

UNIFORM MERGER AND CONVERSION ACT

PREFATORY NOTE

Scope and Approach of the Uniform Merger and Conversion Act

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

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

As of November, 2001, three similar projects are being pursued by the American Bar Association (“ABA”). First, the Committee on Corporate Laws of the ABA has drafted and published a new Chapter 9 of the MBCA which is a “junction-box” statute that authorizes

1 domestic business corporations to become a different form of entity or, conversely, permits non-
2 domestic business corporations to become a domestic business corporation. The procedures
3 anticipated by Chapter 9 of the MBCA include: (1) *domestication* (a procedure in which a
4 corporation may change its state of incorporation, either domestic to foreign or foreign to
5 domestic); (2) *nonprofit conversion* (a procedure that permits a domestic business corporation to
6 become either a domestic nonprofit corporation or a foreign nonprofit corporation); (3) *foreign*
7 *nonprofit domestication and conversion* (a procedure that permits a foreign nonprofit corporation
8 to become a domestic business corporation); and (4) *entity conversion* (procedures that authorize
9 a domestic business corporation to become a domestic or foreign other entity or that permit a
10 foreign other entity to become a domestic business corporation). Because Chapter 9 of the
11 MBCA anticipates only those transactions that involve a *domestic business corporation* either at
12 the outset or at the termination of the transaction, the ABA has constituted a second project to
13 deal with nonprofit corporations as a constituent party to the foregoing transactions. The second
14 project will thus likely focus on the same types of transactions as Chapter 9 of the MBCA but for
15 inclusion instead within the Model Nonprofit Corporation Act. To date, an exposure draft of the
16 Model Nonprofit Corporation Act amendments has not been circulated for review. The third
17 project is one spearheaded by a Joint Task Force of the Committee on Corporate Laws and the
18 Committee on Partnerships and Unincorporated Business Organizations of the Business Law
19 Section (“Joint Task Force”) of the ABA. The Joint Task Force is charged with drafting a model
20 act that addresses mergers, conversions and entity interest exchanges of *different forms* of
21 business entities. The Model Act is presently entitled the Model Entity Transactions Act (draft
22 of 11-01)(“META”). At present, META has been circulated for review and comment. Unlike
23 Chapter 9 of the MBCA, META addresses only those transactions that involve different forms of
24 entities. Thus, because a domestication does not indicate a change of form, domestications are
25 not covered by META. For example, a practitioner wishing to find guidance regarding the
26 domestication of a limited partnership would have to refer to the statutes governing limited
27 partnerships and not to META. Reference would only be made to META for cross-form
28 transactions. META also anticipates the *repeal and/or amendment of* all cross-form provisions
29 in *RUPA*, *ULLCA* and *Re-RULPA*. The only provisions of the Uniform Unincorporated Acts that
30 would not be affected would be those involving the same type of business (e.g., mergers between
31 same-form partnerships or between limited liability companies). Further, META would *add*
32 entity interest exchanges and domestications to uniform unincorporated law and thereafter
33 impose unanimity voting requirements for both domestications and exchanging entities in
34 interest exchanges. META does not require approval by an acquiring entity in an interest
35 exchange.

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

1 incorporated entity to be governed by the Act where the organic law governing the domestic
2 incorporated entity is silent regarding a transaction authorized by the Act.

3 The three ABA projects are at varying degrees of completion but the work of each clearly
4 overlaps, to some degree, with the scope and purpose of the Uniform Act. The NCCUSL
5 Drafting Committee, its Chair and Reporter are working closely with the Chair of the MBCA
6 junction-box project as well as the Co-Chairs of the Joint Task Force.
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8 The present draft of the Uniform Act is presented in six Articles. The first Article sets
9 forth: (1) name; (2) scope; (3) regulatory approvals; and (4) definitions. The definitional section
10 utilizes generic terminology intended to encompass both corporate and unincorporated (“cross-
11 species”) transactions.

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

15 Article 3 governs the entity interest exchange. The entity interest exchange is derived
16 from the share exchange in corporate law and in Chapters 11 and 13 of the MBCA. The entity
17 interest exchange does not presently exist in separate form in any uniform unincorporated
18 association act. The Drafting Committee, at its first meeting in November, 2000, opted to
19 include provisions for an entity interest exchange. Certain difficulties are presented by the entity
20 interest exchange, including: (1) necessary default approvals; (2) informational requirements for
21 a plan of entity interest exchange; (3) filing requirements for the exchange; (4) transitional rules
22 to address third party rights negotiated at a time prior to the widespread use of entity interest
23 exchanges; and (5) contractual or statutory appraisal rights for certain affected owners. Each of
24 these points is addressed in this draft.

25 Article 4 governs conversion. Article 4 is intended to address traditional intrastate and
26 foreign “different-form conversions.” Article 4 also sets forth: (1) default approval rules; (2)
27 informational requirements for conversions; and (3) transitional rules for “new” conversions. In
28 addition, Article 4 acknowledges the possibility of contractual appraisal rights for certain owners
29 in the conversions authorized under Article 4.

30 Article 5 govems domestications. Article 5 is intended to authorize a foreign entity to
31 domesticate as an domestic unincorporated entity of the same type and to authorize a domestic
32 unincorporated entity to domesticate as a foreign entity of the same type so long as the organic
33 law of the foreign jurisdiction permit the domestication. Article 5 provides: (1) requirements for
34 a plan of domestication; (2) approvals, including a default rule of approval; (3) necessary filings;
35 (4) effectiveness of a foreign entity domesticating as a domestic entity of the same type; and (5)
36 contractual appraisal rights.
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38 Article 6 sets out miscellaneous provisions, including: (1) severability; (2) effective date;
39 (3) repeals; (4) applicability; and (5) savings clause.