

Model Entity Transaction Act

- Due to changes in Federal tax law, many businesses now utilize various types of entities, including limited liability companies and limited liability partnerships.
- Alaska is the **only** state that does not authorize a limited liability company to merge with another form of entity. Alaska businesses are required to complete restructuring transactions in two or three indirect and expensive steps, rather than directly and cheaply in a single merger transaction.
- Many states have adopted new legislation to facilitate transactions between more than one form of entity.
- Some states have added provisions in each of their individual entity laws to authorize entities organized under each law to convert to other forms of entities or to allow mergers between entity forms. (The “hybrid” approach.)
- Other states have taken a more comprehensive approach (“junction box” statutes), allowing cross-entity mergers and conversions to other entity forms in one act and central location.
- Adopting the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) Model Entity Transaction Act (“META”) in Alaska would facilitate transactions between more than one form of entity, would improve the existing business climate in Alaska and help reduce unnecessary administrative and legal burdens currently imposed on Alaska companies. Adopting model laws assists practitioners, giving access to existing case law and commentaries.
- Implementation of META would require conforming amendments and possibly repeals to any of Alaska’s conflicting existing business statutes. Appendix 2 of META provides a guide for analyzing existing statutes to determine which statutes should be amended or repealed and whether additional provisions should be added, to meet the goals of: “(1) avoiding any potential inconsistency between META’s provisions and similar provisions in the state’s entity statutes; and (2) making the interplay between META and the state’s various entity laws relatively easy to navigate.” Model Entity Transactions Act, Appendix 2, (2007), <http://www.nccusl.org/Update/ActSearchResults.aspx>. The simplest method would likely be to limit existing Alaska entity laws to “same-type transactions”. This approach would likely require the least amount of alterations to existing Alaska entity laws, as few amendments should be necessary for entity laws that do not have any cross-type merger provisions. Id. at 91.
- Some states have found it useful to expand the coverage of their junction box statutes beyond inter-form mergers and conversions to include administrative matters such as entity names, registered agent, effects of dissolution, filings with the filing officer and treatment of foreign entities.
- Although Alaska’s need to act is greatest in the area of inter-entity mergers and conversions, it may be prudent to undertake efforts to coordinate the administrative rules governing Alaska business organizations in connection with any proposed legislation. Colorado’s Corporations and Associations Act, COLO. REV. STAT. ANN. §§ 7-90-101 to -604, is an example of a comprehensive junction box statute that addresses both inter-entity mergers and conversions and administrative matters such as filings, annual reports, entity names and registered agents. As with the adoption of META, implementation of a more comprehensive junction box statute would require a thorough analysis of the overall existing statutory framework in Alaska and could require significant amendments to existing state law.
- Alaska is in need of new statutory authority to permit cross-entity transactions in order to remain responsive to the needs of Alaskan companies. While Alaska could adopt a patchwork of legislative amendments to its existing entity laws, adoption of a comprehensive junction box statute would help to avoid inconsistencies and conflicts between existing statutes. Adopting META would be an important step towards bringing Alaska more into the mainstream of statutory business law.



SUMMARY

Model Entity Transactions Act

The Uniform Law Commissioners have provided unincorporated organization law to the states since the first Uniform Partnership Act in 1914. The current portfolio of uniform acts on unincorporated organizations includes the Uniform Partnership Act (1997), the Uniform Limited Partnership Act (2001), the Uniform Limited Liability Company Act (1996) and the Uniform Unincorporated Nonprofit Organization Act (1996). Corporate law has been the focus of the American Bar Association for at least 50 years. It is responsible for the Model Business Corporation Act and the Model Not-for-Profit Corporation Act. It also prepared a Prototype Limited Liability Company Act. Partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies and corporations are the basic entities under American law (business trusts and cooperatives are also growing in importance) that provide the means to aggregate capital, and limit liability where applicable, along with the structure to organize an enterprise, whether it is for profit or nonprofit.

All of this uniform and model act work has made American law particularly efficient for entrepreneurs. Anyone who establishes and develops a business has choices available for the entity that may be chosen to do business. As a business grows, these options also allow for some changes in form and location of the entity chosen. For example, a small enterprise that chooses to be a partnership initially has the opportunity to reorganize as a corporation when the business is big enough to want the advantage of the corporate form. Not-for-profit activities also have a greater array of organizational forms, now including the limited liability company and the limited partnership along with the not-for-profit corporation. American law is particularly flexible and responsive to the needs of both the for-profit and the not-for-profit sectors. American business organization law is the envy of the rest of the world for this reason.

However, more can be done. There is no comprehensive statutory framework for changing entity form, whether for merger of entities, conversion of one entity to another, exchanging interests to merge businesses without merging the entities (called an interest exchange), or for changing the location of the entity (called a domestication). The newest uniform acts on limited liability companies and limited partnerships have limited provisions. The Model Business Corporation Act has been modified to do some of these kinds of transactions. The comprehensive effort had not been done until the **Model Entity Transactions Act (META)**, promulgated by the Uniform Law Commissioners and the American Bar Association in 2004.

The Uniform Law Commissioners and the American Bar Association have a long relationship going back to the founding of the Commissioners. Every drafting committee the Commissioners authorize to work on an act has advisors from the American Bar Association. However, in this instance the need to draw together corporate law with the law of unincorporated organizations, meant a more formal joint relationship was necessary. META is a product of this joint relationship.

The problem with mergers, conversions, interest exchanges and changing the location of entities is that an entity involved may have to be dissolved to accomplish the desired end. This means technically winding down the business, satisfying creditors and interest holders in the winding down, and potentially incurring adverse tax consequences. This is a burden when the objective is not to dissolve the business but to continue it in another form or another location. The hazards of the process are many and very costly. A statute that allows these events to occur without dissolving at least one of the entities involved will increase efficiency and lower costs. A general statute, not limited in scope to less than all of the kinds of entities commonly involved in these transactions, is highly desirable. Cross-entity transactions should be available. That statute should also be one that can be fit with the existing entity law in a state so that it is not necessary to repeal all the existing entity law to accomplish the objective. META is the general statute that is designed to fit in with a state's existing entity law to accomplish the objective.

META governs the course of four kinds of transactions: *merger* of one entity with another, *conversion* of an entity to another kind of entity, an *interest exchange* between two entities so that one of them is controlled

by the other without actually merging the two entities and the *domestication* of an entity originally organized in one state in another state. A merger occurs when one entity acquires another entity and the result is a single entity composed of both the original entities. A conversion occurs when one kind of entity converts to another kind, i.e., a limited liability company converts into a business corporation. An interest exchange occurs when interest holders transfer their interests in one entity to another for interests in the second entity. For example, the holders of all interests in a limited partnership transfer their interests to a corporation in return for shares of stock in the corporation. A domestication occurs when an entity formed under the laws of one state becomes an entity formed in another state, extinguishing its entity status in the first state. The articles of META essentially provide the procedures to accomplish each of these transactions.

META authorizes each of these kinds of transactions. It authorizes different entities to merge, i.e., a corporation may merge with a limited partnership. It authorizes a partnership to convert to a limited liability company. An interest swap may occur between a limited partnership and a limited liability company. A corporation may change its place of organization from one state to another. These are examples of the kinds of transactions authorized. They can occur between an entity in one state and a foreign entity formed originally in another state, providing that the law of the foreign state permits such a transaction.

In each kind of transaction, there must be a plan that is approved by the interest holders in the entities. The plan generally describes the transaction and its effect in detail. Approval of the plan proceeds according to the organic statute and rules that govern the pre-existing entities, or if none, by unanimous consent of all interest holders. If, for example, a partnership agreement governing a limited partnership provides for consent of partners to one of the kinds of transactions subject to META, the agreement would be the organic rules that would determine the approval of the plan. Otherwise all the partners would have to consent.

Once a plan is approved, a statement relevant to the transaction must be filed in the office in a state in which entity statements or charters are normally filed. The filing puts the transaction and the identity of the entity that survives in public records. That entity becomes the entity with the capacity to do business and it has the applicable liability shield from that time onward.

The objective in these procedures is to make sure that no interest is extinguished in the process of any of the transactions under META, whether a merger, conversion, interest exchange or domestication. This is true for an interest holder such as a shareholder in a corporation or holder of a partnership interest. It is also true for creditor interests that pre-existed the given transaction. The point of the procedures is to end with an entity that continues the business of those entities it succeeds without extinguishing obligations incurred by these entities in a seamless, nondisruptive transfer.

There are a few exclusions from META. If mergers in a state are already governed by the merger provisions in a state's enactment of a uniform or model act, META will not apply or displace those provisions. The same is true for interest exchanges when a state has the Model Business Corporation Act. Not all entities will necessarily be governed by META. There are special corporations, for example, that should not be included, depending upon their status in a state. META allows for them to be specifically excluded.

META is a model act, not a uniform act, although several of the acts affected are uniform acts. Although there is some uniformity in entity law, i.e., partnership law, it is not true across the full spectrum of entity law. This means that using META from state to state is likely to mean much adaptation of META provisions. The effect of utilizing META may have the impact of introducing more uniformity of law relating to entities from state to state, but use of its language in a uniform way cannot be expected.

Business organization law and the law relating to not-for-profit organizations has been much refurbished, updated and improved in the 30 years preceding 2004, the year of META. Development has been dynamic and good for economic function in the entire United States. META adds another element to this dynamic progression of law relating to these entities. It is good for business and not-for-profit ventures alike. It should be studied, adapted and enacted in every state as soon as practicable.

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ABOUT ULC

The **Uniform Law Commission (ULC)**, also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 116th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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Memorandum

To: Senator Joe Paskvan, Chair, Senate labor and Commerce Committee
From: Steve Miller, Sherman & Howard L.L.C.
Date: October 26, 2009
Re: Update of Alaska Business Statutes

BACKGROUND

During the past twenty years many new types of business entities – including limited liability companies, limited liability partnerships, and limited liability limited partnerships – have been recognized under state law. As a result of the proliferation of new entity forms, many businesses now utilize various types of entities in their organizational structures. The relaxation of federal tax rules governing entity classification has led to an increase in the volume of restructuring and acquisition transactions by and among the various types of entity forms. These transactions have often required the use of multiple indirect steps, as opposed to a single transaction, because of the lack of clear statutory authority allowing transactions between more than one form of entity.

Many states have addressed this need by providing new legislation to facilitate transactions between more than one form of entity. Some states have added provisions in their individual entity laws to authorize entities organized under each law to convert to other forms of entities or to allow mergers between entity forms. For example, Delaware has adopted separate provisions in both its General Corporation Law and its Limited Liability Company Act that, functioning together, allow a merger between a corporation and a limited liability company. See DEL. CODE ANN. tit. 8, §§ 263.264 (2008) (corporations), DEL. CODE ANN. tit. 6, §§ 18-209 (2008) (limited liability companies). Other states have taken a more comprehensive approach and have chosen to enact new statutes that address cross-entity mergers and conversions in one act and central location. These statutes, known as “junction box” statutes, contain provisions allowing all types of corporate and unincorporated entities to engage in mergers, conversions,

and, in some cases, interest exchanges and domestication transactions. See ALA. CODE §§I 10-15-1 to -7 (2007); COLO. REV. STAT. ANN. §§ 7-90-101 to -604 (West 2008).

ALASKA LAW

As noted above, many states have adopted new or amended existing provisions to facilitate transactions between different entity forms. While states have taken varying approaches to inter-entity transactions, virtually all states have addressed certain types of transactions. In fact, Alaska is the *only* state that does not authorize a limited liability company to merge with another form of entity.

Currently Alaska law authorizes only the following mergers, consolidations and conversions:

- two or more domestic corporations may merge, Alaska Stat. § 10.06.530;
- one or more foreign corporations and one or more domestic corporations may be merged or consolidated, or participate in an exchange, Alaska Stat. § 10.06.562;
- a limited liability company may merge or consolidate with or into a limited liability company or a foreign limited liability company, Alaska Stat. § 10.50.500;
- any other entity may convert to a limited liability company, Alaska Stat. § 10.50.570;
- any other entity may convert to a limited partnership, Alaska Stat. § 32.11.095; and
- a partnership may be merged with one or more partnerships or limited partnerships. Alaska Stat. § 32.06.905.

As a result of the limited provisions governing inter-entity transactions, Alaska businesses are required to complete restructuring transactions in two or three indirect steps rather than directly in a single transaction. For example, an Alaska limited liability company cannot merge directly into an Alaska corporation. Nevertheless, a similar result can be obtained by (i) forming a foreign limited liability company; (ii) merging the Alaska limited liability company with and into the foreign limited liability company; (iii) converting the surviving entity of the merger, the foreign limited liability company, into a foreign corporation pursuant to the provisions of that state's business laws; and (iv) merging the foreign corporation with and into an Alaska corporation. Likewise, an Alaska limited liability company could be converted into an Alaska corporation through the use of foreign entities to facilitate the conversion.

While it may be theoretically possible to attain many of the same results accomplished by a comprehensive inter-entity merger or conversion statute without having such a statute

available, it is certainly much more efficient and economical to accomplish inter-entity transactions in a single step. As noted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in connection with the adoption of the Model Entity Transactions Act (discussed *infra*):

The problem with mergers, conversions, interest exchanges and changing the location of entities is that an entity involved may have to be dissolved to accomplish the desired end. This means technically winding down the business, satisfying creditors and interest holders in the wind down, and potentially incurring adverse tax consequences. This is a burden when the objective is not to dissolve the business but to continue it in another form or another location. The hazards of the process are many and very costly. A statute that allows these events to occur without dissolving at least one of the entities involved will increase efficiency and lower costs . . . Cross-entity transactions should be available.

Model Entity Transactions Act Summary, (2007), at <http://www.nccusl.org/Update/ActSearchResults.aspx>. Adopting new legislation in Alaska to facilitate transactions between more than one form of entity would improve the existing business climate in Alaska and help reduce unnecessary administrative and legal burdens currently imposed on Alaska companies.

MODEL & STATE LAW PROVISIONS

Both NCCUSL and the American Bar Association (“ABA”) have undertaken efforts in recent years to facilitate transactions between entities. NCCUSL included provisions permitting entities to engage in mergers with other entity forms and authorizing the conversion of one form of entity to another in the Uniform Limited Liability Company Act (1996 and 2006), Uniform Limited Cooperative Association Act (2007), Uniform Partnership Act (1997) and Uniform Limited Partnership Act (2001). Similarly, the ABA amended the Model Business Corporation Act in 1999 to authorize mergers between corporations and other forms of entities, and again in 2002 to authorize the conversion of entities into and out of the corporate form. Unlike a junction box statute, which applies to transactions between multiple entities, each of these statutes only apply if an entity of the type formed under the statute is a party to the transaction.

Given the inherent limitations in the acts previously adopted, NCCUSL and the ABA set out to draft a comprehensive junction box statute that would allow differing forms of entities to merge with each other or convert to other entity forms. The Model Entity Transactions Act (“META”), the most recent version of which is attached to this memorandum as Appendix A, originally was adopted by NCCUSL and the ABA in 2004 and provides a comprehensive statutory framework that addresses all varieties of cross-entity transactions. Under META, all types of corporate and unincorporated organizations may engage in mergers, conversions, interest exchanges (essentially a triangular merger accomplished without the use of a transitory

third party), and domestications (a transaction in which an existing entity moves its jurisdiction of organization to another state while still retaining whatever form it had before the domestication).

Implementation of META or a similar junction box statute would require conforming amendments and repeals to Alaska's existing business statutes. Appendix 2 of META provides a guide for analyzing existing statutes to determine which statutes should be amended or repealed and whether additional provisions should be added. As noted in Appendix 2, two goals should be paramount in deciding how to approach revisions to existing state laws: "(1) avoiding any potential inconsistency between META's provisions and similar provisions in the state's entity statutes; and (2) making the interplay between META and the state's various entity laws relatively easy to navigate." Model Entity Transactions Act, Appendix 2, (2007), at <http://www.nccusl.org/Update/ActSearchResults.aspx>. The appendix sets forth four separate approaches to achieving this cohesion. The simplest method would likely be to limit existing Alaska entity laws to "same-type transactions". This approach would likely require the least amount of alterations to existing Alaska entity laws, as few amendments should be necessary for entity laws that do not have any cross-type merger provisions. *Id.* At 91.

Some states have found it useful to expand the coverage of their junction box statutes beyond inter-form mergers and conversions to include administrative matters such as entity names, registered agent, effects of dissolution, filings with the filing officer and treatment of foreign entities. These statutes seek to coordinate the non-substantive rules applicable to differing organizational forms, where appropriate, into a comprehensive junction box statute in order to eliminate inadvertent differences that may be set forth in existing entity laws. For instance, "where one statute speaks of a sixty-day grace period for filing a corrective report while another speaks of a two-month period, most would agree that it makes sense to coordinate the provisions..." Robert R. Keatinge, Plumbing and Other Transitional Issues. 58 Bus. Law 1051, 1058 (2003).

Although Alaska's need to act is greatest in the area of inter-entity mergers and conversions, it may be prudent to undertake efforts to coordinate the administrative rules governing Alaska business organizations in connection with any proposed legislation. Attached as Appendix B is a copy of Colorado's Corporations and Associations Act, COLO. REV. STAT. ANN. §§ 7-90-101 to -604. The Corporations and Associations Act is an example of a comprehensive junction box statute that addresses both inter-entity mergers and conversions and administrative matters such as filings, annual reports, entity names and registered agents. As with the adoption of META, implementation of a more comprehensive junction box statute would require a thorough analysis of the overall existing statutory framework in Alaska and could require significant amendments to existing state law.

RECOMMENDATIONS & CONCLUSION

Alaska is in need of new statutory authority to permit cross-entity transactions in order to remain responsive to the needs of Alaskan companies. While Alaska could adopt a patchwork of legislative amendments to its existing entity laws, adoption of a comprehensive junction box statute would help to avoid inconsistencies and conflicts between existing statutes. META is a general statute that is designed to fit with any state's existing entity laws and should be enacted

March 17, 2010

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in an appropriate form in Alaska in order to allow Alaska businesses the opportunity to engage in cross-entity transactions. Adopting META, or enacting similar provisions adopted by other states, would be an important step towards bringing Alaska more into the mainstream of statutory business law.