact business in this state by an appropriate filing with the secretary of state.

"Organic document." A public organic document or a private organic document.

"Organic law." The statute providing for the creation of an entity or principally

governing its internal affairs.

"Owner liability." Personal liability for a debt, obligation or liability of an entity that is imposed on a person:

(1) solely by reason of the person's status as an interest holder; or

(2) by an organic document pursuant to a provision of the organic law authorizing the organic document to make one or more specified interest holders liable in their capacity as interest holders for all or specified debts, obligations or liabilities of the entity.

"Person." A natural person, entity, estate, trust that is not a business trust, or governmental or quasi-governmental subdivision, agency or instrumentality.

"Plan." A plan of merger, exchange or conversion.

"Private organic document." The written or unwritten set of rules for governing the internal affairs of an entity that its organic law provides may be adopted by its interest holders and that is not required to be filed of public record. Where a private organic document has been amended or restated, the term means the private organic document as last amended or restated.

"Public organic document." The document, if any, that is filed of public record to create an entity. Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

"Qualified foreign entity." A foreign entity that is authorized to transact business in this state by an appropriate filing with the secretary of state.

"Record form." Inscribed on a tangible medium or stored in an electronic or other medium and retrievable in visually perceivable form.

"Sign." To identify a filing with the secretary of state, whether in writing, electronically or otherwise, by means of a signature, mark or other symbol, with intent to authenticate the filing.

"Surviving entity." A merging entity that continues in existence following the merger, or a new entity that is created by the merger.

"Transferee." A person who holds all or part of a transferable interest but not a governance interest.

"Transferable interest." The right under the organic law of an entity to receive distributions from the entity either in the ordinary course or upon liquidation.

Comment:

"Conversion." As used in this Act, the term "conversion" does not include a transaction (often referred to as a "domestication") in which an entity changes the jurisdiction in which it is organized but does not change to a different form of entity. This definition is patterned in part after Tex. Bus. Corp. Act, Art. 1.02 (8).

"Converting entity." This definition is patterned in part after Model Business Corporation Act § 9.50(f)(1) ("converting entity").

"Domestic entity." This definition is patterned after Model Business Corporation Act § 1.40(6A) ("domestic unincorporated entity").

"Entity." This definition determines the overall scope of the Act because only an "entity" may participate in the transactions authorized by chapters 2, 3 and 4. *See* sections 201, 301 and 401.

This definition is intended to include all forms of private organizations and artificial legal persons other than those excluded by paragraphs (1) through (4). Thus this definition is broader than the definition of "business entity" in Code of Ala. § 10-15-2(2) which does not include nonprofit entities. This definition also includes regulated entities such as public utilities, banks and insurance companies. If certain types of entities are to be excluded from the scope of this Act for policy reasons, that may be done by listing those types of entities

in section 105(a).

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

Paragraph (1) of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not a partnership under the Uniform Partnership Act (1997). In that connection, Section 202(c) of the Uniform Partnership Act (1997) provides in part:

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

Inter vivos and testamentary trusts are treated in many states as having a separate legal existence, but they have been excluded from the definition of "entity" (and thus are not within the scope of this Act) because of a decision that for public policy reasons they should not be able to engage in transactions under this Act. Trusts that carry on a business, however, such as a Massachusetts trust, real estate investment trust, Illinois land trust, or other common law or statutory business trust are "entities."

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

The term "entity" includes:

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

The term does not include a sole proprietorship.

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

subject to chapter 4.

This definition is patterned in part after Model Business Corporation Act § 1.40(24A) ("unincorporated entity").

"Exchange." The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself. *See* section 301(a). Thus, an exchange may involve in effect a triangular transaction similar to a triangular merger.

"Filing entity." Whether an entity is a filing entity is determined by reference to its organic law. In some states, for example, a business trust is a filing entity, while in other states business trusts are recognized only by common law.

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

- Business corporation.
- [*Business trust.*]
- Limited liability company.
- Limited partnership.
- Nonprofit corporation.

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

"Foreign entity." This definition is patterned after Model Business Corporation Act § 1.40(10B) ("foreign unincorporated entity").

"Governance interest." A governance interest is typically only part of the interest that a person will hold in an entity and is usually coupled with a transferable interest (or economic rights). However, memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests. In some unincorporated business entities, there is a more limited right to transfer governance interests than there is to transfer transferable interests. An interest holder in such an unincorporated business entity who transfers only a transferable interest and retains the governance interest will also retain the status of an interest holder, while the transferee will not acquire the status of an interest holder but will be only a transferee for purposes of this Act.

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

"Governor." This term has been chosen to provide a way of referring to a person in charge of the affairs of an entity that is different from any of the existing terms used in connection with particular types of entities. *Compare* Colo. § 7-90-102(35.7) which uses the term "manager" to refer to this concept, even though "manager" is also a term of art in connection with limited liability companies.

The term "governor" includes:

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

- Trustee of a business trust.

"Interest." In the usual case, the interest held by an interest holder will include both a governance interest and a transferable interest (or economic rights). Members in certain nonprofit corporations or unincorporated nonprofit associations may not have any transferable interest, but such members nonetheless hold an interest and have the status of interest holders under this Act. An interest holder in an unincorporated business entity may transfer all or part of the interest holder's transferable interest without the transferee acquiring the governance interest of the transferor. In that case, the transferor will retain the status of an interest holder and the transferee will have only that status for purposes of this Act.

This definition is patterned after Model Business Corporation Act § 1.40(13B) ("interest"). The term includes:

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

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

The term "interest holder" includes:

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

This definition has been patterned after Model Business Corporation Act § 1.40(13A) ("interest holder").

"Merger." As used in this Act, the term "merger" includes what is sometimes referred to as a consolidation, in which a newly created entity results from the transaction. A merger subject to this Act may involve more than one entity of the same type, so long as at least one entity involved in the transaction is of a different type. It is not required that the entity of a different type preexist the transaction. For example, the consolidation of two corporations into an LLC is within the scope of the Act. *See* section 201. This definition is patterned after Tex. Bus. Corp. Act, Art. 1.02 (18).

"Nonfiling entity." This definition is patterned after Model Business Corporation Act § 1.40(14B) ("nonfiling entity"). The term includes:

- [*Business trust.*]
- General partnership.
- Unincorporated nonprofit association.

"Organic document." This definition is patterned after Model Business Corporation

Act § (15A) ("organic document").

"Organic law." This definition is more limited in scope than the definition of "organic statute" in Colo. Stat. 7-90-102(42), because the Colorado definition also includes "all other applicable statutes … governing the operation of the entity." To the extent those other statutes should properly be applicable to a transaction under this Act, their effect is preserved by section 103. *See also* section 104.

Certain entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.*, Cal. Gen. Corp. Law § 2115, N.Y. N-PCL §§ 1318-1321, 15 Pa.C.S. § 6145. Such a "sticky fingers" law is not an organic law for purposes of this Act because it is not the statute that "principally" governs the internal affairs of the entity.

The term "organic law" includes, in the case of domestic entities:

- [*Model Business Corporation Act.*]
- [*Model Nonprofit Corporation Act.*]
- [*Prototype Limited Liability Company Act.*]
- [*Uniform Limited Liability Company Act.*]
- [*Uniform Limited Partnership Act.*]
- [*Uniform Partnership Act.*]
- [*Uniform Unincorporated Nonprofit Association Act.*]

This definition is patterned after Model Business Corporation Act § 1.40(15B) ("organic law").

"Owner liability." This term is used in the context of preserving the personal liability of interest holders when the entity in which they hold interests is the subject of a transaction under this Act. The term includes only derivative liability for an underlying debt of the entity imposed on interest holders either directly by statute or by an organic document pursuant to a provision of organic law. Liabilities that an interest holder incurs in any other fashion are not owner liabilities for purposes of this Act. Thus, for example, if a state's business corporation law were to make shareholders personally liable for unpaid wages, that liability would be an "owner liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "owner liability." Similarly, the liability to return an improper distribution is not an owner liability because it is a direct liability of the interest holder.

The reason for excluding contractual liabilities from the definition of "owner liability" is because those liabilities are constitutionally protected from impairment and thus do not need to be separately protected in this Act.

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

"Private organic document." If the organic law of an entity authorizes some or all of the provisions that may be included in a private organic document to be agreed to orally, those oral provisions are within the scope of the term "private organic document."

The term "private organic document" includes:

- Bylaws of a business corporation.
- Bylaws of a business trust.
- Bylaws of a nonprofit corporation.
- Operating agreement of a limited liability company.
- Partnership agreement of a general partnership.
- Partnership agreement of a limited partnership.

This definition is patterned after Model Business Corporation Act § 1.40(17A) ("private organic document").

"Public organic document." The term does not include a statement of partnership authority filed under [*section 303 of the Uniform Partnership Act (1997)*] or any of the other statements that may be filed under that act since those statements do not create the partnership. For the same reason, the term also does not include a statement of qualification filed under [*section 1001 of that act*] to become a limited liability partnership. Similarly, the term does not include a statement of authority filed under [*section 5 of the Uniform Unincorporated Nonprofit Association Act*] or a statement appointing an agent filed under [*section 10 of that act*].

The term "public organic document" includes:

- Articles of incorporation of a business corporation.
- Articles of incorporation of a nonprofit corporation.
- Articles of association of an unincorporated nonprofit association.
- Certificate of limited partnership.
- Certificate of organization of a limited liability company.
- [*Deed of trust of a business trust.*]

This definition is patterned after Model Business Corporation Act § 1.40(17B) ("public organic document").

"Record form." This definition is patterned after Uniform Limited Partnership Act (2001) § 102(16).

"Surviving entity." This definition is patterned in part after Model Business Corporation Act § 9.50(f)(2) ("surviving entity").

"Transferee." A transferee is a person to whom an interest holder has only transferred some or all of the interest holder's transferable interest. A transferee does not have a governance interest in the entity.

§ 103. Relationship of [*Act*] to other laws.

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

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

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

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

(3) If a transaction under this [*Act*] is enjoined or reversed because of a violation of a regulatory law after the filing that effected the transaction has become effective, the enjoining or reversal of the transaction shall not affect the valid existence of a converting, exchanging or merging entity which shall be reinstated upon the filing with the secretary of state by any interested party of a final order not subject to appeal enjoining or reversing the transaction.

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

until the violation is cured.

(d) Structural provisions in regulatory laws controlling.—If and to the extent that a regulatory law sets forth provisions relating to the government and regulation of the affairs of an entity that are inconsistent with the provisions of this [*Act*] on the same subject, the provisions of the regulatory law shall control.

(e) Application of organic law.—The organic law of an entity governs any issue not dealt with in this [*Act*].

(f) Supplemental principle of law.—Unless displaced by particular provisions of this [*Act*], the principles of law and equity supplement this [*Act*].

(g) Definition.—As used in this section, the term "regulatory law" means any statute, other than an organic law, regulating the business of an entity and any rule or regulation validly promulgated under such a statute by any department, agency, board or commission of this State.

Comment:

This section preserves regulatory jurisdiction over transactions under the Act. The provisions of this Act must be read together with any applicable regulatory law and, to the extent they are irreconcilable, the provisions of the regulatory law will control.

Subsection (b) sets forth rules on the relationship between this Act and regulatory laws. The first clause of subsection (b) recognizes that particular regulatory laws may provide rules different from those in subsections (b)(1) through (3), but the requirement that those other rules be "expressly" stated is intended to indicate that a variation of the rules in subsection (b) should be applied only if clear. While subsection (c) protects the ability of the state to enforce its regulatory laws following a transaction that violates a regulatory law, subsection (b)(2) generally protects the valid existence of the converting, exchanging or surviving entity following the transaction. In many cases, the appropriate remedy for a violation of a regulatory law is not the reversal of the transaction, but a less severe sanction such as the loss of a license to conduct the regulated business or a monetary penalty or fine. Where injunction or reversal of a transaction is ordered, subsection (b)(3) confirms that the entity in existence before the failed transaction continues without change in its existence upon the filing of the order with the secretary of state. A regulatory agency will be an interested party under subsection (b)(3) and will have the power to file the order enjoining or reversing the transaction.

This section does not create an independent power of a court or regulatory agency to enjoin or reverse a transaction. The appropriate remedy for violation of a regulatory law will be determined under the regulatory law itself. This section simply preserves the effectiveness of the remedy of injunction or reversal where that remedy already independently exists.

Subsections (a)-(d) and (g) are patterned after 15 Pa.C.S. § 103. *See* the Comment to the definition of "organic law" in section 102.

§ 104. Required approvals. [*Optional*]

(a) Regulated entities.—If a domestic or foreign entity may not be a party to a merger without the approval of the [*attorney general*], the [*department of banking*], the [*department of insurance*] or the [*public utility commission*], the entity shall not be a party to a transaction under this [*Act*] without the prior written approval of that agency.

(b) Nonprofit entities.—Property held in trust or for charitable purposes under the laws of this state by a domestic or foreign entity shall not, by any transaction under this [*Act*], be diverted from the objects for which it was donated, granted or devised, unless and until the entity obtains an order of [*court*] [*the attorney general*] specifying the disposition of the property to the extent required by or pursuant to [*cite state statutory cy pres or other nondiversion statute*].

Comment:

This section is an optional provision that may be used in a fashion similar to a transitional rule as described below.

Because at least some of the provisions of this Act will be new in most states, it is likely that existing state laws that require regulatory approval of transactions by businesses such as banks, insurance companies or public utilities may not be worded in a fashion that will include at least some of the transactions authorized by this Act. The purpose of subsection (a) is to ensure that transactions under this Act will be subject to the same regulatory approval as mergers. This section is based on whether a merger by a regulated entity requires prior approval because the transactions authorized by this Act may be effectuated indirectly in many cases under existing law by establishing a wholly-owned subsidiary of the desired type and then merging into it. The list of agencies in subsection (a) should be conformed to the laws of the enacting state. The consequence of violating subsection (a) will be the same as in the case of a merger consummated without the required approval.

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

Subsection (a) is patterned after Model Business Corporation Act § 9.02. Subsection (b) is patterned after 15 Pa.C.S. § 5547(b).

§ 105. Scope. [*Optional*]

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

(1)

(2)

(b) Excluded transactions.—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)

Comment:

This section is an optional provision that may be used to exclude certain types of entities or transactions from the scope of the Act. This Act does not contain a general provision authorizing domestic entities to engage in transactions under the Act because the provisions dealing with each specific type of transaction supply that authority.

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

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

A state should use subsection (b) to list those situations in which the state has enacted specific legislation governing certain types of transactions. A mutual to stock conversion

of an insurance company has been listed in subsection (b)(1) as one example of such a transaction.

Subsection (b) is patterned after Model Business Corporation Act § 9.01.

Subchapter B
Documents

Section
111. Reference to extrinsic facts.
112. Filings.
113. Filing fees.

§ 111. Reference to extrinsic facts.

Any of the provisions of a document filed with the secretary of state pursuant to this [*Act*] may be dependent on facts objectively ascertainable outside the filed document in accordance with the following provisions:

(1) The manner in which the facts will operate on the provisions of the document shall be set forth in the document.

(2) The facts may include, but are not limited to:

(i) any of the following that are available in a nationally recognized news or information medium either in print or electronically: statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data;

(ii) a determination or action by any person or body, including any party to a document; or

(iii) the terms of, or actions taken under, an agreement to which a party to a document is a party, or any other agreement or document.

(3) The following provisions of a document may not be made dependent on facts outside the document:

(i) The name and address of any person required in the document.

(ii) The registered office or registered agent of any entity required in the document.

(iii) The number of authorized interests of each class or series of an entity.

(iv) The effective date of the document.

(v) Any required statement of the date on which the underlying transaction was approved or the manner in which that approval was given.

(4) If a provision of a document is made dependent on a fact ascertainable outside of the document, and that fact is not ascertainable by reference to a source described in paragraph (2)(i) or a document that is a matter of public record, or the affected interest holders have not received notice of the fact from the entity, then the entity shall file with the secretary of state an amendment of its public organic document setting forth the fact promptly after the time when the fact referred to is first ascertainable or thereafter changes. An amendment under this paragraph (4) is deemed to be authorized by the authorization of the original document to which the amendment relates and may be filed by the entity without further action by its governors or interest holders.

Comment:

This section is patterned in part after Model Business Corporation Act § 1.20(k). The Model Act provision, however, applies not only to documents filed with the secretary of state, as does this section, but also to plans of merger, exchange and conversion. On the other hand, the organic laws of unincorporated entities have traditionally not included provisions regarding references to extrinsic facts in either filed documents or plans of

merger, exchange and conversion. The difference reflects the fact that many of the characteristics of unincorporated entities are fixed by contract among the owners, as opposed to corporations where more of their characteristics come from the organic law. Thus, the ability to refer to extrinsic facts in a plan of merger, etc. of an unincorporated entity is limited only by general principles of contract and is broader than the provisions of this section. The public organic document of most unincorporated entities is very brief and applying this section to those documents will not substantially change the freedom of contract enjoyed by unincorporated entities. Paragraph (4) is a new requirement, however, that did not previously apply to unincorporated entities. Since this section does not apply to plans of merger, etc., a corporation will have greater freedom under this Act to refer to extrinsic facts in those plans than it has under the Model Act. The practical effect for corporations may not be that much different, however, because to the extent that references to extrinsic facts have continuing applicability that requires them to become part of the articles of incorporation they must satisfy the tests of this section.

This section permits any of the provisions of a filed document to be made dependent on facts outside the document with the exceptions provided in paragraph (3). Terms of a filed document may be made dependent on a fact outside the control of the entity. Common examples are references to an interest rate such as the federal funds rate or to securities market prices. Paragraph (2) also provides that the facts on which a filed document may be made dependent include facts within the control of a party to the document in order to make clear that those facts do not need to occur independently. In addition to a determination or action by the entity, references to extrinsic facts may also include, without limitation, references to determinations or actions by the governors, a committee of the governors, an officer, employee or agent of an entity, or any other person.

The only limitations on referring to extrinsic facts in a filed document are that the facts must be objectively ascertainable and that the filed document must state the manner in which the facts will operate. The purpose of these requirements is to avoid disputes over whether an extrinsic fact has occurred or its effect.

If the provisions of a filed document are made dependent on an agreement or other document as authorized by paragraph (2)(iii), care should be taken to identify the agreement or document appropriately. The agreement or document must be identified in a manner that satisfies the objectively ascertainable standard and the manner in which the terms or events under it are to operate must be specified. Consideration should also be given to the intended effects of an amendment to the agreement or document. A simple reference to an agreement will presumably include subsequent amendments, while a reference to the same agreement as in effect on a specified date presumably will not.

Where the provisions of a filed document are dependent on extrinsic facts, paragraph (4) establishes a procedure that will permit interest holders to determine what those facts may be in the following manner:

1. If the facts are ascertainable by reference to one of the generally available sources of information described in paragraph (2)(i), an interest holder may determine the facts by reference to that source.

2. If the facts are set forth in a document of public record, an interest holder may determine the facts by consulting the public record. Documents that are a matter of public record will include, without limitation, filings with the secretary of state under this Act or an organic law and those filings with the Securities and Exchange Commission that are publicly available either on the EDGAR electronic filing system or in hard copy.

3. If an entity has provided notice of the facts to those interest holders affected by the provision of the filed document that is dependent on the facts, those interest holders may

refer to the notice. Other interest holders should also have access to the notice under the applicable organic law.

4. In all other cases, an entity is required to file an amendment of its public organic document when a fact referred to in a filed document is first ascertainable or thereafter changes. To simplify the filing of the amendment, paragraph (4) provides that separate approval of the amendment is not required. If there is any doubt as to whether the filing of an amendment is necessary, an entity should err on the side of filing the amendment.

§ 112. Filings.

(a) Status.—A filing under this [*Act*] by a domestic entity shall have the status of a filing under the entity's organic law for purposes of a provision of that law that makes a filing with the secretary of state a part of the public organic document of the entity.

(b) Addresses.—A provision of this [*Act*] that requires a document filed with the secretary of state to set forth an address shall be construed to require the furnishing of an actual street address or rural route box number. The secretary of state shall refuse to file any document that sets forth only a post office box address.

(c) Tax clearance.—A domestic entity shall not file a statement of merger or charter surrender where the surviving or converted entity is a nonqualified foreign entity, and a qualified foreign entity shall not file an application for withdrawal of its authority, unless the statement or application is accompanied by a tax clearance certificate from the [*Department of Revenue*] evidencing the payment by the entity of all taxes and charges due the state required by law.

(d) Procedures.—Filings with the secretary of state under this [*Act*] shall be subject to the provisions of [*sections 1.24 through 1.26 and 1.29 of the Model Business Corporation Act*].

Comment:

Articles of merger and other similar documents filed under [*the Model Business Corporation Act*] are made a part of the articles of incorporation of each domestic business corporation that is a party to the merger by [*section 1.40(1) of the Model Business Corporation Act*]. Similar filings under other organic laws may become part of the public organic documents of domestic filing entities. Subsection (a) provides that filings under this Act will similarly become part of the public organic document of a domestic entity.

Subsection (b) has been included to simplify the wording of the various provisions of the Act that require the inclusion of addresses in documents filed with the secretary of state.

Subsection (c) is an optional provision for use in states that require tax clearance before giving effect to fundamental transactions that result in the disappearance of an entity from the state.

Subsection (d) provides the necessary rules on how filings under the Act are to be handled by reference to the provisions on filings in the [*Model Business Corporation Act*]. Whether those provisions are the appropriate ones to incorporate into this Act, and whether provisions on this subject are even necessary, will depend on how a state integrates this Act with its other organic laws.

§ 113. Filing fees.

The secretary of state shall collect the following fees when the documents described are delivered for filing:

(1) Statement of merger..... $___
(2) Statement of abandonment of merger..... $___
(3) Statement of exchange..... $___
(4) Statement of abandonment of exchange..... $___
(5) Statement of conversion..... $___
(6) Statement of abandonment of conversion..... $___

(7) Statement of charter surrender..... $___
(8) Application for withdrawal of authority..... $___
(9) Application for transfer of authority..... $___

Comment:

This section sets forth a list of the fees to be charged by the secretary of state when filing documents under this Act. Many states may choose to include these fees in the general fee bill for filings with the secretary of state instead of separately enacting this section.

The documents filed under this Act are referred to as "statements" in order to differentiate them from filings under corporation laws, which are typically referred to as "articles," and from filings under partnership and other unincorporated entity laws, which are typically referred to as "certificates."

Chapter 2
Mergers

Section
201. Merger authorized.
202. Plan of merger.
203. Action on plan of merger.
204. Statement of merger.
205. Effect of merger.
206. Abandonment of merger.

§ 201. Merger authorized.

(a) General rule.—[*Except as provided in subsection (c), one*] [*One*] or more domestic entities may be a party to a merger with one or more domestic or foreign entities, and two or more foreign entities may merge into a new domestic entity, so long as in either case at least one of the merging entities or the surviving entity is of a different type from one of the other entities.

(b) Participation by foreign entities.—A foreign entity may be a party to a merger authorized by this chapter, or may be created in such a merger, only if the merger is not prohibited by the laws of the foreign jurisdiction.

[*(c) Excluded entities.—Domestic entities of the following types shall not have the power to participate in a merger under this chapter:*

(1)

(2)]

Comment:

This chapter only provides for mergers between or among entities that are of different types. A merger just between two corporations, for example, will be governed solely by the merger provisions of [*chapter 11 of the Model Business Corporation Act*]. Similarly, a merger just between two limited liability companies will be governed solely by the merger provisions of [*Article 9 of the ULLCA or Article 12 of the Prototype LLC Act*]. However, a merger between a domestic business corporation and a domestic limited liability company will be subject to this chapter. If all of the merging entities and the surviving entity are of the same type, then the provisions of this chapter are not available because the merger may be accomplished purely under the provisions of the organic law applicable to that type of entity.

Subsection (c) is an optional provision that may be used to exclude certain types of entities from the scope of this chapter. It is limited to domestic entities because a restriction on the power of a foreign entity to engage in a merger is more properly placed in the

organic law of the foreign entity. A provision that excludes certain types of domestic entities from the Act generally is set forth in section 105.

§ 202. Plan of merger.

(a) General rule.—A domestic entity may be a party to a merger by adopting and approving a plan of merger, which shall be in record form and shall include:

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

(2) the terms and conditions of the merger;

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

(4) the organic documents of the surviving entity as they will be in effect immediately after consummation of the merger.

(b) Amendment of plan.—The plan of merger may include a provision that the plan may be amended by the governors or interest holders prior to filing a statement of merger, except that the plan may not be amended without a vote of the interest holders of a domestic merging entity to change:

(1) the amount or kind of interests, securities, obligations, rights to acquire interests, or securities, cash, or other property to be received by those interest holders under the plan;

(2) the organic documents of the surviving entity that will be in effect immediately following consummation of the merger, except for changes that would not require the approval of the interest holders of the surviving entity under its organic law; or

(3) any of the other terms or conditions of the plan if the change would adversely affect any of those interest holders in any material respect.

(c) Limitation.—A plan of merger shall not include any provision that violates the organic law of any party to the merger.

Comment:

This chapter imposes virtually no restrictions or limitations on the terms or conditions of a merger, except for those set forth in subsections (b) and (c). Interest holders in a party to the merger that merges into the survivor may receive interests or securities of the survivor, interests or securities of a party other than the survivor, obligations, rights to acquire interests or securities, cash, or other property. The capitalization of the survivor may be restructured in the merger, and its organic documents may be amended in the merger in any way deemed appropriate.

The consideration paid to the interest holders of the merging parties may be supplied in whole or part by a person who is not a party to the merger. Although not required by this section, the plan of merger may also provide for the payment of consideration in the merger to transferees of whom the entity has notice.

Although this chapter imposes virtually no restrictions or limitations on the terms or conditions of a merger, this section requires that the terms and conditions be set forth in the plan of merger. However, the plan of merger need not be set forth in the statement of merger that is delivered to the secretary of state for filing after the merger has been adopted and approved. *See* section 204.

As an alternative to setting forth the full text of the organic documents of the surviving entity, the plan of merger may set forth the amendments to be made to those documents or provide that those documents will be unchanged.

This section is patterned after Model Business Corporation Act § 11.02(c) and (e).

§ 203. Action on plan of merger.

(a) General rule.—A plan of merger shall be proposed, adopted and approved by each domestic merging entity in accordance with the provisions in the organic law and organic documents of the entity for proposing, adopting and approving a merger. The interest holders of a domestic entity that adopts a plan of merger under this chapter shall be entitled to exercise appraisal rights if they would have been entitled to exercise appraisal rights under the organic law of the entity.

(b) Absence of organic law provisions.—If the organic law of a domestic merging entity does not provide procedures by which that entity may be a party to a merger, or if a domestic merging entity has not been formed pursuant to a statute, then the plan of merger shall be proposed, adopted and approved in accordance with the applicable procedures in the organic documents of the entity.

(c) Consent to owner liability.—If as a result of the merger an interest holder of a domestic merging entity would become subject to owner liability for the surviving entity or any other person, approval of the plan of merger shall require the separate written consent of that interest holder, unless:

(1) an organic document in record form of the merging entity provides for approval of a merger in which some or all of the interest holders become subject to owner liability by the vote or consent of less than all the interest holders; and

(2) that interest holder assented in record form to that provision of the organic document, or became an interest holder subsequent to the adoption of that provision of the organic document.

Comment:

This chapter does not provide a separate set of provisions on how a merger is to be proposed, adopted and approved by a domestic merging entity, but looks instead to the existing merger provisions of the entity's organic law. Amendments to the various organic laws to integrate them with this chapter are set forth in chapter 6.

The incorporation into this chapter of the merger procedures in the organic law of a party to a merger should be construed broadly to include not only express statutory procedures, but also applicable common law principles such as fiduciary duty standards of governors and majority interest holders. Statutory provisions on "short-form" mergers without approval of interest holders and voting by classes or voting groups will also be applicable. Any special approval rights with regard to a merger in an entity's organic documents will also be applicable to a merger under this chapter.

In the case of a domestic merging entity whose organic law does not provide for mergers (such as an unincorporated nonprofit association subject to the [*Uniform Unincorporated Nonprofit Association Act*]) or a common law entity (such as, in many states, a business trust), subsection (b) looks to the organic documents of the entity for the necessary merger procedures. If the organic documents do not provide those procedures, they may presumably be added by amendment in accordance with the applicable procedures for amending the organic documents.

The references in this section to "adoption" and "approval" of a plan of merger reflect the usage in the [*Model Business Corporation Act*], which uses the term "adoption" for action on a plan of merger by the board of directors and the term "approval" for action by the shareholders. It is the intention of this section that all of the various procedures for action on a plan of merger in an entity's organic law will be applicable to a merger under this chapter, regardless of the terminology used in that organic law.

Subsection (c) is patterned in part after Model Business Corporation Act § 11.04(h). Subsection (c) will be applicable, for example, to shareholders of a corporation that merges into a general partnership that is not a limited liability partnership if the shareholders

become general partners of the surviving general partnership. If such a shareholder were to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect of exercising appraisal rights is that the shareholder would not become a general partner in the surviving entity; and, in that case, the consent of that shareholder would not be required.

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

§ 204. Statement of merger.

(a) Required contents.—After a merger has been duly proposed, adopted and approved, a statement of merger shall be signed on behalf of the surviving entity. The statement shall set forth:

(1) The name, type and jurisdiction of organization of the surviving entity. If the surviving entity is a domestic entity, the name of the surviving entity must satisfy the requirements of the organic law of the surviving entity.

(2) The following information:

(i) If the surviving entity is required to maintain a registered agent and registered office, its registered agent and registered office.

(ii) If the surviving entity is not required to maintain a registered agent and registered office, the address of its executive office or principal place of business.

(iii) If the surviving entity is a foreign entity, either:

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

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

[*(iv) Any other information the state adopting this Act may choose to require.*]

(3) The names, types and jurisdictions of organization of each merging entity other than the surviving entity.

(4) The manner in which the plan was adopted and approved by each domestic merging entity and, if one or more merging entities are foreign entities, the fact that the plan was adopted and approved by each foreign merging entity in accordance with its organic law.

(5) If the surviving entity is in existence prior to the merger, any amendments to its public organic document that are provided in the plan of merger.

(6) If the statement of merger is to be effective other than upon its filing, the future date and time, if any, on which it will be effective.

(7) Any other information the parties desire to include.

(b) Public organic document.—If the surviving entity is to be a domestic filing entity that is created by the merger, the statement of merger shall either contain all of the information required to be set forth in its public organic document or shall have attached a public organic document, except that provisions that would not be required to be included in a restated public organic document may be omitted.

(c) Filing.—The statement of merger shall be delivered to the secretary of state for filing. The statement of merger shall take effect on:

(1) the date and time of filing, as evidenced by such means as the secretary of state may use for the purpose of recording the date and time of filing; or

(2) such later date and time, if any, as is specified in the statement [*and that is not more than 90 days after the statement is delivered to the secretary of state*].

(d) Cancellation of authority to do business.—If any of the merging entities that is not the surviving entity is a qualified foreign entity, its certificate of authority or other type of foreign qualification shall be cancelled automatically at the effective time of the statement of merger.

Comment:

The filing of a statement of merger makes the transaction a matter of public record. A separate public filing under the merger provisions of the organic law of a domestic merging entity is not required.

The filing requirements for a statement of merger are set forth in sections 112 and 113. The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it does so the statement becomes effective at the time and date specified.

The representation in subsection (a)(4) that the plan of merger was adopted and approved by each foreign merging entity in accordance with its organic law necessarily presupposes that the plan was also approved in accordance with any valid, special requirements in the organic documents of the foreign entity.

This section is patterned generally after Model Business Corporation Act § 11.06. Subsection (c) is patterned after Model Business Corporation Act § 1.23.

§ 205. Effect of merger.

(a) General rule.—When a merger becomes effective:

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

(2) the separate existence of each entity that is merged into the surviving entity ceases;

(3) the title to all real and personal property, both tangible and intangible, and every contract right possessed by each entity that merges into the surviving entity is vested in the surviving entity without reversion or impairment;

(4) all liabilities of each entity that merges into the surviving entity become liabilities of the surviving entity;

(5) the name of the surviving entity may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger;

(6) if the surviving entity is in existence prior to the merger, its public organic document, if any, and its private organic document are amended to the extent provided in the plan of merger;

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

(8) the interests of each entity that is a party to the merger that are to be converted in the merger into other interests, securities, obligations, rights to acquire interests or securities, cash, other property, or any combination of the foregoing, are converted, and the former holders of those interests are entitled only to the rights provided to them under the terms of the merger and to any appraisal rights that they may have under the organic law of the entity.

(b) Enforcement of appraisal rights.—Upon a merger becoming effective, a foreign entity that is the surviving entity is deemed to:

(1) appoint the secretary of state as its agent for service of process in any proceeding to enforce the rights of interest holders of each domestic entity that is a party to the merger who properly exercise appraisal rights; and

(2) agree that it will promptly pay the amount, if any, to which such interest holders are so entitled.

(c) Limitation on future owner liability.—A person who becomes subject to owner liability for an entity as a result of the merger shall have owner liability only to the extent provided in the organic law of that entity and only for those debts, obligations and liabilities that arise after the effective time of the statement of merger.

(d) Past owner liability.—If a person ceases to have owner liability for a merging entity as a result of the merger, the following rules apply:

(1) The merger does not discharge any owner liability under the organic law of the merging entity to the extent any such owner liability arose before the effective time of the statement of merger.

(2) The person shall not have owner liability under the organic law of the merging entity for any debt, obligation or liability that arises after the effective time of the statement of merger.

(3) The organic law of the merging entity shall continue to apply to the collection or discharge of any owner liability preserved by paragraph (1), as if the merger had not occurred.

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

Comment:

The surviving entity in a merger automatically becomes the owner of all real and personal property and becomes subject to all the liabilities, actual or contingent, of each party that is merged into it. A merger is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. It does not give rise to a claim that a contract with a merging entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger. The contract rights that are vested in the surviving entity include, without limitation, the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the merger.

All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued. Under subsection (a)(5), the name of the survivor may be, but need not be, substituted in any pending proceeding for the name of a party to the merger whose separate existence ceased as a result of the merger. The substitution may be made whether the survivor is a complainant or a respondent, and may be made at the instance of either the survivor or an opposing party. Such a substitution has no substantive effect, because whether or not the survivor's name is substituted the survivor succeeds to the claims of, and is subject to the liabilities of, any party to the merger whose separate existence ceased as a result of the merger.

Subsection (a)(8) is limited to specifying the effects of a merger on those interests of parties to the merger that are converted in the merger. Some or all of the interests of a surviving entity that continues in existence may remain unchanged in a merger, although the holders of those interests may be entitled to appraisal rights.

When a merger becomes effective, a foreign entity that is the surviving entity is deemed to appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of any interest holders of each domestic merging entity who are entitled to and exercise appraisal rights. A foreign surviving entity is also deemed to agree that it will promptly pay the amount, if any, to which such interest holders are entitled. This result is based on the implied consent of the foreign entity to the terms of this chapter by virtue of entering into an agreement that is governed by this chapter.

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

Subsections (c) and (d) do not deal with the case of a person who has owner liability for an entity before a merger and continues to have owner liability for the surviving entity, for example, a general partner in a limited partnership into which a limited liability company is merged. In that case, the provisions on the liabilities of general partners in the organic law of the limited partnership will apply without interruption. The effects of subsections (c) and (d) will depend to a certain extent on how a contractual liability is worded. For example, a lease that provides that the entire rent is due when the lease is signed, but permits that rent to be paid in future installments, will be treated differently from a lease that does not provide that the entire rent is earned upon signing. In general, when a particular liability arises for purposes of subsections (c) and (d) will be determined by other applicable law.

See section 103 (relating to relationship of Act to other laws), which modifies the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise.

This section is patterned after Model Business Corporation Act § 11.07.

§ 206. Abandonment of merger.

(a) General rule.—Unless otherwise provided in a plan of merger, after the plan has been proposed, adopted and approved as required by this chapter, and at any time before the merger has become effective, the merger may be abandoned by the governors of a domestic merging entity without action by its interest holders.

(b) Abandonment after filing.—If a merger is abandoned after a statement of merger has been filed with the secretary of state but before the merger has become effective, a statement that the merger has been abandoned in accordance with this section, signed on behalf of any of the merging entities, shall be delivered to the secretary of state for filing prior to the effective date of the merger. The statement shall take effect upon filing and the merger shall be deemed abandoned and shall not become effective.

Comment:

Unless otherwise provided in the plan of merger, a party to a merger may abandon the transaction without the approval of its interest holders, even though the transaction has been previously approved by those interest holders. The power of a party under this section to abandon a transaction does not affect any contract rights that other parties may have.

The manner in which a merger may be abandoned under this section will be determined by the entity's organic law and its organic documents. Absent some special provision, abandonment may be authorized in the same manner as any other action. The plan of merger may also provide for the manner in which the governors may abandon the merger.

This section is patterned after Model Business Corporation Act § 11.08.

Chapter 3
Exchanges

Section

301. Interest exchanges authorized.
302. Plan of exchange.
303. Action on plan of exchange.

304. Statement of exchange.
305. Effect of exchange.
306. Abandonment of exchange.

§ 301. Interest exchanges authorized.

(a) General rule.—[*Except as provided in subsection (e), through*] [*Through*] an interest exchange:

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

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

(b) Participation by foreign entities.—A foreign entity may be a party to an interest exchange authorized by this chapter only if the interest exchange is not prohibited by the laws of the foreign jurisdiction.

(c) Law governing effect of exchange.—If the exchanging entity is a domestic entity, the effect of the exchange shall be as provided in section 305. If the exchanging entity is a foreign entity, the effect of the exchange shall be as provided in the organic law of the foreign entity.

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

[*(e) Excluded entities.—Domestic entities of the following types shall not have the power to participate in an interest exchange [as an exchanging entity] under this section:*

(1)

(2)]

Comment:

This chapter only provides for interest exchanges between entities that are of different types. An interest exchange, for example, just between two corporations will be governed solely by the share exchange provisions of [*chapter 11 of the Model Business Corporation Act*]. However, an interest exchange in which a domestic business corporation acquires the membership interests in a domestic limited liability company will be subject to this chapter.

Because the concept of an interest exchange is new, a person contracting with an entity or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this chapter should not be charged with the consequences of not having dealt with the concept of an interest exchange in the context of those special rights. Subsection (d) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, an entity is a party to a contract that provides that the entity cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to an interest exchange in which the entity is the exchanging entity. If the entity fails to obtain the consent, the result will be that the other party will have the same rights it would have if the entity were to participate in a merger without the required consent.

The purpose of subsection (d) is to protect the third party to a contract with the entity, and subsection (d) should not be applied in such a way as to impair unconstitutionally the third party's contract. As applied to the entity, subsection (d) is an exercise of the reserved power of the state legislature set forth in the entity's organic law.

The transitional rule in subsection (d) ceases to apply at such time as the provision of the agreement or debt instrument giving rise to the special rights is first amended after the effective date of this chapter because at that time the provision may be amended to address expressly an interest exchange.

A similar transitional rule governing the application to an interest exchange of special voting rights of governors or interest holders and other internal procedures is found in section 303(e).

Subsection (e) is an optional provision that may be used to exclude certain types of entities from the scope of this chapter. It is limited to domestic entities because a restriction on the power of a foreign entity to engage in an interest exchange is more properly placed in the organic law of the foreign entity. A provision that excludes certain types of domestic entities from the Act generally is set forth in section 105.

Subsections (a) and (b) are patterned after Model Business Corporation Act § 11.03(a) and (b). Subsection (d) is patterned after Model Business Corporation Act § 9.50(e).

§ 302. Plan of exchange.

(a) General rule.—A domestic exchanging entity may participate in an interest exchange by proposing, adopting and approving a plan of exchange, which shall be in record form and shall include:

(1) the terms and conditions of the exchange;

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

(3) any changes desired to be made in the organic documents of the exchanging entity.

(b) Amendment of plan.—The plan of exchange may include a provision that the plan may be amended by the governors or interest holders prior to filing a statement of exchange, except that the plan may not be amended without a vote of the interest holders of a domestic exchanging entity to change:

(1) the amount or kind of interests, securities, obligations, rights to acquire interests or securities, cash, or other property to be received by those interest holders under the plan; or

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

(c) Limitation.—A plan of exchange shall not include any provision that violates the organic law of any party to the exchange.

Comment:

This chapter imposes virtually no restrictions or limitations on the terms or conditions of an interest exchange, except for those set forth in subsections (b) and (c). Interest holders in the exchanging entity may receive interests or securities of the acquiring entity or of a party other than the acquiring entity, obligations, rights to acquire interests or securities, cash or other property. The capitalization of the exchanging entity may be restructured in the exchange, and its organic documents may be amended in the exchange in any way deemed appropriate.

Although not required by this section, the plan of exchange may also provide for the payment of consideration in the exchange to transferees of whom the entity has notice.

Although this chapter imposes virtually no restrictions or limitations on the terms or conditions of an interest exchange, this section requires that the terms and conditions be set forth in the plan of exchange. However, the plan of exchange need not be set forth in the statement of exchange that is delivered to the secretary of state for filing after the exchange has been adopted and approved. *See* section 304.

This section is patterned after Model Business Corporation Act § 11.03(c) and (e).

§ 303. Action on plan of exchange.

(a) General rule.—A plan of exchange of a domestic exchanging entity shall be proposed, adopted and approved in accordance with the provisions in the organic law of the exchanging entity for proposing, adopting and approving an interest exchange. The interest holders of a domestic exchanging entity that adopts a plan of exchange under this chapter shall be entitled to exercise appraisal rights if they would have been entitled to exercise appraisal rights under the organic law of the entity.

(b) Acquiring entity.—Except as otherwise provided in the organic law or organic documents of the acquiring entity, it shall not be necessary for the plan of exchange to be approved by the interest holders of the acquiring entity.

(c) Substitute procedures.—If the organic law of a domestic exchanging entity does not provide procedures for the proposal, adoption and approval of an interest exchange, a plan of exchange shall be proposed, adopted and approved in accordance with the procedures in the organic law of the exchanging entity for proposing, adopting and approving a merger. The interest holders of a domestic entity that adopts a plan of exchange in accordance with this subsection shall be entitled to exercise appraisal rights if appraisal rights are available upon any type of merger under the organic law of the entity.

(d) Absence of organic law provisions.—If the organic law of a domestic exchanging entity does not provide procedures by which the entity may be a party to either an interest exchange or a merger, or if a domestic exchanging entity has not been formed pursuant to a statute, then the plan of exchange shall be proposed, adopted and approved in accordance with the applicable procedures in the organic documents of the entity.

(e) Transitional provision.—If any provision of an organic document of a domestic exchanging entity or an agreement to which any of its governors or interest holders are parties, adopted or entered into before [*the effective date of this chapter*] contains a provision applying to a merger of the entity that does not refer to an interest exchange, the provision shall be deemed to apply to an interest exchange until such time as the provision is amended subsequent to that date.

(f) Consent to owner liability.—If as a result of the interest exchange an interest holder of a domestic exchanging entity would become subject to owner liability for the acquiring entity or any other person, approval of the plan of exchange shall require the separate written consent of that interest holder, unless:

(1) an organic document in record form of the exchanging entity provides for approval of an interest exchange in which some or all of the interest holders become subject to owner liability by the vote or consent of less than all the interest holders; and

(2) that interest holder assented in record form to that provision of the organic document, or became an interest holder subsequent to the adoption of that provision of the organic document.

Comment:

This chapter does not provide a separate set of provisions on how an interest exchange is to be proposed, adopted and approved by a domestic exchanging entity, but looks instead to the existing exchange provisions of the entity's organic law. Amendments to the various organic laws to integrate them with this chapter are set forth in chapter 6.

Because interest exchanges are a fairly recent innovation, not every organic law provides for them. In those instances where an organic law provides for mergers, but not for exchanges, subsection (c) makes the merger procedures applicable.

The incorporation into this chapter of the merger or exchange procedures in the organic law of a party to an exchange should be construed broadly to include not only express statutory procedures, but also applicable common law principles such as fiduciary duty standards of governors and majority interest holders.

If merger procedures are applicable under subsection (c), statutory provisions on "short-form" mergers without approval of interest holders and voting by classes or voting groups will also be applicable. Any special approval rights with regard to a merger in an entity's organic documents will also be applicable.

In the case of a domestic exchanging entity whose organic law does not provide for either mergers or exchanges (such as an unincorporated nonprofit association subject to the [*Uniform Unincorporated Nonprofit Association Act*]) or a common law entity (such as, in many states, a business trust), subsection (d) looks to the organic documents of the entity for the necessary exchange procedures. If the organic documents do not provide those procedures, they may presumably be added by amendment in accordance with the applicable procedures for amending the organic documents.

The references in this section to "adoption" and "approval" of a plan of exchange reflect the usage in the [*Model Business Corporation Act*], which uses the term "adoption" for action on a plan of exchange by the board of directors and the term "approval" for action by the shareholders. It is the intention of this section that all of the various procedures for action on a plan of exchange in an entity's organic law will be applicable to an exchange under this chapter.

Because the concept of an interest exchange is new, persons who negotiated special rights for governors or interest holders before the enactment of this chapter should not be charged with the consequences of not having dealt with the concept of an exchange in the context of these special rights. Subsection (e) accordingly provides a transitional rule that is intended to protect such special rights. Other documents, in addition to the organic documents, that may contain such special rights include agreements among interest holders, voting agreements or other similar arrangements. If, for example, an organic document provides that an entity cannot participate in a merger without a supermajority vote of the interest holders, that supermajority requirement will also apply to an interest exchange in which the entity is the exchanging entity.

The purpose of subsection (e) is to protect persons who negotiated special rights for governors or interest holders whether in a contract or the organic documents, and subsection (e) should not be applied in such a way as to impair unconstitutionally the rights of any party to a contract with the entity. As applied to the entity, subsection (e) is an exercise of the reserved power of the state legislature under the entity's organic law.

The transitional rule in subsection (e) ceases to apply at such time as the provision of the organic document or agreement giving rise to the special rights is first amended after the effective date of this chapter because at that time the provision may be amended to address expressly an interest exchange.

A similar transitional rule with regard to the application to an interest exchange of special contractual rights of third parties is found in section 301(d).

Subsection (e) is patterned after Model Business Corporation Act § 9.52(6).

Subsection (f) is patterned after Model Business Corporation Act § 11.04(h). Subsection (f) will be applicable, for example, to shareholders of a corporation that is acquired in an interest exchange by a general partnership if the shareholders become general partners and the partnership is not a limited liability partnership. If such a shareholder were

to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect of exercising appraisal rights is that the shareholder would not become a general partner; and, in that case, the consent of the shareholder would not be required.

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

§ 304. Statement of exchange.

(a) Required contents.—After a plan of exchange in which the exchanging entity is a domestic entity has been duly proposed, adopted and approved, a statement of exchange shall be signed on behalf of the acquiring entity and exchanging entity. The statement shall set forth:

(1) the names of the acquiring entity and exchanging entity;

(2) the manner in which the plan of exchange was adopted and approved by the exchanging entity;

(3) any amendments to the public organic document of the exchanging entity that are provided for in the plan of exchange; and

(4) any other information the parties desire to include.

[*(5) any other information the state adopting this Act may choose to require.*]

(b) Filing.—The statement of exchange shall be delivered to the secretary of state for filing and shall take effect on:

(1) the date and time of filing, as evidenced by such means as the secretary of state may use for the purpose of recording the date and time of filing; or

(2) such later date and time, if any, as is specified in the statement [*and that is not more than 90 days after the statement is delivered to the secretary of state*].

Comment:

The filing of a statement of exchange makes the transaction a matter of public record. A separate public filing under the organic law of the exchanging entity is not required. The filing requirements for a statement of exchange are set forth in sections 112 and 113. The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it does so the statement becomes effective at the time and date specified.

This section is patterned after Model Business Corporation Act § 11.06. Subsection (b) is patterned after Model Business Corporation Act § 1.23.

§ 305. Effect of exchange.

(a) General rule.—When a statement of exchange takes effect, the interests of the exchanging entity that are, under the terms of the plan of exchange, to be converted or exchanged shall cease to exist or shall be exchanged. The former holders of those interests shall thereafter be entitled only to the interests, securities, obligations, rights to acquire interests or securities, cash or other property into which they have been converted or for which they have been exchanged in accordance with the plan; and the acquiring entity shall be the holder of the interests in the exchanging entity stated in the plan to be acquired by the acquiring entity. The organic documents of the exchanging entity shall be amended to the extent, if any, that changes in those documents are stated in the plan.

(b) Limitation on future owner liability.—A person who becomes subject to owner liability for an entity as a result of the interest exchange shall have owner liability only to the extent provided in the organic law of that entity and only for those debts, obligations and liabilities that arise after the effective time of the statement of exchange.

(c) Past owner liability.—If a person ceases to have owner liability for the exchanging entity as a result of the interest exchange, the following rules apply:

(1) The interest exchange does not discharge any owner liability under the organic law of the exchanging entity to the extent any such owner liability arose before the effective time of the statement of exchange.

(2) The person shall not have owner liability under the organic law of the exchanging entity for any debt, obligation or liability that arises after the effective time of the statement of exchange.

(3) The organic law of the exchanging entity shall continue to apply to the collection or discharge of any owner liability preserved by paragraph (1), as if the interest exchange had not occurred.

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

Comment:

In contrast to a merger, an interest exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring entity the assets of the exchanging entity, or render the acquiring entity liable for the liabilities of the exchanging entity.

Under section 303(f) an interest exchange cannot have the effect of making an interest holder of a domestic exchanging entity subject to owner liability for the obligations or liabilities of any other person or entity unless each such interest holder has signed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent.

See section 103 (relating to relationship of Act to other laws), which modifies the provisions of this section with respect to the effects of an exchange to the extent a regulatory law provides otherwise.

This section is patterned in part after Model Business Corporation Act § 11.07(b).

§ 306. Abandonment of exchange.

(a) General rule.—Unless otherwise provided in a plan of exchange, after the plan has been proposed, adopted and approved as required by this chapter, and at any time before the interest exchange has become effective, it may be abandoned by the governors of a domestic entity that is a party to the exchange without action by the interest holders.

(b) Abandonment after filing.—If an interest exchange is abandoned after a statement of exchange has been filed with the secretary of state but before the exchange has become effective, a statement that the exchange has been abandoned in accordance with this section, signed on behalf of either of the parties to the exchange, shall be delivered to the secretary of state for filing prior to the effective date of the exchange. The statement shall take effect upon filing and the exchange shall be deemed abandoned and shall not become effective.

Comment:

Unless otherwise provided in the plan of exchange, a party to an interest exchange may abandon the transaction without approval of its interest holders, even though the transaction has been previously approved by those interest holders. The power of a party under this section to abandon a transaction does not affect any contract rights that other parties may have.

This section is patterned after Model Business Corporation Act § 11.08.

Chapter 4
Conversions

Subchapter
A. Conversion Procedures
B. Qualification of Foreign Entities

Subchapter A
Conversion Procedures

Section
401. Conversion authorized.
402. Plan of conversion.
403. Action on plan of conversion.
404. Statement of conversion.
405. Surrender of charter upon conversion.
406. Effect of conversion.
407. Abandonment of conversion.

§ 401. Conversion authorized.

(a) Domestic entity to domestic entity.—[*Except as provided in subsection (e), a*] [*A*] domestic entity may become a domestic entity of a different type pursuant to the provisions of this chapter.

(b) Domestic entity to foreign entity.—[*Except as provided in subsection (e), a*] [*A*] domestic entity may become a foreign entity of a different type pursuant to the provisions of this chapter, if the laws of the foreign jurisdiction do not prohibit the domestic entity from becoming an entity in that jurisdiction.

(c) Foreign entity to domestic entity.—A foreign entity may become a domestic entity of a different type if the laws of the foreign jurisdiction do not prohibit the foreign entity from becoming a domestic entity in another jurisdiction.

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

[*(e) Excluded entities—Domestic entities of the following types shall not have the power to participate in a conversion under this chapter:*

(1)

(2)]

Comment:

The procedure in this chapter permits an entity to change to a different form of entity. A transaction in which an entity changes its jurisdiction of organization but does not change its form (often referred to as a "domestication") is not subject to this Act and will be governed instead by the organic law applicable to the type of entity involved.

When a foreign entity becomes a domestic entity pursuant to this chapter, the effect of the conversion will be as provided in section 406. The procedures by which the conversion is approved, however, will be determined by the laws of the foreign jurisdiction.

Because the concept of conversion is new, a person contracting with an entity or loaning it money who negotiated special rights relating to the transaction before the enactment of this chapter should not be charged with the consequences of not having dealt

with the concept of conversion in the context of those special rights. Subsection (d) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, an entity is a party to a contract that provides that the entity cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to the conversion of the entity. If the entity fails to obtain the consent, the result will be that the other party will have the same rights it would have if the entity were to participate in a merger without the required consent.

The purpose of subsection (d) is to protect the third party to a contract with the entity, and subsection (d) should not be applied in such a way as to impair unconstitutionally the third party's contract. As applied to the entity, subsection (d) is an exercise of the reserved power of the state legislature set forth in the entity's organic law.

The transitional rule in subsection (d) ceases to apply at such time as the provision of the agreement or debt instrument giving rise to the special rights is first amended after the effective date of this chapter because at that time the provision may be amended to address expressly a conversion of the entity.

A similar transitional rule governing the application to a conversion of special voting rights of governors and interest holders and other internal procedures is found in section 403(c).

Subsection (d) is patterned after Model Business Corporation Act § 9.50(e).

Subsection (e) is an optional provision that may be used to exclude certain types of entities from the scope of this chapter. It is limited to domestic entities because a restriction on the power of a foreign entity to engage in a conversion is more properly placed in the organic law of the foreign entity. A provision that excludes certain types of domestic entities from the Act generally is set forth in section 105.

§ 402. Plan of conversion.

(a) General rule.—A domestic entity may engage in a conversion by proposing, adopting and approving a plan of conversion which shall include:

(1) a statement of the type of entity that the converting entity will be immediately after the conversion and, if it will be a foreign entity, its jurisdiction of organization;

(2) the terms and conditions of the conversion, which may not include any provision that violates the organic law of the converting entity or the converted entity;

(3) the manner and basis of converting the interests of the interest holders of the converting entity into interests, securities, obligations, rights to acquire interests or securities, cash or other property, or any combination of the foregoing;

(4) the full text, as they will be in effect immediately after the conversion, of the organic documents of the converted entity.

(b) Amendment of plan.—The plan of conversion may include a provision that the plan may be amended by the governors or interest holders prior to filing the document required by the laws of the foreign jurisdiction to consummate the conversion, except that the plan may not be amended without a vote of the interest holders to change:

(1) the amount or kind of interests, securities, obligations, rights to acquire interests or securities, cash, or other property to be received by the interest holders under the plan;

(2) the organic documents that will be in effect immediately following consummation of the conversion, except for changes that would not require the approval of the interest holders under the organic law of the converted entity; or

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

(c) Limitation.—A plan of conversion shall not include any provision that violates the organic law of either the converting entity or the converted entity.

Comment:

This chapter imposes virtually no restrictions or limitations on the terms or conditions of a conversion, except for those set forth in subsections (a)(2) and (b). Interest holders in the converting entity may receive interests or other securities of the converted entity or any other person, obligations, rights to acquire interests or other securities, cash, or other property. The capitalization of the converted entity may be restructured in the conversion, and its organic documents may be amended in the conversion, in any way deemed appropriate.

Although not required by this section, the plan of conversion may also provide for the payment of consideration in the conversion to transferees of whom the entity has notice.

Although this chapter imposes virtually no restrictions or limitations on the terms or conditions of a conversion, subsection (b) requires that the terms and conditions be set forth in the plan of conversion. However, the plan of conversion need not be set forth in the statement of conversion that is delivered to the secretary of state for filing after the conversion has been adopted and approved. *See* section 404.

This section is patterned after Model Business Corporation Act § 9.51.

§ 403. Action on plan of conversion.

(a) General rule.—A plan of conversion of a domestic entity shall be proposed, adopted and approved in accordance with the provisions in the organic law of the entity for proposing, adopting and approving a merger of the entity. The interest holders of a domestic entity that adopts a plan of conversion shall be entitled to exercise appraisal rights if appraisal rights are available upon any type of merger under the organic law of the converting entity.

(b) Absence of organic law provisions.—If the organic law of a domestic converting entity does not provide procedures by which the entity may be a party to a merger, or if a domestic converting entity has not been formed pursuant to a statute, then the plan of conversion shall be proposed, adopted and approved in accordance with the applicable procedures in the organic documents of the entity.

(c) Transitional provision.—If any provision of the organic documents of a domestic entity or an agreement to which any of its governors or interest holders are parties, adopted or entered into before [*the effective date of this chapter*] contains a provision applying to a merger of the entity that does not refer to a conversion of the entity, the provision shall be deemed to apply to a conversion of the entity until such time as the provision is amended subsequent to that date.

(d) Consent to owner liability.—If as a result of the conversion an interest holder of a domestic converting entity would become subject to owner liability for the converted entity or any other person, approval of the plan of conversion shall require the separate written consent of that interest holder, unless:

(1) an organic document in record form of the converting entity provides for approval of a conversion in which some or all of the interest holders become subject to owner liability by the vote or consent of less than all the interest holders; and

(2) that interest holder assented in record form to that provision of the organic document, or became an interest holder subsequent to the adoption of that provision of the organic document.

Comment:

This chapter does not provide a separate set of provisions on how a conversion is to be proposed, adopted and approved by a domestic converting entity, but looks instead to the existing merger provisions of the entity's organic law.

The incorporation into this chapter of the merger procedures in the organic law of the converting entity should be construed broadly to include not only express statutory procedures, but also applicable common law principles such as fiduciary duty standards of governors and majority interest holders. Statutory provisions on "short-form" mergers without approval of interest holders and voting by classes or voting groups will also be applicable. Any special approval rights with regard to a merger in an entity's organic documents will also be applicable.

In the case of a domestic converting entity whose organic law does not provide for mergers (such as an unincorporated nonprofit association subject to the [*Uniform Unincorporated Nonprofit Association Act*]), or a common law entity (such as, in many states, a business trust), subsection (b) looks to the organic documents of the entity for the necessary merger procedures. If the organic documents do not provide those procedures, they may presumably be added by amendment in accordance with the applicable procedures for amending the organic documents.

The references in this section to "adoption" and "approval" of a plan of conversion reflect the usage in the [*Model Business Corporation Act*], which uses the term "adoption" for action on a plan of merger by the board of directors and the term "approval" for action by the shareholders. It is the intention of this section that all of the various procedures for action on a plan of merger in an entity's organic law will be applicable to a conversion under this chapter.

Because the concept of conversion is new, persons who drafted and negotiated special rights for governors or interest holders before the enactment of this chapter should not be charged with the consequences of not having dealt with the concept of conversion in the context of those special rights. Subsection (c) accordingly provides a transitional rule that is intended to protect such special rights. Other documents, in addition to organic documents, that may contain such special rights include agreements among interest holders and voting agreements, or other similar arrangements. If, for example, an organic document provides that the entity cannot participate in a merger without a supermajority vote of the interest holders, that supermajority requirement will also apply to the conversion of the entity.

The purpose of subsection (c) is to protect persons who negotiated special rights for governors or interest holders whether in a contract with the entity or in the organic documents, and subsection (c) should not be applied in such a way as to impair unconstitutionally the rights of any party to a contract with the entity. As applied to the entity, subsection (c) is an exercise of the reserved power of the state legislature set forth in the entity's organic law.

The transitional rule in subsection (c) ceases to apply at such time as the provision of the organic documents or agreement giving rise to the special rights is first amended after the effective date of this chapter because at that time the provision may be amended to address expressly a conversion of the entity.

A similar transitional rule governing the application to a conversion of special contractual rights of third parties is found in section 401(d).

Subsections (c) and (d) are patterned after Model Business Corporation Act § 9.52(6) and (7).

Subsection (d) will be applicable, for example, to shareholders of a corporation that converts to a general partnership if the shareholders become general partners and the partnership is not a limited liability partnership. If such a shareholder were to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect of exercising appraisal rights is that the shareholder would not become a general partner; and, in that case, the consent of the shareholder would not be required.

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

§ 404. Statement of conversion.

(a) Converting domestic entity.—After the conversion of a domestic entity to a different form of domestic entity has been duly proposed, adopted and approved, a statement of conversion shall be signed on behalf of the converted entity. The statement shall:

(1) set forth the name of the entity immediately prior to the filing of the statement of conversion and, if that name does not satisfy the requirements of the organic law of the converted entity, or the converting entity desires to change its name, the name to which the name of the converting entity is to be changed, which shall be a name that satisfies the requirements of the organic law of the converted entity;

(2) state the type of entity that the converted entity will be;

(3) state that the plan of conversion was duly approved in the manner required by this chapter;

(4) if the converted entity is a filing entity, either contain all of the information required to be set forth in its public organic document or have attached a public organic document, except that provisions that would not be required to be included in a restated public organic document under the organic law of the converted entity may be omitted; and

(5) any other information the converting entity desires to include.

[*(6) any other information the state adopting this Act may choose to require.*]

(b) Converting foreign entity.—After the conversion of a foreign entity to a domestic entity has been approved in the manner required by the organic law of the foreign entity, a statement of conversion shall be signed on behalf of the foreign entity. The statement shall:

(1) set forth the name of the entity immediately prior to the filing of the statement of conversion and, if the that name does not satisfy the requirements of the organic law of the converted entity, or the converting entity desires to change its name, the name to which the name of the converting entity is to be changed, which shall be a name that satisfies the requirements of the organic law of the converted entity;

(2) set forth the jurisdiction under the laws of which the converting entity was organized immediately prior to the filing of the statement of conversion and, if the converting entity is a filing entity, the date on which the converting entity was organized in that jurisdiction;

(3) state the type of entity that the converted entity will be;

(4) state that the conversion of the entity was duly approved in the manner required by the organic law of the converting entity;

(5) if the converted entity is a filing entity, either contain all of the information required to be set forth in its public organic document or have attached a public organic document, except that provisions that would not be required to be included in a restated public organic document may be omitted; and

(6) any other information the converting entity desires to include.

[*(7) any other information the state adopting this Act may choose to require.*]

(c) Filing.—The statement of conversion shall be delivered to the secretary of state for filing and shall take effect on:

(1) the date and time of filing, as evidenced by such means as the secretary of state may use for the purpose of recording the date and time of filing; or

(2) such later date and time, if any, as is specified in the statement [*and that is not more than 90 days after the statement is delivered to the secretary of state*].

Comment:

The filing of a statement of conversion makes the transaction a matter of public record. A separate public filing under the organic laws of the converting or surviving entity is not required. The filing requirements for a statement of conversion are set forth in sections 112 and 113. The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it does so the statement becomes effective at the time and date specified.

This section is patterned after Model Business Corporation Act § 9.53. Subsection (c) is patterned after Model Business Corporation Act § 1.23.

§ 405. Surrender of charter upon conversion.

(a) General rule.—Whenever a domestic entity that is a filing entity has proposed, adopted and approved, in the manner required by this chapter, a plan of conversion providing for the entity to be converted to a foreign entity, a statement of charter surrender shall be signed on behalf of the converting entity. The statement of charter surrender shall set forth:

(1) the name of the entity;

(2) a statement that the statement of charter surrender is being filed in connection with the conversion of the entity to a foreign entity;

(3) a statement that the conversion was duly approved in the manner required by this chapter;

(4) the jurisdiction under the laws of which the converted entity will be organized;

(5) if the converted entity will be a nonfiling entity, the address of its executive office immediately after the conversion; and

(6) any other information the converting entity desires to include.

[*(7) any other information a state may choose to require.*]

(b) Filing.—The statement of charter surrender shall be delivered by the converting entity to the secretary of state for filing and shall take effect on the later of:

(1) the date and time of filing, as evidenced by such means as the secretary of state may use for the purpose of recording the date and time of filing; or

(2) such later date and time, if any, as is specified in the statement [*and that is not more than 90 days after the statement is delivered to the secretary of state*].

(c) Effect.—When the statement of charter surrender takes effect, the converting entity ceases to be a domestic entity.

Comment:

The filing of a statement of charter surrender makes the conversion of the domestic entity to a foreign entity a matter of public record in this state. It also terminates the status of the converting entity as a domestic entity. Once the statement of charter surrender has become effective, the converting entity will no longer be in good standing in this state. Its internal affairs will no longer be governed by its former organic law and, as a result, filings that may have been made under that organic law, such as the following, will no longer be effective: a statement of qualification as a limited liability partnership under [*Section 1001 of the Uniform Partnership Act (1997)*], a statement of partnership authority under [*Section 303 of the Uniform Partnership Act (1997)*] or a statement of authority under [*Section 5 of the Uniform Unincorporated Nonprofit Association Act*].

The filing requirements for a statement of charter surrender are set forth in sections 112 and 113. The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it

does so the statement becomes effective at the time and date specified. To avoid any question about a gap in the existence of the converting entity, it is recommended that a delayed effective date provision be used in the conversion filings in both this state and the foreign jurisdiction, or that the time of the filings be coordinated, so that the filings take effect at the same time.

This section is patterned after Model Business Corporation Act § 9.54. Subsection (b) is patterned after Model Business Corporation Act § 1.23.

§ 406. Effect of conversion.

(a) General rule.—When a conversion becomes effective:

(1) the title to all real and personal property, both tangible and intangible, and contract rights of the converting entity remain in the converted entity without reversion or impairment and without the need of filing a deed or other instrument of conveyance or the payment of any transfer tax or fee;

(2) the liabilities of the converting entity remain the liabilities of the converted entity;

(3) an action or proceeding pending against the converting entity shall be continued against the converted entity as if the conversion had not occurred, and the name of the converted entity may, but need not be, substituted for the name of the converting entity in any pending action or proceeding;

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

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

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

(7) the converted entity is deemed to:

(i) be organized under and subject to the organic law of the converted entity for all purposes;

(ii) be the same entity without interruption or dissolution as the converting entity that existed prior to the conversion; and

(iii) have been organized on the date that the converting entity was originally organized;

(8) in the case of a converted entity that is not a corporation, all of the interest holders shall be deemed to have agreed to the terms of its organic documents; and

(9) all filings by a converting domestic entity under its organic law with the secretary of state prior to the statement of conversion are no longer effective.

(b) Enforcement of appraisal rights.—When a conversion of a domestic entity to a foreign entity becomes effective, the surviving entity is deemed to:

(1) appoint the secretary of state as its agent for service of process in any proceeding to enforce the rights of interest holders who exercise appraisal rights in connection with the conversion, if any such interest holders are entitled to appraisal rights; and

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

(c) Limitation on future owner liability.—An interest holder who becomes subject to owner liability for an entity as a result of a conversion shall have owner liability only to the extent provided in the organic law of that entity and only for those debts, obligations and liabilities that arise after the effective time of the statement of conversion.

(d) Past owner liability.—If a person ceases to have owner liability for the converting entity as a result of the conversion, the following rules apply:

(1) The conversion does not discharge any owner liability under the organic law of the converting entity to the extent any such owner liability arose before the effective time of the statement of conversion.

(2) The person shall not have owner liability under the organic law of the converting entity for any debt, obligation or liability that arises after the effective time of the statement of conversion.

(3) The organic law of the converting entity shall continue to apply to the collection or discharge of any owner liability preserved by paragraph (1), as if the conversion had not occurred.

(4) The person shall have whatever rights of contribution from other persons are provided by the organic law of the converting entity with respect to any owner liability preserved by paragraph (1), as if the conversion had not occurred.

(e) Confirmation in land records.—A converted entity may file a copy of the statement of conversion in the [*office for filing deeds*] in any county in which the converting entity held an interest in real property. [*A transfer tax or fee shall not be collected in connection with the filing, but the converted entity may be required to pay a filing fee of not more than $*_____].

Comment:

The converted entity automatically becomes the owner of all real and personal property and becomes subject to all the liabilities, actual or contingent, of the converted entity. A conversion is not a conveyance, transfer or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. It does not give rise to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion. The contract rights that remain in the converted entity include, without limitation, the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the conversion.

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

One consequence of subsection (a)(7) is that the converting entity is not required to wind up its affairs, or to pay its liabilities and distribute its assets.

If the converted entity is not a corporation, subsection (a)(8) provides that all of its interest holders are deemed to have agreed to the terms of its organic documents. This preserves the contractual nature of the entity. Except as properly modified by its organic documents, the default rules in the organic law of the converted entity will also be part of the contract among the interest holders.

When a conversion becomes effective a foreign converted entity is deemed to appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of any interest holders who exercise appraisal rights, and to agree that it will promptly pay the amount, if any, to which such interest holders are entitled. This result is based on the implied consent of the foreign entity to the terms of this chapter by virtue of that entity in the form of the converting entity having entered into the conversion.

Under section 403(d) a conversion cannot have the effect of making any interest holder subject to owner liability unless each such interest holder has executed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent.

Subsections (a)(1) and (e) deal with the chain of title to interests in real property held by a converting entity. A statement of conversion filed under section 404 should be adequate evidence of the title of the converted entity to such interests, but subsection (e) provides an optional method of creating a record of the conversion in the appropriate land records. Similar provisions are not necessary in chapter 2 because the effect of a merger under this Act on the title to real estate should be the same as in a merger under existing organic laws. *Compare* Code of Ala. §10-15-3(d)(2).

When a conversion becomes effective, the internal affairs of the converting entity will no longer be governed by its former organic law and, as a result, filings that may have been made under that organic law, such as the following, will no longer be effective: a statement of qualification as a limited liability partnership under [*Section 1001 of the Uniform Partnership Act (1997)*], a statement of partnership authority under [*Section 303 of the Uniform Partnership Act (1997)*] or a statement of authority under [*Section 5 of the Uniform Unincorporated Nonprofit Association Act*].

See section 103 (relating to relationship of Act to other laws), which modifies the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise.

This section is patterned after Model Business Corporation Act § 9.55.

§ 407. Abandonment of conversion.

(a) General rule.—Unless otherwise provided in a plan of conversion of a domestic entity, after the plan has been adopted and approved as required by this chapter, and at any time before the conversion has become effective, it may be abandoned by the governors without action by the interest holders.

(b) Abandonment after filing by domestic entity.—If a conversion of a domestic entity is abandoned after a statement of conversion or statement of charter surrender has been filed with the secretary of state but before the conversion has become effective, a statement that the conversion has been abandoned in accordance with this section, signed on behalf of the converting entity, shall be delivered to the secretary of state for filing prior to the effective date of the conversion. The statement shall take effect upon filing and the conversion shall be deemed abandoned and shall not become effective.

(c) Abandonment after filing by foreign entity.—If a conversion of a foreign entity to a domestic entity is abandoned in accordance with the laws of the foreign jurisdiction after a statement of conversion has been filed with the secretary of state, a statement that the conversion has been abandoned, signed on behalf of the foreign entity, shall be delivered to the secretary of state for filing. The statement shall take effect upon filing and the conversion shall be deemed abandoned and shall not become effective.

Comment:

Unless otherwise provided in the plan of conversion, the converting entity may abandon the transaction without the approval of its interest holders, even though the transaction has been previously approved by those interest holders.

This section is patterned after Model Business Corporation Act § 9.56.

Subchapter B
Qualification of Foreign Entities

Section
411. Automatic withdrawal upon certain conversions.
412. Withdrawal upon conversion to a different foreign entity.
413. Transfer of authority.

§ 411. Automatic withdrawal upon certain conversions.

If a qualified foreign entity converts to a domestic entity, its certificate of authority or other type of foreign qualification shall be cancelled automatically on the effective time of the statement of conversion.

Comment:

This section is patterned after Model Business Corporation Act § 9.53(e).

§ 412. Withdrawal upon conversion to a different foreign entity.

(a) Required filing.—A qualified foreign entity that converts to a form of foreign entity that is not required to obtain a certificate of authority or make a similar type of filing with the secretary of state if it transacts business in this state shall apply for withdrawal of its authority to transact business in this state by delivering an application, signed on behalf of the foreign entity, to the secretary of state for filing. The application shall take effect upon filing and shall set forth:

(1) the name of the foreign entity and the name of the jurisdiction under whose law it was organized before the conversion;

(2) that it surrenders its authority to transact business in this state as a qualified foreign entity;

(3) the type of foreign entity to which it has been converted and the jurisdiction whose laws govern its internal affairs;

(4) a statement that it revokes the authority of its registered agent to accept service on its behalf and appoints the secretary of state as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state, along with:

(i) a mailing address to which the secretary of state may mail a copy of any process served on the secretary of state under this paragraph; and

(ii) a commitment to notify the secretary of state in the future of any change in its mailing address.

(b) Service of process.—After the withdrawal under this section of a foreign entity is effective, service of process on the secretary of state is service on the surviving foreign entity. Upon receipt of process, the secretary of state shall mail a copy of the process to the foreign nonfiling entity at the mailing address set forth under subsection (a)(4).

Comment:

This section is patterned after Model Business Corporation Act § 15.22.

§ 413. Transfer of authority.

(a) Required filing.—A qualified foreign entity that converts to another form of foreign entity that is required to obtain a certificate of authority or make a similar type of filing with the secretary of state if it transacts business in this state shall file with the secretary of state an application for transfer of authority signed on behalf of the foreign entity. The application shall take effect upon filing and shall set forth:

(1) the name of the foreign entity;

(2) the type of foreign entity to which it has been converted and the jurisdiction whose laws govern its internal affairs; and

(3) any other information that would be required in a filing under the laws of this state by a foreign entity of the type the foreign entity has become seeking authority to transact business in this state.

(b) Transfer of authority.—Upon the effectiveness of the application for transfer of authority, the authority of the foreign entity to transact business in this state shall be transferred without interruption to the foreign entity resulting from the conversion which shall thereafter hold such authority subject to the provisions of the laws of this state applicable to that type of entity.

Comment:

This section is patterned after Model Business Corporation Act § 15.23.