

D R A F T
FOR APPROVAL

MODEL ENTITY TRANSACTIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

AMERICAN BAR ASSOCIATION

MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR
PITTSBURGH, PENNSYLVANIA
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MODEL ENTITY TRANSACTIONS ACT

*CONTAINING ARTICLE 6
WITH PARTIAL COMMENTS*

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NATIONAL CONFERENCE OF COMMISSIONERS
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MODEL ENTITY TRANSACTIONS ACT

TABLE OF CONTENTS

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 102. DEFINITIONS	1
--------------------------------	---

[ARTICLE] 6

DIVISION

SECTION 601. DIVISION AUTHORIZED	2
SECTION 602. PLAN OF DIVISION	5
SECTION 603. APPROVAL OF DIVISION	6
SECTION 604. AMENDMENT OR ABANDONMENT OF PLAN OF DIVISION	8
SECTION 605. STATEMENT OF DIVISION; EFFECTIVE DATE	10
SECTION 606. EFFECT OF DIVISION	12
SECTION 607. ALLOCATION OF LIABILITIES IN DIVISION	16
APPENDIX	20

1 **MODEL ENTITY TRANSACTIONS ACT**

2

3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

5

6 **SECTION 102. DEFINITIONS.** In this [act]:

7 (6.1) “Dividing entity” means a domestic entity that approves a plan of division
8 pursuant to Section 603 or a foreign entity that approves a division pursuant to the law of its
9 jurisdiction of organization.

10 (6.2) “Division” means a transaction authorized by [Article 6].

11 (32.1) “Resulting entity” means an entity that continues in existence after or is
12 created by a division.

1 [ARTICLE] 6

2 DIVISION

3
4 SECTION 601. DIVISION AUTHORIZED.

5 (a) Except as otherwise provided in this section, by complying with this [article],
6 a domestic entity may divide into:

7 (1) the dividing entity and one or more new entities, whether domestic or
8 foreign; or

9 (2) two or more new entities, whether domestic or foreign.

10 (b) A foreign entity may be created by the division of a domestic entity only if the
11 division is authorized by the law of the foreign entity's jurisdiction of organization.

12 (c) Except as otherwise provided in this section, if the division is authorized by
13 the law of the foreign entity's jurisdiction of organization, one or more of the resulting entities
14 created in a division of a foreign entity may be a domestic entity.

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

18 [(e) The following entities may not divide or be created in a division under this
19 [article]:

20 (1)

21 (2)]

22 **Legislative Note:** *Very few state entity laws currently authorize divisions. As pointed out in*

Appendix 2, in those few states that do have division provisions, it is recommended that they be amended to apply only to divisions where the dividing entity and the resulting entities are all of the same type, for example a transaction where a corporation is divided into two or more corporations. In addition, a new subsection should be added to this section analogous to Sections 201(c) and 301(c) stating:

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

(1)

(2)

The statutes listed in that added subsection would be the existing division provisions as amended.

Alternatively, the existing division provisions could be repealed and then Article 6 would apply to all same-type and cross-type divisions. A third alternative is to add same-type division provisions to all of a state's existing entity statutes so that Article 6 would only apply to divisions where one or more of the resulting entities is of a different type from the dividing entity or the other resulting entities; but this alternative would be quite cumbersome to implement given the absence of division provisions in most existing entity statutes.

Comment

1. 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.

Restructurings that divide a business into more than one entity have become increasingly popular in recent years. One prominent example is the transaction in which, as part of a settlement of antitrust litigation, the telephone assets of AT&T were divided among the seven so-called "Baby Bells" and the stock of the Baby Bells was distributed to the AT&T shareholders in what is known as a spin-off division. Another example is the split-off by General Motors of one of its major subsidiaries, Electronic Data Systems, where GM distributed EDS stock to the holders of its Class E stock. A third type of division, known as a split-up, is sometimes used in closely held businesses to resolve protracted dissension among the equity owners. For example, if the entity operates two distinct businesses, it may be possible to resolve dissension among two groups of owners by distributing the equity interests in one to one faction and the equity interests in the second to the other faction. As a result, unlike spin-off and split-off divisions where the distributing entity continues in existence, there will be two new entities and the distributing entity ceases to exist.

1 In addition to being a non judicial remedy for resolving dissension, there are many other
2 business reasons for using divisions, including: separating conflicting businesses or businesses
3 having different capital requirements or operating characteristics, freeing a parent company of
4 underperforming businesses, unlocking value in a portion of the business operations that is
5 expected to have greater market value operating as a separate business, and disposing of an
6 unwanted business to facilitate a buy-out of the rest of the business enterprise.

7
8 **2. Nonstatutory Divisions** – This article also does not apply to a division in which an
9 existing subsidiary is distributed to the dividing entity’s equity holders, unless the assets and
10 liabilities of the existing subsidiary need to be changed in preparation for the division transaction,
11 in which case this article may be useful. See Sections 602(a)(4)(ii) and 606(a)(4).

12
13 **3. Tax Considerations** – This article authorizes a division for state law purposes.
14 Federal and state tax laws will independently determine how a division transaction will be taxed.

15
16 **4. Protection of Creditors and Other Persons** – Because the assets and liabilities of a
17 dividing entity are allocated among the resulting entities in a division transaction governed by
18 this article, there is a legitimate concern that the rights of creditors and equity owners of the
19 dividing entity are not illegally curtailed by the division. Since this Act only deals with the types
20 of transactions within its scope and the procedures for approval and the effect of these
21 transactions, law other than this Act will govern any potential illegal allocation in a division. See
22 Section 103. This other law includes: fraudulent conveyance and bankruptcy law, fiduciary duty
23 principles, illegal distribution statutes, oppression law, securities laws and other federal and state
24 regulatory law (e.g., regulation of transactions by charitable organizations). See Richard M.
25 Cieri, Lyle G. Ganke and Heather Lennox, “Breaking Up Is Hard To Do: Avoiding the
26 Solvency-Related Pitfalls in Spinoff Transactions,” 54 Bus. Law 533 (1999); Edward S. Adams
27 and Arijit Mukherji, “Spin-offs, Fiduciary Duty and the Law,” 68 Ford. L. Rev. 15 (1999); F.
28 Hodge O’Neal and Robert B. Thompson, O’Neal and Thompson’s Oppression of Minority
29 Shareholders and LLC Members, Sections 5:28-5:32 and 7:1-7:43 (2nd Rev. Ed. 2004). Section
30 355 of the Internal Code also serves as a deterrent to abusive corporate divisions because a
31 division can only qualify as a nontaxable dividend distribution if the division has an
32 “independent business purpose,” which requires that there must be a real and substantial non-
33 federal tax purpose germane to the business of the entities. See Adams and Mukherji, *supra* at
34 20-26. See also Section 607 and the Comments thereto.

35
36 **5. Section 601(d)** – This section parallels analogous provisions in Article 3 (interest
37 exchanges), 4 (conversions), and 5 (domestications). See Comment 5 to Section 301(d).

38
39 **6. Section 601(e)** – Section 601(e) is an optional provision that may be used to exclude
40 certain types of entities from the scope of this article. It is limited to domestic entities because a
41 restriction on the power of a foreign entity to engage in a division is more properly placed in the
42 organic law of the foreign entity. A provision that excludes certain types of entities from the Act
43 generally is set forth in section 109.

1 **SECTION 602. PLAN OF DIVISION.**

2 (a) A domestic entity may divide under this [article] by approving a plan of
3 division. The plan of division must be in a record and contain:

4 (1) the name and type of the dividing entity;
5 (2) a statement whether the dividing entity will survive the division;
6 (3) the name, jurisdiction of organization, and type of each new resulting
7 entity;

8 (4) the manner of:

9 (A) converting the interests of the dividing entity into interests,
10 securities, obligations, rights to acquire interests or securities, cash, or other property, or any
11 combination of the foregoing;

12 (B) allocating between or among the resulting entities those assets
13 of the dividing entity that are not to be owned by all of the resulting entities as tenants in
14 common pursuant to Section 606(a)(4) and those liabilities of the dividing entity as to which not
15 all of the resulting entities are to be liable jointly and severally pursuant to Section 607(a)(3); and

16 (C) distributing the interests of the resulting entities created in the
17 division;

18 (5) the proposed public organic document, if any, of each new resulting
19 entity and the full text of its private organic rules that are proposed to be in a record;

20 (6) if the dividing entity will survive the division, any proposed
21 amendments to its public organic document or to its private organic rules that are, or are
22 proposed to be, in a record;

(7) the other terms and conditions of the division; and
(8) any other provision required by the law of this state or the organic rules of the dividing entity.

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

Comment

This section parallels analogous provisions in Article 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications). Section 602(4)(B) is different from the other analogous provisions, however, because in a division some or all of the assets and liabilities are allocated between the dividing entity and the resulting entities, which does not occur in the other types of transactions authorized by this Act.

SECTION 603. APPROVAL OF DIVISION.

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

(1) by a domestic dividing entity:

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

(B) if its organic rules do not provide for approval of a division, in accordance with the requirements, if any, in its organic law and organic rules for approval of a transaction that has the effect of a merger as if the division were that type of transaction; or

(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

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

1 unless:

2 (A) the organic rules of the entity provide in a record for the
3 approval of a division in which some or all of its interest holders become subject to interest
4 holder liability by the vote or consent of fewer than all of the interest holders; and

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

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

10 **Comment**

11
12 1. **In General** – Approval under Section 603 is intended to include whatever actions by
13 the governors and interest holders of a dividing entity are required by either its organic law or
14 organic rules to effectuate the division. For example, if the organic rules of an entity prescribe a
15 procedure for the proposal, adoption and/or approval of a division, the term “approval” includes
16 conformance to all of those rules. See the definition of “approval” in Article 1. If the organic
17 law and organic rules require only approval by the requisite vote of interest holders, then section
18 603 mandates only that required by the organic rules, nothing more. “Approval” also
19 contemplates any additional requirements attendant to the proposal, adoption and approval of an
20 action by the entity approving the division. This approval process will include, in the case of
21 some incorporated entities, rules applicable to voting and records that apply to shareholder votes.
22 On the other hand, Section 603 is not intended to impose any greater requirements for effecting a
23 division than those required by the applicable organic rules or organic law of the entity.
24

25 2. **Section 603(a)** - Section 603(a) provides the substantive rule applicable to the
26 approval of divisions by domestic dividing entities under the Act. Subsection (a) sets out an
27 alternative three-part test:
28

29 1. Approval of a division must be in accordance with any procedures in the organic rules
30 of the entity.
31

32 2. If the organic rules are silent with respect to procedures for approval of a division,
33 then the entity will follow the procedures for approval of a plan of merger in its organic
34 law or organic rules.

1 3. If the organic law and the entity’s organic rules are silent with respect to procedures
2 for approval of a division or a merger, then approval by all of the interest holders entitled
3 to vote on any matter is required.
4

5 The incorporation into this article of the merger procedures in the organic law of the
6 dividing entity should be construed broadly to include not only express statutory procedures, but
7 also applicable common law principles such as fiduciary duty standards for governors and
8 majority interest holders. Statutory provisions on voting by classes or voting groups will also be
9 applicable. Statutory provisions on “short-form” mergers, however, will not be applicable
10 because those provisions only apply to a merger between a parent and a subsidiary and the
11 structure of a division does not involve a transaction between a parent and a subsidiary.
12

13 3. **Section 603(a)(2)** – Subsection (c) is patterned generally after § 1110 of ULPA
14 (2001). Section 603(a)(2) will be applicable, for example, to shareholders of a dividing
15 corporation where one of the resulting entities is a general partnership that is not a limited
16 liability partnership if the shareholders become general partners of the general partnership. If
17 such a shareholder were to exercise appraisal rights, however, the shareholder would not become
18 subject to owner liability because one effect of exercising appraisal rights is that the shareholder
19 would not become a general partner in the resulting entity; and, in that case, the consent of that
20 shareholder would not be required.
21

22 The consent of an interest holder required by subsection (a)(2)(B) may be given either by
23 (i) signing or agreeing generally to the terms of organic rules that includes the required provision
24 permitting less than unanimous approval of a division in which interest holders become subject
25 to owner liability, or (ii) voting for or consenting to an amendment to add such a provision.
26

27 4. **Section 603(b)** – Where a foreign entity is the dividing entity, subsection (b) defers to
28 the laws of the foreign entity’s jurisdiction of organization for the requirements for approval of
29 the division by the foreign entity. Those laws will include the organic law of the foreign entity
30 and other applicable laws, such as this Act (or any applicable regulatory law) if it has been
31 adopted in the foreign jurisdiction. The laws of the foreign jurisdiction will also control the
32 application of any special approval requirements found in the organic rules of the foreign entity.
33

34 **SECTION 604. AMENDMENT OR ABANDONMENT OF PLAN OF DIVISION.**

35 (a) A plan of division of a domestic dividing entity may be amended:

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

38 (2) by the governors or interest holders of the entity in the manner

1 provided in the plan, but an interest holder that was entitled to vote on or consent to approval of
2 the division is entitled to vote on or consent to any amendment of the plan that will change:

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

6 (B) the public organic document or private organic rules of any of
7 the resulting entities that will be in effect immediately after the division becomes effective,
8 except for changes that do not require the approval of the interest holders of the resulting entity
9 under its organic law or organic rules; or

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

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

14 (1) as provided in the plan; or

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

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

- (1) the name of the dividing entity;
- (2) the date on which the statement of division was filed; and
- (3) a statement that the division has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications).

SECTION 605. STATEMENT OF DIVISION; EFFECTIVE DATE.

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

(b) A statement of division must contain:

- (1) the name, jurisdiction of organization, and type of the dividing entity;
- (2) a statement as to whether the dividing entity will survive the division;
- (3) the name, jurisdiction of organization, and type of each resulting entity created by the division;
- (4) if the statement of division is not to be effective upon filing, the later date and time on which it will become effective, which may not be more than 90 days after the date of filing;
- (5) if the dividing entity is a domestic entity, a statement that the plan of division was approved in accordance with this [article] or, if the dividing entity is a foreign entity, a statement that the division was approved by the foreign dividing entity in accordance with the law of its jurisdiction of organization;

1 (6) if the dividing entity is a domestic filing entity and survives the
2 division, any amendment to its public organic document approved as part of the plan of division;

3 (7) for each domestic resulting entity created by the division, its public
4 organic document, if any, as an attachment;

5 (8) for each resulting entity created by the division that is a domestic
6 limited liability partnership, its [statement of qualification], as an attachment; and

7 (9) a description of any real property allocated in whole or in part
8 pursuant to Section 606(a)(4)(A) to a resulting entity other than the dividing entity, in sufficient
9 detail to identify the property.

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

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

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

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

1 **Comment**

2
3 This section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges),
4 4 (conversions), and 5 (domestications).
5

6 Section 605(b)(9) deals with the allocation of real estate to a resulting entity and will
7 assist in tracking the chain of title to that real estate. A similar provision is not necessary with
8 respect to the other types of transactions authorized by this Act.
9

10 **SECTION 606. EFFECT OF DIVISION.**

11 (a) When a division becomes effective:

12 (1) if the dividing entity is to survive the division, the dividing entity
13 continues to exist;

14 (2) if the dividing entity is not to survive the division, the dividing entity
15 ceases to exist;

16 (3) the resulting entities created in the division come into existence;

17 (4) property of the dividing entity:

18 (A) is allocated to and vests in the resulting entities created in the
19 division, or remains vested in the dividing entity, in each case without assignment, reversion or
20 impairment, to the extent specified in the plan of division;

21 (B) not allocated by the plan of division remains vested in the
22 dividing entity if the dividing entity survives the division; and

23 (C) not allocated by the plan of division is allocated to and vests
24 equally in the resulting entities as tenants in common without assignment, reversion, or
25 impairment if the dividing entity does not survive the division;

26 (5) a resulting entity to which a cause of action is allocated as provided in

1 paragraph (4) may be substituted or added in any pending action or proceeding to which the
2 dividing entity is a party at the effective time of the division;

3 (6) the liabilities of the dividing entity are allocated between or among the
4 resulting entities as provided in Section 607;

5 (7) each resulting entity created in the division holds any property
6 allocated to it as the successor to the dividing entity, and not by assignment, whether directly or
7 indirectly, or by operation of law;

8 (8) if the dividing entity survives the division:

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

11 (B) its private organic rules that are to be in a record, if any, are
12 amended to the extent provided in the plan of division and remain binding on its interest holders;

13 (9) the public organic document, if any, and the organic rules of each
14 resulting entity created by the division become effective and are binding upon the interest holders
15 of the resulting entity; and

16 (10) the interests in the dividing entity that are to be converted in the
17 division are converted, and the interest holders of those interests are entitled only to the rights
18 provided to them under the plan of division [and to any appraisal rights they may have under
19 Section 108].

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

1 entity.

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

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

10 (1) the division does not discharge any interest holder liability under the
11 organic law of the domestic dividing entity to the extent the interest holder liability arose before
12 the division became effective;

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

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

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

21 (e) When a division becomes effective, the certificate of authority or other foreign
22 qualification of a foreign dividing entity that does not survive the division is canceled.

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Comment

1. In General – With the exception of subsections (a)(4) and (a)(6), which are necessary because only in a division are assets and liabilities allocated among various entities, this section parallels analogous provisions in Articles 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications).

2. Interest Holder Liability - Subsection (c) 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.

Subsection (d) 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.

The effects of subsections (c) and (d) will depend to a certain extent on how a contractual liability is worded. For example, a lease that provides that the entire rent is due when the lease is signed, but permits that rent to be paid in future installments, will be treated differently from a lease that does not provide that the entire rent is earned upon signing.

Under section 603(a)(2), 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.

1 **SECTION 607. ALLOCATION OF LIABILITIES IN DIVISION.**

2 (a) Subject to subsections (b) and (c), when a division becomes effective, each
3 resulting entity is responsible:

4 (1) individually for the liabilities that the entity undertakes or incurs in its
5 own name subsequent to the division;

6 (2) individually for the liabilities of the dividing entity that are allocated
7 to or remain the liability of the resulting entity to the extent specified in the plan of division;

8 (3) jointly and severally with the other resulting entities for the liabilities
9 of the dividing entity that are not allocated by the plan of division.

10 (b) Allocation of a liability in a plan of division is ineffective, and the liability
11 becomes a liability of all of the resulting entities, jointly and severally, if:

12 (1) the division materially increases the risk of nonpayment to a creditor
13 on the liability or the risk of nonperformance to a person owed performance of the liability; or

14 (2) the allocation of assets and liabilities in the division is ineffective or
15 voidable under law other than this [act].

16 (c) If the division breaches a liability of the dividing entity, the dividing entity, if
17 it survives the division, and each of the resulting entities allocated the liability or any assets
18 associated with performance of the liability, is liable, jointly and severally, for the breach.

19 (d) In applying the law governing fraudulent transfers to the division:

20 (1) the dividing entity:

21 (A) is not subject to that law if it does not survive the division;

22 and

1 (B) is subject to that law only in its capacity as a resulting entity if
2 it survives the division;

3 (2) with regard to each resulting entity:

4 (A) the entity is treated as a debtor;

5 (B) the liabilities allocated to that entity are treated as an
6 obligation incurred by the debtor;

7 (C) the entity is treated as not having received a reasonably
8 equivalent value in exchange for incurring the obligation; and

9 (D) the assets allocated to the entity are treated as remaining
10 assets.

11 (e) In applying the provisions of the organic law of the dividing entity on
12 dividends or other distributions to the division:

13 (1) distributions of interests are disregarded; and

14 (2) the solvency of the resulting entities is considered only as it appeared
15 to the governors of the dividing entity in their good faith judgment as of the date:

16 (A) they approved the division if the statement of division takes
17 effect within 120 days after the date of approval; or

18 (B) the statement of division takes effect if that occurs more than
19 120 days after the date of approval.

20 (f) Liens, security interests, and other charges upon the property of the dividing
21 entity are not impaired by the division, notwithstanding any otherwise enforceable allocation of
22 liabilities of the dividing entity.

(g) If the dividing entity is bound by a security agreement governed by Article 9 of the Uniform Commercial Code as enacted in any jurisdiction and the security agreement provides that the security interest attaches to after-acquired collateral, each resulting entity is bound by the security agreement.

Comment

1. In General – The purpose of Section 607 is to set out in detail how liabilities are allocated in a division between the dividing and resulting entities and which of the entities are responsible for those liabilities. The basic rule is that to the extent existing liabilities of the dividing entity are allocated by the plan of division, those liabilities are the responsibility of the entity to which they have been allocated, but the resulting entities are jointly and severally liable for any liabilities that are not specifically allocated. The resulting entities will also be jointly and severally liable for a liability, even if allocated in the plan, where:

(1) the division materially increases the risk of nonpayment to a creditor or the risk of nonperformance,

(2) the division constitutes a breach of an agreement with a creditor or other third party, or

(3) the division is held to be voidable under fraudulent transfer statutes or other law.

The basic thrust of Section 607 is to provide existing creditors of the dividing entity at the time of the division with essentially the same rights they would have had if the division had not taken place.

With respect to a liability incurred after the division is effective, the entity that undertakes or incurs the liability is liable for that liability, absent an agreement to the contrary.

2. Section 607(b) – Section 607(b) provides a set of rules that explain how the fraudulent transfer law applies to a division.

3. Section 607(c) – Since a division may technically involve a distribution by the dividing entity, it is necessary to have rules that determine how entity statutes that limit distributions apply when a division takes place. Section 607(c) provides the appropriate rules that are intended to apply to distribution limitations in all of a state's various entity statutes.

4. Section 607(e) – Where a dividing entity has granted a security interest in after-

1 acquired property, the effect of subsection (e) is that the resulting entities will have the status of
2 “new debtors” under UCC Article 9.

1 **APPENDIX**

2
3 **CONFORMING AMENDMENTS TO ACCOMPANY ARTICLE 6 OF THE**
4 **MODEL ENTITY TRANSACTIONS ACT**

5
6 **SECTION 102. DEFINITIONS.** In this [act]:

7 * * *

8 (4) “Conversion” means a transaction ~~of the kind~~ authorized by [Article] 4.

9 * * *

10 (10) “Domestication” means a transaction ~~of the kind~~ authorized by [Article] 5.

11 * * *

12 (17) “Interest exchange” means a transaction ~~of the kind~~ authorized by [Article]

13 3.

14 * * *

15 (22) “Merger” means a transaction ~~of the kind~~ authorized by [Article] 2.

16 * * *

17 **SECTION 110. ALTERNATIVE APPROVAL OF TRANSACTIONS.** Except as
18 provided in the organic law or organic rules of a domestic entity, approval of a transaction under
19 this [act] by the unanimous vote or consent of its interest holders satisfies the requirements of
20 this [act] for approval of the transaction.

21 **SECTION 201. MERGER AUTHORIZED.**

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

1 * * *

2 (2) two or more foreign entities may be parties to a merger in which the surviving
3 entity is merge into a domestic entity.

4 * * *

5 (c) This [article] does not apply to a ~~merger~~ transaction under:

6 * * *

7 **SECTION 203. APPROVAL OF MERGER.**

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

9 (1) by a domestic merging entity:

10 (A) in accordance with the requirements, if any, in its organic law
11 and organic rules for approval of a transaction that has the effect of a merger; or

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

15 * * *

16 **SECTION 205. STATEMENT OF MERGER; EFFECTIVE DATE.**

17 * * *

18 (b) A statement of merger must contain:

19 * * *

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

22 (7) if the surviving entity is created by the merger and is a domestic

1 limited liability partnership, ~~a copy of~~ its [statement of qualification], as an attachment.

2 * * *

3 (d) If the surviving entity is a domestic entity, its ~~name~~ public organic document,
4 if any, must satisfy the requirements of the law of this state. ~~If the surviving entity is to be a~~
5 ~~qualified foreign entity, its name must be available for use in this state or it must adopt an~~
6 ~~available name for that purpose.~~ except that it does not need to be signed any may omit any
7 provision that is not required to be included in a restatement of the public organic document.

8 * * *

9 **SECTION 206. EFFECT OF MERGER.**

10 (a) When a merger becomes effective:

11 * * *

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

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

15 (B) its private organic rules that are to be in a record, if any, are
16 amended to the extent provided in the plan of merger and ~~are~~ remain binding ~~upon the~~ on its
17 ~~interest holders of the surviving entity;~~

18 * * *

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

22 ~~(b)~~ (c) When a merger becomes effective, a person that did not have interest

holder liability with respect to any of the merging entities and that becomes subject to interest holder liability with respect to a domestic entity as a result of a merger has interest holder liability only to the extent provided by the organic law of the entity and only for those liabilities that arise after the merger becomes effective.

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

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

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

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

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

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

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

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

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

5 **SECTION 301. INTEREST EXCHANGE AUTHORIZED.**

6 * * *

7 (c) This [article] does not apply to ~~an interest exchange~~ a transaction under:

8 * * *

9 **SECTION 303. APPROVAL OF INTEREST EXCHANGE.**

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

11 (1) by a domestic acquired entity:

12 (A) in accordance with the requirements, if any, in its organic law
13 and organic rules for approval of an interest exchange;

14 (B) except as otherwise provided in subsection (d), if neither its
15 organic law nor organic rules provide for approval of an interest exchange, in accordance with
16 the requirements, if any, ~~for approval of a merger~~ in its organic law and organic rules for
17 approval of a transaction that has the effect of a merger, as if the interest exchange were ~~a merger~~
18 that type of transaction; or

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

22 * * *

1 **SECTION 306. EFFECT OF INTEREST EXCHANGE.**

2 (a) When an interest exchange becomes effective:

3 * * *

4 (3) the public organic document, if any, of the acquired entity is amended
5 ~~to the extent~~ as provided in the plan of interest exchange and is remains binding ~~upon the~~ on its
6 ~~interest holders of the acquired entity~~; and

7 (4) the private organic rules of the acquired entity that are to be in a
8 record, if any, are amended to the extent provided in the plan of interest exchange and ~~are~~ remain
9 ~~binding upon the~~ on its interest holders ~~of the acquired entity~~.

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

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

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

22 (1) the interest exchange does not discharge any interest holder liability

1 under the organic law of the domestic acquired entity to the extent the interest holder liability
2 arose before the interest exchange became effective;

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

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

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

13 **SECTION 401. CONVERSION AUTHORIZED.**

14 * * *

15 [(d) The following entities may not engage in a conversion ~~under this [article]~~:

16 (1)

17 (2)]

18 **SECTION 403. APPROVAL OF CONVERSION.**

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

20 (1) by a domestic converting entity:

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

1 (B) if its organic rules do not provide for approval of a conversion,
2 in accordance with the requirements, if any, ~~for approval of a merger~~ in its organic law and
3 organic rules for approval of a transaction that has the effect of a merger, as if the conversion
4 were ~~a merger~~ that type of transaction; or

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

8 * * *

9 **SECTION 405. STATEMENT OF CONVERSION; EFFECTIVE DATE.**

10 * * *

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

15 * * *

16 **SECTION 406. EFFECT OF CONVERSION.**

17 (a) When a conversion becomes effective:

18 * * *

19 (7) if a converted entity is a filing entity, its public organic document is
20 effective and is binding ~~upon the~~ on its interest holders ~~of the converted entity~~;

21 * * *

22 (9) the private organic rules of the converted entity that are to be in a

1 record, if any, approved as part of the plan of conversion are effective and are binding upon the
2 on its interest holders of the converted entity; and

3 * * *

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

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

13 ~~(c)~~ (d) When a conversion becomes effective:

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

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

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

22 (4) a person has whatever rights of contribution from any other person as

are provided by the organic law or organic rules of the domestic converting entity with respect to any interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

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

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

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

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

SECTION 501. DOMESTICATION AUTHORIZED.

* * *

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

(1)

(2)]

SECTION 502. PLAN OF DOMESTICATION.

(a) A domestic entity may become a foreign entity in a domestication ~~under this [article]~~ by approving a plan of domestication. The plan must be in a record and contain:

* * *

SECTION 503. APPROVAL OF DOMESTICATION.

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

1 (1) by a domestic domesticating entity:

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

4 (B) if its organic rules do not provide for approval of a
5 domestication, in accordance with the requirements, if any, ~~for approval of a merger~~ in its
6 organic law and organic rules for approval of a transaction that has the effect of a merger as if the
7 domestication were ~~a merger~~ that type of transaction; or

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

11 * * *

12 **SECTION 505. STATEMENT OF DOMESTICATION; EFFECTIVE DATE.**

13 * * *

14 (b) A statement of domestication must contain:

15 * * *

16 (4) if the domesticating entity is a domestic entity, a statement that the
17 plan of domestication was approved in accordance with this [article] or, if the domesticating
18 entity is a foreign entity, a statement that the domestication was approved ~~by the foreign~~
19 ~~domesticating entity~~ in accordance with the law of its jurisdiction of organization;

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

22 (6) if the domesticated entity is a domestic limited liability partnership, ~~the~~

1 ~~text of~~ its [statement of qualification], as an attachment.

2 * * *

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

7 * * *

8 **SECTION 506. EFFECT OF DOMESTICATION.**

9 (a) When a domestication becomes effective:

10 * * *

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

13 * * *

14 (9) the private organic rules of the domesticated entity that are to be in a
15 record, if any, approved as part of the plan of domestication are effective and are binding upon
16 the on its interest holders ~~of the domesticated entity;~~ and

17 * * *

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

22 ~~(b)~~ (c) When a ~~merger~~ domestication becomes effective, a person that did not

1 have interest holder liability with respect to the domesticating entity and that becomes subject to
2 interest holder liability with respect to a domestic entity as a result of ~~a~~ the domestication has
3 interest holder liability only to the extent provided by the organic law of the entity and only for
4 those liabilities that arise after the domestication becomes effective.

5 ~~(c)~~ (d) When a domestication becomes effective:

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

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

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

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

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

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

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

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