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FOR DISCUSSION ONLY

UNIFORM ENTITY TRANSACTIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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

UNIFORM ENTITY TRANSACTIONS ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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Prefatory Note

Scope and Approach of the Uniform Entity Transactions Act

Presently state business organization statutes (incorporated and unincorporated) vary in their approach to same-species and cross-species mergers, consolidations, divisions, conversions, share/entity interest exchanges, and 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, The Uniform Partnership Act (1997) ("*RUPA*") 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 divisions, entity interest exchanges, or domestications. The Revised Uniform Limited Partnership Act (1976 with 1985 amendments) ("*RULPA*") 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. The Uniform Limited Partnership Act (2001) ("*Re-RULPA*") anticipates for-profit and nonprofit cross-species conversions and mergers but not cross or same-species entity interest exchanges, divisions or domestications. The Uniform Limited Liability Company Act (1996) ("*ULLCA*") authorizes cross-form mergers and conversions but is silent regarding for-profit and nonprofit cross or same-species entity interest exchanges, divisions and domestications.

As a result of this divergence in the law of business organizations, the Uniform [Entity Transaction] 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 mergers, divisions, conversions, consolidations, share/entity interest exchanges, and domestications between and among the same or different types of domestic and foreign for-profit and nonprofit entities. NCCUSL considered whether this [Act] should 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 this [Act] should present a broad free-standing "junction-box" statute.

As of July, 2003, three other junction-box projects are being pursued by the American Bar Association ("ABA"). First, the Committee on Corporate Laws of the ABA Business Law Section has drafted and published a new Chapter 9 of the Revised Model Business Corporation Act ("*MBCA*") which is a "junction-box" statute that authorizes domestic business corporations to become a different form of entity or, conversely, permits non-domestic business corporations

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). Because Chapter 9 of the *MBCA* anticipates only those transactions that involve a *domestic business corporation* either at the outset or at the termination of the transaction, the ABA has constituted a second project to deal with nonprofit corporations as a constituent party to the foregoing transactions. The second project will thus likely focus on the same types of transactions as Chapter 9 of the *MBCA* but for inclusion instead within the Model Nonprofit Corporation Act. To date, an exposure draft of the Model Nonprofit Corporation Act amendments has not been circulated for review. The third project is one spearheaded by the ABA Business Section Law Section Ad-Hoc Committee on Entity Rationalization ("Ad-Hoc Committee"). The Ad-Hoc Committee was charged with drafting a model act that addresses mergers, conversions and entity interest exchanges of *different forms* of business entities. For a period of several weeks in January and February, 2002, weekly two-hour conference calls were held to review the 2001 draft of *MITA*. Several participants in the Drafting Committee, including ABA advisors George Coleman, Bill Clark, Bob Keatinge and Barry Nekritz and Reporter of the NCCUSL project, Ann Anker, participated in each of these calls. The Model Act was released as the Model Inter-Entity Transactions Act ("*MITA*") 57 Bus. Law 1569 (Aug. 2002). Unlike Chapter 9 of the *MBCA, MITA* addresses only those transactions that involve *different forms of entities.* Thus, because a domestication does not involve a change of form, domestications are not covered by *MITA*. Rather, reference would only be made to *MITA* only for cross-form transactions. *MITA* also anticipates the *repeal and/or amendment of* all cross-form provisions in *RUPA, ULLCA* and *Re-RULPA* as well as existing cross-form provisions of corporation acts and the Prototype Limited Liability Company Act. The only provisions of *RUPA*. *RULPA*, *ULLCA*, and *ReRULPA* (the "Uniform Unincorporated Acts") that would not be affected would be those involving transactions between the same type of business (*e.g.*, mergers between same-form partnerships or between limited liability companies). Further, *MITA* would *add* entity interest exchanges and domestications to the Uniform Unincorporated Acts and thereafter set forth all voting procedures for both domestications and exchanging entities in interest exchanges to that necessary for a merger.

This [Act], in its present state, is drafted as a free-standing, "junction-box" statute that will: (1) *repeal* all existing merger and conversion provisions in all Uniform Unincorporated Acts; (2) *replace* those provisions with new, broader merger and conversion provisions; and (3) *add* the new transactions of divisions, entity interest exchanges and domestications. This [Act] also defines the necessary approvals for each of these transactions. With this [Act] repealer, therefore, a practitioner need only review this [Act] to locate the substantive rules for all domestic alternative entity mergers, divisions, entity interest exchanges, conversions and

domestications. In sum, this [Act] will *enable* cross-form and same-form mergers, divisions, conversions and entity interest exchanges– as well as to domestications – for unincorporated entities. This [Act] will permit a domestic incorporated entity to use the Act only if the organic law and organic rules governing the domestic incorporated entity permit the transaction. Foreign entities – unincorporated or incorporated – may use this [Act] if the organic law and organic rules of the foreign entity do not prohibit the transaction.

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

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

Article 2 governs mergers. Article 2 is derived in large part from existing corporate and unincorporated 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 divisions. The division is a special type of merger that permits a dividing entity to subdivide itself into two or more separate and distinct entities. The division presently does not exist in any uniform unincorporated act. The ABA, on the other hand, is reviewing a proposed addition to the *MBCA* regarding divisions. *MITA* reserves a chapter for divisions, but no provisions have yet been proposed. The division provisions of Article 3 reflect the unique nature of the contractual allocation of assets and liabilities that result from a division.

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

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

Article 6 governs domestications. Article 6 is intended to authorize a foreign entity to domesticate as a domestic unincorporated entity of the same type and to authorize a domestic unincorporated entity to domesticate as a foreign entity of the same type so long as the organic rules of the foreign jurisdiction permit the domestication and the organic law of the foreign entity does not prohibit the domestication. Article 6 provides: (1) requirements for a plan of domestication; (2) approvals, including a default rule of approval; (3) necessary filings; and (4) effectiveness of a domestication.

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

UNIFORM ENTITY TRANSACTIONS ACT

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [Act]:

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

(2) "Approve" includes, in the case of any entity, whatever steps are necessary to approve a transaction.

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

(4) "Converted entity" means the entity that continues in existence after a conversion.

(5) "Converting entity" means the entity that approves a plan of conversion pursuant to section 503.

(6) "Dividing entity" means the entity that is to be divided pursuant to [Article] 3.

(7) "Division" means a transaction authorized by [Article] 3.

(8) "Domestic entity" means a domestic incorporated entity and a domestic unincorporated entity.

(9) "Domestic incorporated entity" means an incorporated entity created under or whose

internal affairs are governed by the law of this [State].

(10) "Domestic unincorporated entity" means an unincorporated entity created under or whose internal affairs are governed by the law of this [State].

(11) "Domesticated entity" means the entity that continues in existence after a domestication.

(12) "Domesticating entity" means the entity that adopts a plan of domestication and that files a statement or plan of domestication pursuant to section 604.

(13) "Domestication" means a transaction authorized by [Article] 6.

(14) "Entity" means a person other than an individual. The term does not include an estate, trust (other than a business or land trust), governmental, or quasi-governmental subdivision, agency, or instrumentality.

(15) "Entity interest exchange" means a transaction authorized by [Article] 4.

(16) "Exchanging entity" means the entity all of one or more of the classes or series of which the ownership interests or transferee interests are exchanged in an entity interest exchange.

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

(18) "Foreign entity" means an entity other than a domestic entity.

(19) "Merger" means a transaction authorized by [Article] 2.

(20) "Merging entity" means an entity that is a party to a merger and exists immediately before the filing of the statement of merger and does not survive the merger.

(21) "Nonfiling entity" means an entity other than a filing entity.

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

(23) "Organic law" means the statute or body of law that governs the internal affairs of an entity.

(24) "Organic rules" mean the rules, adopted in accordance with and not prohibited by the organic law of an entity, whether or not in a record, that govern the internal affairs of an entity.

(25) "Owner" means a person that is:

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

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

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

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

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

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

(26) "Ownership interest" means an owner's proprietary interest in an entity.

(27) "Owner's liability" means personal liability for debts, obligations, and liabilities of an entity which is imposed on an owner solely by reason of the person's status as an owner in the entity pursuant to the organic law or the organic rules of the entity.

(28) "Party to a merger" means any merging entity and the surviving entity.

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

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

(31) "Public organic document" means the public record, as well as all amendments to those documents, the filing of which creates an entity.

(32) "Qualified foreign entity" means a foreign entity that is authorized to transact business in this [State] by an appropriate filing with the [Secretary of State].

(33) "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.

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

(35) "Sign" means:

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

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

(36) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

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

(38) "Transaction" means a fundamental entity change such as a merger, a division, an entity interest exchange, a conversion or a domestication.

(39) "Transfer" includes an assignment, conveyance, sale, lease, mortgage, security interest, encumbrance and gift.

(40) "Transfer" includes an assignment, conveyance, sale, lease, mortgage, security interest, encumbrance and gift.

(41) "Transferee" means a person to which all or part of a transferee interest has been transferred, whether or not the transferor is an owner.

(42) "Transferee interest" means an owner's right to receive distributions of an unincorporated entity.

Preliminary Comments

"Approve" [(2)] - The term "approve" includes the proposal and or adoption of the transaction by the board of directors and approval of the transaction by the shareholders where appropriate in the case of corporations. Approval may also include any procedural steps under the organic law or organic rules of the affected entity.

"Conversion" [(3)] - The term "conversion" involves the procedure whereby a domestic unincorporated entity of one type is converted into an entity of another type whether domestic or foreign. "Conversion" also involves the procedure whereby a domestic or foreign entity is converted into a domestic unincorporated entity of another type.

The term "type" is used throughout this [Act] to mean: (1) with respect to entities of the same form, general and limited liability partnerships and limited and limited liability limited partnerships; and (2) with respect to entities of a different form, any incorporated or unincorporated entities not specified in (1). In other words, a general partnership is of the same "type" of entity as a limited liability partnership. Likewise, a limited partnership and a limited liability limited partnership are of the same "type" of entity. This is consistent with *RUPA* §

201(b) and *ReRULPA* § 102(11). A general partnership is a different "type" of entity than a limited partnership, limited liability limited partnership, limited liability company, or corporation. In its March 2002 draft, the drafting committee placed this information within the text of the [Act]. It was removed and placed within the commentary on the recommendation of the Committee on Style. The conversion is undertaken by the converting entity (§ 102(4)) while it is the converted entity (§ 102(3)) that survives the transaction.

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

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

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

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

"Domestic incorporated entity" [(10)] - The term "domestic incorporated entity" is used throughout this [Act]: (1) to distinguish the domestic entities that are *authorized* to engage in a merger, conversion, entity interest exchange or domestication *pursuant to this [Act]* with any

other entity; and (2) to make clear that a domestic *incorporated* entity may "elect" to engage in a transaction with a domestic *unincorporated* entity governed by this [Act] if the organic rules and organic law governing the incorporated entity do not prohibit the transaction. Because jurisdictions vary in their description of incorporated entities, states should conform this section accordingly.

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

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

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

"Entity" [(15)] - The definition of the term "entity" is intended to be broad but also to reflect the unique nature of certain types of incorporated and unincorporated entities. For example, in some jurisdictions corporations are created under special acts, special corporation acts or for special purposes. Also, many jurisdictions have entities that are unique to specific forums. In those jurisdictions, the definition should be conformed according to what the [State] wishes to include or exclude from the scope of this [Act]. The present definition also specifically includes nonprofit entities. The definition excludes sole proprietorships but includes general partnerships under both *UPA* and *RUPA*.

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

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

The definition of "entity" was redrafted to reflect the Committee's decision in New Orleans,

2001 to specifically exclude estates, trusts (other than business or land trusts) and, governmental or quasi-governmental entities, agencies or subdivisions. Further, an individual is not a sole proprietorship under this [Act].

"Foreign Entity" [(18)] - 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 *UPA* (1916) is a domestic or foreign partnership. Likely, a *UPA* partnership will be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of *RUPA* partnerships that have not registered as limited liability partnerships will be governed by *RUPA* § 106(a).

"Merger" [(19)] 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. The term "merger" also includes the traditional two-party merger in which one party does not survive the transaction. "Merger" also includes a forward or reverse triangular merger where a third, subsidiary, entity is formed to effect the transaction on behalf of one of the constituent entities to the merger.

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

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

"Organic rules" [(24)] - The term "organic rules" is intended to include all governing rules of an entity whether or not in written form. The term is intended to include agreements in "record" form as defined in *ULLCA* at § 101 (16)("information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.") as well as oral partnership agreements and oral operating agreements among LLC members. "Organic rules" represent either the parties' *actual, negotiated* agreement ***or****, in a default situation, what the law deems* the parties' agreement to be. Thus, references to the organic rules in this [Act] include references to the organic law to the extent of: (1) nonwaivable provisions of the organic law, and (2) matters not addressed in the written or unwritten

agreement of the parties. For example, assume in an LLC that three members agree to profit-sharing but do not specify managerial rights. In this circumstance, the parties *actual agreement* reflects rights to receive profits that may be different from those provided for by statute. Further, the parties' agreement regarding management *is imposed by law.* Both the actual and "constructive" (default) agreements constitute the "organic rules" of the entity.

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

The present language is that suggested by the Committee in December of 2001. The language is taken largely from *Re-Rulpa* § 1101 (8). An accompanying definition for "ownership interest" was added at § 102 to clarify the meaning of § 102 (23)(E). Subsection (D) has been modified to reflect for-profit and nonprofit corporations and the differing "ownership" interests of each. Also, a new subsection (E) has been added regarding ownership interests in nonprofit entities. Subsection (F) is intended to exclude sole proprietorships.

"Ownership interest" [(26)] - An "ownership interest" includes a partnership interest in a general partnership (including a limited liability partnership), a partnership interest in a limited partnership (including a limited liability limited partnership), a membership interest in a limited liability company, a share in a corporation, a membership interest in a nonprofit corporation, a membership interest in an unincorporated association, and a beneficial interest in a business trust. Where nonprofit entities have no membership interests, the ownership interest would include the interest held by the entity's governing body.

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

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

"Public organic document" [(31)] - A "public organic document" is a document that is filed of public record to *create* an entity. A "public organic document" includes a certificate of limited partnership, the articles of organization for a limited liability company, the articles of incorporation for a nonprofit or for-profit corporation, the articles of association for an unincorporated nonprofit association, or a deed of trust of a business trust. "Public organic document" does not include *a statement of partnership authority* filed pursuant to § 303 of *RUPA or a statement of qualification for an LLP or LLLP* . With regard to the filing of a statement of qualification for an LLP or LLLP, such a filing *does not constitute the filing that* ***creates*** *the entity.* Rather, an LLP is an *already-formed general partnership* that has filed a

statement of qualification for the purpose of gaining limited liability for its partners. As to an LLLP, the underlying entity (the LP) is formed by filing a certificate of formation followed by or simultaneous with the filing of a statement of qualification (in those jurisdictions that permit an LLLP). *(Re-RULPA* permits the creation of an LLLP by the inclusion of the necessary LLLP language in the certificate of formation, thereby eliminating the second filing.)

"Qualified foreign entity" [(32)] - General partnerships are not intended to be included within the entity filing regime for "qualified foreign entities."

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

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

"Transaction" [(39)] - The term "transaction" is intended to refer the fundamental entity changes that may be effected under this [Act].

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

SECTION 103. GOVERNING LAW.

(a) Following a transaction authorized by this [Act], the organic law of a surviving entity, resulting entity, exchanging entity, converted entity, or domesticated entity continues to govern the entity.

(b) Unless displaced by a specific provision in this [Act], the principles of law and equity, including those governing the rights of creditors, transferees or assignees, supplement this [Act].

Preliminary Comments

Section 103 - Section 103(a) is intended to make clear that subsequent to a transaction authorized and completed according to this [Act], the organic law of the *entity or entities existing after the subject transaction* continues to govern the entity unabated.

Section 103(b) is included to make clear that unless a particular provision of this [Act] displaces "other law," the principles of law and equity continue to apply, *especially including the rights of creditors, transferees, assignees or other appropriate parties.* Examples of "other" law that might govern creditor rights in the transactions set forth in this [Act] are the various uniform fraudulent transfer and conveyance acts; common law fraud; state insolvency statutes; Title 11 of the U.S.C. regarding creditor rights in federal bankruptcy proceedings; cases interpreting the rights of creditors following leveraged buyouts, spinoffs, asset purchases or other similar transactions; cases interpreting the liability of corporate directors for distributions to executives or shareholders while the corporation is insolvent, or operating in the vicinity of "insolvency;" the rights of creditors during or following real estate transactions; creditor rights under Articles 8 and 9 of the UCC; cases interpreting creditor claims under GAAP; and creditor rights cases arising under any Uniform Unincorporated Act, 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.

Section 103 was reinstated after a most useful Conference discussion at the Annual Meeting in Tucson in 2002 concerning creditor rights following, or during, the transaction procedures set forth in this [Act] - particularly that of a division.

SECTION 104. SUBORDINATION OF ACT TO REGULATORY LAW

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

(b) Except as expressly provided otherwise by or pursuant to regulatory law:

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

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

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

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

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

Preliminary Comments

Section 104 -. This section loosely corresponds to *MITA* § 103**.** *MITA* **§** 104 provides an optional provision under which the transaction may not proceed without the prior approval of the

regulatory agency, this [Act] like *MITA* § 103, addresses the consequences of a failure to have such authority. Because of the inclusion of corporate transactions within this [Act], the Reporter added this section back for discussion purposes only. Great concern was expressed regarding regulated transactions and creditor rights during and after the Annual Meeting in Arizona so it seemed appropriate to look at such a provision another time before a final reading of the Act.

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

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

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

SECTION 105. CONSENT OF OWNER WITH RESPECT TO OWNER'S LIABILITY.

In addition to the approvals required by Sections 203, 204, 303, 304, 403, 404, 503, 504, 603, or 604, if a person would have owner's liability with respect to an unincorporated surviving, resulting, exchanging, converted, or domesticated entity, approval and amendment of a merger, division, entity interest exchange, conversion, or domestication are not effective without the consent in a record of the person, unless:

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

(2) the person has consented in a record to that provision of the organic rules that contain that provision, or became an owner subsequent to the adoption of that provision in the organic rules.

Preliminary Comments

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

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

SECTION 106. FILINGS.

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

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

(c) Filings with the [Secretary of State] under this [Act] shall be subject to the provisions of _____.

Preliminary Comments

Section 106 - Section 106 is new and is intended to help integrate corporate provisions into

this [Act]. Section 106 is taken from *MITA*. Section 106 is included for discussion purpose only.

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

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

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

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

SECTION 107. FILING FEES.

The [Secretary of State] shall collect the following fees when the documents described are delivered for filing:

(1) Statement of merger .....$.....

(2) Statement of abandonment of merger.....$.....

(3) Statement of division.....$.....

(4) Statement of abandonment of division.....$.....

(5) Statement of entity interest exchange.....$.....

(6) Statement of abandonment of interest exchange...$.....

(7) Statement of conversion .....$.....

(8) Statement of abandonment of conversion .....$.....

(9) Statement of domestication .....$.....

(10) Statement of abandonment of domestication .....$.....

(11) Statement of surrender of articles of incorporation..$.....

(12) Application for withdrawal of authority.....$.....

(13) Application for transfer of authority .....$.....

Preliminary Comments

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

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

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

(1)

(2)

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

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

(2)

(3)]

Preliminary Comments

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

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

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

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

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

[SECTION 109. APPRAISAL RIGHTS. [OPTIONAL]

[Reserved]

Preliminary Comments

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

[ARTICLE] 2

MERGER

SECTION 201. MERGER.

(a) By complying with the provisions of this [Article] and subject to subsections (b) and (c), one or more domestic unincorporated entities may merge with one or more domestic or foreign entities into a domestic or foreign surviving entity, and two or more foreign entities may merge into a domestic surviving unincorporated entity.

(b) A domestic incorporated entity may merge with one or more domestic unincorporated entities into a domestic surviving entity, or may be created in such a merger if the merger is not expressly prohibited by the organic law or the organic rules of the domestic incorporated entity.

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

Preliminary Comments

The statutory merger contemplated by this [Act] involves the combination of one or more domestic unincorporated 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 unincorporated domestic 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 may have only one entity survive the merger. If independent existence of the constituent entities is favored at the conclusion of the transaction, a merger may not be the optimal vehicle to accomplish the statutory transfer of assets and liabilities. Independent existence could be better accomplished through an entity interest exchange pursuant to Article 3.

Additionally, corporate entities that are a party to a merger likely will be subject to appraisal/dissenters rights by minority shareholders. On the other hand, most state alternative entity statutes are silent on the issue of "appraisal rights" for minority owners in unincorporated entities. However, in those jurisdictions that provide dissenters right to the owners in unincorporated entities, the statutes provide for "buyout," "appraisal" or "contractual appraisal" rights. *See* Ann E. Conaway Anker, *Restructuring (or "Shuffling") Equity Interests in Cross-*

Form Mergers and Conversions, Inter-Entity Mergers and Conversions, presented by the Committee on Taxation and Committee on Partnerships and Unincorporated Business Organizations, Chicago, August 2001.

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

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

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

Section 201(a) - Section 201(a) provides for mergers between the same or different types of domestic unincorporated entities and between domestic unincorporated entities and domestic or foreign incorporated entities. Thus, a merger between two domestic limited partnerships would be governed by this Act as would a merger between a domestic limited partnership and a domestic limited liability company. If the merger involves a domestic general partnership and a domestic corporation, this Act would govern the general partnership and the organic law of the domestic corporate entity would govern the corporation if the organic law of the corporation authorized the transaction. If the merger were between two domestic corporations into a domestic unincorporated entity and the organic law of the incorporated entities were silent as to the merger, this [Act] would apply if the domestic corporations so "elected."

Section 201(a) only speaks to the domestic side of a merger. For example, if the organic law of a foreign entity that is to merge with a domestic unincorporated entity authorizes the transaction, this [Act] will also "authorize" the transaction for the foreign entity. Thus, in order

to assure that these transactions take place with ease across state lines, uniformity of law is required. This [Act] is intended to *enable the targeted transactions as to* ***domestic unincorporated entities*** *only*. There is some limited extraterritorial effect to this [Act] under § 201(c) as to foreign entities whose organic law and rules *are silent* regarding the transaction. In those circumstances, it may fairly be said that some degree of risk is involved in giving an unconditional legal opinion as to the effect of a transaction involving a foreign entity from a "silent" jurisdiction.

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

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

SECTION 202. PLAN OF MERGER

(a) A domestic entity may be a party to a merger by approving a plan of merger.

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

(1) as to each merging and the surviving entity, its name, jurisdiction of its organic law and type of entity;

(2) the terms and conditions of the merger;

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

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

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

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

(c) A plan of merger may state or contain any other provision.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is set forth in the plan.

Preliminary Comments

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

Section 202(b)(3) - Section 202(b)(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. Because § 202(b)(3) ostensibly permits the non-uniform treatment of equity holders in a merger, some concern has been raised as to whether the language of section 202(b)(3) should be modified to either *enable, limit or eliminate* an "equity shuffle" in a merger. *See Ann E. Conaway Anker, Restructuring (or "Shuffling") Equity Interests in Cross-Form Mergers and Conversions*, Inter-Entity Mergers and Conversions, presented by the Committee on Taxation and Committee on Partnerships and Unincorporated Business Organizations, Chicago, August 2001. As presently drafted, a non-uniform "equity shuffle" may be accomplished in a merger involving an 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. Arguably, any perceived "unfairness" in the "shuffle" may be resolved under the guise of fiduciary duties, assuming, of course, that such duties have not been contractually modified or eliminated.

Section 202(b)(3) - The inclusion of transferee interests in § 202(b)(3) is not intended *to create* a requirement that any particular transferee interest be contained in a plan. It is also not intended to create rights in a transferee that do not otherwise exist: (1) in the organic law governing the affected entity; or (2) in a contract to which the entity is a party. Rather, § 202(b)(3) is *permissive only* and should be read to include only those transferee interest *of which the entity has notice*. For example, assume an Alabama general partnership is to merge with a Texas LLC. Assume also that the partnership has three partners and one partner has

assigned her economic rights to her adult child. If the partnership has knowledge of the merger, the adult child's transferee interest *may*, *and arguably should*, be taken into account in the merger. If, on the other hand, the partnership has no knowledge of the transfer, § 202(b)(3)does *not create the obligation to include the transferee interest nor does it create standing to sue for its absence in the plan.* The prior draft of the [Act] contained a provision defining "knowledge and notice." That section was omitted on the theory that the organic law of participating entities contain these provisions.

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

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

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

SECTION 203. APPROVAL OF MERGER.

(a) Subject to Section 105 of this [Act], a plan of merger must be approved by a domestic unincorporated entity according to applicable procedures for approval of a merger in the entity's organic rules or, if none, then by all the owners of the domestic unincorporated entity.

(b) Subject to Section 105 of this [Act], a plan of merger must be approved by a domestic incorporated entity according to a applicable provisions for merger in the entity's organic rules or organic law.

(c) A plan of merger must be approved by each foreign entity according to the entity's organic law.

Preliminary Comments

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

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

Section 203(a) - Section 203(a) provides the substantive rule applicable to the approval of mergers by *domestic unincorporated entities* under this [Act]. Section 203(a) sets out an alternative two-part test: first, approval follows any provision in the entity's organic rules that is *specific to mergers*; and, second, if the organic rules do not mention mergers, the necessary vote becomes unanimous approval by the owners of the domestic unincorporated entity. In essence, § 203 allows the parties to *specifically* prescribe merger approval or, in the alternative, defaults to unanimity. A third alternative is also available for the approval of a merger, *i.e., the number specified for the amendment of the operating agreement of the entity.* For example, consider an LLC that wishes to merge with a corporation. Assume that the operating agreement of the LLC is silent regarding approval of mergers but provides for amendment of the operating agreement by a 2/3 vote. Section 203(a) provides that because no *specific provision for merger appears in the operating agreement, the default rule is unanimity.* Yet, because this [Act] does not repeal any substantive provisions regarding the internal operation or governance of the unincorporated

entity (with the exception of the "transactional" provisions of the underlying acts), the entity is entitled to amend its operating agreement to *add a specific provision for merger.* For example, in the case of an LLC, *see, e.g.*, *ULLCA* §§ 404(a)(2) ("except as otherwise provided in subsection (c), any matter relating to the business of the company may be decided by a majority of the members"); 404(c)(1) ("the only matters of a member or manager-managed company's business requiring the consent of all of the members are: (1) the amendment of the operating agreement under Section 103 ..."); and § 103 (the operating agreement prevails over the "default" rules of the *ULLCA* with *the exception of those enumerated in § 103(b))*which does not prohibit the amendment of § 404(c)(1) requiring unanimous consent for the amendment of the operating agreement). Section 203 of the Act looks first to *an existing provision for approval of mergers* and in the absence of such a provision, provides a gap-filler of unanimity. In this instance, the organic rules of the LLC provide a third alternative of amendment of the operating agreement by a 2/3 vote to *add a specific merger provision at a number fewer than all in order to trump the unanimity default rule.* The third alternative was not included within the text of this [Article] because of its redundancy in relation to existing entity law.

Section 203(b) - Section 203(b) defers to the organic rules or organic law for domestic incorporated entities, and does not provide a gap-filler if there is no provision addressing a merger. Unlike § 203(a), § 203(b) also provides for approval in accordance with the organic law governing the domestic entity.

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

SECTION 204. AMENDMENT AND ABANDONMENT OF MERGER.

(a) Subject to Section 105 of this [Act], a plan of merger may be amended or abandoned by a domestic unincorporated entity:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

(b) Subject to Section 105 of this [Act], a plan of merger may be amended or abandoned by a domestic incorporated entity in accordance with the entity's organic law.

(c) A plan of merger may be amended or abandoned by a foreign entity in accordance with the entity's organic law.

Preliminary Comments

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

SECTION 205. STATEMENT OF MERGER; EFFECTIVE DATE.

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

(b) The statement of merger must contain:

(1) the name, jurisdiction of formation and type of organization of each merging entity, and the name, as approved by the surviving entity's organic law, jurisdiction of formation and type of organization of the surviving entity;

(2) if the merger is not to be effective upon the filing of the statement of merger, the future date and time certain after the statement is delivered for filing to the [Secretary of State];

(3) a statement as to each merging entity that the merger was approved as required by section 203;

(4) if the surviving entity is to be created by the merger, the entity's proposed public organic document, if any;

(5) if the surviving entity is required to maintain a registered agent and registered office, its registered agent and registered office in this [State];

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

(7) if the surviving entity is a foreign entity:

(A) the address to which service of process made on the [Secretary of State] may be mailed; and

(B) if it is a qualified foreign entity, its registered agent and registered office in this [State]; or

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

(8) if the surviving entity exists before the merger, any amendments to its public organic document that are stated or contained in the plan of merger; and

(9) any other information required by the organic law or organic rules of the parties to the merger.

(c) A statement of merger may state or contain any other provision.

(d) If a merger is abandoned or amended after a statement of merger is filed with the [Secretary of State] but before the merger becomes effective, a statement that the merger has been abandoned in accordance with this section, signed on behalf of any of the merging entities, shall be delivered to the [Secretary of State] for filing prior to the effective date of the merger. The statement shall take effect upon filing and the merger is abandoned and shall not become effective.

(e) The merger becomes effective pursuant to this [Article] upon the later of:

(1) the date and time of filing of the statement of merger; or

(2) a future date and time certain specified in the statement of merger.

Preliminary Comments

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

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

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

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

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

SECTION 206. EFFECT OF MERGER.

(a) When a merger becomes effective, the following rules apply:

(1) The surviving entity continues or comes into existence.

(2) The existence as a separate entity of each merging ceases.

(3) All property owned and every contract right possessed by each merging entity vests in the surviving entity without reversion or impairment.

(4) All debts, liabilities, and other obligations of each merging entity continue as debts, liabilities and obligations of the surviving entity.

(5) The name of the surviving entity may, but need not be, substituted in any pending proceeding for the name of any merging entity.

(6) All of the rights, privileges, immunities, powers and purposes of each merging entity vest in the surviving entity.

(7) Unless otherwise provided by the organic law of a merging entity, the merger does not require the dissolution of a merging entity.

(8) If a surviving entity exists before the merger, its public organic document, if any, and its organic rules, are amended to the extent provided in the plan of merger and are binding upon the owners of the surviving entity.

(9) If a surviving entity is created by the merger, its public organic document, if any, and its organic rules, become effective and are binding upon the owners of the surviving entity.

(10) The ownership or transferee interests in each party to the merger that are to be converted in the merger are converted and the former owners or transferees of those interests are entitled to the rights provided to them under the plan of merger and to any rights they hold under the organic law or organic rules of the merging entity.

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

(c) The effect of a merger on the owner's liability of a person that is incurred before the effective date of a merger is as follows:

(1) The merger does not discharge an owner's liability under the organic law of the

merging entity in which the person was an owner to the extent any such owner's liability was incurred before the merger becomes effective.

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

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

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the merging entity with respect to an owner's liability preserved by paragraph (1), as if the merger had not occurred.

(d) A foreign entity that is the surviving entity is deemed to:

(1) agree that it may be served with process in this [State] for the enforcement of any obligation of any domestic merging entity; and

(2) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing those obligations and agrees to provide to the [Secretary of State] the address to which a copy of such process may be mailed to the surviving entity.

(e) The certificate of authority or other type of foreign qualification of any merging entity shall be canceled automatically at the effective time of the merger.

Preliminary Comments

Section 206(a) - Section 206(a) is intended to reflect the general understanding that in a merger, the assets, contract rights, and liabilities of the merging entities automatically vest in the surviving entity. As such, 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. Further, § 206(a)(7) is intended to make clear that the merger does not trigger

the dissolution of the merging entities, and that they are thus not required to windup and liquidate their businesses. As a result, a merger should not constitute a transfer, assignment or conveyance of any property held by the merging entities prior to the merger. Claims of reverter or impairment of title otherwise applicable should not be triggered by the merger.

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

Section 206(a)(5) – Section 206(a)(5) is based upon *MBCA* § 11.07(5) with certain changes to take advantage of the more efficient definitional system of this [Act]. As to actions or claims pending against merging entities that are not to survive the merger, such claims may proceed under § 206(a)(5) as if the merger had not occurred. The surviving entity may, but need not, be substituted in any claim or proceeding that is continued after the merger. Substitution of the surviving entity's name in any continued proceeding has no effect on the substantive rights of the claimants in the continued action.

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

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

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

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

[ARTICLE] 3

DIVISION

SECTION 301. DIVISION.

(a) By complying with the provisions of this [Article] a domestic unincorporated entity may divide into:

(1) two or more domestic entities;

(2) the dividing entity and one or more domestic or foreign entities;

(3) one or more domestic entities and one or more foreign entities; or

(4) two or more foreign entities.

(b) If a division is not expressly prohibited by the organic law or the organic rules of the incorporated entity, a domestic incorporated entity may divide into:

(1) two or more domestic unincorporated entities;

(2) the dividing entity and one or more domestic unincorporated entities;

(3) the dividing entity and one or more domestic unincorporated entities and one or more domestic incorporated entities;

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

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

(c) If a division is authorized by the organic law of a foreign entity a foreign entity may divide:

(1) two or more domestic unincorporated entities;

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

(3) the dividing entity and one or more domestic unincorporated entities,

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

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

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

Preliminary Comments

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

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

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

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

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

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

Section 301(c) - Section 301(c) is the result of the Committee's November, 2002 meeting in which the Committee unanimously agreed to integrate corporate provisions within this [Act]. Section 301(c) as drafted would have a domestic corporation act under its own organic law if the law authorizes the division. If the organic law is silent, the domestic corporation may "elect" into this [Act] to accomplish the division.

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

SECTION 302. PLAN OF DIVISION.

(a) A domestic entity may be a party to a division by approving a plan of division.

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

(1) as to the dividing entity and each resulting entity, its name, jurisdiction of its organic law and type of entity;

(2) the terms and conditions of the division;

(3) the manner and basis of:

(i) converting the ownership or transferee interests of the dividing entity into ownership or transferee interests, securities, obligations, rights to acquire ownership or transferee interests of the resulting entities, securities, cash, other property or any combination of the foregoing;

(ii) the disposition of the ownership or transferee interests of which the dividing entity into interests, securities, obligations, rights to acquire ownership or transferee interests, securities, cash, other property or any combination of the foregoing of the entities resulting from the division; and

(iii) the allocation of the assets and liabilities of the dividing entity between and among the resulting entities;

(4) a statement that the dividing entity will or will not continue after the division;

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

(6) if a resulting entity exists before the division, any amendments to its public organic document or organic rules as are in a record; and

(7) any provision required by the organic law or organic rules of the dividing or resulting entities.

(c) A plan of division may state or contain any other provision.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan.

Preliminary Comments

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

SECTION 303. APPROVAL OF PLAN OF DIVISION.

(a) Subject to Section 105 of this [Act], a plan of division must be approved by a domestic unincorporated entity according to a provision for division in the entity's organic rules or, if none, then by all the owners of the domestic unincorporated entity.

(b) Subject to Section 105 of this [Act], a plan of division must be approved by a domestic incorporated entity according to the applicable procedures for division in the entity's organic rules or organic law.

(c) A plan of division must be approved by each foreign entity according to the entity's organic law.

Preliminary Comments

Section 303 has been adapted to mirror the approval provisions for each of the transactions provided for in this Act. As such, the commentary to analogous provisions also apply to § 303.

SECTION 304. AMENDMENT AND ABANDONMENT OF DIVISION.

(a) Subject to Section 105 of this [Act], a plan of division may be amended or abandoned by a domestic unincorporated entity:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

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

(c) A plan of division merger may be amended or abandoned by a foreign entity in accordance with the entity's organic law.

Preliminary Comments

Section 304 follows the approach of Section 204.

SECTION 305. STATEMENT OF DIVISION; EFFECTIVE DATE.

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

(b) The statement of division must contain:

(1) the name, jurisdiction of formation and type of organization of the dividing entity, and the name, as approved by the resulting entity's organic law, jurisdiction of formation and type of organization of each resulting entity;

(2) if the division is not to be effective upon the filing of the statement of division the future date and time certain, after the statement is delivered for filing to the [Secretary of State];

(3) a statement as to the dividing entity that the division was approved as required by section 303;

(4) a statement that the dividing entity will or will not survive the division;

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

(6) if the resulting entity is required to maintain a registered agent and registered office, its registered agent and registered office in this [State];

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

(8) if a resulting entity is a foreign entity:

(A) the address to which service of process made on the [Secretary of State] may be mailed; and

(B) if it is a qualified foreign entity, its registered agent and registered office in this [State]; or

(C) if it is a non qualified foreign entity, the street address of its chief executive office or principal place of business;

(9) if a resulting entity exists before the division, any amendments to its public

organic document that are stated or contained in the plan of division;

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

(11) any information required by the organic law or organic rules of the parties to the division.

(d) A statement of division may contain any other provision.

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

(f) The division becomes effective pursuant to this [Article] upon the later of:

(1) the date and time of filing of the statement of division; or

(2) a future date and time certain specified in the statement division.

Preliminary Comments

Section 305 is drafted to mirror the filing requirements of mergers in Section 205. Certain modifications were made to reflect the unique nature the division.

SECTION 306. EFFECT OF DIVISION.

(a) When a division becomes effective, the following rules apply:

(1) The dividing entity is divided into two or more entities as are named in the plan of division, one of which may be the dividing entity.

(2) If the dividing entity is not to survive the division, the existence of the dividing entity as a separate entity ceases.

(3) If the dividing entity survives the division, the existence of the dividing entity continues.

(4) The resulting entities continue or come into existence.

(5) All property and contract rights owned by the dividing entity are:

(A) Allocated to and vested in the resulting entities as specified in the plan of division;

(B) If no allocation is made and the dividing entity survives the division, all unallocated property vests in the dividing entity; or

(C) If no allocation is made and the dividing entity does not survive the division, all unallocated property vests equally as tenants in common among the resulting entities without reversion or impairment.

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

(7) Liens upon the property of the dividing entity are not impaired by the division.

(8) The debts, obligations and liabilities of the dividing entity become the debts, obligations and liabilities of the resulting entities subject to section 307.

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

(A) If the dividing entity survives the division, the unallocated debts, obligations and liabilities remain in the dividing entity; or

(B) If the dividing entity does not survive the division, the resulting entities are jointly and severally liable for any unallocated debts, obligations and liabilities.

(10) Each dividing or other resulting entity holds any property and contract rights and is liable for any debts, obligations, and liabilities allocated to it as the successor to the dividing entity, and the property and contract rights and debts, obligations, and liabilities are not deemed to have been assigned to the dividing entity or the other resulting entity in any manner, whether directly or indirectly or by operation of law.

(11) If a dividing entity continues after the division, its public organic document, if any, and its organic rules, are amended to the extent provided in the plan of division and are binding on the owners of the dividing or resulting entities.

(12) For each resulting entity created by the division, its public organic document, if any, and its organic rules, become effective and are binding upon the owners of the resulting entity.

(13) The ownership or transferee interests of the dividing entity that are to be converted in the division are converted and the former owners or transferees of those interests are entitled to the rights provided to them under the plan of division, by virtue of their ownership or

transferee interests, and to any rights they hold under the organic law or organic rules of the dividing or resulting entity.

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

(c) The effect of a division on the owner's liability of a person that ceases to have owner's liability as a result of a division is as follows:

(1) The division does not discharge an owner's liability under the organic law of the dividing entity in which the person was an owner to the extent any such owner's liability was incurred before the division becomes effective;

(2) The person does not have owner's liability under the organic law of the dividing entity in which the person was an owner before the division for any debts, obligations, or liabilities that are incurred after the division becomes effective;

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

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

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

(1) agree that it may be served with process in this [State] for the enforcement of any

obligation of the dividing entity to which it is subject of each dividing entity;

(2) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing those obligations and agrees to provide to the [Secretary of State] the address to which a copy of such process may be mailed to the surviving entity.

(e) If any dividing entity that is not a resulting entity is a qualified foreign entity, its certificate of authority or other type of foreign qualification shall be canceled automatically at the effective time of the division.

(f) Solely for purposes of this Section, an allocation of assets or liabilities is deemed a transfer for purposes of fraudulent conveyance law and the organic law governing wrongful distributions to owners.

(g) The certificate of authority or other type of foreign qualification of any dividing entity that is not a resulting entity shall be canceled automatically at the effective time of the division.

Preliminary Comments

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

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

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

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

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

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

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

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

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

[ARTICLE] 4

ENTITY INTEREST EXCHANGE

SECTION 401. ENTITY INTEREST EXCHANGE.

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

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

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

(b) A domestic incorporated entity may be a party to an entity interest exchange with a domestic unincorporated entity if the entity interest exchange is not expressly prohibited by the domestic incorporated entity's organic law and organic rules.

(c) A foreign entity may be a party to an entity interest exchange with a domestic unincorporated entity if the entity interest exchange is authorized by the organic law of the foreign entity.

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

Preliminary Comments

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

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

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

Many states have not provided for an entity interest exchange within their alternative entity law. For those jurisdictions that do provide for entity interest exchanges *see Texas Business Corporation Act, Article 5.02 and Texas Revised Partnership Act, Article 6132b-9,03* (Texas provides for both the share and entity interest exchange); and *NRS Chapter 92A* (permitting an entity interest exchange).

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

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

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

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

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

Section 401(d) - Section 401(d) is the creditor's rights provision that the Committee voted in insert at its meeting in November, 2002. **Query whether this rule should remain in effect**

after the parties have actually negotiated an amendment to the agreement? Further Query, is "merger" a better analogy or should an equity interest exchange be analogized with change of control provisions?

SECTION 402. PLAN OF ENTITY INTEREST EXCHANGE.

(a) A domestic entity may be a party to an entity interest exchange by approving a plan of entity interest exchange.

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

(1) as to the exchanging entity and the acquiring entity an its name, jurisdiction of its organic law and its type;

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

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

(4) any amendments to the public organic document or organic rules of the exchanging entity; and

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

(c) A plan of entity interest exchange may contain any other provision.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is set forth in the plan.

Preliminary Comments

Section 402(a) - Section 402(a) states the general intent that, for this [Article] to apply, one of the constituent entities must be a domestic unincorporated entity.

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

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

SECTION 403. APPROVAL OF ENTITY INTEREST EXCHANGE.

(a) Subject to Section 105 of this [Act], a plan of entity interest exchange must be approved by a domestic unincorporated exchanging entity according to the applicable procedures for an for entity interest exchange in the entity's organic rules or, if none, then by all the owners of the domestic unincorporated exchanging entity.

(b) Subject to Section 105 of this [Act], a plan of entity interest exchange must be approved by domestic incorporated entity according to applicable procedures for entity interest exchange in the entity's organic rules or organic law.

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

Preliminary Comments

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

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

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

Section 403(c) - Section 403(c) presently defers to the parties' specific intent first, then to the approval required under the entity's organic law regarding entity interest exchanges, and finally defaults to the approval necessary to effect a merger under the entity's organic law (incorporated entities likely will default to the number in the entity's organic rules for merger or to a majority vote and unincorporated entities likely will default to the number specified for merger in the entity's organic rules for merger or to unanimity). The final default rule will permit an entity interest exchange by the vote necessary to accomplish a *merger if the organic law of the entity is silent regarding entity interest exchanges.* As with the same default rule in § 303(b), the policy underlying the § 403(b) default rule is efficiency of transactions where the same end result could be effected through a series of mergers.

SECTION 404. AMENDMENT AND ABANDONMENT OF ENTITY INTEREST EXCHANGE.

(a) Subject to Section 105 of this [Act], a plan of entity interest exchange may be amended or abandoned by a domestic unincorporated entity:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

(b) Subject to Section 105 of this [Act], a plan of entity interest exchange may be amended or abandoned by a domestic incorporated entity in accordance with the entity's organic law.

(c) A plan of entity interest exchange may be amended or abandoned by a foreign entity in accordance with the entity's organic law.

Preliminary Comments

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

SECTION 405. STATEMENT OF ENTITY INTEREST EXCHANGE; EFFECTIVE DATE.

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

(b) The statement of entity interest exchange must contain:

(1) the name, jurisdiction of formation and type of organization of the exchanging entity, and the name, jurisdiction of formation and type of organization of the acquiring entity;

(2) if the entity interest exchange is not to be effective upon the filing of the statement of entity interest exchange pursuant to subsection (b), the future date and time certain after the statement or plan is delivered for filing to the [Secretary of State];

(3) a statement as to the exchanging entity that the entity interest exchange was approved as required by section 403;

(4) any amendments to the public organic document of the exchanging entity that are stated or contained in the plan of entity interest exchange;

(5) if the acquiring entity is a foreign entity:

(A) the address to which service of process made on the [Secretary of State] may be mailed; and

(B) if it is a qualified foreign entity, its registered agent and registered office in this [State]; or

(C) if it is a non qualified foreign entity, the street address of its chief executive office or principal place of business; and

(7) any information required by the organic law or organic rules of the parties to the entity interest exchange.

(c) A statement of entity interest exchange or plan of entity interest exchange may state or contain any other provision.

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

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

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

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

Preliminary Comments

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

The information required to be filed in the statement under section 404 is intentionally less burdensome than that required for a merger under section 204. The present draft adopts a minimalist filing philosophy because: (1) a filing as to the *transaction* will be required by any domestic unincorporated acquiring or exchanging entity; (2) both the acquiring and the exchanging entity *remain in existence* after the exchange (although arguably in a reorganized or recapitalized form); and (3) the terms and conditions of the exchange or any resulting restructuring or recapitalization will have been approved by the owners under section 403. Section 404 thus omits a reference to *terms and conditions* because owner approval has already been met (assuming, also, that where approval is defective, the owners have recourse under contract or alternative entity law). A filing as to the *transaction* allows at least some minimal protection for secured lenders who have loaned against collateral that may have "shifted" in some manner in an exchange which results in a recapitalization or restructuring. Also, in light of new Article 9, it seemed advisable to provide for a *notice* filing regarding the *transaction* and to thereafter leave the secured lenders to police their collateral and a possible new debtor accordingly.

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

SECTION 406. EFFECT OF ENTITY INTEREST EXCHANGE.

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

(1) The ownership and transferee interests of the exchanging entity that were to be converted or exchanged in the entity interest exchange shall either cease to exist or are to be converted or exchanged. The former owners or transferees of those interests are entitled to the rights provided to them under the plan of entity interest exchange and to any rights they hold under the organic law or organic rules of the entity to the entity interest exchange.

(2) The acquiring entity becomes the holder of the ownership or transferee interests in the exchanging entity as stated in the plan of entity interest exchange.

(3) The public organic document and organic rules of the entities to the entity interest exchange are amended to the extent provided in the plan of entity interest exchange and under the organic law of the entities to the exchange and are binding upon the owners of the entities to the exchange.

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

(c) The effect of an entity interest exchange on the owner's liability of a person that ceases to have owner's liability for the exchanging entity as a result of the entity interest exchange is as follows:

(1) The entity interest exchange does not discharge an owner's liability under the

organic law of the entity in which the person was an owner to the extent any such owner's liability was incurred before the entity interest exchange becomes effective;

(2) The person does not have owner's liability under the organic law of the entity in which the person was an owner before the entity interest exchange for any debts, obligations, or liabilities that are incurred after the entity interest exchange becomes effective;

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

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the entity with respect to an owner's liability preserved by paragraph (1), as if the entity interest exchange had not occurred.

(d) A foreign entity that is the acquiring entity is deemed to:

(1) agree that it may be served with process in this [State] for the enforcement of any obligation of any domestic exchanging entity of the exchanging entity; and

(2) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing those obligations and agrees to provide to the [Secretary of State] the address to which a copy of such process may be mailed to the acquiring entity.

Preliminary Comments

Section 406(a) - Section **406**(a) has been redrafted since the meeting of March 2001. At present, section **406**(a) attempts to make clear four points - that after the entity interest exchange becomes effective: (1) the *entity interest of the exchanging entity* are exchanged, converted or canceled as provided in the plan; (2) the *only rights of the former holders* of the exchanging entity are those received as consideration for the exchange, conversion or cancellation; (3) the

acquiring entity becomes the *owner* of the exchanging entity's ownership or transferee interests (and thus the controlling entity); and (4) the *organic documents of the parties are amended* by the entity interest exchange filing, 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 respective entities.).

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

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

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

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

[ARTICLE] 5

CONVERSION

SECTION 501. CONVERSION.

(a) By complying with this [Article] a domestic unincorporated entity may:

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

(2) become a foreign entity of a different type if the conversion is authorized by the organic law rules of the foreign entity.

(b) A domestic incorporated entity may convert to a domestic unincorporated entity if the conversion is not expressly prohibited by the organic law and organic rules of the domestic incorporated entity.

(c) A foreign entity may convert to a domestic unincorporated entity of a different type if the conversion is authorized by the organic law of the foreign entity.

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

Preliminary Comments

The conversion contemplated by Article 5 involves the transformation of one type of entity into a different type of entity. The conversion, like the merger of Article 2, transfers all the property, rights, privileges, title, debts, obligations, liabilities and duties of the converting entity to the converted entity by operation of law. Unlike a merger, however, a conversion involves a *single entity* which, after the conversion, is considered to be the *same entity* as before the

conversion. The conversion, therefore, provides a *direct method* to accomplish what before required the creation of *two entities* followed by a merger of the entities. Because a conversion involves only a change of form, it should not constitute a "sale" or "conveyance" under state law or applicable contract provisions.

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

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

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

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

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

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

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

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

SECTION 502. PLAN OF CONVERSION.

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

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

(1) as to each converting and converted entity, the name, the jurisdiction of its organic law and its type;

(2) the terms and conditions of the conversion;

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

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

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

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

(c) A plan of conversion may contain any other provision.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is set forth in the plan.

Preliminary Comments

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

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

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

SECTION 503. APPROVAL OF PLAN OF CONVERSION.

(a) Subject to Section 105 of this [Act], a plan of conversion must be approved by a domestic unincorporated entity according to applicable procedures for approval of conversion or, if none, then by all the owners of the domestic unincorporated entity.

(b) Subject to Section 105 of this [Act], a plan of conversion must be approved by a domestic incorporated entity according applicable procedures for conversion in the entity's organic rules or organic law.

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

Preliminary Comments

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

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

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

SECTION 504. AMENDMENT AND ABANDONMENT OF CONVERSION.

(a) Subject to Section 105 of this [Act], a plan of conversion may be amended or abandoned by a domestic unincorporated entity:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

(b) [Subject to Section 105 of this [Act], a plan of conversion may be amended or abandoned by a domestic incorporated entity in accordance with the entity's organic law.

(c) A plan of conversion may be amended or abandoned by a foreign entity in accordance with the entity's organic law.

Preliminary Comments

Section 504 permits abandonment or termination for a domestic unincorporated entity according to a provision in a plan of conversion or, unless prohibited by the plan of conversion, by the same consent as required to approve the plan.

SECTION 505. STATEMENT OF CONVERSION; EFFECTIVE DATE.

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

(b) The statement of conversion must contain:

(1) the name, jurisdiction of formation and type of organization of the converting entity, and the name, if it is to be changed, jurisdiction of formation and type of organization of the converted entity;

(2) if the conversion is not to be effective upon the filing of the statement of conversion the future date or time, if any, on which it will be effective;

(3) a statement that the conversion was approved as required by section 503;

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

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

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

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

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

this [State]; or

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

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

(d) A statement of conversion may state or contain any other provision.

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

(e) The conversion becomes effective pursuant to this [Article] upon the later of:

(1) the date and time of filing of the statement of conversion; or

(2) a future date and time certain specified in the statement of conversion.

Preliminary Comments

Section 505 - Section 505 states the substantive filing requirements for converting domestic unincorporated entities. The specific filing requirements are stated in section 504(b). These requirements generally mirror those of the transactions set forth in this [Act].

Section 504(c)(4) - Section 504(c)(4) allows a converted entity that is a domestic filing entity to either: (1) contain all information to be required to organize the converted entity in the statement of conversion; or (2) attach a copy of the domestic converted entity's public organic documents to the conversion filing. The intent of § 504(c)(4) is efficiency in filings as well as public notice regarding the transaction.

Section 504(c)(5) - Section 504(c)(5) requires a converted entity that is a domestic nonfiling

entity to provide the *street address* of the converted entity's chief executive office or principal place of business. A post office box would not satisfy § 504(b)(5). The intent of § 504(b)(5) is to provide notice of the place at which the converted entity may be found for all purposes, including that of service of process. The chief executive office or principal place of business is not required to be located within the converted entity's jurisdiction of formation.

Section 505(c)(6) - Section 505(c)(6) imposes on converted foreign entities a filing requirement that includes information of either: (1) a registered agent and registered office for a qualified foreign entity in the converting entity's jurisdiction of formation; or (2) a *street address* of its chief executive office or principal place of business for a nonqualified foreign entity. As with section 505(c)(5), a post office box would not satisfy the policy or intent of the section. Section 505(c)(6) provides notice of a place at which the foreign entity may be found for all purposes, including service of process.

Section 505(d) - Section 504(d) is new. The section was added to grant to recording authorities the statutory basis upon which to accept certain documents for filing.

Section 505(e) - Section 504(e) sets out the general rule that the conversion becomes effective upon the later of filing or a date or time specified in the statement of conversion. Section 504(d)(1) states the intent that "filing" for purpose of determining the effectiveness of the conversion is to be determined by the *means normally used for filing* within each [jurisdiction] adopting this [Act].

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

SECTION 506. EFFECT OF CONVERSION.

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

(1) The converted entity is deemed to:

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

(ii) be the same entity without interruption or dissolution as the converting entity;

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

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

(3) All property owned and every contract right possessed by the converting entity vests in the converted entity without reversion or impairment.

(4) All debts, liabilities and other obligations of the converting entity continue as debts, liabilities and obligations of the converted entity.

(5) The name of the converted entity may, but need not be, substituted in any pending proceeding for the name of the converting entity.

(6) Unless prohibited by law other than this [Act], all of the rights, privileges, immunities, powers and purposes of the converting entity remain in the converted entity.

(7) Unless otherwise provided by the organic law of the converting entity, the conversion does not require the dissolution of the converting entity.

(8) If a converted entity is a filing entity, the statement of conversion, its public organic document and its organic rules, as are stated or contained in the plan, become effective and are binding upon the owners of the converted entity.

(9) If a converted entity is a nonfiling entity, its organic rules, as are stated or contained in the plan, become effective and are binding upon the owners of the converted entity.

(10) The ownership or transferee interests of the converting entity that are to be converted in the conversion are converted and the former owners or transferees of those interests

are entitled to the rights provided to them under the plan of conversion and to any rights they hold under the organic law or organic rules of the converting entity.

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

(c) The effect of a conversion on the owner's liability of a person that is incurred before the effective date of a conversion is as follows:

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

(2) The person does not have owner's liability under the organic law of the converting entity in which the person was an owner before the conversion for any debts, obligations, or liabilities that are incurred after the conversion becomes effective.

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

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the converting entity with respect to an owner's liability preserved by paragraph (1), as if the conversion had not occurred.

(d) A foreign entity that is the converted entity is deemed to:

(1) agree that it may be served with process in this [State] for the enforcement of any

obligation of any domestic merging entity; and

(2) appoint the [Secretary of State] as its agent for service of process for the purpose of enforcing those obligations and agree to provide to the [Secretary of State] the address to which a copy of such process may be mailed to the converted entity.

(e) If the converting entity is a qualified foreign entity, its certificate of authority or other type of foreign qualification shall be canceled automatically at the effective time of the conversion.

Preliminary Comments

Section 506(a) - Section 506(a) governs the *legal effect of a conversion where the converted entity is a domestic entity*. For example, section 505(a) regulates the effect of a conversion of a foreign entity to a domestic entity or the conversion of a domestic entity of one type to a domestic entity of another type.

Section 506(a) provides an exhaustive list of the effect of a conversion where the converted entity is a domestic entity. First, under section 506(a), the converting entity ceases to exist and the public organic documents under which the converting entity operated are no longer effective. Second, the converted entity becomes subject to the organic laws of the jurisdiction of conversion and the converted entity is deemed to have come into existence at the time the converting entity was formed, created or otherwise came into being. Third, all actions or proceedings, rights and privileges, and debts and obligations of the converting entity vest in the converted entity unimpaired as if the conversion had not occurred. For this purposes, "liabilities" includes state and local taxes. Fourth, all owner interests in the converting entity shall be reclassified as provided in the plan of conversion and all rights of the owners in the converted entity become effective as stated in the plan. Finally, sections 506(a)(8) and (9) provide the filing effect of the statement of conversion for a converted filing and nonfiling entity.

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

Section 506(c) - Section 506(c) provides the rule for *past owner's liability*. Section 506(c) has four parts: (1) an *owner in a converting entity* who had personal liability for the debts of the converting entity under the entity's organic law *is not discharged* from those debts if the *debts arose before the effective date* of the conversion; (2) an *owner in a converting entity* shall not have owner's liability for the *debts of the converted entity* if those *debts arose after the effective*

date of the conversion; (3) the *organic laws of the converting entity continue* to apply for any past owner's liability preserved under section 506(c)(1)(past personal liability regarding the converting entity); and (4) the *organic laws of the converting entity* relative to *rights of contribution* among owners in the converting entity continue to apply for owner's liabilities preserved under section 506(c)(1)(contribution rights among owners in a converting entity). Sections 506(b) and (c) do not address the circumstance where owner's liability exists before and after a conversion.

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

[ARTICLE] 6

DOMESTICATION

SECTION 601. DOMESTICATION.

(a) By complying with this [Article] a domestic unincorporated entity may domesticate as a foreign entity of the same type.

(b) A foreign entity may domesticate as a domestic unincorporated entity if the domestication is authorized by the organic law of the foreign entity.

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

Preliminary Comments

Article 6 authorizes a foreign unincorporated entity to become a domestic unincorporated entity of the same type and also authorizes a domestic unincorporated entity to become a foreign unincorporated entity of the same type. Article 6 arguably governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this [Act]. Likewise, the organic laws of a foreign jurisdiction, and not Article 6, would arguably govern the legal effect of a domestic unincorporated entity that domesticates in another jurisdiction. In the latter scenario, Article 6 serves as to statutorily *enable* a domestic unincorporated entity to domesticate to a foreign jurisdiction. [Article 6 does not create a right in the domestic entity to be received in the foreign jurisdiction. Section 601 does not provide that a foreign incorporated entity to become a domestic incorporated entity] The bracketed material is now in question depending upon what the Committee wishes to do with the default rule regarding domestications..

The domestication authorized by Article 6 differs from a conversion in that a domestication requires that the domesticating entity be the same type as the domesticated entity. In a conversion, the converting entity must change its type. A domestication likewise differs from a merger because a merger requires two existing entities - a domestication and conversion involve

the same entity. As with a conversion, all rights and privileges, debts and liabilities, 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.

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

SECTION 602. PLAN OF DOMESTICATION.

(a) A domestic entity may domesticate by approving a plan of domestication.

(b) A plan of domestication must be in a record and must contain:

(1) as to each domesticating and domesticated entity, its name, jurisdiction of its organic law and type of entity;

(2) the terms and conditions of the domestication;

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

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

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

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

(c) A plan of domestication may state or contain any other provision.

(d) Any of the provisions of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the provisions of the plan is set forth in the plan.

Preliminary Comments

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

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

Section 602(b)(3) - The language of section 602(b)(3) is identical to that found in Articles 2 (mergers), 3 (divisions), 4 (entity interest exchanges) and 5 (conversions). Previous Reporter's Notes raised for the Committee the issue of **"**shuffling**"** entity interests in the foregoing transactions. As was stated in those notes, the language of the parallel provisions could be interpreted to allow an "equity shuffle" notwithstanding the absence of "appraisal" rights for owners in unincorporated entities. Further, for the foregoing transactions that involve both an incorporated and an unincorporated entity, the present provisions of Chapter 13 of the *MBCA* would grant appraisal rights to owners in the incorporated entity. In the current draft of Chapter 9 of the *MBCA* (entitled Domestication and Conversion), however, the conforming amendments to Chapter 13 with respect to domestication do *not* permit an appraisal right for shareholders in a domestication.

SECTION 603. APPROVAL OF PLAN OF DOMESTICATION.

(a) Subject to Section 105 of this [Act], a plan of domestication must be approved by a domestic unincorporated entity according to applicable procedures for approval of domestication

in the entity's organic rules or, if none, then by all the owners of the domestic unincorporated entity.

(b) A plan of domestication must be approved each foreign entity according to the entity's organic law.

Preliminary Comments

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

SECTION 604. AMENDMENT AND ABANDONMENT OF DOMESTICATION.

(a) Subject to Section 105 of this [Act], a plan of domestication may be amended or abandoned by a domestic unincorporated entity:

(1) as provided in the plan; or

(2) unless prohibited by the plan, by the same consent as was required to approve the plan.

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

Preliminary Comments

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

SECTION 605. STATEMENT OF DOMESTICATION; EFFECTIVE DATE.

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

(b) The statement of domestication must contain:

(1) the name, jurisdiction of formation and type of organization of the domesticating entity, and the name, if it is to be changed, jurisdiction of formation and type of organization of the domesticated entity;

(2) if the domestication is not to be effective upon the filing of the statement of domestication the future date or time, if any, on which it will be effective;

(3) a statement that the domestication was approved as required by section 603;

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

(5) if the domesticated entity is required to maintain a registered agent and registered office, its registered agent and registered office in this [State];

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

(7) if the domesticated entity is a foreign entity:

(A) if it is a qualified foreign entity, its registered agent and registered office in this [State]; or

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

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

(d) A statement of domestication may contain any other provision.

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

(f) The domestication becomes effective pursuant to this [Article] upon the later of:

(1) the date and time of filing of the statement of domestication; or

(2) a date and time certain specified in the statement of domestication.

Preliminary Comments

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

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

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

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

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

SECTION 606. EFFECT OF DOMESTICATION.

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

(1) The domesticated entity is deemed to:

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

(ii) be the same entity without interruption or dissolution as the domesticating entity;

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

(2) A signed statement of charter surrender or certificate of cancellation is effective and all other public documents filed with the [Secretary of State] by a domestic domesticating

entity are no longer effective.

(3) All property owned and every contract right possessed by the domesticating entity vests in the domesticated entity without reversion or impairment.

(4) All debts, liabilities and other obligations of the domesticating entity continue as debts, liabilities and obligations of the domesticated entity.

(5) The name of the surviving entity may, but need not be, substituted in any pending proceeding for the name of any merging entity.

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

(7) Unless otherwise provided by the organic law of the domesticating entity, the domestication does not require the dissolution of the assets of the domesticating entity.

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

(9) If a domesticated entity is a nonfiling entity, its organic rules, as are stated or contained in the plan, become effective and are binding upon the owners of the domesticated entity.

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

(b) A person that becomes subject to owner's liability with respect to a domesticated

entity as a result of a domestication has owner's liability only to the extent provided in the organic law of the entity and only for those debts, obligations, and liabilities that are incurred after the domestication becomes effective.

(c) The effect of a domestication on the owner's liability of a person that is incurred before the effective date of a domestication is as follows:

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

(2) The person does not have owner's liability under the organic law of the domesticating entity in which the person was an owner before the domestication for any debts, obligations, or liabilities that are incurred after the domestication becomes effective.

(3) The organic law of the domesticating entity continues to apply to the collection or discharge of an owner's liability preserved by paragraph (1), as if the domestication had not occurred.

(4) The person has rights of contribution from other persons provided by the organic law or organic rules of the domesticating entity with respect to an owner's liability preserved by paragraph (1), as if the domestication had not occurred.

(d) A foreign entity that is the domesticated entity is deemed to:

(1) agree that it may be served with process in this [State] for the enforcement of any obligation of any domestic domesticating entity; and

(2) appoint the [Secretary of State] as its agent for service of process for the

purpose of enforcing those rights and agree to provide the [Secretary of State] the address to which a copy of such process may be mailed to the domesticated entity.

(e) The certificate of authority or other type of foreign qualification of the domesticating entity shall be canceled automatically at the effective time of the domestication.

Preliminary Comments

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

Section 606 is intended to set forth an exhaustive list. Section 606(a)(3) states the general proposition that the domesticated entity is deemed to have begun its existence at the time the domesticating entity was first formed or otherwise created. As such, the domesticated entity is the same entity whose existence relates back to the creation of the domesticating entity. Sections 606(a)(4), (5), (6) and (7) preserve all actions or proceedings, rights and privileges and creditor claims and liens pending against the domesticating entity unimpaired. A domestication, therefore, 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. Section 606(a)(10) states the rule that the ownership or transferee interests of the domesticating entity are reclassified into whatever rights were negotiated in the domestication and that the owners or transferees of the domesticating entity are entitled to those rights. Sections 606(a)(7) and (8) address the effect of the filing of a statement of domestication on a filing and nonfiling domesticated entity. Finally, Section 605(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. (As previously noted, this transaction is one for which the *MBCA* does not grant dissenter's rights.)

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

Section 606(c) - Section 606(c) addresses past owner liability. To the extent that these rules address the *legal effect of owner liability after a domestication*, they are more properly the subject of the organic law of the foreign jurisdiction. This section was bracketed in prior drafts.

Query whether § 605(d) should be included since whatever owner's liability existed before the domestication will continue after the transaction as well.

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

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

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

SECTION 702. 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 and 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 7001 (b)).

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

SECTION 704. EFFECTIVE DATE. This [Act] takes effect [January 1, 200___.]

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

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

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

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

Preliminary Comments

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

SECTION 706. APPLICABILITY.

(a) Before January 1, 20___ [drag-in-date], this [Act] governs only:

(1)

(2)

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

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

(1)

(2)

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