D R A F T

FOR APPROVAL

AMENDMENTS TO MODEL ENTITY TRANSACTIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

AMERICAN BAR ASSOCIATION

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AMENDMENTS TO MODEL ENTITY TRANSACTIONS ACT

DRAFTING COMMITTEE OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

HARRY J. HAYNSWORTH, IV, 2200 IDS Center, 80 S. 8th St., Minneapolis, MN 55402, *Chair*
K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910
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STEVEN G. FROST, Suite 1400, 111 W. Monroe St., Chicago, IL 60603-4080
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SECTION ON TAX LAW

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MELISSA WANGEMANN, Kansas Secretary of State, 120 SW 10th Ave., Topeka, KS 66612-1594
L.H. WILSON, 1120 Connecticut Ave. NW, Washington, DC 20036

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300,
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

AMERICAN BAR ASSOCIATION
SECTION ON BUSINESS LAW
321 N. Clark St.
Chicago, Illinois 60610
312/988-6244
www.abanet.org

MODEL ENTITY TRANSACTIONS ACT

TABLE OF CONTENTS

[ARTICLE] 4

CONVERSION

[ARTICLE] 5

DOMESTICATION

~~**[ARTICLE] 6**~~

~~**[DIVISION]**~~

[ARTICLE] ~~7~~ 6

MISCELLANEOUS PROVISIONS

APPENDIX 1

FILINGS

APPENDIX 2

CONFORMING AMENDMENTS AND REPEALS

MODEL ENTITY TRANSACTIONS ACT

Prefatory Note

1. Development of the Act

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

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

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

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

After beginning their independent drafting projects, both the Conference and the ABA realized that combining their respective areas of expertise would produce the best product for enactment by the states. They have accordingly combined their efforts so that the Model Entity Transactions Act ~~(2005)~~ (2007) draws on the expertise of the Conference in the law of unincorporated entities and of the ABA in the law of corporations.

Prior to the development of this Act, state business organization statutes (both

incorporated and unincorporated) varied in their approach to ~~same-type and cross-type~~ mergers involving the same or different types of entities, consolidations, ~~divisions,~~ conversions, share/interest exchanges, and domestications by or among domestic and foreign for-profit and nonprofit entities. The dissimilarities in state statutes included: (1) which transactions were authorized; (2) whether entities of more than one type could be parties to the same transaction; (3) inclusion of for-profit and nonprofit entities; (4) inclusion of incorporated and unincorporated organizations; and (5) single or dual status for converting, domesticating, or transferring entities. For example, The Uniform Partnership Act (1997) ("RUPA") authorized the conversion or merger of partnerships or limited partnerships. RUPA did not, however, anticipate the conversion or merger of types of business entities other than partnerships or limited partnerships nor did it address ~~divisions,~~ interest exchanges~~,~~ or domestications. The Uniform Limited Partnership Act (1976 with 1985 amendments) ("RULPA") is silent regarding mergers and any form of ~~cross-type~~ transaction involving more than one type of entity. A RULPA limited partnership could, however, effect a conversion or merger by "linking back" to the limited RUPA merger or conversion provisions. The Uniform Limited Partnership Act (2001) ("Re-RULPA") anticipated for-profit and nonprofit ~~cross-type~~ conversions and mergers involving more than one type of entity, but not ~~cross or same-type~~ interest exchanges~~, divisions,~~ or domestications. The Uniform Limited Liability Company Act (1996) ("ULLCA") authorized ~~cross-type~~ mergers involving more than one type of entity and conversions but was silent regarding for-profit and nonprofit ~~cross or same-type~~ interest exchanges~~, divisions,~~ and domestications.

New Chapter 9 of the Revised Model Business Corporation Act ("MBCA"), approved in 2003, authorized a domestic business corporation to become a different type of entity and permitted a non-domestic business entity to become a domestic business corporation. The transactions addressed in Chapter 9 of the MBCA include: (1) domestication (a procedure in which a corporation may change its state of incorporation, either domestic to foreign, or foreign to domestic); (2) nonprofit conversion (a procedure that permits a domestic business corporation to become either a domestic nonprofit corporation or a foreign nonprofit corporation); (3) foreign nonprofit domestication and conversion (a procedure that permits a foreign nonprofit corporation to become a domestic business corporation); and (4) entity conversion (procedures that authorize a domestic business corporation to become a domestic or foreign other entity or that permit a foreign other entity to become a domestic business corporation). Chapter 9 of the MBCA authorized only those transactions that involve a domestic business corporation either at the outset or at the termination of the transaction.

2. Scope of the Act

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

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

amalgamation of existing law.

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

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

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

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

Article ~~7~~ 6 sets out certain miscellaneous provisions, including: (1) consistency of application; (2) e-sign language; (3) ~~effective date; and (4)~~ savings clause; and (4) effective date.

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

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

3. Approach of the Act

Mergers of two or more corporations into a surviving corporation have been an accepted part of corporation law for a long time and are found in all state corporation laws. On the other hand, mergers are a more recent development in unincorporated entity laws. Following the lead of the MBCA, some states have begun to authorize ~~cross-type~~ mergers of more than one type of entity in their corporation laws. States that have adopted RUPA, Re-RULPA, or ULLCA also have provisions on ~~cross-type~~ mergers of more than one type of entity and conversions in those laws. This Act is drafted on the assumption that states will not be comfortable repealing mergers

completely out of their corporation laws or those unincorporated entity laws where merger provisions have begun to appear. To create a consistent pattern across their various entity laws, it is recommended that states limit the existing provisions on mergers in their entity laws to ~~same-type~~ mergers involving the same type of entity ~~and add provisions on same-type mergers to those entity laws where they are currently missing~~. It is not necessary, however, for a state to add ~~same-type~~ merger provisions to those entity laws that do not already contain them because this Act has been drafted to authorize ~~same-type~~ mergers for those entities not currently authorized to engage in such mergers. *See* Section 201.

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

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

A different approach is taken with respect to domestications. A domestication is a ~~same-type~~ transaction only involving a single form of entity ~~where~~ in which an existing entity moves its jurisdiction of organization to another state but retains whatever form it had before the domestication. *See* Section 501. Only a limited number of states currently have ~~domestications~~ domestication statutes. Therefore, in order to avoid having to enact separate domestication provisions for all of the various entity statutes in virtually every state, META includes a separate chapter governing domestications. ~~It is recommended that states repealing~~ States do not need to repeal existing domestication provisions. *See* Section 501(e) and Appendix 2 which does not provide for repeal of the domestication provisions in Subchapter 9B of the Model Business Corporation Act.

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

Finally, because merger statutes have stood the test of time and business lawyers are used to working with these provisions, a policy decision was made to incorporate basically the same requirements and substantive law rules in the chapters dealing with interest exchanges,

conversions, and domestications~~, and divisions~~. In addition, an interest exchange (which is in effect a triangular merger accomplished without the need for the transitory third party to the triangular merger) is effectively a form of merger transaction; and a conversion or domestication can be accomplished through a merger transaction by merging the converting or domesticating entity into a new form of entity (in the case of a conversion) or the same form of entity organized in a different state (in the case of a domestication). Thus, although there are differences because of the different nature of each type of transaction, the provisions in Sections 302 – 306 (interest exchanges), 402 – 406 (conversions), and 502 – 506 (domestications)~~, and 602 – 606 (divisions)~~ are patterned after and look quite similar to Sections 202 – 206 (mergers).

MODEL ENTITY TRANSACTIONS ACT

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [Act]:

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

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

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

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

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

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

(4) "Business corporation" means a corporation whose internal affairs are governed by [the Model Business Corporation Act].

~~(4)~~ (5) "Conversion" means a transaction authorized by [Article] 4.

~~(5)~~ (6) "Converted entity" means the converting entity as it continues in existence after a conversion.

~~(6)~~ (7) "Converting entity" means the domestic entity that approves a plan of conversion pursuant to Section 403 or the foreign entity that approves a conversion pursuant to the law of its jurisdiction of organization.

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

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

~~(9)~~ (8) "Domestic entity" means an entity whose internal affairs are governed by the law of this state.

~~(10)~~ (9) "Domesticated entity" means the domesticating entity as it continues in existence after a domestication.

~~(11)~~ (10) "Domesticating entity" means the domestic entity that approves a plan of domestication pursuant to Section 503 or the foreign entity that approves a domestication pursuant to the law of its jurisdiction of organization.

~~(12)~~ (11) "Domestication" means a transaction authorized by [Article] 5.

~~(13)~~ (12) "Entity" means ~~a~~:

(A) a business corporation;

(B) a nonprofit corporation;

(C) a general partnership, including a limited liability partnership;

(D) a limited partnership, including a limited liability limited partnership;

(E) a limited liability company;

(F) a business trust;

(G) an unincorporated nonprofit association; or

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

~~(A)~~ (i) an individual;

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

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

~~(D)~~ (iv) a decedent's estate; or

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

~~(14)~~ (13) "Filing entity" means an entity that is created by the filing of a public organic document.

~~(15)~~ (14) "Foreign entity" means an entity other than a domestic entity.

~~(16)~~ (15) "Governance interest" means the right under the organic law or organic rules of an entity, other than as a governor, agent, assignee, or proxy, to:

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

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

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

~~(17)~~ (16) "Governor" means a person by or under whose authority the powers of an entity are exercised and under whose direction the business and affairs of the entity are managed

pursuant to the organic law and organic rules of the entity.

~~(18)~~ (17) "Interest" means:

(A) a governance interest in an unincorporated entity;

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

(C) a share or membership in a corporation.

~~(19)~~ (18) "Interest exchange" means a transaction authorized by [Article] 3.

~~(20)~~ (19) "Interest holder" means a direct holder of an interest.

~~(21)~~ (20) "Interest holder liability" means:

(A) personal liability for a liability of an entity that is imposed on a person:

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

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

(B) an obligation of an interest holder under the organic rules of an entity to contribute to the entity.

~~(22)~~ (21) "Jurisdiction of organization" of an entity means the jurisdiction whose law includes the organic law of the entity.

~~(23)~~ (22) "Liability" means a debt, obligation, or any other liability arising in any manner, whether or not it is secured or contingent.

~~(24)~~ (23) "Merger" means a transaction ~~authorized by [Article] 2~~ in which two or more merging entities are combined into a surviving entity pursuant to a filing with the [Secretary of State].

~~(25)~~ (24) "Merging entity" means an entity that is a party to a merger and exists immediately before the merger becomes effective.

(25) "Nonprofit corporation" means a corporation whose internal affairs are governed by [the Model Nonprofit Corporation Act].

(26) "Nonqualified foreign entity" means a foreign entity that is not a qualified foreign entity.

~~(26)~~ (27) "Organic law" means the statutes, if any, other than this [Act], governing the internal affairs of an entity.

~~(27)~~ (28) "Organic rules" means the public organic document and private organic rules of an entity.

~~(28)~~ (29) "Person" means an individual, corporation, estate, trust, partnership, limited liability company, business or similar trust, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

~~(29)~~ (30) "Plan" means a plan of merger, interest exchange, conversion, or domestication~~, or division~~.

~~(30)~~ (31) "Private organic rules" mean the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all of its interest holders, and are not part of its public organic document, if any.

~~(31)~~ (32) "Protected agreement" means:

(A) ~~a debt security, note, or similar evidence of~~ a record evidencing indebtedness ~~for money borrowed, whether secured or unsecured, issued or signed by an entity which is unpaid, in whole or in part,~~ and any related agreement in effect on the effective date of this

[Act];

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

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

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

~~(32)~~ (33) "Public organic document" means the public record the filing of which creates an entity, and any amendment to or restatement of that record.

~~(33)~~ (34) "Qualified foreign entity" means a foreign entity that is authorized to transact business in this state pursuant to a filing with the [Secretary of State].

~~(34)~~ (35) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

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

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

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

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

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

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

(A) recognized at common law; or

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

Comment

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

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

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

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

"Business corporation" [(4)] – Business corporations and nonprofit corporations are the only types of entities referred to separately in the Act, and thus definitions for them are needed while definitions for other types of entities have not been included.

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

"Converted entity" ~~[(5)]~~ [(6)] – This term is used in Article 4 to describe the entity that results from a conversion.

"Converting entity" ~~[(6)]~~ [(7)] – A converting entity is the entity that becomes the

converted entity under Article 4. This definition is patterned in part after Model Business Corporation Act § 9.50(f)(1) ("converting entity").

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

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

"Domestic entity" ~~[(9)]~~ [(8)] – The term "domestic entity" in this Act means an entity whose internal affairs are governed by the organic laws of the adopting jurisdiction. Except in the case of general partnerships, this will mean an entity that is formed, organized, or incorporated under domestic law. In the case of a general partnership organized under the Uniform Partnership Act (1997) ("RUPA"), it will mean a general partnership whose governing law under RUPA § 106 is the law of the adopting state. Under RUPA § 106 the governing law is determined by the location of the partnership's chief executive office, except for limited liability partnerships where the governing law is the state where the statement of qualification is filed.

"Domesticated entity" ~~[(10)]~~ [(9)] – This term is used in Article 5 and means the entity that is domesticated pursuant to Article 5. By ~~its~~ the nature of the transaction, the domesticated entity will be of the same type as the domesticating entity.

"Domesticating entity" ~~[(11)]~~ [(10)] – This term is used in Article 5 and means the entity that is domesticated pursant to Article 5.

"Domestication" ~~[(12)]~~ [(11)] – The term "domestication" means a transaction of the kind authorized by Article 5 pursuant to which an entity may change its *jurisdiction* of formation *but not its type* so long as the laws of the foreign jurisdiction permit the domestication. The legal effect of the domestication of an entity out of an adopting state will be governed by the laws of both the adopting state and the foreign jurisdiction. Some statutes include what is described in this Act as "domestication" in their definition of a "conversion." See, e.g., Colo. Rev. Stat § 7-90-201(2) and (3). It is intended that the domestication provisions of this Act will apply to a transaction that may be characterized under another act as a "conversion" if it meets the definition of "domestication" under this Act.

"Entity" ~~[(13)]~~ [(12)] – This definition determines the overall scope of the Act because only an "entity" may participate in the transactions authorized by Articles 2, 3, 4, and 5~~, and 6~~. *See* Sections 201, 301, 401, and 501~~, and 601~~.

~~The term "entity" includes:~~

- ~~Business corporation.~~
- ~~Business trust.~~
- ~~General partnership, whether or not a limited liability partnership.~~
- ~~Limited liability company.~~

~~· Limited partnership, whether or not a limited liability limited partnership.~~
~~· Nonprofit corporation.~~
~~· Unincorporated nonprofit association.~~
~~The term does not include a sole proprietorship.~~

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

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

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

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

Paragraph (H)(i) of this definition excludes a sole proprietorship from the concept of an "entity."

Paragraph ~~(C)~~ (H)(iii) of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not a partnership

under RUPA. In that connection, Section 202(c) of RUPA provides in part:

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

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

"Filing entity" ~~[(14)]~~ [(13)] – Whether an entity is a filing entity is determined by reference to whether its legal existence is attributable to the filing of a document with the state filing officer. While the statute refers to an entity that is "created," it is intended to encompass corporations which are "incorporated," limited liability companies which are "organized," and limited partnerships which are "formed" by a filing required by the organic law governing the entity. Business trusts present a special problem. In some states, for example, a business trust is a filing entity, while in other states business trusts are recognized only by common law.

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

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

"Foreign ~~Entity" [(15)]~~ entity" [(14)] – The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by the Uniform Partnership Act (1914) ("UPA") is a domestic or foreign partnership. A UPA partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of partnerships under the Uniform Partnership Act (1997) ("RUPA") that have not registered as limited liability partnerships will be governed by RUPA § 106(a) ("state where the partnership's chief executive office is located").

"Governance interest" ~~[(16)]~~ [(15)] – A governance interest is typically only part of the

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

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

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

"Governor" ~~[(17)]~~ [(16)] – This term has been chosen to provide a way of referring to a person who has the authority under an entity's organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of entities. *Compare* Colo. § 7-90-102(35.7) which uses the term "manager" to refer to this concept, even though "manager" is also a term of art in connection with limited liability companies. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

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

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

- Trustee of a business trust.

"Interest" ~~[(18)]~~ [(17)] – In the usual case, the interest held by an interest holder will include both a governance interest and a transferable interest (or economic rights). Members in certain nonprofit corporations or unincorporated nonprofit associations generally do not have any transferable interest because they may not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders under this Act. An interest holder in an unincorporated business entity may transfer all or part of the interest holder's transferable interest without the transferee's acquiring the governance interest of the transferor. In that case, whether the transferor will retain the status of an interest holder will be determined by the applicable organic law and the transferee will have the status of an interest holder under paragraph (B) of this definition. That paragraph will also apply to subsequent transferees from the original transferee.

The term "interest" includes:

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

"Interest exchange" ~~[(19)]~~ [(18)] – The term "interest exchange" means a transaction authorized by Article 3 pursuant to which an entity may acquire interests in another entity. The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself. *See* Section 301(a).

"Interest holder" ~~[(20)]~~ [(19)] – This Act does not refer to "equity" interests or "equity" owners or holders because the term "equity" could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but only have a right to vote on its internal affairs. *Compare* Code of Ala. § 10-15-2(4) ("equity owner").

The term "interest holder" includes:

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

This definition has been patterned after Model Business Corporation Act § 1.40(13B)

("interest holder").

"Interest holder liability" ~~[(21)]~~ [(20)] – This term is used to describe the vicarious liability of an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term includes only personal liability of an interest holder for a debt of the entity imposed on the interest holder either by statute or by the organic rules to the extent authorized pursuant to the organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder liabilities for purposes of this Act. Thus, for example, if a state's business corporation law makes shareholders personally liable for unpaid wages because of their status as shareholders, that liability would be an "interest holder liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "interest holder liability" because it is a direct liability and not based on the status of being a shareholder. Similarly, the liability to make contributions to the entity or to return an improper distribution is not an interest holder liability because it is a direct liability of the interest holder even though creditors of the entity might be able to recover from the interest holder.

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

"Jurisdiction of organization" ~~[(22)]~~ [(21)] – The term "jurisdiction of organization" refers to the jurisdiction whose laws include the organic law of the entity. The scope of this Act is not limited to United States jurisdictions, although for practical purposes that will largely be the case since a transaction that impinges on a foreign country may be conducted under this Act only if the laws of the foreign country authorize the transaction. *See* Sections 201(b), 301(b), 401(b), and 501(b)~~, and 601(b) and (c)~~.

"Liability" ~~[(23)]~~ [(22)] – The term "liability" is intended to be all-inclusive and includes all obligations of whatever description or kind. It includes anything that would be a liability under generally accepted accounting principles. It also includes contingent liabilities, and in general any obligation owed to another person.

"Merger" ~~[(24)]~~ [(23)] – The term means a transaction ~~authorized by Article 2 pursuant to~~ in which two or more entities are combined into a single entity pursuant to a filing with the Secretary of State. The term "merger" in this Act includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities.

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

~~the organic law or organic rules of an entity, rather than just to the rules for approval of a "merger." Chapter 11 of the MBCA provides rules for approval of a merger transaction, using the term "merger" within its meaning under the MBCA, but not within its meaning under this Act. The rules in Chapter 11 of the MBCA, however, will apply under Section 203, 303, 403, 503, and 603 because a transaction under that Chapter has the effect of a transaction under Article 2.~~

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

"Merging entity" ~~[(25)]~~ [(24)] – The term "merging entity" refers to each entity that is in existence immediately before a merger and is a party to the merger. It will include the surviving entity if the surviving entity exists before the merger becomes effective. It does not include an entity that provides consideration to be received by interest holders if that entity is not a party to the merger.

"Nonprofit corporation" [(25)] – Nonprofit corporations and business corporations are the only types of entities referred to separately in the Act, and thus definitions for them are needed while definitions for other types of entities have not been included.

"Nonqualified foreign entity" [(26)] – The term "nonqualified foreign entity" refers to an entity that has is not authorized to transact business in the state pursuant to a public filing. Nonqualified foreign entities (26) and qualified foreign entities (34) together constitute the universe of foreign entities.

"Organic law" ~~[(26)]~~ [(27)] – Organic law includes statutes other than this Act that govern the internal affairs of an entity. To the extent these other statutes should be applicable to a transaction under this Act, their effect is preserved by Section 103.

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

"Organic rules" ~~[(27)]~~ [(28)] – The term "organic rules" means an entity's public organic document and the private organic rules. The organic rules, together with this Act, the organic law, and the common law provide the rules governing the internal affairs of the entity.

"Person" ~~[(28)]~~ [(29)] – The term "person" has the standard meaning of that term in uniform acts.

"Plan" ~~[(29)]~~ [(30)] – The term "plan" refers to the plan of merger, interest exchange, conversion, or domestication, ~~or division,~~ as the case may be, depending on which form of transaction is taking place. *See* Sections 202, 302, 402, and 502~~, and 602~~.

"Private organic rules" ~~[(30)]~~ [(31)] – The term private "organic rules" is intended to include all governing rules of an entity that are binding on all of its interest holders, whether or not in written form, except for the provisions of the entity's public organic document, if any. The term is intended to include agreements in "record" form as well as oral partnership agreements and oral operating agreements among LLC members. Where private organic rules have been amended or restated, the term means the private organic rules as last amended or restated.

The term "private organic rules" includes:

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

"Protected agreement" ~~[(31)]~~ [(32)] – The term "protected agreement" refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of the Act. Thus a revolving line of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of the Act. If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication~~, or division transaction~~ even though the agreement does not mention those other types of transactions. *See* Sections 301(d), 401(c), and 501(d) ~~and 601(d)~~.

"Public organic document" ~~[(32)]~~ [(33)] – A "public organic document" is a document that is filed of public record to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of partnership authority filed under Section 303 of the Uniform Partnership Act (1997) or any of the other statements that may be filed under that act since those statements do not create a new entity. A limited liability partnership is the same entity as the partnership that files the statement. For the same reason, the term also does not include a statement of qualification filed under Section 1001 of that act to become a limited liability partnership. Similarly, the term does not include a statement of authority filed under Section 5 of the Uniform Unincorporated Nonprofit Association Act or a statement appointing an agent filed under Section 10 of that act. Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

The term "public organic document" includes:

- Articles of incorporation of a business corporation.

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

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

"Qualified foreign entity" ~~[(33)]~~ [(34)] – The term "qualified foreign entity" refers to an entity that is authorized to transact business in ~~this~~ the state pursuant to a public filing. Nonqualified foreign entities (26) and qualified foreign entities together constitute the universe of foreign entities.

"Record" ~~[(34)]~~ [(35)] – The term "record" is taken from the Uniform Electronic Transactions Act. It is intended to apply broadly and include all information so long as the information is retrievable in a "perceivable" form.

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

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

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

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

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

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

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

equity supplement this [Act].

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

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

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

(2) if the corporation survives the transaction, the approval of the plan is by a vote of the shareholders or directors which would be sufficient to create or impair the right or obligation directly under the provision.

Comment

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

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

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

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

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

SECTION 104. REQUIRED NOTICE OR APPROVAL.

(a) A domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer in order to ~~sell some or all of its assets,~~ be a party to a merger~~, or change its purposes or form of organization shall~~ must give the notice~~,~~ or obtain the approval~~,~~ in order to be a party to ~~a transaction under this [Act]~~ an interest exchange, conversion, or domestication.

(b) Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this [Act] becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, or devised, unless the entity obtains an order of [name of court] [the attorney general] to the extent required by or pursuant to ~~[cite state statutory cy pres or other nondiversion law]~~ this state's cy pres or other law dealing with nondiversion of charitable assets specifying the disposition of the

property.

Legislative Note: *As an alternative to enacting subsection (a), a state may identify each of its regulatory laws that requires prior approval for a merger of a regulated entity, decide whether regulatory approval should be required for an interest exchange, conversion, or domestication, and make amendments as appropriate to those laws.*

As with subsection (a), an adopting state may choose to amend its various laws with respect to the nondiversion of charitable property to cover the various transactions authorized by this Act as an alternative to enacting subsection (b).

Comment

1. **Section 104(a)** – 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 consequence of violating subsection (a) should be the same as in the case of a merger consummated without the required approval.

2. **Section 104(b)** – 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 property to other uses may not cover 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.

3. **Application** – An approval or order obtained under this section may impose conditions or specify the disposition of assets or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this Act specifying the effects of a transaction. *See* Sections 206, 306, 406, and 506~~, and 606~~.

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

SECTION 105. STATUS OF FILINGS. A filing under this [Act] signed by a

domestic entity becomes part of the public organic document of the entity if the entity's organic law provides that similar filings under that law become part of the public organic document of the entity.

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. This section provides that filings under this Act will similarly become part of the public organic document of a domestic corporation. It should be noted that some state statutes no longer require filed documents to be "signed" in order to facilitate electronic filing. *See, e.g.*, Colorado Rev. Stat. § 7-90-301 *et seq*. In such cases, this section should be modified to delete the reference to "signed" and merely refer to being filed (or accepted for filing).

SECTION 106. NONEXCLUSIVITY. The fact that a transaction under this [Act] produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law other than this [Act].

Comment

This section allows a transaction that has the same end result as one of the transactions governed by this Act, but that is accomplished in a manner not within the scope of this Act, to be exempt from this Act. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities can be accomplished pursuant to sale of assets statutory provisions rather then under Chapter 2 of this Act, even though the end result of the transaction is essentially the same as if the two entities had merged into a third entity. ~~Another example would be a division transaction where a corporation creates a subsidiary and then distributes the equity interests in the subsidiary to its shareholders on a pro rata basis. While this is a classic I.R.C. § 355 spinoff that is in effect a division of the corporation, it is not a division transaction within the scope of Chapter 6 of this Act. *See* Section 601.~~

SECTION 107. REFERENCE TO EXTERNAL FACTS. A plan may refer to facts ascertainable outside of the plan if the manner in which the facts will operate upon the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a

party to the transaction.

Comment

This section is based on, but more concise than, § 1.20(k) of the Model Business Corporation Act.

SECTION 108. ALTERNATIVE MEANS OF APPROVAL OF TRANSACTIONS. Except as otherwise provided in the organic law or organic rules of a domestic entity, approval of a transaction under this [Act] by the unanimous vote or consent of its interest holders satisfies the requirements of this [Act] for approval of the transaction.

Comment

This section makes it clear that a unanimous vote by the interest holders of an entity constitutes the only approval needed of a transaction under this Act. That is consistent with the default rules on approval in Sections 203 (approval of a merger), 303 (approval of an interest exchange), 403 (approval of a conversion), and 503 (approval of a domestication)~~, and 603 (approval of a division)~~.

~~[~~SECTION 109. APPRAISAL RIGHTS. ~~Except as otherwise provided in the entity's organic law or organic rules, an~~

(a) An interest holder of a domestic merging, acquired, converting, or domesticating~~, or dividing~~ entity is entitled to appraisal rights in connection with the transaction if the interest holder would have been entitled to appraisal rights ~~if the entity were a party to a merger under its organic law.]~~ under the entity's organic law in connection with a merger in which the interest of the interest holder was changed, converted, or exchanged unless:

(1) the organic law permits the organic rules to limit the availability of appraisal rights; and

(2) the organic rules provide such a limit.

(b) An interest holder of a domestic merging, acquired, converting, or domesticating

entity is entitled to contractual appraisal rights in connection with a transaction under this [Act] to the extent provided:

(1) in the entity's organic rules;

(2) in the plan; or

(3) in the case of a business corporation, by action of its governors.

(c) If an interest holder is entitled to contractual appraisal rights under subsection (b) and the entity's organic law does not provide procedures for the conduct of an appraisal rights proceeding, the provisions on [Chapter 13 of the Model Business Corporation Act] apply to the extent practicable or as otherwise provided in the entity's organic rules or the plan.

Legislative Note: *Section ~~109 is an optional provision that~~ 109(a) preserves appraisal rights (sometimes referred to as "dissenters' rights") granted by other laws. As an alternative to enacting ~~this section~~ subsection (a), a state may wish to amend the appraisal rights provisions of its organic laws to specify which transactions under this Act will give rise to appraisal rights. See the suggested amendments in Appendix 2. If that alternative approach is adopted, ~~the references to Section 109 in other sections of this Act should be replaced with references to the appropriate provisions of the organic laws granting appraisal rights.~~ subsections (b) and (c) should be designated as a subsections (a) and (b).*

Comment

1. Section 109(a) – If an entity's organic law permits the organic rules to limit the availability of appraisal rights, such a provision of the organic rules will apply to the availability of appraisal rights under this section. This section, however, does not authorize the organic rules to limit the availability of appraisal rights in a transaction under the Act if the entity's organic law does not authorize such a provision of the organic rules.

Section 13.02(a)(1)(ii) of the Model Business Corporation Act does not provide for appraisal rights in connection with a merger for shares that remain outstanding after consummation of the merger. Appraisal rights will similarly not be available under Section 109(a) for shares that are not changed or converted in connection with a merger.

2. Section 109(b) – This Act permits a plan to set forth the terms and conditions of a transaction. A domestic entity may thus choose to grant optional appraisal rights as part of the terms of a transaction in circumstances where appraisal rights would not be available under this section. ~~It was not considered necessary to confirm the possibility of so-called "contractual appraisal rights."~~ Section 109(b) validates the grant of such contractual appraisal rights. *Cf.* 6

Del. Code §§ 15-120 (general partnerships), 17-212 (limited partnerships), and 18-210 (limited liability companies) which validate "contractual appraisal rights"; and Model Business Corporation Act § 13.02 which permits the articles of incorporation, bylaws, or a resolution of the board of directors to confer appraisal rights in contexts in which they would otherwise not be available. Legislative authorization in subsection (b) of the grant of contractual appraisal rights removes any question as to whether a court would have jurisdiction to hear a case in which the parties were attempting to create jurisdiction in the court by private agreement. The procedures to be followed in a contractual appraisal rights proceeding under subsection (b) will be the appraisal rights procedures in the entity's organic law if that law provides such procedures. If the entity's organic law does not provide procedures for conducting an appraisal rights proceeding, subsection (c) makes the appraisal rights procedures in the state's business corporation law applicable unless the entity's organic rules or the plan provide otherwise.

[SECTION 110. EXCLUDED ENTITIES AND TRANSACTIONS.

(a) The following entities may not participate in a transaction under this [Act]:

(1)

(2)

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

(1)

(2)

(3)].

Legislative Note: *Subsection (a) may be used by states that have special statutes restricted to the organization of certain types of entities. A common example is banking statutes that prohibit banks from engaging in transactions other than pursuant to those statutes.*

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 entities with a charitable purpose from the scope of the Act, that may be done by referring to those entities in subsection (a).

More limited provisions that exclude certain types of domestic entities just from certain provisions of this Act are set forth in Sections 201(d) (mergers), 301(e) (interest exchanges), 401(d) (conversions), and 501(e) (domestications)~~, and 601(e) divisions~~.

Subsection (b) may be used to exclude certain types of transactions governed by more specific statutes. A common example is the conversion of an insurance company from mutual to

stock form. There may be other types of transactions that vary greatly among the states.

[ARTICLE] 2

MERGER

SECTION 201. MERGER AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [Article]:

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

(2) two or more foreign entities may merge into a domestic entity.

(b) Except as otherwise provided in this section, by complying with the provisions of this [Article] applicable to foreign entities a foreign entity may be a party to a merger under this [Article] or may be the surviving entity in such a merger if the merger is authorized by the law of the foreign entity's jurisdiction of organization.

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

(1) [Chapter 11 of the Model Business Corporation Act];

(2) [Chapter 11 of the Model Nonprofit Corporation Act];

(3) [Article 9 of the Uniform Partnership Act (1997)];

(4) [Article 11 of the Uniform Limited Partnership Act (2001)];

(5) [Article 12 of the Prototype Limited Liability Company Act];

(6) [Article 9 of the Uniform Limited Liability Company Act]; or

(7) [Cite provisions of any other organic laws that have merger provisions for entities of the same type.]

[(d) The following entities may not participate in a merger under this [Article]:

(1)

(2)]

Legislative Note: *The text of subsection (c) will depend on which choice a state makes with respect to the scope of the Act. Four options are outlined in paragraph 3 of the Legislative Note at the beginning of Appendix 2:*

1. *It is anticipated that most states will choose option (a) under which the state will retain all of the merger provisions for entities of the same type it currently has in its organic laws and will repeal any merger provisions for entities of different types in those laws. The end result will be that the merger provisions in the organic laws will apply to mergers of entities of the same type and this Act will apply to mergers involving entities of more than one type. The format of subsection (c) incorporates this option.*

2. *If a state chooses option (b), it will add merger provisions for entities of the same type to all of its organic laws and the list of statutes in subsection (c) will need to be expanded.*

3. *If a state chooses option (d), the list of statutes in subsection (c) will probably include only the business and nonprofit corporation act merger provisions since under option (d) this Act will apply to mergers of unincorporated entities involving entities of the same type, as well as mergers involving different types of entities.*

4. *If a state were to choose option (c), which is very unlikely to be the case, subsection (c) will not be necessary because this Act will govern all mergers whether involving just the same type or entity or different types of entities.*

Comment

1. **In General** – The merger transaction authorized by this Act involves the combination of one or more domestic entities with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic surviving entity. Upon the effective date of the merger, all the assets and liabilities of the constituent entities vest in the surviving entity as a matter of law. As such, mergers require the existence of at least two separate entities before the transaction and only one entity may survive the merger. If independent existence of the constituent entities is desired following the conclusion of the transaction, a restructuring transaction other than a merger must be used to accomplish the transfer of assets and liabilities.

2. **Section 201(a)** – Subsection (a)(1) states the general rule that subject to the rules set forth in subsections (c) and (d) one or more domestic entities may merge with or into a domestic or foreign surviving entity. Subsection (a)(2) provides that two or more foreign entities may merge into a domestic surviving entity so long as subsection 201(b) is met.

3. **Section 201(b)** – Subsection (b) states that a foreign entity may be a party to a merger

or may be the surviving entity in a merger if the merger is authorized by the laws of the foreign entity's jurisdiction of organization.

4. **Section 201(c)** – It is expected that many adopting states will retain provisions on mergers solely between entities of the same type in the organic law governing that type of entity and will add similar provisions to other organic laws. *See* the discussion in Section 3 of the Prefatory Note. On the other hand, there will be some types of entities where it is unlikely that merger provisions will be added to their organic law, for example, unincorporated nonprofit associations. In cases where the organic law provides for a merger involving entities all of the same type, the organic law and not this Act applies to the transaction; but this Act would apply to any merger involving cross-type entities. In cases where the applicable organic law does not provide for mergers, this Act will serve the important function of authorizing mergers involving entities of that type, as well as cross-type mergers involving entities of that type. Some states have statutes that allow cross-type mergers as well as same-type mergers, in which case the cross-type provisions should be repealed when this Act is enacted. *See* Appendix 2.

5. **Section 201(d)** – Subsection (d) is an optional provision that may be used to exclude certain types of entities from the scope of this article. A provision that excludes certain types of entities from the Act generally is set forth in Section 110.

6. **Tax Considerations** – This Act authorizes a merger for state law purposes. Federal law and other state law will independently determine how a merger transaction will be taxed.

SECTION 202. PLAN OF MERGER.

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

(1) as to each merging entity, its name, jurisdiction of organization, and type;

(2) if the surviving entity is to be created in the merger, a statement to that effect and its name, jurisdiction of organization, and type;

(3) the manner of converting the interests in each party to the merger into interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing;

(4) if the surviving entity exists before the merger, any proposed amendments to its public organic document or to its private organic rules that are, or are proposed to be, in a

record;

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

(6) the other terms and conditions of the merger; and

(7) any other provision required by the law of a merging entity's jurisdiction of organization or the organic rules of a merging entity.

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

Comment

1. **Section 202(a)** – The requirements for the plan of merger are set forth in Section 202(a). They are similar to plan of merger provisions in corporation statutes. *See* Model Business Corporation Act § 11.02(c).

2. **Section 202(a)(1)** – Section 202(a)(1) requires that the plan of merger identify the parties to the merger. The name of a merging entity as it appears in the plan of merger will be its name in its jurisdiction of organization. *See* Comment 3 to Section 205.

3. **Section 202(a)(3)** – The language of Section 202(a)(3) is similar to Model Business Corporation Act § 11.02(c)(3), Uniform Partnership Act (1997) § 905(b)(5), Uniform Limited Partnership Act (2001) § 1106(b)(3), and Uniform Limited Liability Company Act § 904(b)(5). Although Section 202(a)(3) and those other provisions are all phrased in similar language, what may be done under Section 202(a)(3) with respect to providing for continuing interests in the surviving entity for some holders of interests of a class or series of a party to the merger while paying some other form of consideration to other holders of the same class or series of interests in that entity will vary depending on the type of entity involved and the extent to which its organic rules provide for non-uniform treatment of interest holders in a manner that is permissible under its organic law. Similarly the ability to use a merger to reorganize the capital structure of the surviving entity will vary depending on the type of entity involved and whether the entity has appropriately adopted relevant provisions in its organic rules.

~~Section 202(a)(3) enables constituent organizations to provide for continuing interests in a surviving entity for some equity holders and the payment of some other form of consideration for other equity participants. In addition, constituent entities may use a merger to reorganize the capital structure of the surviving entity. Section 202(a)(3) also permits the non-uniform treatment of equity holders in a merger. A~~ If the organic law and organic rules of an unincorporated entity permit a non-uniform "equity shuffle" ~~[may]~~ to be accomplished in a

merger involving ~~an~~ the unincorporated entity ~~and~~, the minority owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal right currently afforded to minority stockholders in merging corporate entities. Any perceived "unfairness" in the "shuffle" ~~will need to~~ would be addressed either (i) under ~~the guise~~ principles of fiduciary duties and the contractual obligations of good faith and fair dealing, assuming, of course, that such duties and obligations have not been contractually modified or eliminated to the extent permitted by the applicable organic law, or (ii) by the exercise of whatever rights the minority owners may have to veto the transaction or to withdraw or to dissociate and be paid the value of their interests.

The Model Business Corporation Act generally requires that shares of the same class or series must be treated in the same manner in a merger unless the corporation has adopted an applicable provision of its articles of incorporation pursuant to section 6.01(e) of that act providing for variations in the treatment of holders of the same class or series of shares. Thus a determination of what may be done by way of an equity shuffle in the case of a corporation will require reference to its organic law and organic rules.

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.

4. **Section 202(b)** – Section 202(b) provides the statutory authority for a merging party to include ~~information~~ a provision in a plan of merger that is not specifically listed in Section 202(a). One such possibility is contractual appraisal rights as provided in Section 109(b).

SECTION 203. APPROVAL OF MERGER.

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

(1) by a domestic merging entity:

(A) in accordance with the requirements, if any, in its organic law and organic rules for approval of ~~a transaction that has the effect of~~:

(i) in the case of an entity that is not a business corporation, a merger; or

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of that business corporation; or

(B) if neither its organic law nor organic rules provide for approval of ~~a transaction that has the effect of~~ such a merger, by all of the interest holders of the entity entitled

to vote on or consent to any matter; and

(2) in a record, by each interest holder of a domestic merging entity that will have interest holder liability for liabilities that arise after the merger becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

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

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

(b) A merger involving a foreign merging entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization.

Comment

1. **Section 203(a)** – Approval under Section 203 includes whatever actions or procedures by the governors and interest holders of an entity are required by its organic law, as modified by its organic rules, to effectuate the merger. If the organic rules of an entity prescribe a procedure for the proposal, adoption and/or approval of a merger, the term "approval" includes compliance with all of those rules. *See* the definition of "approval" in Section 102. ~~The phrase "transaction that has the effect of a merger" used in subsection (a)(1)(B) is explained in the Comment to the definition of "merger" in Section 102(24).~~

If the organic law of an entity is silent with respect to procedures for approval of a merger, the organic rules may be amended to provide those procedures. Otherwise, the default procedure in subsection (a)(1)(B) requires approval by the interest holders entitled to vote on governance matters.

The incorporation into this article 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 voting by classes or voting groups in a merger will also be applicable. ~~In addition, any statutory provisions on "short-form" merger will apply in a transaction where a controlled subsidiary is being merged into the parent.~~

2. **Section 203(a)(2)** – Subsection (a)(2) is patterned in part after Uniform Limited Partnership Act (2001) § 1110. Subsection (a)(2) 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 under subsection (a)(2).

The consent of an interest holder required by subsection (a)(2)(B) may be given either by (i) signing or agreeing generally to the terms of organic rules that include 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.

3. **Section 203(b)** – Where a foreign entity is a party to a merger under this Act, subsection (b) defers to the laws of the foreign jurisdiction for the requirements for approval of the merger by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws, such as this Act if it has been adopted in the foreign jurisdiction. The laws of the foreign jurisdiction will also control the application of any special approval requirements found in the organic rules of the foreign entity.

SECTION 204. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER.

(a) A plan of merger of a domestic merging entity may be amended:

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

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

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

(B) the public organic document or private organic rules of the surviving

entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

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

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

(1) as provided in the plan; or

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

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

(1) the name of each merging or surviving entity that is a domestic entity or a qualified foreign entity;

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

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

Comment

This section sets out the requirements for amending or abandoning the plan of merger. They are similar to provisions for amending or abandoning mergers found in existing corporation merger statutes. *See* Model Business Corporation Act §§ 11.02(e) and 11.08.

SECTION 205. STATEMENT OF MERGER; EFFECTIVE DATE.

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

(b) A statement of merger must contain:

(1) the name, jurisdiction of organization, and type of each merging entity that is not the surviving entity;

(2) the name, jurisdiction of organization, and type of the surviving entity;

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

(4) a statement that the merger was approved by each domestic merging entity, if any, in accordance with this [Article] and by each foreign merging entity, if any, in accordance with the law of its jurisdiction of organization;

(5) if the surviving entity exists before the merger and is a domestic filing entity, any amendment to its public organic document approved as part of the plan of merger;

(6) if the surviving entity is created by the merger and is a domestic filing entity, its public organic document, as an attachment; ~~and~~

(7) if the surviving entity is created by the merger and is a domestic limited liability partnership, its [statement of qualification], as an attachment; and

(8) if the surviving entity is a nonqualified foreign entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 206(e).

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

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

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

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

Comment

1. The requirements for the statement of merger are similar to articles of merger provisions found in most existing corporate merger statutes. *See* Model Business Corporation Act § 11.06.

2. **Section 205(a)** – 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. Optional provisions dealing with the filing requirements and filing fee for a statement of merger are set forth in Appendix 1.

3. **Section 205(b)(1) and (2)** – The names of foreign entities set forth in the statement of merger will generally be their names in their jurisdiction of formation, except that if a foreign entity has been required to adopt a different name in order to qualify to do business in the adopting state, the foreign qualification statute will likely require that the name of the entity as set forth in the statement of merger be the name adopted for purposes of qualifying to do business.

4. **Section 205(b)(3)** – *See* Comment 9.

5. **Section 205(b)(4)** – The statement in subsection (b)(4) that the plan of merger was approved by each entity in accordance with this article necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of each merging entity.

6. **Section 205(b)(6)** – The public organic document of a domestic surviving entity created by the merger that is attached to the statement of merger becomes the original, officially filed text of the public organic document of the surviving entity when the statement of merger takes effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity.

Similarly, a statement of qualification for a domestic limited liability partnership created by the merger that is attached to the statement of merger does not need to be filed separately.

7. **Section 205(d)** – Organic laws typically require an initial filing that creates an entity to be signed by the person serving as the incorporator or other organizer. Subsection (d), however, provides that the public organic document of the surviving entity does not need to be signed since it is itself attached to a signed document.

Subsection (d) also permits the public organic document of the surviving entity to omit any provision that is not required to be included in a restatement of the public organic document. Pursuant to this provision, for example, the public organic document of a business corporation created as the surviving entity in the merger would not need to state the name and address of each incorporator even though that information would be required by Section 2.02(a)(4) of the Model Business Corporation Act if the corporation were being incorporated outside the context of the merger.

8. **Section 205(e)** – A plan of merger that contains all the information required in the statement of merger may be filed instead of the statement of merger. The plan must be in a record and signed by each merging party.

9. **Section 205(f)** – 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. Section 205(f) is subject to the 90-day delayed effective date filing limitation in subsection 205(b)(3).

SECTION 206. EFFECT OF MERGER.

(a) When a merger becomes effective:

(1) the surviving entity continues or comes into existence;

(2) each merging entity that is not the surviving entity ceases to exist;

(3) all property of each merging entity vests in the surviving entity without assignment, reversion, or impairment;

(4) all liabilities of each merging entity are liabilities of the surviving entity;

(5) except as otherwise provided by law other than this [Act] or the plan of merger, all of the rights, privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

(6) if the surviving entity exists before the merger:

(A) all of its property continues to be vested in it without reversion or impairment;

(B) it remains subject to all of its liabilities; and

(C) all of its rights, privileges, immunities, powers, and purposes continue to be vested in it;

(7) the name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(8) if the surviving entity exists before the merger:

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

(B) its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger and ~~remain~~ are binding on and enforceable by:

(i) its interest holders; and

(ii) in the case of a surviving entity that is not a business corporation or a nonprofit corporation, any other person that is a party to an agreement that is part of the surviving entity's private organic rules;

(9) if the surviving entity is created by the merger~~,~~:

(A) its public organic document, if any, is effective and is binding on its interest holders; and

(B) its private organic rules are effective and are binding ~~upon the~~ on and enforceable by:

(i) its interest holders ~~of the surviving entity~~; and

(ii) in the case of a surviving entity that is not a business corporation or a nonprofit corporation, any other person that was a party to an agreement that was part of the organic rules of a merging entity if that person has agreed to be a party to an agreement that is part of the surviving entity's private organic rules; and

(10) the interests in each merging entity that are to be converted in the merger are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of merger ~~[~~and to any appraisal rights they have under Section 109~~]~~ and the merging entity's organic law.

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

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

(d) When a merger becomes effective, the interest holder liability of a person that ceases

to hold an interest in a domestic merging entity with respect to which the person had interest holder liability is as follows:

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

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

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

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

(e) When a merger becomes effective, a foreign entity that is the surviving entity:

(1) may be served with process in this state for the collection and enforcement of any liabilities of a domestic merging entity; and

(2) appoints the [Secretary of State] as its agent for service of process for collecting or enforcing those liabilities.

(f) When a merger becomes effective, the certificate of authority or other foreign qualification of any foreign merging entity that is not the surviving entity is canceled.

Comment

1. **In General** – With the exception of subsections (c) and (d), this section closely tracks existing corporate statutory provisions on the effect of a corporate-to-corporate merger. *See* Model Business Corporation Act § 11.07.

Subsections (c) and (d) set forth rules for two circumstances that typically do not exist in a merger where all the entities involved are corporations. Subsection (c) deals with the situation where an interest holder that does not have vicarious liability for the obligations of a merging entity before the merger has interest holder liability after the merger. An example would be a corporate shareholder who agrees to be the general partner in a general partnership that is the surviving entity in a merger between a corporation and a general partnership that is not a limited liability partnership. Subsection (d) deals with the situation where an interest holder has vicarious liability for the obligations of one of the merging parties before the merger but ceases to have any interest holder liability for the obligations of the surviving entity after the merger is effective. An example would be a general partner in a general partnership that merges into a corporation.

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 provides that rent may be paid in future installments, will be treated differently from a lease that does not provide that the entire rent is earned upon signing.

Under Section 203(a)(2), a merger cannot have the effect of making an interest holder of a domestic merging entity subject to interest holder liability for the obligations or liabilities of any other person or entity unless the 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.

See also Comments 6 and 7.

2. **Section 206(a)** – Subsection (a) states the general understanding that in a merger the assets and liabilities of the merging entities automatically vest in the surviving entity. The surviving entity becomes the owner of all real and personal property of the merged entities and is subject to all debts, obligations, and liabilities of the merging entities. A merger does not constitute a transfer, assignment, or conveyance of any property held by the merging entities prior to the merger. A merger also 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 the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the merger.

After a merger becomes effective, the law of the surviving entity's jurisdiction of organization governs the surviving entity.

See Sections 103(b) and 104(b) which modify the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise or any of the parties holds property committed to charitable purposes.

3. **Section 206(a)(7)** – 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)(7), 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, and is subject to the liabilities, of any party to the merger whose separate existence ceased as a result of the merger.

4. **Section 206(a)(8)** – The private organic rules of an unincorporated entity typically may be either oral or written. The plan of merger is not required to set forth amendments to oral provisions of the private organic rules of the surviving entity, and thus subsection (a)(8)(B) is limited in scope just to amendments to the private organic rules that are to be in a record, if any.

5. **Section 206(a)(10)** – The bracketed language in this subsection should only be included if the enacting state adopts Section 109.

6. **Section 206(c)** – Subsection (c) sets forth the general rule that an interest holder that was not liable for the liabilities of a merging entity before the merger but will have personal liability for the obligations of the surviving entity after the merger will be personally liable only for the liabilities of a domestic surviving entity that arise after the effective date of a merger. When a liability arises will be determined by other applicable law. The concept of "liabilities" is defined very expansively in Section 102.

7. **Section 206(d)** – Subsection (d) provides four rules with respect to a person who ceases to have interest holder liability after the effective date of the merger:

(1) the interest holder remains personally liable for any obligations that were incurred before the effective date of the merger;

(2) the interest holder does not have any personal liability for obligations of the surviving entity;

(3) the pre-existing personal liability of the interest holder is enforced against the interest holder on the same basis as if the merger had not taken place; and

(4) the interest holder has the same rights of contribution from other interest holders of the merging entity as the interest holder would have had if the merger had not occurred.

8. **Section 206(e)** – 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. The proceedings covered by subsection (e) include a proceeding to enforce the rights of any interest holders of each domestic merging entity who are entitled to and exercise appraisal rights. One of the liabilities that a foreign surviving entity succeeds to is the obligation of a merging entity to pay the amount, if any, to which its interest holders who assert appraisal rights are

entitled.

[ARTICLE] 3

INTEREST EXCHANGE

SECTION 301. INTEREST EXCHANGE AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [Article]:

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

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

(b) Except as otherwise provided in this section, by complying with the provisions of this [Article] applicable to foreign entities a foreign entity may be the acquiring or acquired entity in an interest exchange under this [Article] if the interest exchange is authorized by the law of the foreign entity's jurisdiction of organization.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to an interest exchange, the provision applies to an interest exchange in which the domestic entity is the acquired entity as if the interest exchange were a merger until the provision is amended after the effective date of this [Act].

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

(1) [Chapter 11 of the Model Business Corporation Act]; or

(2)]

[(e) The following entities may not participate in an interest exchange under this [Article]:

(1)

(2)]

Legislative Note: *As pointed out in the Legislative Note to Appendix 2, it is ~~recommended~~ anticipated that most states will choose to limit any existing interest exchange provisions to same-type transactions, for example interest exchanges where all of the entities are corporations. Any interest exchange provisions added to entity statutes should similarly be limited to same-type transactions. The net effect will be that the interest exchange provisions in the various entity statutes will govern same-type interest exchanges and Chapter 3 will govern cross-type interest exchanges. In the event a state does not have any existing interest exchange legislation and chooses not to add interest exchange provisions to any of its entity statutes, Article 3 will govern and will cover both same-type and cross-type interest exchanges. See Section 2 of the Prefatory Note and Appendix 2.*

Comment

1. **In General** – An interest exchange is the same type of transaction as the share exchange provided for in Section 11.03 of the Model Business Corporation Act ("MBCA"). The effect of an interest exchange is that: (1) the separate existence of the acquired entity is not affected; and (2) the acquiring entity acquires all of the interests of one or more classes of the acquired entity. An interest exchange also allows an indirect acquisition through the use of consideration in the exchange that is not provided by the acquiring entity (*e.g.*, consideration from another or related entity).

Neither share exchanges nor interest exchanges are universally recognized in either corporation or unincorporated entity laws. Where there is no existing interest exchange statutory authority, a triangular merger in which the acquiring entity forms a new subsidiary and the acquired entity is then merged into the new subsidiary produces the same result. Article 3 allows the interest exchange to be accomplished directly in a single step, rather than indirectly through the triangular merger route.

The "classes or series" referenced in Section 301(a) are commonly found in corporation law. *See, e.g.*, MBCA § 6.02. Specific provisions authorizing classes and series are less common in unincorporated entity law. *But see* 6 Del.C. §§ 15-407 (general partnerships), 17-208 (limited partnerships), and 18-215 (limited liability companies).

2. **Section 301(a)** – The acquiring entity is not required to acquire all of the interests in the exchanging entity. For example, assume that an LLC with three classes of membership interests enters into an interest exchange with another entity. The acquiring entity need only acquire all of the ownership interests of one or more classes of the LLC membership interests.

3. **Section 301(b)** – Subsection (b) allows a foreign entity to effectuate an interest exchange with a domestic entity if the interest exchange is authorized by the organic law of the foreign entity.

4. **Section 301(c)** – This subsection deals with rights of parties to protected agreements (defined in Section 102(31)) when an interest exchange takes place. Because the concept of an interest exchange is relatively 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 article 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 (c) accordingly provides a transitional rule that is intended to protect such special rights as to third parties. 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 had if the entity were to participate in a merger without the required consent.

The transitional rule in subsection (c) ceases to make sense at such time as the provisions of the agreement giving rise to the special rights is first amended after the effective date of this article because at that time the provision may be amended to address expressly an interest exchange. The transitional rule will continue to apply, however, if a provision other than the specific provisions giving rise to the special rights is amended.

5. **Section 301(d)** – The statutes that should be listed in Section 301(c) are interest exchange statutes that already exist or are added to the state's various entity statutes when META is adopted. *See also*, the Legislative Note above.

6. **Section 301(e)** – Subsection (e) is an optional provision that may be used to exclude certain types of entities from the scope of this chapter. A provision that excludes certain types of entities from the Act generally is set forth in Section 110.

SECTION 302. PLAN OF INTEREST EXCHANGE.

(a) A domestic entity may be the acquired entity in an interest exchange under this [Article] by approving a plan of interest exchange. The plan must be in a record and contain:

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

(2) the name, jurisdiction of organization, and type of the acquiring entity;

(3) the manner of converting the interests in the acquired entity into interests,

securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing;

(4) any proposed amendments to the public organic document or private organic rules that are, or are proposed to be, in a record of the acquired entity;

(5) the other terms and conditions of the interest exchange; and

(6) any other provision required by the law of this state or the organic rules of the acquired entity.

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

Comment

1. **General** – This section sets forth the requirements for the plan of interest exchange, which must be approved by the acquired entity in accordance with Section 303. The content of the plan of interest exchange is similar to the content of a plan of merger. *See* Section 202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

2. **Section 302(a)(3)** – Under this subsection, interest holders in the acquired 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 acquired entity may be restructured in the exchange, and its organic documents and organic rules may be amended in the exchange in any way deemed appropriate.~~ *See also* Comment 3 to Section 202(a)(3).

3. **Filing the Plan of Interest Exchange** – The plan of interest exchange may, but need not, be filed instead of the statement of interest exchange (Section 305) so long as it contains all the information required to be in the statement and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 305(d).

SECTION 303. APPROVAL OF INTEREST EXCHANGE.

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

(1) by a domestic acquired entity:

(A) in accordance with the requirements, if any, in its organic law and

organic rules for approval of an interest exchange;

(B) except as otherwise provided in subsection (d), if neither its organic law nor organic rules provide for approval of an interest exchange, in accordance with the requirements, if any, in its organic law and organic rules for approval of ~~a transaction that has the effect of~~:

(i) in the case of an entity that is not a business corporation, a merger, as if the interest exchange were ~~that type of transaction~~ a merger; or

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of that business corporation, as if the interest exchange were that type of merger; or

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

(2) in a record, by each interest holder of a domestic acquired entity that will have interest holder liability for liabilities that arise after the interest exchange becomes effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

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

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

(b) An interest exchange involving a foreign acquired entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization.

(c) Except as otherwise provided in its organic law or organic rules, the interest holders of the acquiring entity are not required to approve the interest exchange.

(d) A provision of the organic law of a domestic acquired entity that would permit a merger between the acquired entity and the acquiring entity to be approved without the vote or consent of the interest holders of the acquired entity because of the percentage of interests in the acquired entity held by the acquiring entity does not apply to approval of an interest exchange under subsection (a)(1)(B).

Legislative Note: *An issue that needs to be analyzed under this section is what approval requirements apply to an interest exchange if there are no interest exchange provisions for entities of the same type in the organic law for a particular type of entity. If an entity's organic law (and also its organic rules) are silent on approving an interest exchange, subsection (a)(1)(B) provides that the required approval is the approval required for a merger under the entity's organic law. If the merger approval in the entity's organic law required a majority vote of the entity's interest holders, the approval of an interest exchange where the entity is the acquired entity would also require a majority vote of its interest holders. If the organic law, on the other hand, required a unanimous vote of the entity's interest holders to approve a merger, a unanimous vote would also be required to approve an interest exchange. As a result, differences between entity laws on the vote required to approve a merger will be carried over into this Act. It is important, therefore, that states review any differences in the merger approval requirements in their organic laws to determine if those differences are supported by appropriate policy considerations.*

If an entity's organic law does not provide for approval of either a merger or an interest exchange (and if the entity's organic rules are also silent on approval of a merger or interest exchange), then subsection (a)(1)(C) requires approval of an interest exchange by all of the entity's interest holders. States should evaluate how that approval requirement compares to any approval requirements it has adopted for mergers or interest exchanges in any of its other organic laws.

This Article permits the organic rules of an acquired entity to be amended in the context of an interest exchange. The other Articles in this Act also permit the organic rules to be amended in the contexts of the other types of transactions that may be accomplished under this

Act. When states conduct the analysis described in this Legislative Note of what approval requirement to adopt, they should also evaluate that question from the perspective of what approval requirements they provide in their organic laws for amending the organic rules of each type of entity.

The analysis described in this Legislative Note needs to be performed with respect to Sections 403 and 503 as well.

See Appendix 2 for additional information about these issues.

Comment

1. **In General** – This section sets forth the required approval (~~*see*~~ defined in Section 102(3)) of an interest exchange. An interest exchange transaction governed by this article only requires approval by the acquired entity, unless the applicable organic law or the organic rules of the acquiring entity otherwise provide (*see* subsection (c)), a condition that rarely exists.

If the acquired entity is a domestic entity, one of three possibilities will be applicable:

(1) if the organic law (*see* Section 102~~(26)~~(27)) governing the acquired domestic entity has specific provisions for approval of an interest exchange, or even if there are no such provisions, the organic rules (*see* Section 102~~(27)~~(28)) of the acquired entity have specific provisions for approval of an interest exchange, then the approval provisions in the organic law or organic rules apply;

(2) if there are no specific provisions for approval of an interest exchange in the acquired entity's organic law or organic rules but either the organic law governing the acquired entity or the acquired entity's organic rules contain provisions for approval of mergers, then those merger provisions (except for any short form merger provisions that allow approval of a merger by the acquired entity without a vote of its interest holders – *see* subsection (d)) apply; and

(3) if neither (1) or (2) are applicable, then unanimous consent of the acquired entity's interest holders will be required.

A three-tiered approval scheme is necessary because specific provisions for interest exchanges do not exist in many state corporate and unincorporated entity statutes or in the various types of entity organic rules. *See* Comment 4 to Section 301.

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

If the acquired entity is a foreign entity, then approval is in accordance with the laws of the acquired entity's jurisdiction of organization. *See* subsection (b). *See also* Comment 3 to Section 203.

2. **Section 303(a)(2)** – *See* Comment 2 to Section 203 for an explanation of this interest holder liability provision.

3. Section 303(d) – Section 303(d) is an exception to the general approach followed in this section of looking to the underlying rules on approval of mergers. Many business corporation laws permit a corporation that owns a specified percentage of the shares of another corporation (typically 80 or 90%) to merge with the subsidiary corporation without a vote of the subsidiary's shareholders. Section 303(d) makes clear that those "short form" merger rules do not apply and a vote of the interest holders of a subsidiary is always required to approve an interest exchange under Article 3. A provision similar to Section 303(d) has not been included in Articles 4 or 5 because the conversion and domestication transactions under those chapters only involve a single entity rather than two entities as in the case of a short form merger.

SECTION 304. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE.

(a) A plan of interest exchange of a domestic acquired entity may be amended:

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

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

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

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

(C) any other terms or conditions of the plan, if the change would

adversely affect the interest holder in any material respect.

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

(1) as provided in the plan; or

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

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

(1) the name of the acquired entity;

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

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

Comment

This section parallels analogous provisions in Articles 2 (mergers), 4 (conversions), and 5 (domestications)~~, and 6 (divisions)~~.

SECTION 305. STATEMENT OF INTEREST EXCHANGE; EFFECTIVE DATE.

(a) A statement of interest exchange must be signed on behalf of a domestic acquired entity and filed with the [Secretary of State].

(b) A statement of interest exchange must contain:

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

(2) the name, jurisdiction of organization, and type of the acquiring entity;

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

(4) a statement that the plan of interest exchange was approved by the acquired entity in accordance with this [Article]; and

(5) any amendments to the acquired entity's public organic document approved as part of the plan of interest exchange.

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

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

(e) A statement of interest exchange becomes effective upon the date and time of filing or the later date and time specified in the statement of interest exchange.

Comment

1. **In General** – The filing of a statement of interest 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 mandatory requirements for a statement of interest exchange are set forth in subsection (b). They are essentially the same as the requirements for a statement of merger in Section 205.

2. **Section 305(b)(3) and (e)** – The effective date and time of a statement of interest exchange are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement is effective on that date and time, subject to the 90 day maximum

delayed effective date in Section 305(b)(3).

3. **Section 305(d)** – A plan of interest exchange can be used as a substitute for the statement of interest exchange so long as the plan satisfies the requirements in subsection (d).

SECTION 306. EFFECT OF INTEREST EXCHANGE.

(a) When an interest exchange becomes effective:

(1) the interests in the acquired entity that are the subject of the interest exchange cease to exist or are converted or exchanged, and the interest holders of those interests are entitled only to the rights provided to them under the plan of interest exchange ~~[~~and to any appraisal rights they have under Section 109 and the acquired entity's organic law~~]~~;

(2) the acquiring entity becomes the interest holder of the interests in the acquired entity stated in the plan of interest exchange to be acquired by the acquiring entity;

(3) the public organic document, if any, of the acquired entity is amended as provided in the statement of interest exchange and ~~remains~~ is binding on its interest holders; and

(4) the private organic rules of the acquired entity that are to be in a record, if any, are amended to the extent provided in the plan of interest exchange and ~~remain~~ are binding on and enforceable by:

(A) its interest holders; and

(B) in the case of an acquired entity that is not a business corporation or nonprofit corporation, any other person that is a party to an agreement that is part of the acquired entity's private organic rules.

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

entity.

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

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

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

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

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

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

Comment

1. **Section 306(a)** – 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 acquired entity, or render the acquiring entity liable for the liabilities of the acquired entity. Thus, subsection (a) is significantly simpler than Section 206(a) with respect to the effects of a merger.

When an interest exchange becomes effective: (1) the interests of the acquired entity are exchanged, converted or canceled as provided in the plan; (2) the only rights of the former interest holders of the acquired entity whose interests are affected by the interest exchange are those rights related to the exchange, conversion or cancellation; (3) the acquiring entity becomes the owner of the acquired entity's interests as provided in the plan; and (4) the organic rules of the acquired entity are amended as provided in the statement of interest exchange, thus obviating the need for repetitive filings (*i.e.*, a filing as to the entity interest exchange and another filing to reflect amendments to public organic documents as required by the laws governing the acquired entity).

2. **Section 306(c)** – Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Articles 2 (mergers), 4 (conversions), and 5 (domestications)~~, and 6 (divisions)~~. *See* Comment 6 to Section 206.

3. **Section 306(d)** – Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Articles 2 (mergers), 4 (conversions), and 5 (domestications)~~, and 6 (divisions)~~. *See* Comment 7 to Section 206.

[ARTICLE] 4

CONVERSION

SECTION 401. CONVERSION AUTHORIZED.

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

(1) a domestic entity of a different type; or

(2) a foreign entity of a different type, if the conversion is authorized by the law of the foreign jurisdiction.

(b) Except as otherwise provided in this section, by complying with the provisions of this [Article] applicable to foreign entities a foreign entity may become a domestic entity of a different type if the conversion is authorized by the law of the foreign entity's jurisdiction of organization.

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

[(d) The following entities may not engage in a conversion:

(1)

(2)]

Legislative Note: *Many states have provisions in their corporate and unincorporated entity statutes that allow conversions. These statutes, however, vary greatly. A few allow conversion of one type of entity into any other type of entity. Most, however, allow only limited types of conversions, e.g., general partnerships to limited partnerships (and limited partnerships to general partnerships) but not to all other types of entities. If a state has conversion provisions, the recommended course of action is to repeal all those statutes. See Appendix 2. The net effect*

will be that this Act will apply to all conversions. Leaving the existing conversion provisions in place will create confusion for practitioners because in some cases there will be two applicable conversion statutes, the existing conversion statute and Article 4 of this Act, but in other situations only Article 4 of this Act will apply.

Comment

1. **In General** – The procedure in this article permits an entity to change to a different type of entity. A transaction in which an entity changes its jurisdiction of organization but does not change its type is a domestication transaction and is the subject of Article 5.

2. **Conversion of a Foreign Entity into a Domestic Entity** – Subsection (b) allows a foreign entity to effectuate a conversion into a domestic entity only if the conversion is permitted by the laws of the foreign entity's jurisdiction of organization. *See* Section ~~102(22)~~ 102(21) for the definition of "jurisdiction of organization." When a foreign entity becomes a domestic entity pursuant to this article, 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 entity's jurisdiction of organization.

3. **Conversion of a Domestic Entity into a Foreign Entity** – Under subsection (a)(2) this type of conversion must be authorized by the law of the foreign jurisdiction. If this is not the case, it may be possible to achieve the same result by forming an entity of the type desired in the foreign jurisdiction and then merging the domestic entity into the new foreign entity under Article 2.

4. **Section 401(c)** – *See* Comment 4 to Section 301.

5. **Section 401(d)** – Subsection (d) is an optional provision that may be used to exclude certain types of entities from the scope of this article. A provision that excludes certain types of entities from the Act generally is set forth in Section 110.

SECTION 402. PLAN OF CONVERSION.

(a) A domestic entity may convert to a different type of entity under this [Article] by approving a plan of conversion. The plan must be in a record and contain:

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

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

(3) the manner of converting the interests in 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 proposed public organic document of the converted entity if it will be a filing entity;

(5) the full text of the private organic rules of the converted entity that are proposed to be in a record;

(6) the other terms and conditions of the conversion; and

(7) any other provision required by the law of this state or the organic rules of the converting entity.

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

Comment

1. **In General** – This section sets forth the requirements for the plan of conversion, which must be approved by the converting entity in accordance with Section 403. The content of a plan of conversion is similar to the content of a plan of merger. *See* Section 202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

2. **Section 402(a)(3)** – Interest holders in the converting entity may receive interests or other securities of the converted entity or of 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 rules may be amended in the conversion, in any way deemed appropriate.~~ *See also* Sections 202(a)(3), 302(a)(3) (interest exchange), and 503(a)(3) (domestication) ~~and 603(a)(3) (division)~~.

3. **Filing the Plan of Conversion** – The plan of conversion may, but need not, be filed instead of the statement of conversion (Section 405), so long as it contains all of the information required to be in the statement of conversion and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 405(e).

SECTION 403. APPROVAL OF CONVERSION.

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

(1) by a domestic converting entity:

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

(B) if its organic rules do not provide for approval of a conversion, in accordance with the requirements, if any, in its organic law and organic rules for approval of ~~a transaction that has the effect of~~:

(i) in the case of an entity that is not a business corporation, a merger, as if the conversion were ~~that type of transaction~~ a merger; or

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of that business corporation, as if the conversion were such a merger; or

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

(2) in a record, by each interest holder of a domestic converting entity that will have interest holder liability for liabilities that arise after the conversion becomes effective, unless, in the case of an entity that is not a business or nonprofit corporation:

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

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

(b) A conversion of a foreign converting entity is not effective unless it is approved by

the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization.

Legislative Note: *The analysis of approval requirements set forth in the Legislative Note to Section 303 should also be performed with respect to conversions.*

Comment

1. **In General** – As is the case with the other types of transactions authorized by this Act, there are three possible ways to obtain approval (~~*see*~~ defined in Section 102(3)) of a conversion by a domestic entity. The first is to determine if the organic rules (defined in Section 102~~(27)~~(28)) of the converting entity contain specific approval provisions for conversions. If they exist, then those provisions apply to approval of the plan of conversion. *See* Section 403(a)(1)(A). If there are no provisions in the organic rules for approval of a conversion, then the provisions for approval of a merger in either the organic law (defined in Section 102~~(24)~~(27)) or organic rules of the entity will apply. Section 403(a)(1)(B). If there are no approval provisions for conversions in the entity's organic rules and no approval provisions for mergers in the entity's organic law or organic rules, then unanimous consent of all the entity's interests holders is required. Section 403(a)(1)(C).

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

In the case of a foreign entity that is converting into another type of entity in this jurisdiction, the required approval is determined by the laws of the foreign entity's jurisdiction of organization. Section 403(b).

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

2. **Section 403(a)(2)** – *See* Comment 2 to Section 203 for an explanation of this interest holder liability provision.

SECTION 404. AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION.

(a) A plan of conversion of a domestic converting entity may be amended:

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

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

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

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

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

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

(1) as provided in the plan; or

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

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

statement of abandonment must contain:

(1) the name of the converting entity;

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

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

Comment

This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 5 (domestications)~~, and 6 (divisions)~~.

SECTION 405. STATEMENT OF CONVERSION; EFFECTIVE DATE.

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

(b) A statement of conversion must contain:

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

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

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

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

(5) if the converted entity is a domestic filing entity, the text of its public organic document, as an attachment; ~~and~~

(6) if the converted entity is a domestic limited liability partnership, the text of its [statement of qualification], as an attachment; and

(7) if the converted entity is a nonqualified foreign entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 406(e).

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

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

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

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

Comment

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

2. **Section 405(b)(3) and (f)** – The effective date and time of a statement of conversion are the date and time of its filing, unless otherwise specified. If a delayed effective date is

specified, the statement of conversion is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 405(b)(3).

3. **Section 405(e)** – A plan of conversion can be used as a substitute for the statement of conversion so long as the plan satisfies the requirements in subsection (e).

SECTION 406. EFFECT OF CONVERSION.

(a) When a conversion becomes effective:

(1) the converted entity is:

(A) organized under and subject to the organic law of the converted entity; and

(B) the same entity without interruption as the converting entity;

(2) all property of the converting entity continues to be vested in the converted entity without assignment, reversion, or impairment;

(3) all liabilities of the converting entity continue as liabilities of the converted entity;

(4) except as provided by law other than this [Act] or the plan of conversion, all of the rights, privileges, immunities, powers, and purposes of the converting entity remain in the converted entity;

(5) the name of the converted entity may be substituted for the name of the converting entity in any pending action or proceeding;

~~(6) unless otherwise provided by the organic law of the converting entity, the conversion does not cause the dissolution of the converting entity;~~

~~(7)~~ (6) if a converted entity is a filing entity, its public organic document is effective and is binding on its interest holders;

~~(8)~~ (7) if the converted entity is a limited liability partnership, its [statement of qualification] is effective simultaneously;

~~(9)~~ (8) the private organic rules of the converted entity that are to be in a record, if any, approved as part of the plan of conversion are effective and are binding on and enforceable by:

(A) its interest holders; and

(B) in the case of a converted entity that is not a business corporation or nonprofit corporation, any other person that is a party to an agreement that is part of the entity's private organic rules; and

~~(10)~~ (9) the interests in the converting entity are converted, and the interest holders of the converting entity are entitled only to the rights provided to them under the plan of conversion ~~[~~and to any appraisal rights they have under Section 109 and the converting entity's organic law~~]~~.

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

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

(d) When a conversion becomes effective:

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

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

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

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

(e) When a conversion becomes effective, a foreign entity that is the converted entity:

(1) may be served with process in this state for the collection and enforcement of any of its liabilities; and

(2) appoints the [Secretary of State] as its agent for service of process for collecting or enforcing those liabilities.

(f) If the converting entity is a qualified foreign entity, the certificate of authority or other foreign qualification of the converting entity is canceled when the conversion becomes effective.

(g) A conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Comment

1. **In General** – A converted entity is the same entity as it was before the conversion; it

just has a different legal form. The legal effects of this are set forth in subsection (a). The converted entity ~~automatically becomes~~ remains the owner of all real and personal property and ~~becomes~~ remains 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.

When a conversion becomes effective, the internal affairs of the converting entity are no longer governed by its former organic law but instead by the organic law of the converted entity. As a result, filings that may have been made under the organic law of the converting entity, 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.

2. **Section 406(a)(5)** – 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.

3. **Section 406(c)** – Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 5 (domestications)~~, and 6 (divisions)~~. *See* Comment 6 to Section 206.

4. **Section 406(d)** – Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 5 (domestications)~~, and 6 (divisions)~~. *See* Comment 7 to Section 206.

5. **Section 406(e)** – When a domestic converting entity becomes a foreign entity as a result of a conversion, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the converting entity. Section 406(d), which parallels analogous provisions in Articles 2 (mergers)~~,~~ and 5 (domestications), ~~and 6 (divisions),~~ authorizes service of process for all such claims in this state, and designates the Secretary of State of this state as the agent for service of process in the event the converted entity cannot be otherwise served in this state.

6. Section 406(g) – When a conversion takes effect, the entity continues to exist – simply in a different form. Section 406(g) thus makes clear that the conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

[ARTICLE] 5

DOMESTICATION

SECTION 501. DOMESTICATION AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [Article], a domestic entity may become a domestic entity of the same type in a foreign jurisdiction if the domestication is authorized by the law of the foreign jurisdiction.

(b) Except as otherwise provided in this section, by complying with the provisions of this [Article] applicable to foreign entities a foreign entity may become a domestic entity of the same type in this state if the domestication is authorized by the law of the foreign entity's jurisdiction of organization.

(c) When the term domestic entity is used in this [Article] with reference to a foreign jurisdiction, it means an entity whose internal affairs are governed by the law of the foreign jurisdiction.

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

~~[~~(e) The following entities may not engage in a domestication under this [Article]:

(1) [a business corporation – if the state has adopted Subchapter 9B of the Model Business Corporation Act];

(2)~~]~~.

Legislative Note: *~~As is pointed out in the Legislative Note to Appendix 2, it is recommended that~~*

~~*a state enacting this Act repeal any existing domestication provision from its entity laws. If that is done, then Article 5 becomes the exclusive means for an entity to engage in a domestication transaction. To the extent existing domestication provisions are retained, there may well be two different procedures for accomplishing a domestication, which will cause unnecessary confusion, particularly if there are differences between those provisions and Article 5.*~~ *Only a few states have domestication provisions in their organic laws. The only uniform or model organic law authorizing domestications is Subchapter 9B of the Model Business Corporation Act. However, since a domestication is a transaction involving entities of the same type, as opposed to a transaction involving entities of different types, it is anticipated that states may elect to keep any existing domestication provisions in their organic laws and they may decide to add domestication provisions to their other organic laws. Any domestication provisions in other organic laws should be listed in subsection (e). The net result will be that Article 5 will only apply to domestications of entities where the entity's organic law does not authorize a domestication. If a state does not have any domestication provisions in any of its organic laws, subsection (e) should be omitted.*

Comment

1. **In General** – A domestication authorized by Article 5 differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

As with a conversion, all rights and privileges, debts and liabilities, and actions or proceedings of a domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale, transfer, assignment, or conveyance and does not give rise to a claim of reverter or impairment of title.

Article 5 governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this Act. On the other hand, the organic laws of the foreign jurisdiction, and not Article 5, will govern the legal effect of a domestication of a domestic entity in another jurisdiction. In the latter scenario, Article 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Article 5 does not create a right in the domestic entity to be received in the foreign jurisdiction. Similarly, Section 501 does not provide a right on the part of a foreign entity to become a domestic entity if the domestication is not authorized by the laws of the foreign jurisdiction. If the foreign jurisdiction does not authorize a domestication transaction, a domestication can still be accomplished by forming a new entity of the same type in the new state and merging the existing entity into the new entity.

2. **Section 501(d)** – *See* Comment 4 to Section 301(d).

3. **Section 501(e)** – Subsection (e) is an optional provision that may be used to exclude certain types of entities from engaging in domestication transactions. A provision that excludes certain types of entities from the Act generally is set forth in Section 110.

SECTION 502. PLAN OF DOMESTICATION.

(a) A domestic entity may become a foreign entity in a domestication by approving a plan of domestication. The plan must be in a record and contain:

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

(2) the name and jurisdiction of organization of the domesticated entity;

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

(4) the proposed public organic document of the domesticated entity if it is a filing entity;

(5) the full text of the private organic rules of the domesticated entity that are proposed to be in a record;

(6) the other terms and conditions of the domestication; and

(7) any other provision required by the law of this state or the organic rules of the domesticating entity.

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

Comment

1. **In General** – This section sets forth the requirements for the plan of domestication, which must be approved by the domesticating entity in accordance with Section 503. The content of a plan of domestication is similar to the content of a plan of merger. *See* Section 202. Subsection (a) lists the mandatory provisions that must be in the plan. Subsection (b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

2. **Section 502(a)(3)** – Interest holders in the domesticating entity may receive interests or other securities of the domesticated entity or any other person, obligations, rights to acquire interests or other securities, cash, or other property. ~~The capitalization of the domesticated entity may be restructured in the domestication, and its organic rules may be amended in the~~

~~domestication in any way deemed appropriate.~~ *See also* ~~Sections~~ Comment 3 to Section 202(a)(3) ~~(mergers), 302(a)(3) (interest exchanges), 402(a)(3) (conversions), and 602(a)(4) (divisions)~~.

3. **Filing the Plan of Domestication** – The plan of domestication~~,~~ may, but need not, be filed instead of the statement of domestication (Section 505) so long as it contains all of the information required to be in the statement and is delivered to the Secretary of State for filing after the plan has been adopted and approved. *See* Section 505(e).

SECTION 503. APPROVAL OF DOMESTICATION.

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

(1) by a domestic domesticating entity:

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

(B) if its organic rules do not provide for approval of a domestication, in accordance with the requirements, if any, in its organic law and organic rules for approval of ~~a transaction that has the effect of~~:

(i) in the case of an entity that is not a business corporation, a merger, as if the domestication were ~~that type of transaction~~ a merger; or

(ii) in the case of a business corporation, a merger requiring approval by a vote of the interest holders of that business corporation, as if the domestication were such a merger; or

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

(2) in a record, by each interest holder of a domestic domesticating entity that will have interest holder liability for liabilities that arise after the domestication becomes

effective, unless, in the case of an entity that is not a business corporation or nonprofit corporation:

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

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

(b) A domestication of a foreign domesticating entity is not effective unless it is approved in accordance with the law of the foreign entity's jurisdiction of organization.

Legislative Note: *The analysis of approval requirements set forth in the Legislative Note to Section 303 should also be performed with respect to domestications.*

Comment

1. **Section 503(a)** – As is the case with the other types of transactions authorized by this Act, there are three possible ways to obtain approval (~~*see*~~ defined in Section 102(3)) of a domestication by a domestic entity. The first is to determine if the organic rules (defined in Section 102~~(27)~~(28)) of the domesticating entity contain specific approval provisions for a domestication. If they exist, then those provisions apply to approval of the plan of domestication. Section 503(a)(1)(A). If there are no domestication approval provisions, then the approval process for a merger in either the entity's organic law (defined in Section 102~~(26)~~(27)) or organic rules will apply. Section 503(a)(1)(B). If there are no specific domestication approval provisions in the entity's organic rules and no merger approval provisions in the entity's organic law or organic rules, then unanimous consent of all the entity's interest holders is required. Section 503(a)(1)(C).

In the case of a foreign entity that is domesticating in this state, the required approval is determined by the laws of the foreign entity's jurisdiction of organization. Section 503(b).

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

If approval of a domestication occurs under subsection (a)(1)(B), the approval provisions for mergers that will apply will not include provisions on "short-form" mergers. A short-form

merger involves a merger between a subsidiary and a parent that controls a large majority of the interests in the subsidiary (typically at least 80 or 90%). In those cases, the parent is permitted to merge with the subsidiary without the need for the governors or interest holders of the subsidiary to approve the merger. Because a domestication is a single-party transaction, short-form merger procedures are inapposite and it was not considered necessary to confirm that in the statutory text (unlike in the case of interest exchanges, which are two-party transactions – *see* Section 303(d)).

2. **Section 503(a)(2)** – *See* Comment 2 to Section 203 for an explanation of this interest holder liability provision.

SECTION 504. AMENDMENT OR ABANDONMENT OF PLAN OF DOMESTICATION.

(a) A plan of domestication of a domestic domesticating entity may be amended:

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

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

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

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

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

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

(1) as provided in the plan; or

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

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

(1) the name of the domesticating entity;

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

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

Comment

This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 4 (conversions)~~, and 6 (divisions)~~.

SECTION 505. STATEMENT OF DOMESTICATION; EFFECTIVE DATE.

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

(b) A statement of domestication must contain:

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

(2) the name and jurisdiction of organization of the domesticated entity;

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

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

(5) if the domesticated entity is a domestic filing entity, its public organic document, as an attachment; ~~and~~

(6) if the domesticated entity is a domestic limited liability partnership, its [statement of qualification], as an attachment; and

(7) if the domesticated entity is a nonqualified foreign entity, a mailing address to which the [Secretary of State] may send any process served on the [Secretary of State] pursuant to Section 506(e).

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

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

(e) A plan of domestication that is signed on behalf of a domesticating domestic entity and meets all of the requirements of subsection (b) may be filed with the [Secretary of State] instead of a statement of domestication and upon filing has the same effect. If a plan of

domestication is filed as provided in this subsection, references in this [Act] to a statement of domestication refer to the plan of domestication filed under this subsection.

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

Comment

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

2. **Section 505(b)(3) and (e)** – The effective date and time of a statement of domestication are the date and time of its filing, unless otherwise specified. If a delayed effective date is specified, the statement of domestication is effective on that date and time, subject to the 90 day maximum delayed effective date in Section 505(b)(3).

3. **Section 505(e)** – A plan of domestication can be used as a substitute for the statement of domestication so long as the plan satisfies the requirements in subsection (e).

SECTION 506. EFFECT OF DOMESTICATION.

(a) When a domestication becomes effective:

(1) the domesticated entity is:

(A) organized under and subject to the organic law of the domesticated entity; and

(B) the same entity without interruption as the domesticating entity;

(2) all property of the domesticating entity continues to be vested in the domesticated entity without assignment, reversion, or impairment;

(3) all liabilities of the domesticating entity continue as liabilities of the domesticated entity;

(4) except as provided by law other than this [Act] or the plan of domestication,

all of the rights, privileges, immunities, powers, and purposes of the domesticating entity remain in the domesticated entity;

(5) the name of the domesticated entity may be substituted for the name of the domesticating entity in any pending action or proceeding;

~~(6) unless otherwise provided by the organic law of the domesticating entity, the domestication does not cause the dissolution of the domesticating entity;~~

~~(7)~~ (6) if the domesticated entity is a filing entity, its public organic document is effective and is binding on its interest holders;

~~(8)~~ (7) if the domesticated entity is a limited liability partnership, its [statement of qualification] is effective simultaneously;

~~(9)~~ (8) the private organic rules of the domesticated entity that are to be in a record, if any, approved as part of the plan of domestication are effective and are binding on and enforceable by:

(A) its interest holders; and

(B) in the case of a domesticated entity that is not a business corporation or nonprofit corporation, any other person that is a party to an agreement that is part of the domesticated entity's private organic rules; and

~~(10)~~ (9) the interests in the domesticating entity are converted to the extent and as approved in connection with the domestication, and the interest holders of the domesticating entity are entitled only to the rights provided to them under the plan of domestication ~~[~~and to any appraisal rights they have under Section 109 and the domesticating entity's organic law~~]~~.

(b) Except as otherwise provided in the organic law or organic rules of the domesticating entity, the domestication does not give rise to any rights that an interest holder, governor, or third

party would otherwise have upon a dissolution, liquidation, or winding-up of the domesticating entity.

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

(d) When a domestication becomes effective:

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

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

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

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

(e) When a domestication becomes effective, a foreign entity that is the domesticated entity:

(1) may be served with process in this state for the collection and enforcement of any of its liabilities; and

(2) appoints the [Secretary of State] as its agent for service of process for collecting or enforcing those liabilities.

(f) If the domesticating entity is a qualified foreign entity, the certificate of authority or other foreign qualification of the domesticating entity is canceled when the domestication becomes effective.

(g) A domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Comment

1. **Section 506(a)(1)** – The domesticated entity is the same entity as the domesticating entity; it has merely changed its jurisdiction of organization.

2. **Section 506(a)(2)** – A domestication is not a sale, conveyance, transfer, or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment, or conveyance.

3. **Section 506(a)(4)** – All pending proceedings involving the domesticating entity are continued. The name of the domesticated entity may be, but need not be, substituted in any pending proceeding for the name of the domesticating entity.

4. **Section ~~506(a)(10)~~ 506(a)(9)** – The interests of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and the interest holders of the domesticating entity are only entitled to those rights. Section ~~506(a)(10)~~ 506(a)(9), on its face, allows certain owners in the domesticating entity to be entitled to a continuing equity interest in the domesticated entity whereas other owners in the domesticating entity may be cashed out as a result of the transaction.

5. **Section 506(c)** – Subsection (c) provides the rule for future interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 4 (conversions)~~, and 6 (divisions)~~. *See* Comment 6 to Section 206.

6. **Section 506(d)** – Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), and 4 (conversions)~~, and 6 (divisions)~~. *See* Comment 7 to Section 206.

7. **Section 506(e)** – When a domestic domesticating entity becomes a foreign entity as a result of a domestication, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the domesticating entity. Section 506(d), which parallels analogous provisions in Articles 2 (mergers)~~,~~ and 4 (conversions), ~~and 6 (divisions),~~ authorizes service of process for all such claims in this state, and designates the Secretary of State of this state as the agent for service of process in the event the domesticated entity cannot be otherwise served in this state.

8. Section 506(g) – When a domestication takes effect, the entity continues to exist – simply as a domestic entity under the laws of a different state. Section 506(g) thus makes clear that the domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

~~**[ARTICLE] 6**~~

~~**[DIVISION]**~~

[ARTICLE] ~~7~~ 6

MISCELLANEOUS PROVISIONS

SECTION ~~701~~ 601. CONSISTENCY OF APPLICATION. In applying and construing this [Act], consideration must be given to the need to promote consistency of the law with respect to its subject matter among states that enact it.

SECTION ~~702~~ 602. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et seq.), but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

SECTION ~~703~~ 603. CONFORMING AMENDMENTS AND REPEALS. [See Appendix 2.]

~~**SECTION 704. EFFECTIVE DATE.** This [Act] takes effect [January 1, 20__.]~~

SECTION ~~705~~ 604. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before the effective date of this [Act].

SECTION 605. EFFECTIVE DATE. This [Act] takes effect [January 1, 20__.]

APPENDIX 1

FILINGS

Introductory Comment to Appendix 1

This appendix provides a set of optional provisions dealing with the manner in which filings under this Act are to be processed by the Secretary of State. The provisions in this appendix will not be needed in those enacting states where this Act is integrated into a code of organic laws that already contains provisions similar to this appendix. If this Act is not integrated into such a code of organic laws, however, there may not be provisions similar to this appendix that will apply to filings under this Act.

The provisions in this appendix are patterned after the filing provisions in the Model Business Corporation Act. States enacting this appendix should conform its provisions to their particular filing requirements and any existing provisions on filings in their organic laws.

SECTION A1-1. REQUIREMENTS FOR DOCUMENTS.

(a) To be entitled to filing by the [Secretary of State], a document must satisfy the following requirements and the requirements of any other provision of this [Act] that adds to or varies these requirements:

(1) This [Act] requires or permits filing the document in the office of the [Secretary of State].

(2) The document contains the information required by this [Act] and may contain other information.

(3) The document is in a record.

(4) The document is in the English language, but the name of an entity need not be in English if written in English letters or Arabic or Roman numerals.

(5) The document is signed:

(A) by an officer of a domestic or foreign corporation;

(B) by a person authorized by a domestic or foreign entity that is not a

corporation; or

(C) if the entity is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(6) The document must state the name and capacity of the person that signed it. The document may contain a corporate seal, attestation, acknowledgment, or verification.

(7) The document must be delivered to the office of the [Secretary of State] for filing. Delivery may be made by electronic transmission if and to the extent permitted by the [Secretary of State]. If a document is filed in typewritten or printed form and not transmitted electronically, the [Secretary of State] may require one exact or conformed copy to be delivered with the document.

(b) When a document is delivered to the office of the [Secretary of State] for filing, the correct filing fee, and any franchise tax, license fee, or penalty required to be paid therewith by this [Act] or other law must be paid or provision for payment made in a manner permitted by the [Secretary of State].

Comment

1. **Form of documents.**

A document may be filed in typewritten or printed form through physical delivery to the Secretary of State or by electronic transmission. Electronic transmission includes the evolving methods of electronic delivery, including facsimile transmissions, electronic transmissions between computers via modems and filings through delivery of magnetic tapes or computer diskettes, all as may be permitted by the Secretary of State. To be eligible for filing, a document must be typed or printed or electronically transmitted in a format that can be retrieved or reproduced in typewritten or printed form and in the English language (except to the limited extent permitted by subsection (a)(4)). The Secretary of State is not authorized to prescribe forms (except to the extent permitted by Section A1-2) and as a result may not reject documents on the basis of form (*see* Section A1-6) if they contain the information called for by the specific statutory requirement and meet the minimal formal requirements of this section.

2. **Signature.**

To be filed a document must be signed by the appropriate person. No specific officer is designated as the appropriate person to sign in the case of a corporation. Similarly, an unincorporated entity is given the authority to designate the person to sign on its behalf. *See* Section ~~102(36)~~ 102(35) for a description of the manner in which a document may be "signed."

The requirement in some state statutes that documents must be acknowledged or verified as a condition for filing has been eliminated. These requirements serve little purpose in connection with documents filed under organic laws. On the other hand, many organizations, like lenders or title companies, may desire that specific documents include acknowledgements, verifications, or seals; subsection (a)(6) therefore provides that the addition of these forms of execution does not affect the eligibility of the document for filing.

3. **Contents.**

A document must be filed by the Secretary of State if it contains the information required by this Act. The document may contain additional information or statements and their presence is not ground for the Secretary of State to reject the document for filing. These documents must be accepted for filing even though the Secretary of State believes that the language is illegal or unenforceable. In view of this very limited discretion granted to Secretaries of State under this section, Section A1-6(d) defines the Secretary of State's role as "ministerial" and provides that no inference or presumption arises from the fact that the Secretary of State accepted a document for filing. *See* the Comments to Sections A1-6 and A1-8.

4. **Number of copies.**

The Secretary of State is permitted to require an exact or conformed copy if the document is being filed in typewritten or printed form, providing the secretary of state flexibility to determine whether or not such copies serve any purpose. There is no such requirement with respect to documents transmitted electronically. Under subsection (a)(7) an "exact" copy is a reproduction of the executed original document; a "conformed" copy is a copy on which the existence of signatures is entered or noted on the copy.

SECTION A1-2. FORMS. The [Secretary of State] may prescribe and furnish on request forms for documents required or permitted to be filed by this [Act] but their use is not mandatory.

Comment

As described in the Comments to Section A1-1, documents are entitled to filing if they meet the substantive and formal requirements of this Act; they may also contain additional information if the person submitting the document so elects. In these circumstances it is not

appropriate to vest the Secretary of State with general authority to establish mandatory forms for use under the Act. This section authorizes (but does not require) the Secretary of State to prepare forms suitable for filing under the Act. However, the use of these forms is permissive and cannot be required by the Secretary of State.

SECTION A1-3. FILING, SERVICE, AND COPYING FEES.

(a) The [Secretary of State] shall collect a fee of $___ each time process is served on the [Secretary of State] under this [Act]. The party to a proceeding causing service of process may recover this fee as costs if the party prevails in the proceeding.

(b) The [Secretary of State] shall collect the following fees for copying and certifying the copy of any document filed under this [Act]:

(1) $____ a page for copying; and

(2) $____ for the certificate.

(c) 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 interest exchange……..... $____

(4) Statement of abandonment of interest exchange……..... $____

(5) Statement of conversion ..... $____

(6) Statement of abandonment of conversion……..... $____

(7) Statement of domestication ..... $____

(8) Statement of abandonment of domestication……..... $____

~~(9) Statement of division..... $____~~

~~(10) Statement of abandonment of division..... $____~~

Comment

This section establishes the filing fees for all documents that may be filed under the Act. The dollar amounts for each document should be inserted by each state as it adopts the Act.

Subsection (b) establishes standard fees for copying filed documents and certifying that the copies are true copies. The dollar amounts for these services should be conformed to the fees charged for similar services under other provisions of law.

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."

SECTION A1-4. EFFECTIVE TIME AND DATE OF DOCUMENT. Except as provided in Section A1-5, a document accepted for filing is effective:

(1) at the date and time of filing, as evidenced by the means used by the [Secretary of State] for recording the date and time of filing;

(2) at the time specified in the document as its effective time on the date it is filed;

(3) at a specified delayed effective time and date if permitted by this [Act]; or

(4) if a delayed effective date but no time is specified, at the close of business on the date specified.

Comment

Documents accepted for filing become effective at the date and time of filing, or at another specified time on that date, unless a delayed effective date is selected. This section gives express statutory authority to the common practice of most Secretaries of State of ignoring processing time and treating a document as effective as of the date it is submitted for filing even though it may not be reviewed and accepted for filing until several days later.

This section requires Secretaries of State to maintain some means of recording the date and time of filing of documents and provides that documents become effective at the recorded time on the date of filing. This provision should eliminate any doubt about situations involving same-day transactions in which a document, for example, a statement of merger, is filed on the morning of the date the merger is to become effective. This section contemplates that the time of

filing, as well as the date, will be routinely recorded.

Paragraph (3) does not authorize or contemplate the retroactive establishment of an effective date before the date of filing.

SECTION A1-5. CORRECTING FILED DOCUMENT.

(a) A domestic or foreign entity may correct a document filed by the [Secretary of State] if:

(1) the document contains an inaccuracy;

(2) the document was defectively signed; or

(3) the electronic transmission of the document to the [Secretary of State] was defective.

(b) A document is corrected by filing with the [Secretary of State] a statement of correction that:

(1) describes the document to be corrected and states its filing date or has attached a copy of the document;

(2) specifies the inaccuracy or defect to be corrected; and

(3) corrects the inaccuracy or defect.

(c) A statement of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, a statement of correction is effective when filed.

Comment

This section permits making corrections in filed documents without refiling the entire document. Under subsection (c), the correction relates back to the original effective date of the document being corrected, except as to persons relying on the original document and adversely affected by the correction. As to these persons, the effective date of the statement of correction is the date the statement is filed.

A document may be corrected either because it contains an inaccuracy or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original document for filing). In addition, the document may be corrected if its electronic transmission was defective. This is intended to cover the situation where an electronic filing is made but, due to a defect in transmission, the filed document is later discovered to be inconsistent with the document intended to be filed. If no filing is made because of a defect in transmission, a statement of correction may not be used to make a retroactive filing. Therefore, an entity making an electronic filing should take steps to confirm that the filing was received by the Secretary of State.

A provision in a document setting an effective date may be corrected under this section, but the corrected effective date must comply with the requirements of this Act limiting delayed effective dates to within 90 days after filing. A corrected effective date is thus measured from the date of the original filing of the document being corrected, *i.e.*, it cannot be before the date of filing of the document or more than 90 day thereafter.

SECTION A1-6. FILING DUTY OF [SECRETARY OF STATE].

(a) A document delivered to the office of the [Secretary of State] for filing that satisfies the requirements of Section A1-1 must be filed by the [Secretary of State].

(b) The [Secretary of State] files a document by recording it as filed on the date and time of receipt. After filing a document, the [Secretary of State] shall deliver to the domestic or foreign entity or its representative a copy of the document with an acknowledgement of the date and time of filing.

(c) If the [Secretary of State] refuses to file a document, the [Secretary of State] shall return the document to the domestic or foreign entity or its representative within five days after the document was delivered, together with a brief, written explanation of the reason for the refusal.

(d) The duty of the [Secretary of State] to file documents under this section is ministerial. The filing or refusal to file a document does not:

(1) affect the validity or invalidity of the document in whole or in part;

(2) relate to the correctness or incorrectness of information contained in the document; or

(3) create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

Comment

1. **Filing duty in general.**

Under this section the Secretary of State is required to file a document if it "satisfies the requirements of Section A1-1." The purpose of this language is to limit the discretion of the Secretary of State to a ministerial role in reviewing the contents of documents. If the document submitted is in the form prescribed and contains the information required by Section A1-1 and the applicable provision of this Act, the Secretary of State must file it even though it contains additional provisions the Secretary of State may feel are irrelevant or not authorized by the Act or by general legal principles. Consistently with this approach, subsection (d) states that the filing duty of the Secretary of State is ministerial and provides that filing a document with the Secretary of State does not affect the validity or invalidity of any provision contained in the document and does not create any presumption with respect to any provision. Persons adversely affected by provisions in a document may test their validity in a proceeding appropriate for that purpose. Similarly, the attorney general of the state may also question the validity of provisions of documents filed with the Secretary of State in an independent suit brought for that purpose; in neither case should any presumption or interference be drawn about the validity of the provision from the fact that the Secretary of State accepted the document for filing.

2. **Mechanics of filing.**

Subsection (b) provides that when the Secretary of State files a document, the Secretary of State records it as filed on the date and time of receipt, retains the original document for the state's records, and delivers a copy of the document to the entity or its representative with an acknowledgement of the date and time of filing. In the case of a document transmitted electronically, delivery may be made by electronic transmission. The copy returned will be the exact or conformed copy if one has been required by the Secretary of State, or will be a copy made by the Secretary of State if an exact of conformed copy was not required. Of course, a person desiring a certified copy of any filed document may obtain it from the office of the Secretary of State by paying the fee prescribed in Section A1-3(b).

3. **Elimination of certificates and similar documents.**

Subsection (b) provides that acceptance of a filing is evidenced merely by the issuance of a fee receipt or acknowledgement of receipt if no fee is required. The Act does not provide for the Secretary of State to issue a formal certificate of filing. A single document – the fee receipt

or acknowledgement – should sufficiently indicate that the document has been accepted for filing.

4. **Rejection of document by Secretary of State.**

Because of the simplification of formal filing requirements and the limited discretion granted to the Secretary of State by this Act, it is probable that rejection of documents for filing will occur only rarely. Subsection (c) provides that if the Secretary of State does reject a document for filing, the Secretary of State must return it to the entity or its representative within five days together with a brief written explanation of the reason for rejection. In the case of a document transmitted electronically, rejection of the document may be made electronically by the Secretary of State or by a mailing to the entity. A rejection may be the basis of judicial review under Section A1-7.

SECTION A1-7. APPEAL FROM REFUSAL TO FILE A DOCUMENT.

(a) If the [Secretary of State] refuses to file a document delivered for filing, the domestic or foreign entity that submitted the document for filing may appeal the refusal within 30 days after the return of the document to the [name or describe] court [of the county where the entity's principal office (or, if none in this state, its registered office) is or will be located] [of _____ county]. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the explanation of the [Secretary of State] for the refusal to file.

(b) The court may summarily order the [Secretary of State] to file the document or take other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings.

Comment

1. **The court with jurisdiction to hear appeals from the Secretary of State**

The identity of the specific court with jurisdiction to hear appeals from the Secretary of State under this section must be supplied by each state when enacting this section. It is intended that this should be a court of general civil jurisdiction. It may either be the court located in the capital of the state or the court in the county where the entity's principal business office is

located in the state or, if the entity does not have a principal office in the state, the court located in the county in which its registered office is located.

2. "**Summary" orders.**

In view of the limited discretion of the Secretary of State under the Act, a "summary" order appears to be appropriate under this section. The word "summary" is not used in a technical sense but to refer to a class of cases where the court might appropriately order that action be taken on the face of the pleadings or after an oral hearing but without any need to resolve disputed factual issues.

3. **Burden of proof and review standard.**

The Act does not address either the burden of proof or the standard for review in judicial proceedings challenging action of the Secretary of State. It is contemplated that these matters will be governed by general principles of judicial review of agency action in each adopting state.

SECTION A1-8. EVIDENTIARY EFFECT OF COPY OF FILED DOCUMENT.

A certificate from the [Secretary of State], delivered with a copy of a document filed by the [Secretary of State], conclusively establishes that the original document is on file with the [Secretary of State].

Comment

The Secretary of State may be requested to certify that a specific document has been filed upon payment of the fees specified in Section A1-3(c). This section provides that the certificate is conclusive evidence only that the document is on file. The limited effect of the certificate is consistent with the ministerial filing obligation imposed on the Secretary of State under the Act. The certificate from the Secretary of State, as well as the copy of the document, may be delivered by electronic transmission.

SECTION A1-9. PENALTY FOR SIGNING FALSE DOCUMENT. A person commits a [_____] misdemeanor [punishable by a fine of not to exceed $___] if the person signs a document the person knows is false in any material respect with intent that the document be delivered to the [Secretary of State] for filing.

Comment

This section makes it a criminal offense for any person to sign a document that he knows is false in any material respect with intent that the document be submitted for filing to the secretary of state. As provided in Section ~~102(36),~~ 102(35), "sign" includes any manual, facsimile, conformed or electronic signature.

This section is keyed to the classification of offenses provided by the Model Penal Code. If a state has not adopted this classification, the dollar amount of the fine should be substituted for the misdemeanor classification.

SECTION A1-10. POWERS OF [SECRETARY OF STATE]. The [Secretary of State] has the power reasonably necessary to perform the duties required by this [Act].

Comment

This section is intended to grant the Secretary of State the authority necessary for the efficient performance of the filing and other duties imposed by the Act, but is not intended to provide general authority to establish public policy. The most important aspects of modern organic laws relate to the creation and maintenance of relationships among persons interested in or involved with an entity; these relationships basically should be a matter of concern to the parties involved and not subject to regulation or interpretation by the Secretary of State.

APPENDIX 2

CONFORMING AMENDMENTS AND REPEALS

Legislative Note: *This appendix provides a guide for amendments, repeals, and additions that must be made to existing statutes when the Act (referred to as META in the balance of this Legislative Note to differentiate it from the other acts referred to) is enacted in a particular state. This is a complex task because of the wide variation in current state statutes with respect to the types of entities that can engage in one or more of the transactions authorized by ~~the Act~~ META.*

1. Step One: Identify Existing Laws

The first step that must be taken is to identify all of the existing statutory provisions that allow for same-type (all of the entities involved are the same, e.g., a merger between two corporations) and cross-type (more than one type of entity is involved in the transaction, e.g., a merger between a corporation and a partnership), mergers, interest exchanges, conversions, and domestications for any kind of entity. An entity is defined in Section 102 to include all types of partnerships (general partnerships, limited liability partnerships, limited partnerships, and limited liability limited partnerships), limited liability companies, all types of corporations (including non-profit corporations, close corporations in those states that have separate statutes for close corporations, and professional corporations), business trusts, cooperatives, and unincorporated nonprofit associations (at least in states that have the Uniform Unincorporated Nonprofit Associations Act or have statutes that allow an unincorporated nonprofit organization to hold property in its own name). Many states have statutes governing other types of business organizations. Texas, for example, has special statutory provisions for real estate investment trusts (in most other states, REITs would be considered a type of business trust). These special types of entities should also be included in the review process.

2. Step Two: Analyze Existing Laws

The next step is to analyze the overall existing statutory framework for same-type and cross-type transactions. This analysis will reveal that there are gaps in coverage for many of the types of transactions covered by the Act, either directly or by default, even in those states that have adopted Chapter 9 and 11 of the Model Business Corporation Act and the uniform unincorporated organization acts.

Every state will have provisions for mergers of corporations into other corporations but not all states authorize interest exchanges between corporations (the corporate statutes generally refer to these as share exchanges) and only a few states specifically authorize corporations to enter into merger or interest exchange transactions with other types of organizations. Moreover, very few existing corporate statutes have provisions for ~~divisions or~~ conversions of corporations into other types of entities or authorize corporations to domesticate in another state.

The same-type and cross-type landscape with respect to unincorporated entities is even less complete. The Uniform Partnership Act (1997) (RUPA), which has been adopted in approximately 2/3 of the states (and in the District of Columbia, Puerto Rico and the Virgin Islands) only authorizes mergers and conversions of general partnerships and limited partnerships. It does not allow conversions into any other type of entity or mergers with any other type of entity; nor does it authorize interest exchange~~,~~ or domestication ~~or division~~ transactions. Several states that have adopted RUPA have provisions allowing same-type and cross-type conversions and mergers of general partnerships with not only limited partnerships but also with corporations and limited liability companies; and a few RUPA states have expanded the list to include any business entity (it is unclear in many of these states, however, whether these statutes apply to non-profit entities). With the exception of Ohio, which authorizes mergers and consolidations of general partnerships with other partnerships and "other domestic or foreign entities," there are apparently no same-type or cross-type provisions in the general partnership statutes of the approximately one-third of the states that still have the 1914 Uniform Partnership Act.

The statutory framework for limited partnership same-type and cross-type transactions is also quite varied. Most states have the Uniform Limited Partnership Act (1976 with 1985 Amendments). That ~~Act~~ act has no provisions dealing with merger, interest exchange, conversion, or domestication ~~or division~~ transactions. According to Volume 6A of Uniform Laws Annotated (Supp. 2004), 19 states have adopted provisions authorizing limited partnerships to merge with or convert into some other types of entities. Arizona, for example, only authorizes limited partnerships to convert into general partnerships, but also authorizes limited partnerships to merge with any other type of business entity. Some states allow conversions of limited partnerships into limited liability companies and a few states expand the conversion list to include corporations; most also allow mergers of limited partnerships into other limited partnerships and some other types of entities. Several states appear to exclude non-profit organizations, business trusts, and cooperatives from their cross-form list.

As of ~~August 2005~~ November 2006, the Uniform Limited Partnership Act (2001) ~~has~~ had been adopted in~~ Florida, North Dakota, Hawaii, Iowa, Minnesota, and Illinois~~ ten states. It authorizes a conversion of a limited partnership into any other type of organization, conversion of any other organization into a limited partnership, a merger of a limited partnership with any other type of organization and a domestication (which is a type of conversion under ULPA (2001)). It does not, however, have any specific provisions for interest exchanges ~~or divisions~~.

Most limited liability company statutes have provisions authorizing mergers and conversions, although the scope of coverage is quite varied. The Uniform Limited Liability Company Act (1997) (ULLCA), which has been adopted in eight states and the Virgin Islands, authorizes the conversion of a limited liability company into a general or limited partnership (but not into a corporation or any other type of entity) and a merger of a limited liability company with other limited liability companies or any "other domestic or foreign entities." ULLCA does not, however, have any provisions authorizing limited liability companies to enter into interest exchange~~,~~ or domestication ~~or division~~ transactions. In the other 42 states there are

substantial differences from the ULLCA scheme with respect to same-type and cross-type transactions. *The recently-adopted revised Uniform Limited Liability Company Act (2006) authorizes cross-type mergers and conversions, but does not provide for interest exchanges or domestications.*

There are no same-type or cross-type provisions in the Uniform Unincorporated Nonprofit Associations Act. Moreover, there are very few same-type or cross-type provisions in statutes governing all the other types of entities that exist under state law. There are some exceptions, however, such as the Delaware Statutory Trust Act which allows mergers and conversions of business trusts into other entities, and the Minnesota cooperative statute which allows farm cooperatives to convert into limited liability companies.

3. Step Three: Prepare Amendments and Repeals

Once the analysis of the existing same-type and cross-type statutes has been made, decisions need to be made as to which ones should be amended or repealed and whether to add additional provisions to these statutes. Under META, if the statute governing an entity has same-type provisions, those provisions govern the transaction in question. META provides default rules, however, if the other applicable entity statute has no same-type provisions for the transaction in question. META also applies to cross-type transactions (but defaults to applicable state entity law for approval requirements and the like). In deciding how to amend, repeal or add to the existing entity statutes, achieving two goals should be paramount:

1. avoiding any potential inconsistency between META's provisions and similar provisions in the state's entity statutes; and

2. making the interplay between META and the state's various entity laws relatively easy to navigate.

There are ~~two ways a statute could~~ at least four ways to achieve these goals.

~~*(a) Limit the Act to Cross-Type Transactions*~~

~~*One method to achieve these goals would be to delete from any existing entity statutes provisions that deal with cross-type transactions and add same-type merger, interest exchange, domestication, and division provisions to every type of entity statute that does not currently have these provisions. Thus all same-type entity transactions would be governed by the state's entity statutes and all cross-type transactions would be governed by META. This approach will require a large number of changes to existing entity statutes in most states because same-type merger, interest exchange, conversion, domestication, and division provisions would have to be added to the state's entity statutes, including its unincorporated nonprofit, cooperative, and business trust statutes.*~~

~~(b)~~ (a) Limit Existing Laws to Same-Type ~~Mergers~~ Transactions

~~A second~~ One method, which ~~reduces somewhat the number of state entity laws that have to be amended is,~~ it is anticipated will be the method chosen by most states, is as follows:

1. *With respect to the state's corporation statutes:*

   ~~a.~~ (i) *Repeal any cross-type provisions from the state's corporation merger statutes. The amendments necessary for this purpose in a state that has adopted the Model Business Corporation Act and the Model Nonprofit Corporation Act are found in Sections A2-1 and A2-2, respectively, In states whose corporate codes do not have any cross-type merger provisions no amendments to the state's corporate merger provisions will be necessary. Most state also may not have interest exchange provisions in their corporate codes. If that is the case, same-type provisions for interest exchanges do not need to be added to the corporate codes because under META the requirements for approval of a merger and other rights that a shareholder would have in a merger, for example, dissenters' rights, apply. See Sections 203(a) (mergers) and 303(a) (interest exchange).*

   ~~b.~~ (ii) *Repeal any conversion provisions in the state's corporation statutes. Article 3 of META will, therefore, govern all conversions.*

   ~~c.~~ (iii) ~~*Repeal*~~ *Retain any ~~domestications~~ existing domestication provisions in the ~~corporate statutes, unless the state has domestication provisions in all of its entity statutes, which is very unlikely to be the case, except possibly in Delaware. See Section A2-1(b) (repeal of domestication provisions in the Model Business Corporation Act). Under Section 503(a), the approval requirements for a merger apply to a domestication, which is the rule in the Model Business Corporation Act domestication provisions and, presumably, in all other existing state entity domestication provisions~~. state's organic laws. As is pointed out in the Legislative Note to META Section 501, these entity specific domestication provisions will be listed in Section 501(e) with the result being that Article 5 of META will apply to those types of entities whose organic laws do not already have domestication provisions.*

   ~~*d. If the state corporation codes have any division provisions, and very few do, limit them to divisions where the dividing entity and the resulting entities are all the same type of entity.*~~

2. *With respect to the state's other entity statutes:*

   (i) *Amend all the merger, interest exchange, and conversion~~, domestication, and division~~ provisions in the state's other entity statutes by stripping out all of the cross-type provisions in the merger provisions, and by repealing*

any interest exchange, or conversion~~, domestication, and division~~ provisions. Any existing domestication provisions would be retained and an appropriate reference to those provisions would be included in Section 501(e). The appropriate amendments for states that have adopted the Uniform Partnership Act (1997), the Uniform Limited Partnership Act (2001), the Uniform Limited Liability Company Act (1996) or the ABA Prototype Limited Liability Company Act are found in Sections A2-3, A2-4, A2-5, and A2-6, respectively.

(ii) The existing requirements for approval of mergers, interest exchanges, conversions, domestications, and amendment of the organic rules in the state's existing organic laws for unincorporated entities need to be carefully reviewed. If they require unanimity (or they are silent on what vote is required), then the suggested amendments in this appendix will make all the voting requirements for both same-type and cross-type transactions involving unincorporated entities consistent. The situation is more complicated, however, if there is not complete consistency among those organic laws; for example, as is sometimes the case, if the state's partnership statutes require unanimity but its LLC statute requires only a majority vote for some or all transactions. If there is not complete consistency, decisions will need to be made whether to retain the differences or to make all of the voting requirements either unanimous or majority. Other issues that will need to be resolved are what the appropriate vote should be for transactions other than mergers (i.e., interest exchanges, conversions, and domestications) where there are no existing voting provisions other than for mergers; what is the appropriate voting requirement for a transaction under META where an unincorporated entity organic law does not have any same-type or cross-type provisions for that type of transaction; and how the voting requirements under META relate to the vote required to amend an unincorporated entity's organic rules. Once this analysis is completed, it will be possible to construct the appropriate amendments to the state's existing unincorporated entity organic laws.

(b) Limit META to Cross-Type Transactions

A second method of integrating META with a state's organic laws is to delete from the existing organic laws any provisions that deal with cross-type transactions and add same-type merger and interest exchange, and domestication provisions to every organic law that does not currently have these provisions. Thus all same-type entity transactions would be governed by the state's organic laws and all cross-type transactions would be governed by META. This approach will require a large number of changes to existing organic laws in most states because same-type merger and interest exchange, and domestication provisions would have to be added to many of the state's organic laws, including its unincorporated nonprofit, cooperative, and business trust statutes. Article 5 of META would also not be enacted because the organic laws

for each type of entity would have domestication provisions.

(c) Make META the Exclusive Statute for Both Same-type and Cross-type Transactions

A third method to integrate META with a state's existing organic laws is to repeal all the existing same-type and cross-type transaction provisions in all of the organic laws and add to META all the corporate merger approval and related statutory provisions such as dissenters rights, as well as substantially modifying Sections 203, 303, 403, and 503 so that there will be one set of approval provisions for a corporation engaging in a META transaction and a second set of approval provisions for unincorporated entities engaging in a META transaction. Making all of these modifications will be a monumental task.

(d) Have META Apply to a Corporation Engaging in a Cross-type Transaction and be the Exclusive Statute for Both Same-type and Cross-type transactions for Unincorporated Entities

A fourth method to integrate META with a state's existing organic laws could be achieved by repealing any provisions for cross-type transactions from the corporation laws (see Sections A2-1 and A2-2 for the appropriate amendments in a state that has enacted the Model Business Corporation Act and the Model Nonprofit Corporation Act) and, in addition by repealing all of the provisions for same-type and cross-type transactions in all of the state's unincorporated entity organic laws. This approach, which is a variant of (c), avoids the problem of incorporating the corporation law voting requirements and related provisions such as appraisal rights. It will work best, however, in a state where all of the existing unincorporated entity organic laws require unanimity for approval of a merger or similar transaction (and where unanimity is also required to amend each type of entity's organic rules), since that is the ultimate default rule in META. This approach will be quite cumbersome if the state's unincorporated entity organic laws require less than unanimous consent for some types of entities, because the less than unanimous approval requirements would have to be incorporated into META.

4. Step Four: Add appropriate cross references.

Finally, this appendix suggests that a reference to META should be placed in the state's entity statutes specifying the transactions that are governed by META. As an alternative to the statutory references proposed in this appendix, legislative notes could be used in those states that follow that practice. A note would be placed in the corporate statutes at the end of the merger ~~provisions (which also include~~ and share exchange provisions~~) conversions, domestication provisions and division provisions~~ stating that META is the primary statute that applies to reorganization transactions involving a corporation and another form of entity. For other entities ~~which~~ whose organic laws have merger provisions, the legislative notes would appear at the end of those provisions stating META is the primary statute for any cross-type merger involving that type of entity and also is the primary statute governing both same-type and cross-type interest exchange~~,~~ and domestication~~, and division~~ transactions where that type of

entity is a party. Finally, if there are no merger provisions for a particular type of entity, a legislative note should be placed at the end of the governing statute stating that META is the statute that governs merger, interest exchange, conversion, and domestication~~, and division~~ transactions where that type of entity is involved.

Introductory Comment

Sections A2-1 through A2-6 set forth the conforming amendments and repeals to the existing model, prototype, and uniform organic laws described above. Deletions are ~~stricken~~ and additions are underlined.

(Replace current Section A2-1 in its entirety with the following text:)

Legislative Note to Section A2-1: *The amendments to the Model Business Corporation Act in Section A2-1 delete provisions relating to mergers involving entities other than corporations, but retain certain provisions relating to those types of entities so that interests in those entities can be used as consideration in a merger between or among corporations. For example, in a triangular merger in which a limited liability company is acquiring a target corporation by merging it with a corporate subsidiary of the LLC, the parties may wish to give the shareholders of the target interests in the LLC in exchange for their shares in the target. To accomplish that result, some of the provisions in the Model Business Corporation Act relating to unincorporated entities need to be retained even though they are no longer needed with respect to mergers between a corporation and an unincorporated entity which are now subject to this Act.*

SECTION A2-1. MODEL BUSINESS CORPORATION ACT.

(a) Section 1.40 (7B) ("eligible entity"), (9B) ("filing entity"), (13B) ("interest holder"), (14B) ("nonfiling entity"), (15A) ("organic document"), (17A) ("private organic document"), and (17B) ("public organic document") of the [Model Business Corporation Act] are repealed.

(b) The title of Chapter 9 of the [Model Business Corporation Act] is amended as follows:

Domestication ~~and Conversion~~

(c) Subchapters 9A, C, D, and E of the [Model Business Corporation Act] are repealed.

(d) Sections 11.01, 11.02, 11.03, 11.04, 11.06, 11.07, and 11.08 of the [Model Business Corporation Act] are amended as follows:

§ 11.01. Definitions.

As used in this chapter:

(a.1) "Acquired corporation" means the domestic or foreign corporation whose shares are acquired in a share exchange.

(a.2) "Acquiring corporation" means the domestic or foreign corporation that acquires shares in a share exchange.

(a) "Merger" means a business combination pursuant to section 11.02.

(b) "Party to a merger" or "party to a share exchange" means any domestic or foreign corporation ~~or eligible entity~~ that will:

(1) merge under a plan of merger;

(2) acquire shares ~~or eligible interests~~ of another corporation ~~or an eligible entity~~ in a share exchange; or

(3) have all of its shares ~~or eligible interests~~ or all of one or more classes or series of its shares ~~or eligible interests~~ acquired in a share exchange.

(c) "Share exchange" means a business combination pursuant to section 11.03.

(d) "Survivor" in a merger means the corporation ~~or eligible entity~~ into which one or more other corporations ~~or eligible entities~~ are merged. A survivor of a merger may preexist the merger or be created by the merger.

§ 11.02. Merger.

(a) One or more domestic business corporations may merge with one or more domestic or foreign business corporations ~~or eligible entities~~ pursuant to a plan of merger, or two or more foreign business corporations ~~or domestic or foreign eligible entities~~ may merge into a new domestic business corporation to be created in the merger in the manner provided in this chapter.

(b) A foreign business corporation~~, or a foreign eligible entity,~~ may be a party to a merger with a domestic business corporation, or may be ~~created by the terms of the plan of merger, only~~ the survivor in such a merger, if the merger is permitted by the laws under which the foreign business corporation ~~or eligible entity is organized or by which it is governed~~ is incorporated.

~~(b.1) If the organic law of a domestic eligible entity does not provide procedures for the approval of a merger, a plan of merger may be adopted and approved, the merger effectuated, and appraisal rights exercised in accordance with the procedures in this chapter and chapter 13. For the purposes of applying this chapter and chapter 13:~~

~~(1) the eligible entity, its members or interest holders, eligible interests and organic documents taken together shall be deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively and vice versa as the context may require; and~~

~~(2) if the business and affairs of the eligible entity are managed by a group of persons that is not identical to the members or interest holders, that group shall be deemed to be the board of directors.~~

(c) The plan of merger must include:

(1) the name of each domestic or foreign business corporation ~~or eligible entity~~ that will merge and the name of the domestic or foreign business corporation ~~or eligible entity~~ that will be the survivor of the merger;

(2) the terms and conditions of the merger;

(3) the manner and basis of converting the shares of each merging domestic or foreign business corporation ~~and eligible interests of each merging domestic or foreign eligible entity~~ into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property, or any combination of the foregoing;

(4) the articles of incorporation of any domestic or foreign business ~~or nonprofit~~ corporation~~, or the organic documents of any domestic or foreign unincorporated entity,~~ to be created by the merger, or if a new domestic or foreign business ~~or nonprofit~~ corporation ~~or unincorporated entity~~ is not to be created by the merger, any amendments to the survivor's articles of incorporation ~~or organic documents~~; and

(5) any other provisions required by the laws under which any party to the merger is ~~organized or by which it is governed~~ incorporated, or by the articles of incorporation ~~or organic document~~ of any such party.

(d) Terms of a plan of merger may be made dependent on facts objectively ascertainable outside the plan in accordance with section 1.20(k).

(e) The plan of merger may also include a provision that the plan may be amended ~~prior to filing articles of merger, but if the shareholders of a domestic corporation that is a party to the merger are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to change:~~ by the directors or shareholders of a domestic business corporation, except that the shareholders who were entitled to vote on the plan shall be entitled to vote on any amendment of the plan that will change:

(1) the amount or kind of shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, or other property to be received under the plan by the shareholders of ~~or owners of eligible interests in~~ any party to the merger;

(2) the articles of incorporation of any corporation~~, or the organic documents of any unincorporated entity,~~ that will survive or be created as a result of the merger, except for changes permitted by section 10.05 ~~or by comparable provisions of the organic laws of any such foreign corporation or domestic or foreign unincorporated entity~~; or

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

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

§ 11.03. Share exchange.

(a) Through a share exchange:

(1) a domestic business corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign business corporation~~, or all of the interests of one or more classes or series of interests of a domestic or foreign other entity,~~ in exchange for shares or other securities, eligible interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange, or

(2) all of the shares of one or more classes or series of shares of a domestic business corporation may be acquired by another domestic or foreign business corporation ~~or other entity,~~ in exchange for shares or other securities, eligible interests,

obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange.

(b) A foreign business corporation ~~or eligible entity,~~ may be a party to a share exchange only if the share exchange is permitted by the laws under which the corporation ~~or other entity is organized or by which it is governed~~ is incorporated.

~~(b.1) If the organic law of a domestic other entity does not provide procedures for the approval of a share exchange, a plan of share exchange may be adopted and approved, and the share exchange effectuated, in accordance with the procedures, if any, for a merger. If the organic law of a domestic other entity does not provide procedures for the approval of either a share exchange or a merger, a plan of share exchange may be adopted and approved, the share exchange effectuated, and appraisal rights exercised, in accordance with the procedures in this chapter and chapter 13. For the purposes of applying this chapter and chapter 13:~~

~~(1) the other entity, its interest holders, interests and organic documents taken together shall be deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively and vice versa as the context may require; and~~

~~(2) if the business and affairs of the other entity are managed by a group of persons that is not identical to the interest holders, that group shall be deemed to be the board of directors.~~

(c) The plan of share exchange must include:

(1) the name of ~~each~~ the acquired corporation ~~or other entity whose shares or interests will be acquired~~ and the name of the acquiring corporation ~~or other entity that will acquire those shares or interests~~;

(2) the terms and conditions of the share exchange;

(3) the manner and basis of exchanging shares of ~~a~~ the acquired corporation ~~or interests in an other entity whose shares or interests will be acquired under the share exchange~~ into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities, or eligible interests, cash, other property, or any combination of the foregoing; and

(4) any other provisions required by the laws under which any party to the share exchange is ~~organized~~ incorporated or by the articles of incorporation ~~or organic document~~ of any such party.

(d) Terms of a plan of share exchange may be made dependent on facts objectively ascertainable outside the plan in accordance with section 1.20(k).

(e) The plan of share exchange may also include a provision that the plan may be amended ~~prior to filing articles of share exchange, but if the shareholders of a domestic corporation that is a party to the share exchange are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to change:~~ by the directors or shareholders of a domestic acquired corporation, except that the shareholders who were entitled to vote on the plan shall be entitled to vote on any amendment of the plan that will change:

(1) the amount or kind of shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, or other property to be issued by the corporation or to be received under the plan by the shareholders of ~~or owners of interests in any party to the share exchange~~ the acquired corporation; or

(2) any of the other terms or conditions of the plan if the change would adversely

affect such shareholders in any material respect.

(f) Section 11.03 does not limit the power of a domestic corporation to acquire shares of another corporation ~~or interests in another entity~~ in a transaction other than a share exchange.

(g) A share exchange or interest exchange in which a business corporation and another form of entity are parties is governed by [the Model Entity Transactions Act].

§ 11.04. Action on a plan of merger or share exchange.

In the case of a domestic corporation that is a party to a merger or share exchange:

(a) The plan of merger or share exchange must be adopted by the board of directors.

(b) Except as provided in subsection (g) and in section 11.05, after adopting the plan of merger or share exchange the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the shareholders the basis for that determination.

(c) The board of directors may condition its submission of the plan of merger or share exchange to the shareholders on any basis.

(d) If the plan of merger or share exchange is required to be approved by the shareholders, and if the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. ~~If the corporation is to be merged into an existing corporation or other entity, the~~ The notice shall also include or be accompanied by a copy or summary of the articles of incorporation ~~or organizational documents of that corporation or other entity. If the corporation is to be merged into a corporation or other entity that is to be created pursuant to the merger, the notice shall include or be accompanied by a copy or a summary of the articles of incorporation or organizational documents of the new corporation or other entity.~~ of the survivor.

(e) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (c), requires a greater vote or a greater number of votes to be present, approval of the plan of merger or share exchange requires the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the plan exists, and, if any class or series of shares is entitled to vote as a separate group on the plan of merger or share exchange, the approval of each such separate voting group at a meeting at which a quorum of the voting group consisting of at least a majority of the votes entitled to be cast on the merger or share exchange by that voting group is present.

(f) Separate voting by voting groups is required:

(1) on a plan of merger, by each class or series of shares that:

(i) are to be converted under the plan of merger into other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property, or any combination of the foregoing; or

(ii) would be entitled to vote as a separate group on a provision in the plan that, if contained in a proposed amendment to articles of incorporation, would require action by separate voting groups under section 10.04;

(2) on a plan of share exchange, by each class or series of shares included in the

exchange, with each class or series constituting a separate voting group; and

(3) on a plan of merger or share exchange, if the voting group is entitled under the articles of incorporation to vote as a voting group to approve a plan of merger or share exchange.

(g) Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger or share exchange is not required if:

(1) the corporation will survive the merger or is the acquiring corporation in a share exchange;

(2) except for amendments permitted by section 10.05, its articles of incorporation will not be changed;

(3) each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, limitations, and relative rights, immediately after the effective date of ~~change~~ the merger or share exchange; and

(4) the issuance in the merger or share exchange of shares or other securities convertible into or rights exercisable for shares does not require a vote under section 6.21(f).

(h) If as a result of a merger or share exchange one or more shareholders of a domestic business corporation would become subject to owner liability for the debts, obligations or liabilities of any other person or entity, approval of the plan of merger or share exchange shall require the execution, by each such shareholder, of a separate written consent to become subject to such owner liability.

§ 11.06. Articles of merger or share exchange.

(a) After a plan of merger or a plan of share exchange involving a domestic acquired corporation has been adopted and approved as required by this Act, articles of merger or share exchange shall be executed on behalf of each party to the merger or the acquired corporation in the share exchange by any officer or other duly authorized representative. The articles shall set forth:

(1) the names of the parties to the merger or share exchange;

(2) if the articles of incorporation of the survivor of a merger are amended, or if a new corporation is created as a result of a merger, the amendments to the survivor's articles of incorporation or the articles of incorporation of the new corporation;

(3) if the plan of merger or share exchange required approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement that the plan was duly approved by the shareholders and, if voting by any separate voting group was required, by each such separate voting group, in the manner required by this Act and the articles of incorporation;

(4) if the plan of merger or share exchange did not require approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement to that effect; and

(5) as to each foreign corporation ~~or eligible entity~~ that was a party to the merger or share exchange, a statement that the participation of the foreign corporation ~~or eligible entity~~ was duly authorized as required by the ~~organic law of the corporation or eligible entity~~ laws of the foreign jurisdiction.

(b) Articles of merger or share exchange shall be delivered to the secretary of state for

filing by the survivor of the merger or the acquiring corporation in a share exchange, and shall take effect at the effective time provided in section 1.23. ~~Articles of merger or share exchange filed under this section may be combined with any filing required under the organic law of any domestic eligible entity involved in the transaction if the combined filing satisfies the requirements of both this section and the other organic law.~~

§ 11.07. Effect of merger or share exchange.

(a) When a merger becomes effective:

(1) the corporation ~~or eligible entity~~ that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be;

(2) the separate existence of every corporation ~~or eligible entity~~ that is merged into the survivor ceases;

(3) all property owned by, and every contract right possessed by, each corporation ~~or eligible entity~~ that merges into the survivor is vested in the survivor without reversion or impairment;

(4) all liabilities of each corporation ~~or eligible entity~~ that is merged into the survivor are vested in the survivor;

(5) the name of the survivor 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) the articles of incorporation ~~or organic documents~~ of the survivor are amended to the extent provided in the plan of merger;

(7) the articles of incorporation ~~or organic documents~~ of a survivor that is created by the merger become effective; and

(8) the shares of each corporation that is a party to the merger~~, and the interests in an eligible entity that is a party to a merger,~~ that are to be converted under the plan of merger into shares, other securities, eligible interests, obligations, rights to acquire ~~securities,~~ shares, other securities, or eligible interests, cash, other property, or any combination of the foregoing, are converted, and the former holders of such shares ~~or eligible interests~~ are entitled only to the rights provided to them in the plan of merger or to any rights they may have under chapter 13 ~~or the organic law of the eligible entity~~.

(b) When a share exchange becomes effective, the shares of ~~each domestic~~ the acquired corporation that are to be exchanged for shares or other securities, eligible interests, obligations, rights to acquire shares ~~or~~, other securities, or eligible interests, cash, other property, or any combination of the foregoing, are entitled only to the rights provided to them in the plan of share exchange or to any rights they may have under chapter 13.

(c) A person who becomes subject to owner liability for some or all of the debts, obligations or liabilities of any entity as a result of a merger or share exchange shall have owner liability only to the extent provided in the organic law of the entity and only for those debts, obligations and liabilities that arise after the effective time of the articles of merger or share exchange.

(d) Upon a merger becoming effective, a foreign corporation~~, or a foreign eligible entity,~~ that is the survivor of the merger is deemed to:

(1) appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights, and

(2) agree that it will promptly pay the amount, if any, to which such shareholders are entitled under chapter 13.

~~[(e) The effect of a merger or share exchange on the owner liability of a person who had owner liability for some or all of the debts, obligations or liabilities of a party to the merger or share exchange shall be as follows:~~

~~(1) The merger or share exchange does not discharge any owner liability under the organic law of the entity in which the person was a shareholder or interest holder to the extent any such owner liability arose before the effective time of the articles of merger or share exchange.~~

~~(2) The person shall not have owner liability under the organic law of the entity in which the person was a shareholder or interest holder prior to the merger or share exchange for any debt, obligation or liability that arises after the effective time of the articles of merger or share exchange.~~

~~(3) The provisions of the organic law of any entity for which the person had owner liability before the merger or share exchange shall continue to apply to the collection or discharge of any owner liability preserved by paragraph (1), as if the merger or share exchange had not occurred.~~

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

§ 11.08. Abandonment of a merger or share exchange.

(a) Unless otherwise provided in a plan of merger or share exchange or in the laws under which a foreign business corporation ~~or a domestic or foreign eligible entity~~ that is a party to a merger or a share exchange is ~~organized or by which it is governed~~, after the plan has been adopted and approved as required by this chapter, and at any time before the merger or share exchange has become effective, it may be abandoned by a domestic business corporation that is a party thereto without action by its shareholders in accordance with any procedures set forth in the plan of merger or share exchange or, if no such procedures are set forth in the plan, in the manner determined by the board of directors, subject to any contractual rights of other parties to the merger or share exchange.

(b) If a merger or share exchange is abandoned under subsection (a) after articles of merger or share exchange have been filed with the secretary of state but before the merger or share exchange has become effective, a statement that the merger or share exchange has been abandoned in accordance with this section, executed on behalf of a party to the merger or share exchange by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the merger or share exchange. Upon filing, the statement shall take effect and the merger or share exchange shall be deemed abandoned and shall not become effective.

§ 13.02. Right to appraisal.

(a) A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions:

* * *

(2) consummation of a share exchange ~~to~~ in which the corporation is ~~a party as the corporation whose shares will be~~ the acquired corporation if the shareholder is

entitled to vote on the exchange, except that appraisal rights shall not be available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not exchanged;

* * *

(5) any other amendment to the articles of incorporation, merger, share exchange or disposition of assets to the extent provided by the articles of incorporation, bylaws or a resolution of the board of directors; or

(6) consummation of a domestication if the shareholder does not receive shares in the foreign corporation resulting from the domestication that have terms as favorable to the shareholder in all material respects, and represent at least the same percentage interest of the total voting rights of the outstanding shares of the corporation, as the shares held by the shareholder before the domestication;

(7) consummation of a conversion of the corporation to ~~nonprofit status pursuant to subchapter 9C; or~~

~~(8) consummation of a conversion of the corporation to a form of other entity pursuant to subchapter 9E~~ a different form of entity under [the Model Entity Transactions Act].

(b) Notwithstanding subsection (a), the availability of appraisal rights under subsection (a)(1), (2), (3), (4)~~, (6) and (8)~~ and (6) shall be limited in accordance with the following provisions:

* * *

~~(d)~~ (c) Sections 15.21 (automatic withdrawal upon certain conversions), 15.22 (withdrawal upon conversion to a nonfiling entity) and 15.23 (relating to transfer of authority) of the [Model Business Corporation Act] are repealed.

(No change to the remaining sections of Appendix 2.)