

**To: New Jersey Law Revision Commission**  
**From: Brian J. Ashnault, Adrian Altunkara, Jon H. Aunio, Micaela Itona, Lauren B. Jones, and Beshoy Shokralla**  
**Re: Model Entity Transactions Act**  
**Date: March 6, 2017**

## **MEMORANDUM**

This Memorandum is intended to provide background information to the Commission regarding the Model Entity Transactions Act (META), drafted by the Uniform Law Commission (ULC), to allow conversion of one kind of business organization to another, or the merger of two or more business organizations into one organization. META was initially released by the ULC in 2007, then amended in 2011 and 2013.<sup>1</sup> The most current version of META represents a collaborative effort between the ULC and the American Bar Association (ABA) to address an issue that cuts across their traditional shared areas of expertise.

Preliminary research for this potential project was conducted by Seton Hall University School of Law students Adrian Altunkara, Brian J. Ashnault, Jon Aunio, and Lauren B. Jones; and New Jersey Institute of Technology students Micaela Itona and Beshoy Shokralla. All researched many aspects of META, including its original purpose, subsequent amendments, its impact on existing New Jersey statutes and business forms, other state's enactments, proposed benefits, potential risks, relevant pending legislation, and interested constituencies.

## **BACKGROUND**

Generally speaking, with regard to the selection of the entity through which one chooses to do business, American business law is known for its flexibility and responsiveness to the needs of both the for-profit and the non-profit sectors.<sup>2</sup> In addition, it has long been accepted that there are circumstances under which a business formed as one entity, may wish to combine with another business, or transform itself in some other manner during the course of its business life-cycle.

Unless they have enacted META or incorporated similar provisions into their statutes, however, most states have no “comprehensive statutory framework for one-step intra- and inter-entity organic reorganizations such as mergers, conversions, interest exchanges and domestications.”<sup>3</sup> Nationwide, state reorganization statutes are described by the ULC as “incomplete” and containing “gaps and inconsistent procedural requirements.”<sup>4</sup>

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<sup>1</sup> Uniform Law Commission, Acts, Entity Transactions Act, (Model); [http://www.uniformlaws.org/Act.aspx?title=Entity%20Transactions%20Act,%20Model%20\(2007\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Entity%20Transactions%20Act,%20Model%20(2007)%20(Last%20Amended%202013)) (last visited March 3, 2017).

<sup>2</sup> Uniform Law Commission, Acts, Entity Transactions Act, (Model), Legislative Information Kit, Act Summary; [http://www.uniformlaws.org/shared/docs/entity\\_transactions/revise%20meta%20summary\\_Jan%202015\\_GH%20edits.pdf](http://www.uniformlaws.org/shared/docs/entity_transactions/revise%20meta%20summary_Jan%202015_GH%20edits.pdf) (last visited March 3, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

As drafted, META is designed to govern “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.”<sup>5</sup> Currently, seven jurisdictions have adopted META, and one state introduced it in 2017.<sup>6</sup>

A problem with mergers, conversions, interest exchanges, and the changing of the location of a business entity is that under the current law, the ongoing entity involved may have to be dissolved to accomplish the desired end. This requires winding down the business, satisfying creditors and interest holders during the winding down, and potentially incurring adverse tax consequences. It has been argued that this can be unnecessarily burdensome, costly, and disruptive when the ultimate objective is not to dissolve the business, but rather to continue it in another form or in another location.

A statute that allows the transitions to occur without dissolving the entities involved could potentially increase efficiency and lower costs. META is designed to do so while protecting outstanding interests in the business, including those of creditors.

META provides the procedures to accomplish each of the aforementioned transactions. For every such transaction, there must be a plan that is approved by the interest holders in the entities.<sup>7</sup> The plan describes the transaction and its effect in detail.<sup>8</sup> Approval of the plan proceeds according to the underlying statutes and rules that govern the existing entities.<sup>9</sup> If there are no such statutes, the transaction proceeds by the unanimous consent of all interest holders.<sup>10</sup> Once a plan is approved, a statement relevant to the transaction must be filed with the state office with which entity statements or charters are normally filed.<sup>11</sup> Filing places the transaction, and the identity of the entity that survives, in public records.<sup>12</sup> One key objective of the process is to make sure that no valid interest in the business is extinguished during the process of any of the transactions under META.<sup>13</sup>

The 2011 and 2013 amendments to META were primarily technical in nature and designed to harmonize the procedural and filing provisions of META with the other uniform and model entity acts that are included in the Uniform Business Organizations Code (2011, last Amended in 2013).<sup>14</sup> The changes to META that are reflected in the final version include the addition of certain new definitions and the clarification of others.<sup>15</sup> Additional new provisions

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<sup>5</sup> *Id.*

<sup>6</sup> The jurisdictions that have adopted META, according to the ULC, are: Alaska, Arizona, Connecticut, Idaho, Kansas, Pennsylvania, and the District of Columbia. Indiana introduced the Act this legislative session. In addition to those jurisdictions mentioned on the ULC’s website, Arkansas and Montana seem to have incorporated some portions of META into their existing statutory schemes as explained in more detail below.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> META, Article I, General Provisions (2013).

focus on the restructuring the transactions (mergers, interest exchanges, conversions, and domestication) involving entities (as defined in the Definitions portion of the act). Some provisions have been revised to address when a transaction takes effect. Others deal with limitations on delaying the effective date. One substantial amendment clarifies the effects of a gift, bequest, grant, promise, etc. made to a merging entity that would not survive the merge and that takes effect or stays payable after the merger (this provision only relates to mergers because, in other transactions, the entity survives in some form).

## DISCUSSION

### I. Impact of META on New Jersey's Existing Statutes

As noted above, META provides a common set of provisions applicable to transactions involving all forms of association including business and nonprofit corporations, partnerships, and limited liability companies. The act also governs mergers and similar fundamental transactions among them, enables conversions from one form to another and domestication ("reincorporation") of foreign entities back into New Jersey, and uses a common approach to approvals of such transactions.<sup>16</sup>

Pursuant to META's provisions, in order to complete each kind of transaction, a plan must be approved by the interest holders of each participating entity, though the requirements of the plan itself and the approval process differ based on the type of entity and transaction.<sup>17</sup>

The following pages contain a brief summary of each of the four types of transactions to highlight areas in which META and existing New Jersey law overlap, and to identify dissimilarities between META and current New Jersey statutes and areas in which the incorporation of META provisions might enhance New Jersey's existing body of law.

#### Mergers

In New Jersey, N.J.S. 14A:10-1 governs the procedure for mergers. The law provides that: (1) any two or more domestic corporations, or any one or more domestic corporations and any one or more other business entities, may merge into one of such corporations or other business entities; (2) pursuant to a plan or merger which sets forth (a) the names of the corporations or other business entities proposing to merge, the name of the corporation or other business entity into which they propose to merge; (b) the terms and conditions of the proposed merger, and (c) the manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving corporation or of the surviving other business entity.<sup>18</sup> To perform a merger, a copy of the Business Plan and Agreement of Merger must be submitted when merging or consolidating a business.<sup>19</sup> In addition, a tax clearance may be

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<sup>16</sup> META Prefatory Note, 1 (AM. LAW INST. & UNIF. LAW COMM'N 2013).

<sup>17</sup> Uniform Law Commission META Summary (2013).

<sup>18</sup> N.J. Stat. Ann. § 14A:10-1 (West).

<sup>19</sup> N.J. Stat. Ann. § 14A:10-1(2) (West).

required if the surviving business is not currently registered or is not an authorized domestic corporation.

The comment to META Section 201 provides:

“The merger transaction authorized by this act involves the combination of one or more domestic entities with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic surviving entity.”<sup>20</sup>

**Subsection (a)** – Subsection (a)(1) states the general rule that subject to subsection (c) one or more domestic entities may merge with or into a domestic or foreign surviving entity. Subsection (a)(2) provides that two or more foreign entities may merge into a domestic surviving entity as long as the requirements of subsection (b) are met.<sup>21</sup>

**Subsection (b)** – Subsection (b) provides that a foreign entity may be a party to a merger or may be the surviving entity in a merger only if the merger is authorized by the laws of the foreign entity’s jurisdiction of formation.<sup>22</sup>

**Subsection (c)** – It is expected that some adopting states will retain provisions on mergers solely between entities of the same type in their organic laws. On the other hand, there will be some types of entities where it is unlikely that merger provisions will be added to their organic law, for example, unincorporated nonprofit associations. In cases where the organic law provides for a merger involving entities all of the same type, the organic law and not this act applies to the transaction; but this act would apply to any merger involving entities of more than one type.<sup>23</sup> In cases where the applicable organic law does not provide for mergers, this act will serve the important function of authorizing mergers involving entities of that type as well as cross-type mergers involving entities of that type<sup>24</sup>. Some states have statutes that allow cross-type mergers as well as same-type mergers, in which case the cross-type provisions should be repealed when this act is enacted.<sup>25</sup>

The text of subsection (c) will depend on which choice a state makes with respect to the scope of the act. Four options are outlined in paragraph 3 of the Legislative note following Section 606.<sup>26</sup>

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<sup>20</sup> META § 201 cmt. at 29 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> META § 606 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

## Share/Interest Exchanges

N.J.S. 14A:10-13 governs the procedure for share exchanges in New Jersey. The statute provides that a domestic or foreign corporation may acquire all of the outstanding shares, or all of the outstanding shares of one or more classes or series, of a domestic corporation if the board of each corporation adopts and the shareholders of the acquired corporation approve a plan of exchange.<sup>27</sup> Upon approving the plan of exchange, the board must submit it to a vote at a meeting of its shareholders.<sup>28</sup> After approval of the plan of exchange, a certificate of exchange shall be executed on behalf of each corporation.<sup>29</sup> The certificate of exchange shall be filed in the office of the Secretary of State and the exchange shall become effective upon the date of the filing or at a later time, not to exceed 90 days after the date of filing, as may be set forth in the certificate.<sup>30</sup>

Section 301 of META provides authorization for interest exchanges. The scope of this article, however, depends on which of the four methods of dealing with the enacting state's interest exchange statutes is chosen.<sup>31</sup> A state may choose to limit any existing interest exchange provisions to same-type transactions, for example interest exchanges where all of the entities are corporations.<sup>32</sup> Any interest exchange provisions added to entity statutes could similarly be limited to same-type transactions.<sup>33</sup> The net effect would be that interest exchange provisions in the various entity statutes will govern same-type interest exchanges and Article 3 will govern **cross-type exchanges**.<sup>34</sup> Accordingly, N.J.S. 14A:10-13 governs interest exchanges between corporations but does not govern procedure for share exchanges between and with other types of entities. If enacted, META would govern such cross-type exchanges and is not required to displace the requirements of N.J.S. 14A:10-13.

A domestic entity may be the acquired entity in an interest exchange under Section 302 of META by approving a plan of interest exchange (similar to the New Jersey statute).<sup>35</sup> If the acquired entity is a domestic entity, one of three possibilities will be applicable:

- (1) if the organic law governing the acquired domestic entity has specific provisions for approval of an interest exchange, or even if there are no such provisions, the organic rules of the acquired entity have specific provisions for approval of an interest exchange, then the approval provisions in the organic law or organic rules apply;<sup>36</sup>
- (2) if there are no specific provisions for approval of an interest exchange in the acquired entity's organic law or organic rules but either the organic law governing the acquired entity or the acquired entity's organic rules contain provisions for approval of mergers, then those merger provisions (except for any provisions that allow approval of a merger

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<sup>27</sup> N.J. Stat. Ann. § 14A:10-13 (West).

<sup>28</sup> N.J. Stat. Ann. § 14A:10-13(3) (West).

<sup>29</sup> N.J. Stat. Ann. § 14A:10-13(5) (West).

<sup>30</sup> N.J. Stat. Ann. § 14A:10-13(6) (West).

<sup>31</sup> META § 301 note at 45 (AM. LAW INST. & UNIF. LAW COMM'N 2013).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> META § 302(a) (AM. LAW INST. & UNIF. LAW COMM'N 2013).

<sup>36</sup> META § 302 cmt. at 50 (AM. LAW INST. & UNIF. LAW COMM'N 2013).

without a vote of the shareholders in the case of an acquired entity that is a corporation) apply;<sup>37</sup> and

(3) If neither (1) or (2) are applicable, then unanimous consent of the acquired entity's interest holders will be required.<sup>38</sup>

A statement of interest exchange must then be signed by a domestic acquired entity and delivered to the Secretary of State for filing.<sup>39</sup>

### Conversion

New Jersey is one of only about ten states that do *not* allow statutory conversions of corporations to other business forms.<sup>40</sup> Instead, New Jersey only allows statutory mergers.<sup>41</sup> It has been suggested that this can be a problem for 'legacy' businesses – those that were created before newer business forms became available.

In the LLC context, N.J.S. 42:2C-78 governs the procedure for conversion of LLCs.<sup>42</sup> The law provides that an organization, other than a LLC or a foreign LLC, may convert to an LLC, and an LLC may convert to an organization other than a foreign LLC pursuant to this section and a plan of conversion, if: (1) the other organization's governing statute authorized the conversion; (2) the conversion is not prohibited by the law of the jurisdiction that enacted the other organization's governing statute; and (3) the other organization complies with its governing statute in effecting the conversion.<sup>43</sup> A plan of conversion shall be recorded and shall include the name and form of the organization before conversion, name and form of the organization after conversion.<sup>44</sup>

Article IV of META provides that a domestic entity may become a different type of domestic entity or a different type of foreign entity if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.<sup>45</sup> Also a foreign entity may become a domestic entity if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.<sup>46</sup>

Many states have existing provisions in their statutes that allow conversions, however, few allow conversion of one type of entity into any other type of entity. Most (New Jersey

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> David M. Steingold, *Converting a Corporation to an LLC in New Jersey*, NOLO, <http://www.nolo.com/legal-encyclopedia/converting-corporation-llc-new-jersey.html>.

<sup>41</sup> *Id.*

<sup>42</sup> N.J. Stat. Ann. § 42:2C-78 (West).

<sup>43</sup> *Id.*

<sup>44</sup> N.J. Stat. Ann. § 42:2C-78(3)(b) (West).

<sup>45</sup> META § 401(a)(1)-(2) (AM. LAW INST. & UNIF. LAW COMM'N 2013).

<sup>46</sup> *Id.*

included) allow only limited types of conversions (e.g., general partnerships to limited partnerships, LLCs to corporations) but not to all other types of entities.<sup>47</sup>

Article IV Sec. 401 – Permits an entity to change to a different type of entity in its jurisdiction of formation or in a foreign jurisdiction.<sup>48</sup>

Article IV Sec. 402 – Sets forth the requirements for the plan of conversion, which must be approved by the converting entity. The content of a plan of conversion is similar to the content of a plan of merger.<sup>49</sup>

Article IV Sec. 403 – Sets forth requirements for getting an approval of conversion plan. As is the case with the other types of transactions authorized by this act, there are three possible ways to obtain approval of a conversion by a domestic entity. The first is to determine if the organic rules of the converting entity contain specific approval provisions for conversions. If they exist, then those provisions apply to approval of the plan of conversion. If there are no provisions in the organic rules for approval of a conversion, then the provisions for approval of a merger in either the organic law or organic rules of the entity will apply. If there are no approval provisions for conversions in the entity's organic rules and no approval provisions for mergers in the entity's organic law or organic rules, then unanimous consent of all the entity's interest holders are required.<sup>50</sup>

### Domestication

N.J.S. 14A:13-3 governs the procedure for admission of foreign corporations. The law provides that “[n]o foreign corporation shall have the right to transact business in this State until it shall have procured a certificate of authority so to do from the Secretary of State.<sup>51</sup> N.J.S. 42:2C-82 provides a procedure for foreign limited liability companies to domesticate in New Jersey. The statute allows for foreign LLCs, with a plan of domestication, to become domestic (New Jersey) LLCs and also allows domestic LLCs, with a plan of domestication, to become foreign LLCs (domestication is the term used in both scenarios).<sup>52</sup>

A few states have existing domestication provisions in their existing bodies of statutes.<sup>53</sup>

Article 5 of META governs the legal effect of a foreign entity domesticating in a jurisdiction adopting this act.<sup>54</sup> The organic laws of the foreign jurisdiction, and not Article 5, will govern the legal effect of most aspects of a domestication of a domestic entity in another

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<sup>47</sup> META § 401 note at 57 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

<sup>48</sup> META § 401 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

<sup>49</sup> META § 402 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

<sup>50</sup> META § 403 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

<sup>51</sup> N.J. Stat. Ann § 14A:13-3.

<sup>52</sup> N.J. Stat. Ann. § 42:2C-82 (West).

<sup>53</sup> META § 501 note at 68 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

<sup>54</sup> META § 401 cmt. at 58 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

jurisdiction.<sup>55</sup> In the latter scenario, Article 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Article 5 does not create a right in the domestic entity to be received in the foreign jurisdiction.<sup>56</sup> Similarly, Section 501 does not provide a right on the part of a foreign entity to become a domestic entity if the domestication is not authorized by the laws of the foreign jurisdiction.<sup>57</sup> If the foreign jurisdiction does not authorize domestication, the same result can be accomplished by forming a new entity of the same type in the new state and merging the existing entity into the new entity.<sup>58</sup>

Similar to a plan of conversion, pursuant to Sec. 502 of META, a domestic entity may become a foreign entity in domestication by approving a plan of domestication.<sup>59</sup> The plan must be approved and filed with the Secretary of State to take effect.<sup>60</sup> Since New Jersey lacks a comprehensive statutory scheme for domestication of all types of entities, META would provide a vehicle for efficient and quick domestication of foreign entities.

## II. Business Entities Addressed in New Jersey Statutes

Statutory Authority	Entity Type
Title 14A (For-Profit Corp.)	Domestic Profit  Domestic Professional Foreign profit (Incl. Foreign professional Corp.)  Foreign Profit “Doing Business as”
Title 15A (Non-Profit Corp.)	Domestic Non-Profit  Foreign Non-Profit
Title 42:2C (Limited Liability Co.)	Domestic LLC  Foreign LLC
Title 42:2A Limited Partnership	Domestic LP  Foreign LP
Title 42 Limited Liability Partnership	Domestic LLP  Foreign LLP

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> META § 502(a) (AM. LAW INST. & UNIF. LAW COMM’N 2013).

<sup>60</sup> META § 505 (AM. LAW INST. & UNIF. LAW COMM’N 2013).

### III. META Adoption in Other States

#### **Alaska**<sup>61</sup> – Alaska Entity Transaction Act - Effective 2014

Alaska adopted the Alaska Entity Transactions Act on recommendation of the Alaska Bar Association due to deficiencies in entity mergers and conversions. The General provisions section contains some alterations to the headings, including dissenter’s rights and a names section. The largest change comes in the form of a completely new section labeling “Filings” which discusses in depth the requirement for documentation, filing times, fees, false documents, confidentiality, and interrogatories. This is based in part on the Colorado equivalent which sought to create a comprehensive statute which included administrative matters for entity transactions. At the time of enactment, Alaska was the only state that did not allow limited liability companies to merge with another form of entity. This is now changed due to the enactment of the AETA. No cases have currently litigated the new statute, and little seems to have been discussed regarding the new statute.

#### **Arizona**<sup>62</sup> - Arizona Restructuring Act – Effective 2015

Arizona in 2011 formed the Mergers and Conversions Committee to update the laws in the state regarding entity transactions. In doing so they used the META as a template for the new Arizona version of the statute. The bill passed unanimously in 2014. The AERA, while serving substantially the same purpose as the META, does make changes to the original template. The largest departure from the META statute is the “Divisions” section of the AERA. Under this section, Arizona became the first state to explicitly allow entities to engage in divisions. Other changes include alterations to the subdivisions under separate provisions, discussing ineffectiveness of merger or domestication due to foreign jurisdictional law. One law review article discussed this as the first step toward making Arizona a business-friendly state, and hope that it would encourage businesses to remain in AZ.<sup>63</sup> The act has yet to be in dispute in a court context.

#### **Indiana** - Introduced 2017

The proposed Indiana Act appears to be substantially the same as META.

#### **Idaho**<sup>64</sup> - Effective 2015

In 2015 Idaho enacted the Uniform Business Organizations Code. The entire code was designed as a tool to bring together and revise areas of current business code. Along with this bill included Title 30, Chapter 22, labeled the Idaho Model Entity Transactions Act. The Act adopted mimics META, and adopts nearly all of the same subdivisions of the uniform act. While this section was enacted in 2015, Idaho had previously adopted an entity transactions act very similar

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<sup>61</sup> Alaska Stat. Ann. § 10.55.103 – 902.

<sup>62</sup> Arizon. Stat. Ann. § 29-2101.

<sup>63</sup> Sloom, Christopher, *The Model Entity Transaction Act: A Step Toward Improving Arizona’s Business Environment*, Arizona Law Review, 57 635 (2015).

<sup>64</sup> Idaho Code Ann. § 30-22.

to its current form in 2007, though it is unknown if the 2007 version was in part based on the META recommendation. No current case law exists, and little information is available regarding the impact of the current law.

**Kansas<sup>65</sup>** - Business Entity Transactions Act –Effective 2010

Kansas has adopted the META with nearly identical subdivisions as the current META, naming it the Business Entity Transactions Act. They do, however, include filing and administrative requirements under the miscellaneous provisions. No current case law disputes the BETA, and there is no indication as to the current status or reaction by businesses.

**Connecticut<sup>66</sup>** - Effective 2014 but approved in 2011 (2011 Amendment to META?)

The Connecticut Entity Transactions act is substantially the same as the current META, with nearly identical subdivisions. CETA does not include the Miscellaneous provisions stated within the META though. The CETA does not affect other business law whatsoever, only accomplishing the initial purpose of the META by allowing business entities greater malleability. According to the initial summary, the Act is intended to created jobs by enhancing Connecticut law. It is unknown if this has been the effect it has had. No case seems to discuss the current CETA in depth.

**Washington D.C.<sup>67</sup>** – Effective 2010

D.C. directly adopted the 2007 version of META. This move to adopt was part of a larger scheme to revise and clean up the former business organizations statutes enacted decades prior. Part of this revision included the META. The D.C. version does not include the Miscellaneous provisions however. No current case law challenges the ETA, and little could be found regarding the experiences since.

**Arkansas** – Adopted in 2009 provisions for Merger and Conversion based on the 2007 META, but did so in a layered way with other existing laws. This bypassed the need to adopt the Act in its entirety, and did so only in the context of these two sections.

**Montana** – Seems to have adopted some definitions from the META in its registered Agents Act, but nothing else regarding the META.

#### **IV. Potential Benefits and Detriments of META**

The goal of META is to simplify the process for engaging in merger, conversion, interest exchange, or domestication, and eliminate unnecessary steps that may have discouraged certain

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<sup>65</sup> Kansas Code Ann. § 17-18.

<sup>66</sup> Conn. Gen. Stat. Ann. § 34-600-646.

<sup>67</sup> D.C. Cod. Ann. § 29.-201.01.

entities from transacting altogether.<sup>68</sup> Further, META enables all entities to engage in all relevant transaction types, rather than precluding certain entities from engaging in certain transactions.<sup>69</sup> For instance, very few states currently allow corporations to convert into another entity type or to domesticate in another state, something that is permitted by META.<sup>70</sup> The Act also provides a simple framework for entities of different types to engage in these transactions with one another – known as "cross-entity transactions."<sup>71</sup>

Also, Section 505 of the Model Entity Transactions Act requires the filing of a statement of conversion.<sup>72</sup> The comments state that "the filing of a statement of conversion makes the transaction a matter of public record."<sup>73</sup> A separate public filing under the organic laws of the converting or surviving entity is not required."<sup>74</sup> Furthermore, section 506(a) states that "when a conversion becomes effective . . . the converted entity is deemed to . . . be organized under and subject to the organic law of the converted entity for all purposes; and be the same entity without interruption or dissolution as the converting entity."<sup>75</sup> Finally, section 506(a)(6) specifically states that "unless otherwise provided by the organic law of the converting entity, the conversion does not require the dissolution of the converting entity."<sup>76</sup> This approach provides the essential notice function and allows for efficient filings and effective tracking.<sup>77</sup> These states maintain a public record of every conversion and merger that occurs.<sup>78</sup> This allows creditors of businesses to track the disposition and location of assets and obligees.<sup>79</sup> Additionally, "the procedure is as efficient and direct as possible, requiring only a single filing to report the exit of a business from one form of entity and the entrance to a new form."<sup>80</sup>

Due to the fact that META is designed to simplify the transaction process and allow businesses to react quickly to changes in the economy, some states may believe that META gives businesses too much freedom, providing a way for businesses quickly to leave one state for another.<sup>81</sup> States with a robust incorporation market may not be inclined to make it easier for businesses to leave the state.<sup>82</sup>

It is difficult, however, for existing business owners and entrepreneurs to predict how a business will grow in the future, and the most favorable methods of organization under the law

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<sup>68</sup> *THE MODEL ENTITY TRANSACTION ACT: A STEP TOWARD IMPROVING ARIZONA'S BUSINESS ENVIRONMENT*, 57 Ariz. L. Rev. 635.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *The Alabama Business Entities Conversion and Merger Act: Issues Surrounding the Effect of Conversion*, 56 Ala. L. Rev. 577.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *THE MODEL ENTITY TRANSACTION ACT: A STEP TOWARD IMPROVING ARIZONA'S BUSINESS ENVIRONMENT*, 57 Ariz. L. Rev. 635.

<sup>82</sup> *Id.*

will vary depending on the development of the business as it matures. Existing business owners and entrepreneurs may deem states with laws like META to be a more favorable business climate.<sup>83</sup> Therefore, in an effort to remain competitive in the market for new and existing businesses, states may choose to adopt laws based on META<sup>84</sup>, or to incorporate some of its provisions as a supplement to their existing statutory schemes.

Also, although META does not include divisions among the transactions that it facilitates, Arizona, which has enacted the Arizona Entity Restructuring Act (AERA) based on META, became the first state to explicitly allow entities to engage in divisions.<sup>85</sup> The drafters of AERA made the decision to include the divisions based, in part, on their belief that allowing entities to divide could unlock value.<sup>86</sup>

## V. Impact of Entity Conversions

There are several impacts associated with the conversion of business entities.

The conversion of an entity may, for example, affect the amount of taxes paid. Corporations and certain LLC's are taxed twice because the entity is effectively separate from its shareholders. This is associated with the protection that the business entity provides from personal liability. The entity and shareholder are each taxed separately. Other entities, such as a partnership, are only taxed once. With a partnership, there is "pass through" taxation, which means that only the shareholders are taxed because there is no independent entity as there is with a corporation.<sup>87</sup> Conversions could result in a change in the flow of taxes to the government if businesses are converting to – or from - corporations or certain LLC's.

Another potential impact is the effect that conversion has on creditors and individuals in litigation against a business that is converting. META contains provisions designed to address this potential issue.<sup>88</sup> Section 103(a)'s commentary note states that relevant case law and other laws in regards to creditors still applies upon the enactment and META. Section 406(d) sets forth that "the conversion does not discharge any interest holder liability under the organic law of a domestic converting entity to the extent the interest holder liability arose before the conversion became effective."<sup>89</sup> It should also be noted that along with streamlining entity conversions, the other main objective of META is to "make sure that no outstanding interest is extinguished in the process of any of the transactions under META."<sup>90</sup> Preliminary research suggests that the cases pertaining to META find that conversion does not let the converting party escape liability from

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> State of NJ Dept. of Treasury, Corporation *Business Tax Overview*, 2016, [http://www.nj.gov/treasury/taxation/corp\\_over.shtml](http://www.nj.gov/treasury/taxation/corp_over.shtml).

<sup>88</sup> META § 103(a) and 406(d), (AM. LAW INST. & UNIF. LAW COMM'N 2013).

<sup>89</sup> *Id.*

<sup>90</sup> Model Entity Transactions Act (META) Summary, Uniform Law

Commission, [http://www.uniformlaws.org/shared/docs/entity\\_transactions/revise%20meta%20summary\\_Jan%202015\\_GH%20edits.pdf](http://www.uniformlaws.org/shared/docs/entity_transactions/revise%20meta%20summary_Jan%202015_GH%20edits.pdf).

third party creditors and/or other interested parties. Similarly, conversion does not alter otherwise applicable state law or contracts.

Outreach to commenters will help Staff assess whether the enactment of META or the inclusion of certain META provisions in New Jersey's existing body of statutes might make New Jersey a more attractive state for businesses.

## **VI. Pending Legislation Does Not Appear to Impact META**

There are several bills relating to business entities, but none of the bills appear to impact a determination by the Commission to continue to work in this area. A3868 and A1032 were introduced by Assemblymen Troy Singleton and Jay Webber, respectively. A1058 was introduced by Assemblymen Jon Bramnick, Erik Peterson, and Patrick Diegnan.<sup>91</sup> These three bills all involve corporation taxation, but would not affect the implementation of META because META adopts each states taxation scheme as is set forth by commentary note for section 201(d). One bill that is directly related to entity conversion is S1089 which was sponsored by Senator Anthony Bucco. This bill sets forth that, "Following a conversion under applicable law of another business entity, which was authorized to transact business in this State, to a foreign corporation, the foreign corporation shall file in the filing office." While this bill involves entity conversion, it does not appear to weigh against work by the Commission in the area of META.<sup>92</sup>

## **VII. Potential Constituents in Support and in Opposition to META**

At this preliminary stage, Staff has not yet engaged in outreach regarding META, but research performed to this time did not reveal any case, journal article, or other writing critical of conversion statutes, but there has been favorable treatment in those sources.

## **CONCLUSION**

Preliminarily, it appears that it would be of benefit to continue to research and review META, and to reach out to commenters who may wish to provide feedback regarding whether enactment of META, or the incorporation of certain selected provisions not now found in New Jersey law, could enhance New Jersey's body of statutes. This Memorandum is submitted in support of Staff's request for the Commission's authorization to do so.

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<sup>91</sup> A.3868, 217<sup>th</sup> N.J. Leg. § 1 (2016). A.1032, 217<sup>th</sup> N.J. Leg. § 1 (2016).

<sup>92</sup> S. 1089, 217<sup>th</sup> N.J. Leg. § 1 (2016).