

D R A F T

FOR DISCUSSION ONLY

# MODEL ENTITY TRANSACTIONS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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AMERICAN BAR ASSOCIATION

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Partial Draft for ~~October 8-10, 2004,~~<sup>1</sup> April 9, 2005,<sup>2</sup> Committee Meeting  
(Containing Article 6)

*WITH COMMENTS*

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Jointly By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and

AMERICAN BAR ASSOCIATION

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# MODEL ENTITY TRANSACTIONS ACT

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## MODEL ENTITY TRANSACTIONS ACT

### SECTION 102. DEFINITIONS. In this [act]:<sup>12</sup>

(6.1) “Dividing entity” means the domestic entity that approves a plan of division pursuant to Section 603 or the foreign entity that approves a division pursuant to the law of its jurisdiction of organization.<sup>13</sup>

(6.2) “Division” means a transaction of the kind authorized by [Article 6].<sup>14</sup>

(32.1) “Resulting entity” means an entity that continues in existence after or is created by a division.<sup>15</sup>

[ARTICLE] 6 ~~[RESERVED]~~<sup>16</sup>

## DIVISION

### SECTION 601. DIVISION AUTHORIZED.

(a) ~~Division of domestic entities.—By complying with this [article] and~~  
~~except~~<sup>17</sup> Except<sup>18</sup> as otherwise provided in this section, by complying with this [article]<sup>19</sup>, a domestic entity may divide into:

- (1) ~~two~~<sup>20</sup> the dividing entity and one<sup>21</sup> or more new entities, whether  
<sup>22</sup>domestic ~~entities;~~<sup>23</sup> or foreign; or<sup>24</sup>
- (2) ~~the dividing entity and one or more new domestic or foreign entities;~~<sup>25</sup>
- ~~(3) one or more new domestic entities and one or more new foreign~~  
~~entities; or~~<sup>26</sup> ~~(4)~~<sup>27</sup> two or more new ~~foreign~~<sup>28</sup> entities, whether domestic or foreign<sup>29</sup>.

(b) ~~Creation of foreign entities.—~~<sup>30</sup> A foreign entity may be created by the division of a domestic entity only if the division is authorized by the laws of the foreign entity's jurisdiction of organization.

(c) ~~Division of foreign entities.—If~~<sup>31</sup> Except as otherwise provided in this section,  
if<sup>32</sup> the division is authorized by the laws of the foreign entity's jurisdiction of organization, one  
or more of the resulting entities created in a division of a foreign entity may be a domestic entity  
~~except as otherwise provided in this section~~<sup>33</sup>.

(d) ~~Other procedures.—This [article] does not apply to a division described in  
subsection (a), (b) or (c) in which the dividing entity and all of the resulting entities are the same  
type of entity if the laws of this [state] authorize such a division.~~<sup>34</sup> (e) ~~Transitional provision.—~~

<sup>35</sup>If a protected agreement contains a provisions that applies to a merger of a domestic entity but  
does not refer to a division, the provision applies to a division of the entity until ~~such time as~~

<sup>36</sup>the provision is amended ~~subsequent to~~<sup>37</sup> after<sup>38</sup> the effective date of this [act].

~~(f) Non-exclusive method of acquisition.—Section 601 does not limit the power of  
a domestic entity to divide into two or more new domestic entities, the dividing entity and one or  
more new domestic or foreign entities, one or more new domestic entities and one or more  
foreign entities, or two or more new foreign entities in a transaction other than a division.~~<sup>39</sup>

~~[(g) Excluded entities.—Domestic entities of the~~<sup>40</sup> e) The<sup>41</sup> following  
~~types~~<sup>42</sup> entities<sup>43</sup> may not divide or be created in a division under this [article]:

(1)

(2)]

## Comments

**1.** <sup>44</sup>**In General** – The division transaction authorized by this article is the reverse of a  
merger. Instead of two or more entities being merged into one entity, in a division one existing  
entity is divided into two or more resulting entities. The dividing entity may or may not survive  
the division, and one or more of the resulting entities may be foreign entities if the laws of the  
foreign entity's jurisdiction of organization permit the division. As part of the division, the  
assets and liabilities of the dividing entity are allocated to the resulting entities as provided in the

plan of division to the extent permitted by this article.

~~2. Section 601(d)~~<sup>45</sup> It is expected that ~~many~~<sup>46</sup> some<sup>47</sup> adopting states will add provisions authorizing divisions to their organic laws. ~~See the discussion in the Prefatory Note~~<sup>48</sup>.

On the other hand, there will be some types of entities where it is unlikely that division provisions will be added to the organic law, for example, unincorporated nonprofit associations. In cases where an organic law provides for a division in which the dividing entity and the resulting entities are all of the same type, there is no need for this Act; but in cases where an organic law does not provide for divisions, this Act will serve the important function of authorizing divisions just involving entities of that type. ~~Subsection (d) has been drafted in general terms to accommodate both the existing law in an adopting state at the time this Act is enacted and also any changes in organic laws after the enactment of this Act. Subsection (d) could be adopted in the following more specific form identifying the organic laws to which it refers~~<sup>49</sup> If one or more organic laws in a particular state authorize the division of entities organized under them, a subsection should be added to this section analogous to Sections 201(c) and 301(c)(d) providing that<sup>50</sup>:

This [article] does not apply to a division under ~~the following statutes in which the dividing entity and all of the resulting entities are the same type of entity~~<sup>51</sup>:

~~(1) Chapter 12B of the MBCA~~<sup>52</sup>

(1)<sup>53</sup>

(2)

~~(3)~~<sup>54</sup> ~~3.~~<sup>55</sup> 2.<sup>56</sup> **Section 601**(~~g~~<sup>57</sup> e<sup>58</sup>) – Section 601<sup>59</sup>(~~g~~<sup>60</sup> e<sup>61</sup>) is an optional provision that may be used to exclude certain types of entities from the scope of this article. ~~It is limited to domestic entities because a restriction on the power of a foreign entity to engage in a division is more properly placed in the organic law of the foreign entity.~~<sup>62</sup> A provision that excludes certain types of ~~domestic~~<sup>63</sup> entities from the Act generally is set forth in section 107.

~~4.~~<sup>64</sup> 3.<sup>65</sup> **Tax Considerations** – <sup>66</sup>This Act authorizes a division for state law purposes. Federal law and other state law will independently determine how a division transaction will be taxed.

## SECTION 602. PLAN OF DIVISION.

(a) ~~Plan of division required.~~<sup>67</sup> A domestic entity may divide under this [article] by approving a plan of division. ~~(b) Required contents.~~<sup>68</sup> The<sup>69</sup> plan of division must be in a record and contain:

(1) ~~as to~~<sup>70</sup> the name and type of the<sup>71</sup> dividing entity ~~and each new~~

~~resulting entity, its~~<sup>72, 73</sup>

(2) a statement whether the dividing entity will continue after the division;<sup>74</sup>

(3) the<sup>75</sup> name, jurisdiction of organization, and type of each new resulting<sup>76</sup> entity;

~~(2) the terms and conditions of the division;~~<sup>77</sup> ~~(i~~<sup>78</sup> 4<sup>79</sup>) the manner ~~and basis~~<sup>80</sup> of :

(~~A~~<sup>81</sup> i<sup>82</sup>) converting the interests of the dividing entity into interests, securities, obligations, rights to acquire interests or securities, cash, or<sup>83</sup> other property, or any combination of the foregoing;

~~(B) allocating the assets and~~<sup>84</sup> ii) allocating between or among only certain of the resulting entities those assets of the dividing entity that are not to be owned by all of the resulting entities as tenants in common pursuant to section 606(a)(4) and those<sup>85</sup> liabilities of the dividing entity ~~between or among~~<sup>86</sup> as to which all of<sup>87</sup> the resulting entities are not to be liable jointly and severally pursuant to section [606(a)(6)(ii)(B)] [607(a)(2)(ii)]<sup>88</sup>; and

~~(C) disposing of~~<sup>89</sup> iii) distributing<sup>90</sup> the interests of the resulting entities created in the division;

~~(ii) for each resulting entity created by the division, its~~<sup>91</sup> 5) the<sup>92</sup> proposed public organic document, if any, of each new resulting entity<sup>93</sup> and the full text of its private organic rules that are proposed to be in a record;

~~(iii~~<sup>94</sup> 6<sup>95</sup>) if the dividing entity will continue after the division, any proposed amendments to its public organic document or private organic rules that are proposed



to be in a record;

~~(3) any facts ascertainable outside of the plan, if the manner in which the acts will operate upon a provision in the plan of division and the manner in which any provision in the plan are made dependent upon facts or events ascertainable outside of the plan. The term “facts” as used in the preceding sentence includes, but is not limited to, the occurrence of any event, including a determination or action by any person, body or entity;~~<sup>96</sup>

(7) the other terms and conditions of the division; and<sup>97</sup>

~~(4) a statement whether the dividing entity will continue after the division in a record; and~~<sup>98</sup> ~~(5~~<sup>99</sup> 8<sup>100</sup>) any other provision required by the laws of ~~the dividing entity’s or resulting entities’ jurisdiction of organization or their~~<sup>101</sup> this state or the<sup>102</sup> organic rules;<sup>103</sup> of the dividing entity.<sup>104</sup>

~~(e) Optional contents. — In addition to the provisions required by subsection (b),~~  
<sup>a</sup> <sup>105</sup> b) A<sup>106</sup> plan of division may contain any other provision not prohibited by ~~applicable~~<sup>107</sup> law.

## Comments

1. **Section 602(a)** - The requirements for the approval of a plan of division are set forth in ~~section 303.~~<sup>108</sup> Section 603.<sup>109</sup>

2. **Section** ~~6302~~<sup>110</sup> 602<sup>111</sup> (~~b~~<sup>112</sup> a<sup>113</sup>) (~~3~~<sup>114</sup> 4<sup>115</sup>) – [Explain options under paragraph (iii) for disposing of interests in the resulting entities.]

3. **Sections** <sup>116</sup> Section<sup>117</sup> **602(2** <sup>118</sup> a<sup>119</sup>) (~~ii~~<sup>120</sup> 5<sup>121</sup>) **and** (~~iii~~<sup>122</sup> 6<sup>123</sup>) – **Sections** ~~302(2~~<sup>124</sup> Section 602(a<sup>125</sup>) (~~ii~~<sup>126</sup> 5<sup>127</sup>) **and** (~~iii~~<sup>128</sup> 6<sup>129</sup>) **provide**<sup>130</sup> provides<sup>131</sup> the interest holders of the dividing entity with the text of the public organic documents, if any, and the private organic rules of the resulting entities and any amendments to the public organic documents or private organic rules of the dividing entity that are proposed to be in a record. ~~The “organic rules” that are referenced here include the default rules of the entity to the extent they are not contractually modified by the parties.~~<sup>132</sup>

4. **Section 602(e** <sup>133</sup> b<sup>134</sup>) – **Section** ~~302~~<sup>135</sup> 602<sup>136</sup> (~~e~~<sup>137</sup> b<sup>138</sup>) provides the statutory authority for the dividing entity to include information in a plan of division that is not specifically listed in

section ~~302~~<sup>139</sup> 602<sup>140</sup> (~~b~~<sup>141</sup> a<sup>142</sup>). One such possibility is that of appraisal rights. Few state statutes provide for appraisal rights for minority dissenting owners of unincorporated entities. A dividing entity, could, however, provide for appraisal rights in section ~~302~~<sup>143</sup> 602<sup>144</sup> (~~e~~<sup>145</sup> b<sup>146</sup>).

### SECTION 603. APPROVAL OF DIVISION.

(a) ~~Domestic entities.—Subject to subsections (c), a~~<sup>147</sup> A<sup>148</sup> plan of division ~~must~~  
~~be~~<sup>149</sup> is not effective unless it has been<sup>150</sup> approved;<sup>151</sup>

(1)<sup>152</sup> by a domestic dividing entity:

~~(1)~~<sup>153</sup> A<sup>154</sup> in accordance with the ~~procedures,~~<sup>155</sup> requirements,<sup>156</sup> if  
any,<sup>157</sup> in<sup>158</sup> in its organic ~~law, as modified by any enforceable provisions in its organic~~  
~~rules,~~<sup>159</sup> rules<sup>160</sup> for approval of ~~a~~<sup>161</sup> a<sup>162</sup> division;

~~(2) if its organic law does not provide procedures for approval of a~~  
~~division, then in accordance with the procedures, if any, for approval of a plan of merger in its~~  
~~organic law or organic rules;~~<sup>163</sup>

~~(3) if its organic law does not provide procedures for approval of a~~  
~~division or a merger, and~~<sup>164</sup> B) if<sup>165</sup> its organic rules do not provide ~~procedures~~<sup>166</sup> for approval of  
a division, ~~then by all governance holders of the entity entitled to vote;~~<sup>167</sup> in accordance with the  
requirements, if any, for approval of a merger in its organic law and organic rules as if the  
division were a merger; or<sup>168</sup>

(C) if neither its organic law nor organic rules provide for approval  
of a division or a merger, by all of the interest holders of the entity entitled to vote on or consent  
to any matter; and<sup>169</sup>

~~(b) Foreign entities.—A division of a foreign entity in which one or more of the~~

~~resulting entities is a domestic entity must be approved in accordance with the laws of the foreign entity's jurisdiction of organization.~~<sup>170</sup>

(c) ~~Consent to interest holder liability. If an~~<sup>171</sup> (2) in a record, by each<sup>172</sup> interest holder of a domestic dividing entity that<sup>173</sup> will have interest holder liability with respect to a resulting entity, ~~that person must vote for or consent to~~<sup>174</sup> for liabilities that arise after<sup>175</sup> the division ~~in a record~~<sup>176</sup> becomes effective<sup>177</sup>, unless:

(~~1~~<sup>178</sup> A<sup>179</sup>) the organic rules of the entity provide<sup>180</sup> in a record ~~provide~~<sup>181</sup> for the approval of a division in which some or all of its interest holders become subject to interest holder liability ~~with~~<sup>182</sup> by<sup>183</sup> the vote or consent of fewer than all of the interest holders; and

(~~2~~<sup>184</sup> B<sup>185</sup>) the ~~person has~~<sup>186</sup> interest holder<sup>187</sup> voted for or consented in a record to that provision of the organic rules<sup>188</sup>; or became an interest holder after the adoption of that provision.<sup>189</sup>

(b) A division of a foreign entity in which one or more of the resulting entities is a domestic entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of organization<sup>190</sup>.

## Comments

1. **In general.** – Approval under ~~section 303~~<sup>191</sup> Section 603<sup>192</sup> is intended to include whatever actions by the governors and interest holders of a dividing entity are required by either its organic law or organic rules to effectuate the division. For example, if the organic rules of an entity prescribe a procedure for the proposal, adoption and/or approval of a division, the term “approval” includes conformance to all of those rules. See<sup>193</sup> the definition of “approval” in Article 1. If the organic law and organic rules require only approval by the requisite vote of interest holders, then section ~~303~~<sup>194</sup> 603<sup>195</sup> 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 division. This approval process will include, in the case of some incorporated entities, rules applicable to voting and

records that apply to shareholder votes. On the other hand, ~~section 303~~<sup>196</sup> Section 603<sup>197</sup> is not intended to impose any greater requirements for effecting a division than those required by the applicable organic rules or organic law of the entity.

2. **Section 603(a)** - Section ~~303~~<sup>198</sup> 603<sup>199</sup> (a) provides the substantive rule applicable to the approval of divisions by domestic dividing entities under the Act. Subsection (a) sets out an alternative three-part test:

1. Approval of a division must be in accordance with any procedures in the organic ~~law~~<sup>200</sup> rules<sup>201</sup> of the entity, ~~as modified by its organic rules~~<sup>202</sup>.
2. If the organic ~~law is~~<sup>203</sup> rules are<sup>204</sup> silent with respect to procedures for approval of a division, then the entity will follow the procedures for approval of a plan of merger in its organic law or organic rules. ~~The assumption here is that a division is simply the reverse transaction of a merger~~<sup>205</sup>.
3. If the organic law ~~is~~<sup>206</sup> and the entity's organic rules are<sup>207</sup> silent with respect to procedures for approval of a division or a merger, ~~and its organic rules do not provide procedures for~~<sup>208</sup> then<sup>209</sup> approval ~~of a divisions, the~~<sup>210</sup> by all ~~governance~~<sup>211</sup> of the interest<sup>212</sup> holders entitled to vote ~~upon the transaction~~<sup>213</sup> on any matter is required<sup>214</sup>.

The incorporation into this article of the merger ~~or division~~<sup>215</sup> procedures in the organic law of the dividing entity should be construed broadly to include not only express statutory procedures, but also applicable common law principles such as fiduciary duty standards ~~of~~<sup>216</sup> for<sup>217</sup> governors and majority interest holders. Statutory provisions on voting by classes or voting groups will also be applicable.

Statutory provisions on “short-form” mergers will not be applicable. [Explain.]

3. **Section 603(a)(2)** – Subsection (c) is patterned generally after § 1110 of ULPA (2001). Section 603(a)(2) will be applicable, for example, to shareholders of a dividing corporation where one of the resulting entities is a general partnership that is not a limited liability partnership if the shareholders become general partners of the general partnership. If such a shareholder were to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect of exercising appraisal rights is that the shareholder would not become a general partner in the resulting entity; and, in that case, the consent of that shareholder would not be required.<sup>218</sup>

The consent of an interest holder required by subsection (a)(2)(B) may be given either by (i) signing or agreeing generally to the terms of organic rules that includes the required provision permitting less than unanimous approval of a division in which interest holders become subject to owner liability, or (ii) voting for or consenting to an amendment to add such a provision.<sup>219</sup>

4. <sup>220</sup>**Section 603(b)** – Where a foreign entity is the dividing entity, subsection (b) defers

to the laws of the foreign entity's jurisdiction of organization for the requirements for approval of the division by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws, such as this Act (or any applicable regulatory law) if it has been adopted in the foreign jurisdiction. The laws of the foreign jurisdiction will also control the application of any special approval requirements found in the organic rules of the foreign entity.

~~4. Section 603(e)—Subsection (e) is patterned after § 1110 of ULPA (2001). Section 603 (e) will be applicable, for example, to shareholders of a dividing corporation where one of the resulting entities is a general partnership that is not a limited liability partnership if the shareholders become general partners of the general partnership. If such a shareholder were to exercise appraisal rights, however, the shareholder would not become subject to owner liability because one effect of exercising appraisal rights is that the shareholder would not become a general partner in the resulting entity; and, in that case, the consent of that shareholder would not be required.~~<sup>221</sup>

~~The consent of an interest holder required by subsection (e)(2) may be given either by (i) signing or agreeing generally to the terms of organic rules that includes the required provision permitting less than unanimous approval of a division in which interest holders become subject to owner liability, or (ii) voting for or consenting to an amendment to add such a provision.~~<sup>222</sup>

#### SECTION 604. AMENDMENT OR ABANDONMENT OF PLAN OF DIVISION.

(a) ~~Amendment before filing.~~<sup>223</sup> A plan of division of a domestic dividing entity may be amended.<sup>224</sup>

(1) in the same manner as the plan was approved, if the plan does not<sup>225</sup> provide for ~~amendment or may provide for amendment of a plan of division by a vote~~ necessary for its adoption. A plan of division of a domestic dividing entity may provide that the plan may be amended by the domestic dividing entity, its governors, or interest holders prior to the filing of a statement of division, except that the interest holders of a domestic dividing entity ~~who were entitled to vote on~~<sup>226</sup> the manner in which it may be amended; or<sup>227</sup>

(2) by the governors or interest holders of the entity in the manner  
provided in the plan, but an interest holder that was entitled to vote on or consent to<sup>228</sup> approval of the division ~~shall be~~<sup>229</sup> is<sup>230</sup> entitled to vote on or consent to<sup>231</sup> any amendment of the plan that

will change:

(~~1~~<sup>232</sup> A<sup>233</sup>) the amount or kind of interests, securities, obligations, rights to acquire interests or securities, cash, or other property, or any combination of the foregoing<sup>234</sup> to be received by ~~those~~<sup>235</sup> any of the<sup>236</sup> interest holders of the dividing entity<sup>237</sup> under the plan:

(~~2~~<sup>238</sup> B<sup>239</sup>) the public organic document or private organic rules of any of the resulting entities that will be in effect immediately ~~following consummation of~~<sup>240</sup> after<sup>241</sup> the division becomes effective<sup>242</sup>, except for changes that ~~would~~<sup>243</sup> do<sup>244</sup> not require the approval of the interest holders of ~~a~~<sup>245</sup> the<sup>246</sup> resulting entity ~~who are entitled to vote~~<sup>247</sup> under its organic law or ~~private~~<sup>248</sup> organic rules ~~of the resulting entity~~<sup>249</sup>; or

(~~3~~<sup>250</sup> C<sup>251</sup>) any of the other terms or conditions of the plan<sup>252</sup> if the change would adversely affect ~~any of those~~<sup>253</sup> the<sup>254</sup> interest ~~holders~~<sup>255</sup> holder<sup>256</sup> in any material respect.

(b) ~~Abandonment.—Unless otherwise provided in subsection 303 (c), an approved~~<sup>257</sup> After a<sup>258</sup> plan of division ~~many be abandoned by:~~<sup>259</sup> (~~1~~)<sup>260</sup> has been approved by<sup>261</sup> a domestic ~~unincorporated~~<sup>262</sup> dividing entity<sup>263</sup> and before a statement of division becomes effective, the plan may be abandoned:<sup>264</sup>

(~~A~~<sup>265</sup> 1<sup>266</sup>) as provided in the plan ~~or laws of the entity's jurisdiction of organization~~<sup>267</sup>; or

(~~B~~<sup>268</sup> 2<sup>269</sup>) unless prohibited by the plan, ~~by a consent equivalent to the consent required to approve the plan;~~<sup>270</sup> in the same manner as the plan was approved.<sup>271</sup>

(~~2~~) ~~a domestic incorporated entity in accordance with the laws of this [State]; and~~

~~(3) a foreign entity in accordance with the laws of the foreign entity's jurisdiction of organization.~~<sup>273</sup> ~~(d) Required abandonment filing.~~<sup>274</sup> c)<sup>275</sup> If a plan of<sup>276</sup> division is abandoned after a statement ~~or plan~~<sup>277</sup> of division has been filed with the [Secretary of State] ~~but before the statement or plan of division has become effective;~~<sup>278</sup> and before the filing becomes effective, a statement of abandonment, signed on behalf of the entity, must be filed with the [Secretary of State] before the time the statement of division becomes effective. The statement of abandonment takes effect upon filing, and the division is abandoned and does not become effective. The statement of abandonment must contain.<sup>279</sup>

(1) the name of the dividing entity;<sup>280</sup>

(2) the date on which the statement of division was filed; and<sup>281</sup>

(3)<sup>282</sup> a statement that the division has been abandoned in accordance with this section, ~~signed on behalf of the dividing entity, shall be filed with the [Secretary of State] before the effective date of the statement or plan of division. The statement filed under this subsection takes effect upon filing and the division is deemed abandoned and does not become effective.~~<sup>283 284</sup>

### Comments

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

### SECTION 605. STATEMENT OF DIVISION; EFFECTIVE DATE.

(a) ~~Required filing.~~<sup>285</sup> A statement of division must be signed ~~by~~<sup>286</sup> on behalf<sup>287</sup> of the ~~domestic~~<sup>288</sup> dividing entity and filed with the [Secretary of State].

(b) ~~Filing plan instead of statement of division. A plan of division that is approved and that contains all the information required by subsection (c) must be signed by a domestic dividing entity and may be filed with the [Secretary of State] instead of a statement of division.~~<sup>289</sup> (c) ~~Contents.~~<sup>290</sup> A statement of division must contain:

(1) The name, jurisdiction of organization,<sup>291</sup> and type ~~of entity~~<sup>292</sup> of the dividing entity.

(2) ~~Whether~~<sup>293</sup> If the dividing entity is a domestic entity, whether<sup>294</sup> the dividing entity will survive the division.

(3) The name, jurisdiction of organization, and type ~~of entity~~<sup>295</sup> of each resulting entity created in the division.

(4) If the statement of division is not to be effective upon filing, a date or time certain specified in the statement or plan of division, which is not more than 90 days after the statement or plan is delivered for filing to the [Secretary of State],<sup>296</sup> on which it will become effective.

(5) ~~That the plan of division was approved as required by section 303~~<sup>297</sup> ~~if~~<sup>298</sup> If<sup>299</sup> the dividing entity is a domestic entity;<sup>299</sup> a statement that the plan of division was approved in accordance with this [article]<sup>300</sup> or, if the dividing entity is a foreign entity, a statement<sup>301</sup> that the division was approved by the foreign dividing entity<sup>302</sup> in accordance with the ~~laws~~<sup>303</sup> law<sup>304</sup> of ~~the foreign entity's~~<sup>305</sup> its<sup>306</sup> jurisdiction of organization.

(6) If the dividing entity is a domestic filing<sup>307</sup> entity and survives the division, any amendments to its public organic document approved as part of the plan of division.



(7) With respect to each domestic resulting entity created by the division, a copy of its public organic document, if any.

(8) ~~If a resulting entity created by the division is:~~<sup>308</sup> A description of any real property allocated to a resulting entity other than the dividing entity in sufficient detail to provide constructive notice of the location of the property.<sup>309</sup>

~~(i) a domestic entity and is required to maintain a registered agent and registered office in this [state], the name of its registered agent and the address of its registered office in this [state]; or~~<sup>310</sup>

~~(ii) a domestic nonfiling entity, the address of its chief executive office or principal place of business.~~<sup>311</sup>

~~(9) If a resulting entity is:~~<sup>312</sup>

~~(i) a qualified foreign entity, the name of its registered agent and address of its registered office in this state and any other information required in an application by such an entity for authority to do business in this [state]; or~~<sup>313</sup>

~~(ii) a nonqualified foreign entity, the address of its chief executive office or principal place of business.~~<sup>314</sup>

~~(10) Any other information the [State] may require.~~<sup>315</sup>

~~[Issue: Should the statement of division be required to describe, at least in summary fashion, the allocation of assets and liabilities occurring in the division?]~~<sup>316</sup>

~~(d) Optional contents.~~<sup>317</sup> c)<sup>318</sup> In addition to the provisions required by<sup>319</sup> requirements of<sup>320</sup> subsection (b), a statement of division may contain any other provision not prohibited by ~~applicable~~<sup>321</sup> law.<sup>322</sup>

(d) If a resulting entity created in the division is a domestic entity, its name must satisfy the requirements of the law of this state<sup>323</sup>.

(e) ~~Effective date.~~<sup>324</sup> A plan of division that is signed on behalf of a domestic dividing entity and meets all of the requirements of subsection (b) may be filed with the [Secretary of State] instead of a statement of division and upon filing has the same effect. If a plan of division is filed as provided in this subsection, references in this [act] to a statement of division refer to the plan of division filed under this subsection.<sup>325</sup>

(f)<sup>326</sup> A statement of division becomes effective upon the date and time of filing;<sup>327</sup> or ~~such~~<sup>328</sup> the<sup>329</sup> later date and time ~~as~~<sup>330</sup> specified in the statement of division.

### Comments

1. **Section 605(a)** - The filing of a statement of division makes the transaction a matter of public record. The filing requirements and filing fee for a statement of division are set forth in sections 105 and 106.

2. **Section 605(b)(5)** – The statement in subsection (b)(5) as to how the plan of division was approved by the dividing entity necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of the entity.

~~3. **Sections 605(b)(8) and (9)**—Subsections 605(b)(8) and (9) require the surviving entity to provide a street address because of the definition of “address” in section 102.~~<sup>331</sup>

~~The chief executive office or principal place of business of a surviving, nonfiling entity need not be within the jurisdiction of formation of the entity. The purpose of subsection (b)(8) and (9)(ii) 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.~~<sup>332</sup>

4. **Section 605(e<sup>333</sup> f<sup>334</sup>)** - The effective time of the statement is the effective time of its filing, unless otherwise specified. A statement may specify a delayed effective time and date, and if it does so the statement becomes effective at the time and date specified.

### SECTION 606. EFFECT OF DIVISION.

(a) ~~General rule.~~<sup>335</sup> When a division becomes effective:

(1) ~~The~~<sup>336</sup> If the<sup>337</sup> dividing entity is ~~divided into the resulting entities~~  
~~named in the plan of~~<sup>338</sup> to survive the<sup>339</sup> division, the dividing entity continues to exist<sup>340</sup>.

(2) If the dividing entity is not to survive the division, the dividing entity ceases to exist.

(3) ~~If the dividing entity is to survive the division, the dividing entity continues to exist.~~<sup>341</sup> ~~(4)~~<sup>342</sup> The resulting entities created in the division come into existence.

(~~5~~<sup>343</sup> 4<sup>344</sup>) All property, ~~causes of action, and contract rights~~<sup>345</sup> of the dividing entity:

(i) ~~are~~<sup>346</sup> is<sup>347</sup> allocated to and ~~vest~~<sup>348</sup> vests<sup>349</sup> in the resulting entities created in the division, or ~~remain~~<sup>350</sup> remains<sup>351</sup> vested in the dividing entity, in each case without reversion or impairment, to the extent specified in the plan of division;

(ii) not allocated by the plan of division ~~remain~~<sup>352</sup> remains<sup>353</sup> vested in the dividing entity if the dividing entity survives the division; and

(iii) not allocated by the plan of division ~~are~~<sup>354</sup> is<sup>355</sup> allocated to and ~~vest~~<sup>356</sup> vests<sup>357</sup> equally in the resulting entities as tenants in common without reversion or impairment if the dividing entity does not survive the division.

(~~6~~<sup>358</sup> 5<sup>359</sup>) The name of a resulting entity to which a cause of action is allocated as provided in paragraph (~~5~~<sup>360</sup> 4<sup>361</sup>) may be substituted or added in any pending action or proceeding to which the dividing entity is a party at the effective time of the division.

**{Drafting Option 1:}**<sup>362</sup>

(6) The liabilities of the dividing entity are allocated between or among the resulting entities as provided in section 607.<sup>363</sup>

**{Drafting Option 2:**<sup>364</sup>

(6) The liabilities of the dividing entity are allocated between or among the resulting entities as follows:<sup>365</sup>

(i) Each resulting entity is responsible, as a separate and distinct entity, only for:<sup>366</sup>

(A) those liabilities that the resulting entity undertakes or incurs in its own name subsequent to the division; and<sup>367</sup>

(B) the liabilities of the dividing entity to the extent provided in this paragraph (6).<sup>368</sup>

(ii) The liabilities of the dividing entity:<sup>369</sup>

(A) subject to subparagraph (iii), are allocated to and become the liabilities of the resulting entities created in the division, or remain the liabilities of the dividing entity, to the extent specified in the plan of division; and<sup>370</sup>

(B) to the extent not allocated in the plan of division, or as to which any of the tests in subparagraph (iii) are not satisfied, are allocated to and become the joint and several liabilities of the resulting entities.<sup>371</sup>

(iii) One or more, but less than all, of the resulting entities will be free of a particular liability of the dividing entity to the extent, if any, provided in subparagraph (ii)(A) only if:<sup>372</sup>

(A) the division does not materially increase the risk of nonpayment to a creditor or the risk of nonperformance to a person owed performance; and<sup>373</sup>

(B) the allocation of assets and liabilities in the division is

not ineffective or voidable under law other than this act.}<sup>374</sup>

(7) ~~The liabilities of the dividing entity are allocated between or among the resulting entities as provided in section 307.~~<sup>375</sup> (8)<sup>376</sup> Each resulting entity created in the division holds any property, ~~causes of action, and contract rights and is liable for any liabilities~~<sup>377</sup> allocated to it as the successor to the dividing entity, and the property, ~~causes of action, contract rights, and liabilities are~~<sup>378</sup> is<sup>379</sup> not deemed to have been assigned to the resulting entity in any manner, whether directly or indirectly, or by operation of law.

(9<sup>380</sup> 8<sup>381</sup>) If the dividing entity survives the division, its public organic document, if any, and its private organic rules are amended to the extent provided in the plan of division and remain binding on its interest holders.

(10<sup>382</sup> 9<sup>383</sup>) The public organic document, if any, and the organic rules of each resulting entity created by the division become effective and are binding upon the interest holders of the resulting entity.

(11<sup>384</sup> 10<sup>385</sup>) The interests ~~of~~<sup>386</sup> in<sup>387</sup> the dividing entity that are to be converted in the division are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of division and to any appraisal rights they may have under section 108.

**{Include the following if Drafting Option 2 is used.}**<sup>388</sup>

(11) Liens, security interests, and other charges upon the property of the dividing entity shall not be impaired by the division, notwithstanding any otherwise enforceable allocation of liabilities of the dividing entity.<sup>389</sup>

(12) If the dividing entity is bound by a security agreement governed by

[Article 9 of the Uniform Commercial Code] and the security agreement provides that the security interest attaches to after-acquired collateral pursuant to [UCC § 9-204(a)], each resulting entity is also bound by the security agreement.]<sup>390</sup>

(b) ~~Future interest holder liability.~~<sup>391</sup> A person that becomes subject to interest holder liability with respect to a domestic resulting entity as a result of a division has interest holder liability only to the extent provided by the organic law of this [State] and only for those liabilities that arise after the division becomes effective.

(c) ~~Past interest holder liability.~~<sup>392</sup> The effect of a division on the interest holder liability of an interest holder of the domestic dividing entity that is incurred before the division becomes effective is as follows:

(1) The division does not discharge any interest holder liability under the organic laws of the domestic dividing entity's jurisdiction of organization in which the person was an interest holder to the extent the interest holder liability was incurred before the division becomes effective.

(2) The person does not have interest holder liability under the laws of the domestic dividing entity's jurisdiction of organization in which the person was in interest holder before the division becomes effective.

(3) The laws of the domestic dividing entity's jurisdiction of organization continue to apply to the collection or discharge of any interest holder liability preserved by paragraph (1) as if the division had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by the laws of the domestic dividing entity's jurisdiction of organization or the

entity's private organic rules with respect to any interest holder liability preserved by paragraph (1) as if the division had not occurred.

(d) ~~Cancellation of foreign qualification.~~<sup>393</sup> If the dividing entity is a qualified foreign entity and does not survive the division, its certificate of authority or other foreign qualification is canceled when the division becomes effective.<sup>394</sup>

~~(e) Qualification of foreign resulting entity. — If a resulting entity created by a division is a qualified foreign entity, it shall be authorized to do business in this [state] when the division becomes effective.~~<sup>395</sup>

~~[(f) Allocation of real property. — The allocation of any fee or freehold interest or leasehold having a remaining term of \_\_\_ years or more in any real property located in this [state] owned by the dividing entity to a resulting entity created by the division shall not be effective until one of the following documents is filed in the [office for the recording of deeds] in which the real property is located:~~<sup>396</sup>

~~(1) a deed, lease or other instrument of confirmation describing the real property;~~<sup>397</sup>

~~(2) a duly executed duplicate original copy of the statement of division;~~<sup>398</sup>

~~(3) a copy of the statement of division certified by the [Secretary of State];~~<sup>399</sup> (4) list other documents that may be filed under the practice in the adopting state<sup>400</sup>.

## Comments

1. **Section 606(a)(~~2~~<sup>401</sup>1<sup>402</sup>) and ~~and~~<sup>403</sup> =<sup>404</sup> (3)** - Subsection (a)(~~2~~<sup>405</sup>1<sup>406</sup>) and ~~and~~<sup>407</sup> =<sup>408</sup> (3) state the general rules that a division results in the division of a single entity into two or more new or existing entities. 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 existence of one or more other entities.

2. **Section 306<sup>409</sup> 606<sup>410</sup> (a)(5<sup>411</sup> 4<sup>412</sup>)** - The property, causes of action, and contract rights 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 assets, the dividing entity retains the assets if it survives the division; otherwise the surviving entities take the assets as tenants in common. The allocation is, of course, subject to the challenge on the basis of fraud or other violation of law.

3. ~~**Section 606(a)(7)**~~ ~~The allocation of liabilities in a division is controlled by section 307.~~<sup>413</sup> **Section 606(a)(6)** ~~–~~<sup>414</sup> The term “liabilities” is defined very broadly in section 102.

4. ~~**Section 606(b)(8)**~~<sup>415</sup> **Section 606(a)(7)**<sup>416</sup> – The allocation of assets and liabilities in a division occurs without an assignment by operation of law. As with a merger, a division should not trigger “assignment” clauses.

5.<sup>417</sup> **Section 606(a)(12)** – Where a dividing entity has granted a security interest in after-acquired property, the effect of subsection (d) is that the resulting entities will have the status of “new debtors” under UCC Article 9.<sup>418</sup>

6.<sup>419</sup> **Section 606(b)** - Subsection (b) sets forth the general rule that an owner in a resulting entity will be personally liable only for the liabilities of the resulting entity that arise after the effective date of a division. When a liability arises will be determined by other applicable law. The concept of “liabilities” is defined very expansively in section 102.

6. **Section 606(c)** - Subsection (c) has four parts:

(1) An interest holder in a dividing entity who had interest holder liability for the liabilities of the dividing entity under the entity’s organic law is not discharged from those liabilities if they arose before the effective date of the division.

(2) An interest holder in a dividing entity does not have interest holder liability for the liabilities of a resulting entity if those liabilities arose after the effective date of the division.

(3) The organic law governing the dividing entity continues in effect for the purpose of preserving the interest holder liability described in paragraph (1) despite the nonexistence of the dividing entity after the merger.

(4) The organic law of the dividing entity continues to apply for the purpose of any contribution rights that may exist with respect to liabilities described in paragraph (1), again notwithstanding the nonexistence of the dividing entity after the division.  
~~[change organic law to new definition]~~<sup>420</sup>

7. **Sections 606(b) and (c)** – The effects of subsections (b) and (c) will depend to a certain extent on how a contractual liability is worded. For example, a lease that provides that



the entire rent is due when the lease is signed, but permits that rent to be paid in future installments, will be treated differently from a lease that does not provide that the entire rent is earned upon signing.

Under section 603(~~e~~<sup>421</sup>a)(~~2~~<sup>422</sup>), a division cannot have the effect of making any interest holder of a domestic dividing entity subject to interest holder liability for the obligations or liabilities of any other person or entity unless each such interest holder has executed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent.

~~8. Section 606(g) Subsection (g) 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.~~<sup>423</sup>

{Drafting Option 1 continued. The following section will be retained only if Drafting Option 2 for Section 606(a) is not used.<sup>424</sup>

## SECTION 607. ALLOCATION OF LIABILITIES IN A DIVISION

(a) ~~General rule.~~<sup>425</sup> When a division becomes effective, the liabilities of the dividing entity are allocated between or among the resulting entities as follows:

(1) ~~The~~<sup>426</sup> Each<sup>427</sup> resulting ~~entities are each~~<sup>428</sup> entity is<sup>429</sup> responsible as a<sup>430</sup> separate and distinct ~~entities~~<sup>431</sup> entity<sup>432</sup> only for:<sup>433</sup>

(i)<sup>434</sup> those liabilities that ~~each~~<sup>435</sup> the<sup>436</sup> resulting entity ~~subsequently~~<sup>437</sup> undertakes or incurs in its own name, ~~except that each resulting entity shall also be liable for~~<sup>438</sup> subsequent to the division; and<sup>439</sup>

(ii)<sup>440</sup> the liabilities of the dividing entity to the extent provided in this section.

(2) ~~All~~<sup>441</sup> The<sup>442</sup> liabilities of the dividing entity:

(i) subject to paragraph (3).<sup>443</sup> are allocated to and become the liabilities of the resulting entities created in the division, or remain the liabilities of the dividing

entity, to the extent specified in the plan of division; and<sup>444</sup>

(ii) not allocated by the plan of division ~~remain the liabilities solely of the dividing entity if the dividing entity survives the division; and~~<sup>445</sup> (iii) not allocated by the plan of division<sup>446</sup> , or as to which any of the tests in paragraph (3) is not satisfied,<sup>447</sup> are allocated to and become the joint and several liabilities of the resulting entities ~~if the dividing entity does not survive the division~~<sup>448</sup>.

(3) One or more, but less than all, of the resulting entities shall be free of a particular liability of the dividing entity to the extent, if any, provided in paragraph (2);<sup>449</sup> if<sup>450</sup>

(i) ~~if no violation of law is effected thereby;~~<sup>451</sup>

(ii) ~~if the allocations of assets and liabilities in the division is not fraudulent as to the creditor who is owed the liability under [cite fraudulent transfer law of adopting state]; and~~<sup>452</sup> (iii)<sup>453</sup> the division does not materially increase the risk of nonpayment ~~or nonperformance of the liability;~~<sup>454</sup> to a creditor on the liability or the risk of nonperformance to a person owed performance of the liability;<sup>455</sup>

~~(b) Optional notice to creditors.—A resulting entity may notify a known creditor or contingent claimant of the division at any time after its effective date as follows:~~<sup>456</sup>

~~(1) The notice must be in a record and:~~<sup>457</sup>

~~(i) describe the division in sufficient detail to permit the creditor reasonably to evaluate the effects of the division on the liability owed to the creditor;~~<sup>458</sup>

~~(ii) state the deadline, which may not be fewer than 120 days after receipt of the notice is given, by which the resulting entity must receive an objection to the allocation to the resulting entity of the liability owed to the creditor;~~<sup>459</sup>

~~(iii) provide a mailing address where an objection may be sent;~~

~~and~~<sup>460</sup>

~~(iv) state that if an objection is not received by the deadline, the liability owed to the creditor will be allocated in the manner described in the notice.~~<sup>461</sup>

~~(2) If a creditor who has received notice under this subsection does not deliver an objection to the resulting entity by the deadline set forth in the notice, the allocation is not subject to the tests in subsection (a)(3).~~<sup>462</sup>

~~(c) Optional Publication of notice to creditors.—A resulting entity may publish notice of the division at any time after its effective date as follows:~~<sup>463</sup>

~~(1) The notice must be in a record and:~~<sup>464</sup>

~~(i) be published one time in a newspaper of general circulation in the county where the principal office of the dividing entity (or, if none in this [state], its registered office) is or was last located;~~<sup>465</sup>

~~(ii) describe the division in sufficient detail to permit persons to whom liabilities are owed reasonably to evaluate the effects of the division on those liabilities;~~<sup>466</sup>

~~(iii) provide a mailing address where an objection may be sent;~~

~~and~~<sup>467</sup>

~~(iv) state that if an objection is not received from a creditor of the dividing entity within three years after the publication of the notice, the liability owed to the creditor will be allocated in the manner described in the notice.~~<sup>468</sup>

~~(2) If the resulting entity publishes a notice as provided in this subsection, the liability owed to a creditor or a contingent claimant who was not known to the dividing entity~~

~~at the effective time of the division and who does not deliver an objection to the resulting entity by the deadline set forth in the notice shall be allocated as provided in the plan of division without regard to the application of the tests in subsection (a)(3).~~<sup>469</sup>

~~(d) Commencement of judicial proceeding by creditor.—If a resulting entity that has received an objection under subsection (b) or (c) rejects the objection, the [creditor] entity shall [may] commence a proceeding in the [name or describe] court of the county where the principal office (or, if none in this [state], the registered office) of the resulting entity is located within 90 days after the date that the creditor is notified by the resulting entity of the rejection for a determination of whether subsection (a)(3) is satisfied. The entity must notify all known creditors of the proceeding and such creditors shall have the right to join the action. The burden of proof is upon the entity to show rejection of a claim under subsection (a)(3). If a creditor does not commence a proceeding within that time period, the allocation of the liability shall be conclusively deemed to satisfy the requirements of subsection (a)(3).~~<sup>470</sup>

~~(e) Commencement of judicial proceeding by resulting entity.—A resulting entity may commence a proceeding in the [name or describe] court of the county where the principal office (or, if none in this [state], the registered office) of the resulting entity is located for a determination of whether the allocation of some or all of the liabilities of the dividing entity satisfies the requirements of subsection (a)(3). A court may appoint a guardian ad litem or take other appropriate action it deems necessary.~~<sup>471</sup>

~~(f) Award of fees and costs.—The court may award costs and attorneys fees to a creditor in such amount as the court finds reasonable in a proceeding under subsection (d) or (e) without regard to the outcome of the proceeding if the court finds that there was a reasonable~~

basis for the creditor to object to the allocation of the liability owed to the creditor.<sup>472</sup>

~~(g) Preservation of liabilities.— If a resulting entity accepts the objection of a creditor or it is determined pursuant to subsection (d) or (e) that the allocation of a liability does not satisfy the requirements of subsection (a)(3), the rights of the creditor shall not be impaired by the division; and any claim existing or action or proceeding pending by or against the dividing entity with respect to that liability may be prosecuted to judgment as if the division had not taken place, or the resulting entities may be proceeded against or substituted in place of the dividing entity as joint and several obligors on the liability, regardless of any provision of the plan of division allocating the liability.~~<sup>473</sup>

(ii) the division was not undertaken with actual intent to hinder, delay, or defraud a creditor on the liability;<sup>474</sup>

(iii) immediately after the effectiveness of the division, the assets of the resulting entity that retains or is allocated the liability are not unreasonably small in relation to its business or performance of the liability.<sup>475</sup>

~~(h) Liens preserved.~~<sup>476</sup> b)<sup>477</sup> Liens, security interests,<sup>478</sup> and other charges upon the property of the dividing entity shall not be impaired by the division, notwithstanding any otherwise enforceable allocation of liabilities of the dividing entity.<sup>479</sup>

(c) If the dividing entity is bound by a security agreement governed by [Article 9 of the Uniform Commercial Code] and the security agreement provides that the security interest attaches to after-acquired collateral pursuant to [UCC § 9-204(a)], each resulting entity is also bound by the security agreement<sup>480</sup>.

## Comments

1. ~~1. An~~<sup>481</sup> A dividing<sup>482</sup> entity can always contract with a creditor for a different result than is provided in this section.~~1~~<sup>483</sup>

~~Define “creditor” “contingent claimant” and “future creditor.” ACA article.~~<sup>484</sup>

2. Where a dividing entity has granted a security interest in after-acquired property, the effect of subsection (d) is that the resulting entities will have the status of “new debtors” under UCC Article 9.<sup>485</sup>

Document comparison done by DeltaView on Tuesday, March 22, 2005 14:54:12

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