Chapter 12 (Entity Transactions) of the
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compared with

MNCA Third Edition Chapters 11 (Mergers and Membership Exchanges) and Chapter 9 (Domestication and Conversion)
(with amendments adopted through those published at 70 Bus. Law 467 (Spring 2015) and also includes amendments approved on second reading on April 18, 2015 but not published)

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Additions in Exposure Draft shown in blue with double underline
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[Chapter] 1112
MERGERS AND MEMBERSHIP EXCHANGES
ENTITY TRANSACTIONS

Subchapter
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§ 1201.  [CHAPTER] DEFINITIONS

(a) As used in this [chapter]Chapter 12 (entity transactions):

(1) “Exchanging Acquired entity” means the domestic or foreign nonprofit
    corporation or eligible entity in which all of one or more classes of memberships or classes or
    series of eligible interests of which are to be acquired in a membership interest exchange.

    “Acquiring entity” means the entity that acquires all of one or more classes or series of
    interests of the acquired entity in an interest exchange.

(2) “Membership exchange Conversion” means a transaction pursuant to Section
    11.03 [Subchapter] 12E (conversion).

    “Converted entity” means the converting entity as it continues in existence after a
    conversion.

    “Converting entity” means the domestic nonprofit corporation that approves a plan of
    conversion pursuant to Section 1252 (approval of conversion) or the eligible entity that approves
    a conversion to a domestic nonprofit corporation pursuant to the organic law of the eligible
    entity.

    “Domesticated corporation” means the domesticating nonprofit corporation as it
    continues in existence after a domestication.

    “Domesticating corporation” means the domestic nonprofit corporation that approves a
    plan of domestication pursuant to Section 1242 (approval of domestication) or the foreign
    corporation that approves a domestication pursuant to the organic law of the foreign corporation.

    “Domestication” means a transaction pursuant to [Subchapter] 12D (domestication).

    “Enactment date,” as used in a particular [Subchapter], means the first date on which the
    law of this state authorized an entity to engage in a transaction of the type authorized by that
    [Subchapter].

    “Interest exchange” means a transaction authorized by [Subchapter] 12C (interest
    exchange).

(3) “Merger” means a transaction in which two or more merging entities are
    combined into a surviving entity pursuant to Section 11.02 a record filed by the secretary of state.

    “Merging entity” means an entity that is a party to a merger and exists immediately
    before the merger becomes effective.

    “Protected agreement” means:
(1) a document evidencing indebtedness of a domestic nonprofit corporation
or eligible entity and any related agreement in effect immediately before the enactment date;

(42) “Party to a merger” or “party to a membership exchange” means any agreement that is binding on a domestic or foreign nonprofit corporation or eligible entity that immediately before the enactment date:

(i) will merge under a plan of merger;

(ii) will acquire memberships or eligible interests of another entity in a membership exchange each case in effect immediately before the enactment date; or

(iii) is an exchanging entity.

(4) an agreement that is binding on any of the interest holders, directors or other governors of a domestic corporation or eligible entity, in their capacities as such, immediately before the enactment date.

(5) “Survivor” in a merger means the corporation or eligible entity into which one or more other corporations or eligible entities are merged. A survivor of a merger may preexist the merger or be created by the merger.

“Registered foreign eligible entity” means a registered foreign corporation or other eligible entity registered to conduct business in this state.

“Surviving entity” means the entity that continues in existence after or is created by a merger under [Subchapter] 12B (merger).

Source Note: Model Nonprofit Corporation Act, 3rd Ed. (2008), §§ 9.01 and 11.01, C. Model Business Corporation Act (2016 Revision), § 9.01.

CROSS-REFERENCES

Articles of incorporation, § 202.

OFFICIAL COMMENT

Section 1201 sets out definitions used in the Act’s provisions on merger, interest exchange, domestication, and conversion.

Section 1201 defines “protected agreement” as those specified documents and agreements which were in effect before the laws of the state first provided for interest exchanges, domestications, or conversions. A person contracting with a corporation or loaning it money, or which drafted and negotiated special rights relating to mergers or similar transactions, before the enactment of Chapter 12 (or any similar predecessor law) should not be charged with the consequences of not having dealt with interest exchanges, domestications, and conversions.

Sections 1230(c), 1240(c) and 1250(e) provide special rules dealing with protected agreements.
§ 1202. EXCLUDED TRANSACTIONS [OPTIONAL]

This [Chapter] may not be used to effect a transaction that:

(1) converts a company organized on the mutual principle to one organized on the basis of share ownership;

(2) converts a nonprofit insurance company to a for-profit stock corporation;

(3) [other examples]


OFFICIAL COMMENT

Section 1202 prohibits certain transactions that are subject to a separate statutory or legal framework from being effected under Chapter 12.

§ 1203. RESTRICTIONS AND REQUIRED APPROVALS

(a) If a domestic or foreign nonprofit corporation or eligible entity may not be a party to a merger without the approval of the [attorney general], the [department of banking], the [department of insurance] or the [public utility commission], and the applicable statutes or regulations do not specifically deal with transactions under this [Chapter] 12 but do require approval for mergers, the corporation or entity may not be a party to a transaction under this [Chapter] 12 without the prior approval of that agency or official.

(b) Property held in trust by an entity or that is a charitable asset may not be diverted from its purpose by any transaction under this [chapter] [Chapter] 12 unless the entity obtains an appropriate order of [court] [the attorney general] specifying the disposition of the property to the extent required by and pursuant to the law of this state on cy pres or otherwise dealing with the nondiversion of charitable assets.

(e) Unless an entity that is a party to a transaction under this [chapter] obtains an appropriate order of [court] [the attorney general] under the law of this state on cy pres or otherwise dealing with the nondiversion of charitable assets, the transaction may not affect:

(1) any restriction imposed upon the entity by its organic documents that may not be amended by its governors, members, or interest holders;

(2) any restriction imposed upon property held by the entity by virtue of any trust under which it holds that property; or

(3) the existing rights of persons other than members, shareholders, or interest
holders of the entity.

(d) A person who is a member that is an interest holder, governor or otherwise affiliated with a charitable corporation or an unincorporated entity with a charitable purpose may not receive a direct or indirect financial benefit in connection with a transaction under this [chapter] 12 to which the charitable corporation or unincorporated entity is a party unless the person is itself a charitable corporation or unincorporated entity with a charitable purpose. This subsection [section] 1203(c) does not apply to the receipt of reasonable compensation for services rendered.

(d) A devise, bequest, gift, grant, or promise contained in a will or other instrument, in trust or otherwise, made before or after a transaction under this [chapter] 12, to or for a charitable corporation or unincorporated entity with a charitable purpose that is the subject of the transaction, inures to the entity as it continues in existence after the transaction if it is a charitable corporation or unincorporated entity with a charitable purpose, subject to the express terms of the will or other instrument.


CROSS-REFERENCES

“Eligible entity” defined, see § 1.40. Appeal from secretary of state’s refusal to file document, § 166 “Eligible interests” defined, see § 1.40. “Interest holder” defined, see § 1.40. “MemberDomestic nonprofit corporation” defined, see § 1.40102. “Shareholder” defined Filing duty of secretary of state, see § 1.40165.

OFFICIAL COMMENT

Section 1203 ensures that transactions under Chapter 12 will be effected only if required state governmental approvals have been obtained. If other state laws require such approvals in the case of mergers, but do not address approvals in the case of interest exchanges, domestications, and conversions, then Section 1203 requires that transactions under Chapter 12 obtain the same regulatory approvals as mergers. To prevent the procedures in Chapter 12 from being used to avoid restrictions on the use of property held in trust by nonprofit entities or that is a charitable asset, Section 1203 requires approval of the effect of transactions under Chapter 12 by the appropriate arm of government having supervision of nonprofit entities.
The definition of what constitutes an “eligible entity” in Section 1.40 determines the kinds of entities, other than nonprofit corporations, with which a nonprofit corporation may merge or engage in a membership exchange.

§ 1204. APPRAISAL RIGHTS

(a) An interest holder of a domestic merging, acquired, converting, or domesticating eligible entity is entitled to appraisal rights in connection with the transaction if the interest holder would have been entitled to appraisal rights under the entity’s organic law in connection with a merger in which the interest of the interest holder was changed, converted, or exchanged unless:

(1) the organic law permits the organic rules to limit or eliminate the availability of appraisal rights; and

(2) the organic rules provide such a limit or elimination.

(b) An interest holder of a domestic merging, acquired, converting, or domesticating eligible entity is entitled to contractual appraisal rights in connection with a transaction under this [Act] to the extent provided:

(1) in the entity’s organic rules;

(2) in the plan; or

The term “interests” as defined in Section 1.40 includes such interests as general and limited partnership interests in limited partnerships, equity interests in limited liability companies, and any other form of equity or ownership interests in an unincorporated entity, as defined in Section 1.40, however denominated. The definition of “eligible interests” in Section 1.40 also includes shares in a domestic or foreign business corporation.

(3) in the case of a business corporation, by action of its governors.

3. SURVIVOR

(c) If an interest holder is entitled to contractual appraisal rights under this Section 1204 and the eligible entity’s organic law does not provide procedures for the conduct of an appraisal rights proceeding, [Chapter 13 of the Model Business Corporation Act] applies to the extent practicable or as otherwise provided in the entity’s organic rules or the plan.

The term “survivor” is used in Chapter 11 as a defined technical term and therefore is not always used in a manner that is equivalent to the ordinary meaning of the term. For example, a corporation may be the “survivor” of a merger within the meaning of Section 11.01(5) even if it is created by the merger, and therefore had no existence before the merger.

4. RESTRICTIONS

[Subchapter] B
This chapter permits mergers of domestic nonprofit corporations with foreign nonprofit corporations, for-profit corporations, or unincorporated entities; and also permits membership exchanges involving those types of entities. Section 11.01(b) protects property held in trust or that is a charitable asset from being diverted by a merger or membership exchange from its trust purposes. Section 11.01(c) similarly protects other restrictions applicable to a nonprofit corporation. A state adopting Section 11.01(b) and (c) should consider what restrictions and procedures should apply in a proceeding under those provisions.

§ 1220. Merger authorized.

§ 1221. Plan of merger.

§ 1222. Approval of merger.

§ 1223. Short-form merger.

§ 1224. Amendment or abandonment of plan of merger.

§ 1225. Articles of merger; effective date of merger.

§ 1226. Effect of merger.

§ 11.021220. MERGER AUTHORIZED.

(a) Except as otherwise provided in this Section 1220, by complying with [Subchapter] 12A (preliminary provisions) and this [Subchapter] 12B:

(a1) One or more domestic nonprofit corporations may merge with one or more domestic or foreign nonprofit corporations, domestic or foreign business corporations or eligible entities pursuant to a plan of merger; and

(2) two or more foreign nonprofit corporations or domestic or foreign eligible entities may merge into a new surviving entity that is a domestic nonprofit corporation to be created in the merger in the manner provided in this [chapter].

(b) A foreign nonprofit corporation, or a foreign eligible entity, Except as otherwise provided in this Section 1220, by complying with the provisions of [Subchapter] 12A and this [Subchapter] 12B applicable to foreign entities, a foreign entity may be a party to a merger with a domestic nonprofit corporation, or may be created by the terms of the plan of merger, only under this [Subchapter] 12B or may be the surviving entity in such a merger if the merger is permitted authorized by the organic law of the corporation or eligible entity’s governing jurisdiction.

(c) If the organic law or organic rules of a domestic eligible entity does not prohibit a merger with a nonprofit corporation but does not provide procedures for, but do not prohibit, the approval of such a merger, a plan of merger may nonetheless be adopted and approved by the unanimous consent of all of the interest holders of the eligible entity, and the merger may be effectuated, in accordance with the procedures in this [chapter]. For the purposes of applying this [chapter], thereafter by effectuated as provided in the other provisions of this [Subchapter] 12B.

(1) the eligible entity, its interest holders, eligible interests and organic records, shall
be deemed to be a domestic nonprofit corporation, members, memberships, and
articles of incorporation and bylaws, respectively, as the context may require; and
(2) if the business and affairs of the eligible entity are managed by a group of persons
that is not identical to the interest holders, that group shall be deemed to be the
board of directors.

The plan of merger must be in the form of a record and include:
(1) the name of each domestic or foreign nonprofit corporation or eligible entity that
will merge and the name of the domestic or foreign nonprofit corporation or
eligible entity that will be the survivor of the merger;
(2) the terms and conditions of the merger;
(3) the manner and basis of converting the memberships of each merging domestic or
foreign nonprofit membership corporation and the eligible interests of each
merging domestic or foreign eligible entity into memberships, eligible interests,
securities, or obligations; rights to acquire memberships, eligible interests,
securities, or obligations; cash; other property or other consideration; or any
combination of the foregoing;
(4) the articles of incorporation and bylaws of any corporation, or the organic records
of any eligible entity, to be created by the merger; or if a new corporation or
eligible entity is not to be created by the merger, any amendments to the
survivor’s articles or bylaws or organic records; and
(5) any other provisions relating to the merger that the parties desire be included in
the plan of merger.

The plan of merger may also include a provision that the plan may be amended prior to
filing articles of merger, but if the members of a domestic corporation that is a party to
the merger are required or permitted to vote on the plan, the plan must provide that
subsequent to approval of the plan by such members the plan may not be amended to
change:
(1) the amount or kind of memberships, eligible interests, securities, or obligations;
rights to acquire memberships, eligible interests, securities, or obligations; cash;
or other property or other consideration to be received by the members of or
owners of eligible interests in any party to the merger;
(2) the articles of incorporation or bylaws of any corporation, or the organic records
of any unincorporated entity, that will survive or be created as a result of the
merger, except for changes permitted by Section 10.05 or by comparable
provisions of the organic law of any such foreign nonprofit or business
corporation or domestic or foreign unincorporated entity; or
(3) any of the other terms or conditions of the plan, if the change would adversely
affect such members in any material respect.

Terms of a plan of merger may be made dependent on facts objectively ascertainable
outside the plan in accordance with Section 1.20(e).

See Section 11.01(b), (c), and (d) (restrictions).

Source Note: Patterned after Model Nonprofit Corporation Act, 3rd Ed. (2008), § 11.02(a) – (c). Cf.
Model Nonprofit Corporation Act (1987) § 371
11.06—Subsection (d) derived from Revised
Model Nonprofit Corporation Act (1987) § 374
11.01(b) and (2016 Revision), § 11.02(a) – (c).

CROSS-REFERENCES
Abandonment of merger, see § 11.08 1224.
Amendment of articles of incorporation in merger, see § 11.06 1221.
Amendment of articles by board of directors, see § 10.05.
Approval of plan of merger, see § 11.03 1222.
Articles of merger, see § 11.06 1225.
“Corporation “ and “domestic nonprofit corporation” defined, § 102.
Effect of merger, see § 11.07 1226.
“Eligible entity” defined, see § 1.40 102.
Extrinsic facts, § 105.
“Foreign corporation” and “foreign nonprofit corporation” defined, § 102.
“Interest holder” defined, § 102.
“Membership exchange” defined, see § 11.03 102.
Merger between parent and subsidiary or between subsidiaries “Organic law” and
“organic rules” defined, see § 11.05 102.
“Public organic record” defined, see § 11.05 102.
Short-form merger, § 1223.

OFFICIAL COMMENT

1. IN GENERAL
Section 11.021220 authorizes mergers between a domestic nonprofit corporation to merge
with another domestic nonprofit corporation or with a foreign nonprofit corporation. It also
authorizes one or more domestic nonprofit corporations, or between one or more domestic
nonprofit corporations and one or more foreign nonprofit corporations or domestic or foreign to
merge with one or more eligible entities. Upon the effective date of the merger the survivor
becomes vested with all the assets of the corporations or other entities that merge into the
survivor and becomes subject to their liabilities, as provided in Section 11.07. (such as business
corporations, limited liability companies, or partnerships). In addition, it provides for the merger
of two or more eligible entities, even if no domestic nonprofit corporation is a party to the
merger, but only if the survivor is a domestic nonprofit corporation created by the merger.

Section 11.02 of the previous version of the act imposed restrictions on the types of
entities with which certain nonprofit corporations could merge. If a nonprofit corporation that is
an exempt organization were to merge into an entity that is not an exempt organization, the
merger would have adverse tax consequences for the nonprofit corporation, but those tax
consequences are a separate issue from the power of a nonprofit corporation to be a party to such
a merger. Most existing state nonprofit corporation laws do not contain restrictions analogous to
former Section 11.02, and those restrictions have been omitted from the act. It is the general
approach of the act to provide an enabling statute that imposes the minimum restrictions
necessary on transactions involving nonprofit corporations, with appropriate public policy
limitations being imposed by other provisions of substantive law addressed to particular
situations where restrictions are considered necessary. The effect of such statutes is preserved by
Section 1.03 with respect to mergers. Some states, however, may wish to include restrictions
similar to those in former Section 11.02 on the power of certain types of nonprofit corporations
to engage in certain mergers.

2. APPLICABILITY TO FOREIGN CORPORATIONS AND ELIGIBLE ENTITIES
A merger of a domestic nonprofit corporation with a foreign nonprofit corporation or a
foreign eligible entity is may be a party to or be the survivor in a merger authorized by Chapter
only if the merger is permitted by the laws under which the foreign corporation or the
foreign eligible entity is organized. Whether and on what terms a foreign corporation or a foreign
eligible entity is authorized to merge with a domestic corporation is a matter that is governed by
the laws under which that. If a foreign corporation or eligible entity is organized or by
which it is governed, not by Chapter 11:

so authorized, it must comply with the applicable Nevertheless, certain provisions of
Chapter 11 have an indirect effect on a foreign corporation or eligible entity that proposes to or
does merge with a domestic corporation, because they set conditions concerning the
effectiveness and effect of the merger in addition to the requirements of its own governing
laws. For example, Section 11.02(d)(a) sets forth certain requirements for the contents of a
plan of merger with a domestic corporation, and section 1226(e) provides that upon a merger
becoming effective, a foreign corporation or foreign eligible entity that is the survivor may be
served with process in the state.

3. APPLICABILITY TO DOMESTIC ELIGIBLE ENTITIES

If the organic law of a domestic eligible entity (including a domestic business
corporation) does not expressly authorize it to engage in a merger with a nonprofit
corporation, it is intended that the domestic eligible entity will nonetheless have that power
pursuant to Section 11.02(a). See Cole v. Kershaw, 2000 Del. Ch. LEXIS 117 (Delaware general
partnership could merge with Delaware limited liability company even though general
partnership law was silent on mergers because limited liability company law authorized the
merger). If the organic law of a domestic eligible entity provides procedures for the adoption,
approval, and effectuation of a merger with any type of entity, those procedures will apply to a
merger with a nonprofit corporation. If the organic law of a domestic eligible entity does not
provide procedures for any type of merger, the procedures of this chapter will apply instead.
Pursuant to Section 11.02(c)(1), the provisions of this chapter will apply to the entity simply by
substituting in the provisions of this chapter the appropriate terms for the analogous concepts
applicable to the entity. If the persons who manage the business and affairs of an eligible entity
are the same as its interest holders, then a single approval by those persons will be sufficient
under Section 11.02(c)(2) be a party to or survive a merger under Chapter 12, Section 1220(c)
provides procedures for such an entity to adopt and effect a plan of merger.

4. TERMS AND CONDITIONS OF MERGER

Chapter 11 imposes virtually no restrictions or limitations on the terms or conditions of a
merger, except for those set forth in Section 11.02(e) concerning provisions in a plan of merger
for amendment of the plan after it has been approved by members and those imposed by Section
11.01(b), (e), and (d). Subject to Section 11.01(d), members or owners of eligible interests in a
party to the merger that merges into the survivor may receive memberships, eligible interests,
securities or obligations of the survivor or any party other than the survivor, rights to acquire the
same, or cash, or other property. The memberships in the survivor may be restructured in the
merger, and its articles or organic documents may be amended by the articles of merger, in any
way deemed appropriate.

§ 1221. PLAN OF MERGER.

Section 11.02(d) requires that the terms and conditions be set forth in the plan of merger
and that the plan of merger be in the form of a record. The plan of merger need not be set forth
in the articles of merger that are to be delivered to the secretary of state for filing after the merger
has been adopted and approved. See Section 11.06.

Section 11.02(d)(4) provides that a plan of merger must set forth the articles of
incorporation of any nonprofit corporation, and the organic records of any eligible entity, to be
created by the merger, or if a new corporation or eligible entity is not to be created by the
merger, any amendments to the survivor’s articles of incorporation or organic documents.

The terms of a merger involving a nonprofit corporation frequently provide for a
contribution to be made by another party either to the nonprofit corporation itself or to another
designated entity. That type of provision may be included in a plan of merger under Section
11.02(d)(2) and (5).

A plan of merger is not required to state who will be the directors and officers of the
survivor, but those subjects are typically dealt with in a plan of merger.

5. AMENDMENTS OF ARTICLES OF INCORPORATION AND BYLAWS

Under Section 11.02, a corporation’s articles of incorporation or bylaws may be amended
by a merger. Under Section 11.02(d)(4), a plan of merger must include any amendments to the
survivor’s articles or bylaws or organic records. If the plan of merger is approved, the
amendments will be effective.

6. ADOPTION AND APPROVAL; ABANDONMENT

A merger must be adopted and approved as set forth in Sections 11.04 and 11.05. Under
Section 11.08, the board of directors or a designated body may abandon a merger before its
effective date even if the plan of merger has already been approved by the corporation’s
members.

7. EFFECTIVE DATE OF MERGER

A merger takes effect on the date the articles of merger are filed; unless a later date, not
more than 90 days after filing, is specified in the articles. See Section 11.06 and the Official
Comment thereto.

§ 11.03. MEMBERSHIP EXCHANGE

(a) Through a membership exchange:

(1) a domestic nonprofit corporation may acquire, pursuant to a plan of membership
exchange, all of the memberships of one or more classes of another domestic or
foreign nonprofit corporation, or all of the eligible interests of one or more classes
or series of eligible interests of a domestic or foreign eligible entity, in exchange
for memberships, eligible interests, securities, or obligations; rights to acquire
memberships, eligible interests, securities, or obligations; cash; other property or
other consideration; or any combination of the foregoing;

(2) all of the memberships of one or more classes of a domestic nonprofit corporation
may be acquired by another domestic or foreign nonprofit corporation or eligible
entity, in exchange for memberships, eligible interests, securities, obligations; rights to acquire memberships, eligible interests, securities, or obligations; cash; other property or other consideration; or any combination of the foregoing, pursuant to a plan of membership exchange;

(ba) A foreign domestic nonprofit corporation or eligible entity may become a party to a membership exchange only if the membership exchange is permitted by the organic law of the corporation or eligible entity, merger under this [Subchapter] 12B by approving a plan of merger. The plan must be in a record and contain:

(e) If the organic law of a domestic eligible entity does not prohibit a membership exchange with a nonprofit corporation but does not provide procedures for the approval of an exchange of interests similar to a membership exchange, a plan of membership exchange may be adopted and approved, and the membership exchange effectuated, in accordance with the procedures, if any, for a merger. If the organic law of a domestic eligible entity does not provide procedures for either an interest exchange or a merger, a plan of membership exchange may be adopted and approved, and the membership exchange effectuated, in accordance with the procedures in this [chapter]. For the purposes of applying this [chapter]:

(1) as to each merging entity, its name, governing jurisdiction, and type of entity;

(1) the eligible entity, its interest holders, eligible interests, and organic documents shall be deemed to be a domestic nonprofit corporation, members, memberships, and articles of incorporation and bylaws, respectively, as the context may require; and

(2) if the business and affairs of the eligible entity are managed by a group of persons that is not identical to the interest holders, that group shall be deemed to be the board of directors. surviving entity is to be created in the merger, a statement to that effect and the entity’s name, governing jurisdiction, and type of entity;

(3) the manner of converting the interests in each party to the merger into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) if the surviving entity exists before the merger, any proposed amendments to: its public organic record, if any; and

(i) its private organic rules that are, or are proposed to be, in a record;

(5) if the surviving entity is to be created in the merger: The plan of membership exchange must be in the form of its proposed public organic record, if any; and include:
(1) the name of each domestic or foreign nonprofit corporation or eligible entity
whose memberships or eligible interests will be acquired and the name of the
corporation or eligible entity that will acquire those memberships or eligible
interests;

(ii) the full text of its private organic rules that are proposed to be in a
record;

(26) the other terms and conditions of the membership exchange or merger; and

(3) the manner and basis of exchanging the memberships of a corporation or the
eligible interests in an eligible entity whose memberships or eligible interests will
be acquired under the membership exchange into memberships, eligible interests,
securities, or obligations; rights to acquire memberships, eligible interests,
securities, or obligations; cash; other property or other consideration; or any
combination of the foregoing;

(47) any changes desired to be made in the provisions required by the law of a
merging entity’s governing jurisdiction or the organic records of the exchanging
rules of a

merger entity; and.

(5) any other provisions relating to the membership exchange that the parties desire
be included in the plan of exchange.

(b) In addition to the requirements of Section 1221(a), a plan of merger may contain
any other provision not prohibited by law.

(c) The plan of membership exchange may also include a provision that the plan may be
amended prior to filing articles of membership exchange, but if the members of a
domestic nonprofit corporation that is a party to the membership exchange are required or
permitted to vote on the plan, the plan must provide that subsequent to approval of the
plan by such members the plan may not be amended to change:

(1) the amount or kind of memberships, eligible interests, securities, or obligations;
rights to acquire memberships, eligible interests, securities, or obligations; cash;
or other property or other consideration to be issued by the domestic nonprofit
corporation or to be received by its members, as the case may be; or

(2) any of the other terms or conditions of the plan if the change would adversely
affect such members in any material respect.

(f) Terms of a plan of membership exchange or merger may be made dependent on facts
objectively ascertainable outside the plan in accordance with Section 1.20(c)(105) (extrinsic facts
in filed record).

(g) Section 11.03 does not limit the power of a domestic nonprofit corporation to acquire
memberships in another corporation or eligible interests in an eligible entity in a
transaction other than a membership exchange.

(h) If any debt security, note or similar evidence of indebtedness for money borrowed,
whether secured or unsecured, or a contract of any kind, issued, incurred, or signed by a
domestic exchanging entity before [the effective date of this section] contains a provision
applying to a merger or change in control of the exchanging entity that does not refer to a
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membership exchange, the provision shall be deemed to apply to a membership exchange
of the exchanging entity until such time as the provision is amended subsequent to that
date.

(i) See Section 11.01(b), (c), and (d) (restrictions).

Source Note: Patterned after Model Nonprofit
Corporation Act, 3rd Ed. (2008), § 11.02(d) and (f). Cf
11.03. Subsection (h) is patterned after Model
Inter-Entity Transactions Act (2016 Revision), §
301-11.02(d) – (f).

CROSS-REFERENCES
Abandonment of membership exchange, see § 11.08.
Approval of plan, see § 11.04.
Articles of membership exchange, see § 11.06.
Classes of memberships, see § 6.01.
Effect of membership exchange, see § 11.07.

OFFICIAL COMMENT

1. In General

A nonprofit corporation’s articles of incorporation may be amended by a merger, and
Section 1221(a)(4) provides that a plan of merger must include any such amendments. If the plan
of merger is approved and the survivor is a domestic entity, Section 1226 provides that the
amendments will become effective with the merger. If the plan includes amendments to the
articles of incorporation of a surviving domestic corporation, Section 1222(a)(5), by reference to
the voting requirements of Section 904 relating to amendments of the articles of incorporation,
may impose voting requirements by separate voting groups that would not otherwise apply.

It is often desirable to structure a corporate combination so that the separate existence of
one or more parties to the combination does not cease although another nonprofit corporation or
eligible entity obtains ownership of the memberships or eligible interests of those parties. In the
absence of the procedure authorized in Section 11.03, this kind of result often can be
accomplished only by a reverse triangular merger, which involves the formation by a
corporation, A, of a new subsidiary, followed by a merger of that subsidiary into another party to
the merger, B, effected through the exchange of memberships in A for memberships in B.
Section 11.03 authorizes a more straightforward procedure to accomplish the same result.

Although the plan of merger must include any amendments to the articles of
incorporation or public organic record of the survivor, the survivor’s articles of incorporation or
public organic record are not otherwise required to be included in the plan unless the survivor is
created by the merger. However, if approval of the plan of merger by the members of a domestic
corporation is required under Section 1222, Section 1222(a)(3) requires that its members be
furnished with a copy or summary of the articles of incorporation or public organic record of the
survivor in connection with voting on approval.

Under Section 11.03, the acquiring nonprofit corporation in a membership exchange
must acquire all of the memberships or eligible interests of the class or series of memberships or
eligible interests that is being acquired. The memberships or eligible interests of one or more
other classes or series of the acquired corporation or eligible entity may be excluded from the
membership exchange or may be included on different bases. After the plan of membership
exchange is adopted and approved as required by Section 11.04, it is binding on all holders of
the class of memberships or class or series of eligible interests to be acquired. Accordingly, a
membership exchange may operate in a mandatory fashion on some holders of the class or series
of memberships or eligible interests acquired.

Section 11.03(g) makes clear that the authorization of membership exchange
combinations under Section 11.03 does not limit the power of nonprofit corporations to acquire
memberships or eligible interests without using the membership exchange procedure, either as
part of a corporate combination or otherwise.

This section does not apply, of course, to the acquisition of a nonprofit corporation
without members. In such a case, control of the corporation can be transferred by means of an
amendment to its articles of incorporation or bylaws changing the manner in which the directors
are selected.

The previous version of the act did not authorize membership exchanges. In connection
with mergers, however, Section 11.02 of the previous version of the act imposed restrictions on
the types of entities with which certain nonprofit corporations could merge. As discussed in the
Official Comment to Section 11.02, it is the general approach of the act to provide an enabling
statute that imposes the minimum restrictions necessary on transactions involving nonprofit
corporations, with appropriate public policy limitations being imposed by other provisions of
substantive law addressed to particular situations where restrictions are considered necessary.
The effect of such statutes is preserved by Section 1.03 and they will apply to membership
exchanges. Some states, however, may wish to include restrictions similar to those in former
Section 11.02 on the power of certain types of nonprofit corporations to engage in certain
membership exchanges.

2. APPLICABILITY TO FOREIGN CORPORATIONS AND FOREIGN ELIGIBLE ENTITIES

Whether and on what terms a foreign nonprofit corporation or a foreign eligible entity is
authorized to enter into a membership exchange with a domestic nonprofit corporation is a
matter that is governed by the laws under which that corporation or eligible entity is organized or
by which it is governed, not by Chapter 11. Therefore, Section 11.04 applies only to adoption of
a plan of membership exchange by a domestic nonprofit corporation (or a domestic eligible
entity as provided in Section 11.03(c)).

Nevertheless, certain provisions of Chapter 11 have an indirect effect on a foreign
corporation, or a foreign eligible entity, that proposes to or does engage in a membership
exchange with a domestic corporation, because they set conditions concerning the effectiveness
and effect of the membership exchange. For example, Section 11.03(d) sets forth certain
requirements for the contents of a plan of membership exchange.

3. APPLICABILITY TO DOMESTIC ELIGIBLE ENTITIES

If the organic law of a domestic eligible entity (including a domestic business
corporation) does not expressly authorize it to engage in a membership exchange with a
nonprofit corporation, the domestic eligible entity will nonetheless have that power pursuant to
Section 11.02(a). If the organic law of a domestic eligible entity provides procedures for the
adoption, approval and effectuation of a merger with any type of entity, but not for a membership
exchange or eligible interest exchange, the merger procedures will apply to a membership
exchange with a nonprofit corporation. If the organic law of a domestic eligible entity does not
provide procedures for any type of merger or share or interest exchange, the procedures of this
chapter will apply pursuant to Section 11.03(c). If the persons who manage the business and
affairs of an eligible entity are the same as its interest holders, then a single approval by those
persons will be sufficient under Section 11.03(c)(2).

4. TERMS AND CONDITIONS OF MEMBERSHIP EXCHANGE

Chapter 11 imposes virtually no restrictions or limitations on the terms or conditions of a
membership exchange, except for those contained in Section 11.03(a) that the acquiring party
must acquire all the memberships of the acquired class or series of memberships or eligible
interests, in Section 11.03(e) concerning provisions in a plan of membership exchange for
amendment of the plan after it has been approved by members, and those imposed by Section
11.01(b), (c), and (d). Members or owners of interests in a party whose memberships are
acquired under Section 11.03(a)(2) may receive securities or eligible interests of the acquiring
party, securities or eligible interests of a party other than the acquiring party, or cash or other
property.

Section 11.03(d) requires that the terms and conditions be set forth in the plan of
membership exchange and that the plan of membership exchange be in the form of a record.
The plan of membership exchange need not be set forth in the articles of membership exchange
that are to be delivered to the secretary of state for filing after the membership exchange has
been adopted and approved. See Section 11.06.

The terms of a merger involving a nonprofit corporation frequently provide for a
contribution to be made by another party either to the nonprofit corporation itself or to a related
entity. It is anticipated that a similar practice will develop with respect to membership
exchanges, and thus Section 11.03(d)(2) and (5) permits that type of provision to be included in
a plan of membership exchange.

5. ADOPTION AND APPROVALS; ABANDONMENT

A membership exchange must be adopted and approved as set forth in Section 11.04.
Under Section 11.08, the board of directors may abandon a membership exchange before its
effective date even if the plan of membership exchange has already been approved by the
nonprofit corporation’s members.

6. EFFECTIVE DATE OF MEMBERSHIP EXCHANGE

A membership exchange takes effect on the date the articles of membership exchange are
filed, unless a later date, not more than 90 days after filing, is specified in the articles. See
Section 11.06 and the Official Comment thereto.

§ 11.04. ACTION ON A PLAN

(a) In the case of a domestic nonprofit corporation that is a party to a merger or
membership exchange, the plan of merger must be adopted in the following manner:

(1) The plan of merger or membership exchange must first be adopted by the
board of directors. The board may set conditions for the approval of the plan of merger by the
members or the effectiveness of the plan of merger. If a domestic nonprofit corporation that is a
party to a merger does not have any members entitled to vote thereon, a plan of merger is
deemed adopted by the corporation when it has been adopted by the board.
Except as provided in paragraph (8), Section 11.05, or the articles of incorporation or bylaws, after adopting Section 1222(a)(1) (plan of merger), Section 1222(a)(7) and Section 1223 (short-form merger), the plan of merger or membership exchange the board of directors must submit then be approved by the members. In submitting the plan of merger to the members entitled to vote on the plan for their approval, the board of directors must also transmit to the members a recommendation that the members approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the members an informal recommendation to inform the members of the basis for that determination.

The board of directors may condition its submission of the plan of merger or membership exchange to the members on any basis.

If the plan of merger or membership exchange is required to be approved by the members, and if the approval is to be given at a meeting, the nonprofit corporation must give notice to each member entitled to vote on the merger or membership exchange, of the meeting of members at which the plan is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. If the corporation is not to be merged into an existing corporation or eligible entity, the notice shall also include or be accompanied by a copy or summary of the articles of incorporation and bylaws or organic rules of that corporation or eligible entity as in effect immediately after the merger. If the corporation is to be merged with a domestic or foreign nonprofit corporation or eligible entity, the notice shall include or be accompanied by a copy or a summary of the articles of incorporation and bylaws or organic rules of the new corporation or eligible entity.

Unless the articles of incorporation or bylaws, or the board of directors acting pursuant to Section 1222(a)(1), require a greater vote or a greater number of votes to be present, the quorum approval of the plan of merger or membership exchange by the members requires the approval of the members at a meeting at which a quorum exists consisting of a majority of the votes entitled to be cast on the plan, and, if any class of memberships is entitled to vote as a separate group on the plan of merger or membership exchange, the approval of each such separate voting group at a meeting at which a quorum of the voting group exists, is present consisting of a majority of the votes entitled to be cast on the merger by that voting group.

Separate voting by voting groups on a plan of merger is required:

(i) on a plan of merger, by each class of memberships that:

(A) are to be converted into memberships, eligible interests, under the plan of merger into securities, interests, or obligations, rights to acquire memberships, eligible interests, securities, or obligations; cash, other property or other consideration, or any combination of the foregoing; or
(B) would be entitled to vote as a separate group on a provision in the plan that, if contained in a proposed amendment to the articles of incorporation, would require action by separate voting groups under Section 10.04.904 (voting on amendments by voting groups) or Section 922 (bylaw amendments requiring member approval); or

(ii) on a plan of membership exchange, by each class of memberships included in the exchange, with each class constituting a separate voting group; and

(iii) on a plan of merger or membership exchange, if the voting group is entitled under the articles of incorporation or bylaws to vote as a voting group to approve a plan of merger or membership exchange.

(6) The articles or bylaws may expressly limit or eliminate the separate voting rights provided in Section 1222(a)(5)(i)(A) as to any class of memberships, except when the plan of merger includes what is or would be in effect an amendment subject to Section 1222(a)(5)(i)(B).

(7) Unless the articles or bylaws otherwise provide, approval by the members of a plan of merger is not required if:

(i) the corporation will survive the merger;

(ii) except for amendments permitted by Section 905 (amendment of articles of nonmembership corporation), its articles will not be changed; and

(iii) each member whose membership was outstanding immediately before the effective date of the merger will hold the same membership, with identical preferences, rights and limitations, immediately after the effective date of the merger.

(8) If as a result of a merger or membership exchange, one or more members of a domestic nonprofit corporation would become subject to owner liability for the debts, obligations or liabilities of any other person or entity, approval of the plan of merger or membership exchange requires the signature of each such member, of a separate consent in a record consenting to become subject to such owner liability, unless in the case of a member that already has interest liability with respect to the corporation:

(i) the new interest liability is with respect to a domestic or foreign nonprofit corporation (which may be a different or the same corporation in which the person is a member); and
the terms and conditions of the new interest holder liability are substantially identical to those of the existing interest holder liability (other than for changes that eliminate or reduce such interest holder liability).

(9) In addition to the adoption and approval of the plan of merger by the board of directors and members as required by this section, the plan of merger must also be approved in the form of a record by any person or group of persons whose approval is required under Section 11.04 (approval by third persons) to amend the articles of incorporation or bylaws.

(b) See Section 1203 (required approvals).


CROSS-REFERENCES

Abandonment of merger or membership exchange, see § 11.08. Amendment of articles by board of directors, see § 10.05.

Director standards of conduct, see § 8.30830.

Director standards of liability, see § 8.31831.

Notice generally, see § 1.41103.

Notice of members meeting, see § 7.05705.

“Record” defined, see § 1.40102.

Supermajority quorum and voting requirements, see § 7.26726.

Voting by voting groups generally, see §§ 7.24724 and 7.25725.

Voting by voting group on amendment of articles of incorporation, see § 10.04904.

Voting entitlement of members generally, see § 7.24721.

“Voting group” defined, see § 1.40102.

“Voting power” defined, see § 1.40102.

OFFICIAL COMMENT

1. IN GENERAL

Under Section 11.04, a plan of merger or membership exchange must be adopted by the board of directors. Thereafter, the board must submit the plan to the members for their approval; unless the conditions stated in Section 11.05 are satisfied. The functions of the board of directors under this section may be vested by the articles of incorporation or bylaws in a designated body either to the exclusion of, or jointly with, the board of directors.

A plan of membership exchange must always be approved by the members of the class
that is being acquired in a membership exchange. Similarly, a plan of merger must always be approved by the members of a nonprofit corporation that is merged into another party in a merger, unless the corporation is a subsidiary and the merger falls within Section 11.05 or the articles of incorporation or bylaws provide that approval by the members is not required.

Section 11.04(6) provides that a class of members has a right to vote on a plan of merger as a separate voting group if the class is being converted in the merger or if the class would have the right to vote as a separate group on a provision in the plan that, if contained in an amendment to the articles of incorporation, would require approval by that class, voting as a separate voting group, under Section 10.04. Under Section 10.04, and therefore under Section 11.04(6), if a change that requires voting by separate voting groups affects two or more classes in the same or a substantially similar way, the relevant classes vote together, rather than separately, on the change. For the mechanics of voting where voting by voting groups is required under Section 11.04(6), see Sections 7.24 and 7.25 and the Official Comments thereto.

If a merger would amend the articles of incorporation in such a way as to affect the voting requirements on future amendments, the transaction must also be approved by the vote required by Section 7.26.

2. Submission to the Members

When submitting a plan of merger to the members, Section 11.041222(a)(2) requires the board of directors of a membership corporation, after having adopted the plan of merger or membership exchange, to submit the plan of merger or membership exchange to the members for approval, except as provided in Section 11.05 or the articles of incorporation or bylaws, or if there are no members entitled to vote on the plan. When submitting the plan of merger or membership exchange the board of directors must make a recommendation to the members that the plan be approved, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation. For example, the board or directors may make such a determination where there is not a sufficient to recommend the transaction, subject to two exceptions. The board might exercise the exception where the number of directors free of having a conflicting interest to approve makes it inadvisable for them to recommend the transaction or because where the board of directors is evenly divided as to the merits of the transaction but is able to agree that members should be permitted to consider the transaction. If the board of directors makes such a determination, it must describe the conflict of interest or special circumstances, and communicate the basis for the determination, when submitting the plan of merger or membership exchange to the members. The exception for conflicts of interest or other special circumstances is intended to be sparingly available. Generally, members should not be asked to act on a merger or membership exchange in the absence of a recommendation by the board of directors. The exception is not intended to relieve the board of directors of its duty to consider carefully the proposed transaction and the interests of members.

Section 11.041222(3a)(2) permits the board of directors to condition its submission of a plan of merger or membership exchange on any basis to the members or the effectiveness of a plan of merger. Among the conditions that a board of directors might impose are that the plan will not be deemed approved unless it is approved by a specified vote of the members (which may be higher than the vote that would otherwise be required), or by one or more specified classes or series of members, voting as a separate voting group, or by a specified percentage of disinterested members. The board is not limited, however, to conditions of these types. If the
members object to a condition imposed by the board, their remedy is to change the members of
the board.

Section 11.04(4) provides that if the plan of merger or membership exchange is required
to be approved by the members, and if the approval is to be given at a meeting, the corporation
must notify each member entitled to vote on the plan of the meeting of members at which the
plan is to be submitted. Requirements concerning the timing and content of a notice of meeting
are set out in Section 7.05.

3. **Quorum and Voting**

Section 11.04(5a) provides that approval of a plan of merger or membership
exchange requires approval of the members at a meeting at which a quorum consisting of a
majority of the votes entitled to be cast on the plan exists and, if any class of members are
entitled to vote as a separate group on the plan, the approval of each such separate group at a
meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the
plan by that class exists (4) sets forth quorum and voting requirements applicable to a member
vote to approve a plan of merger. If a quorum is present, then and subject to any greater vote
required by the articles of incorporation or the board of directors pursuant to Section 1222(a)(1),
under Sections 7.24725 and 7.25726 the plan will be approved if more votes are cast in favor of
the plan than against it by the voting group or each separate voting group, as the case may
be, entitled to vote on the plan.

In lieu of approval at a member meeting, shareholder approval can be given by
themay be by written consent of the members entitled to vote on the merger or membership
exchange, under the procedures set forth in Section 7.04704.

Section 11.04(7) requires any member who will become subject to owner liability to sign
a record consenting to becoming subject to owner liability, which consent must be separate from
the plan of merger or membership exchange. Although the transactions that produce this result
will be infrequent, Section 11.04(7) is an important protective provision in those instances where
owner liability may arise. An example of such a transaction is a merger of a nonprofit
corporation into an unincorporated nonprofit association in a state where members of such an
association are not protected from personal liability for debts or obligations of the association.

The approval provisions of Section 1222(a)(8) apply only in situations where a member
is becoming subject to new “interest holder liability” as defined in Section 102, for example,
where a corporation is merging into a general partnership or a cap on the member’s interest
holder liability is increased. The effect of a merger on interest holder liability will be determined
as provided in Section 1226(d).

4. **Abandonment of Merger or Membership Exchange**

Under Section 11.08, the board of directors may abandon a merger or membership
exchange before its effective date even if the plan of merger or membership exchange has
already been approved by the corporation’s members.

§ 1223. **Short-Form Merger**

§ 11.05. **Merger With Controlled Corporation or Between Controlled Corporations**
(a) A domestic or foreign entity that holds a membership in a domestic nonprofit corporation that carries at least 80 percent of the voting power of each class of membership of the controlled corporation that has voting power may merge:

1. the controlled corporation into itself or into another such-controlled corporation, or merged domestic or foreign nonprofit corporation or eligible entity in which the entity owns at least 80% of the voting power of each class and series of the outstanding interests which have voting power; or

2. itself into the controlled corporation, without.

(b) A merger described in Section 1223(a) does not require the approval of the board of directors, designated body or members of the controlled domestic nonprofit corporation, unless the organic rules of the entity with voting power in the corporation or the articles of incorporation or bylaws of any of the corporations or the organic records of a controlling unincorporated entity the corporation otherwise provide. Section 1222(a)(8) (approval of merger) applies to a merger under this Section 1223. The articles of merger relating to a merger under this Section 1223 do not need to be signed by the corporation.

(bc) If under subsection (a) approval of a merger by the members of a controlled entity with voting power in the domestic nonprofit corporation is not required, the controlling entity shall, within ten days after the effective date of the merger approved under this Section 1223, notify each of the members of the controlled corporation that the merger has become effective.

(ed) Except as provided in subsections (a) and (b) this section, a merger between a controlling entity and a controlled corporation is under this section shall be governed by the provisions of Chapter 11 this [Subchapter] 12B applicable to mergers generally.

(d) A merger pursuant to this section must also be approved in a record by a designated body whose approval is required to amend the articles of incorporation of the controlled corporation.


CROSS-REFERENCES

Articles of merger, see §§ 11.06 1225.
“Corporation” and “domestic nonprofit corporation” defined, § 102.
Director standards of conduct, see § 8.30830.
Director standards of liability, see § 8.31831.
“Record Eligible entity” defined, see § 1.40 102.
OFFICIAL COMMENT

Under Section 11.05, if an entity holds 80 percent of the voting power of each class of memberships of a nonprofit corporation that has voting power, the controlled corporation may be merged into the controlling entity or another such controlled corporation, or the controlling entity may be merged into the controlled corporation, without the approval of the members, board of directors, or a designated body of the controlled corporation, subject to certain informational and notice requirements. Approval by the members of the controlled corporation is not required partly because if an entity already owns 80 percent or more of the voting power of each class of memberships, approval of a merger by the members would be a foregone conclusion, and partly to facilitate the simplification of corporate structure where only a small fraction of memberships is held by outside members. Approval by the board of directors or a designated body of the controlled corporation is not required because if an entity owns 80 percent or more of the voting power of each class of the outstanding memberships, the directors or designated body of the controlled corporation cannot be expected to be independent, so that the approval by the board of directors of the controlled corporation would also be a foregone conclusion. In other respects, mergers between controlling entities and 80 percent-owned corporations are governed by the provisions of Chapter 11.

If the conditions of Section 1223 are met, no approval is required by the board of directors or members of a controlled corporation that is merged into a controlling corporation, or other controlled corporation. In other respects, mergers between controlled and controlling corporations are governed by other provisions of Chapter 12, including Section 1222(a)(9).

Section 11.051223 does not dispense with approval by the members of a nonprofit corporation that is the controlling entity in a merger subject to this section 1223.

This section 1223 only applies to the approvals required with respect to a subsidiary controlled corporation that is a domestic nonprofit corporation because the approvals that would be required in the case of a subsidiary that is any other form of entity will be determined under the organic law of that entity.

§ 11.06. ARTICLES 1224, AMENDMENT OR ABANDONMENT OF PLAN OF MERGER OR MEMBERSHIP EXCHANGE.

(a) A plan of merger may be amended only with the consent of each party to the plan, except as otherwise provided in the plan and before articles of merger have taken effect.

(b) A domestic nonprofit corporation, or a merging domestic eligible entity whose organic law does not provide for amendment of a plan of merger, may approve an amendment of a plan of merger:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or
by its governors or interest holders in the manner provided in the plan, but an interest holder that was entitled to vote on or consent to approval of the merger is entitled to vote on or consent to any amendment of the plan that will change:

(i) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by the interest holders of any party to the plan;

(ii) the public organic record, if any, or private organic rules of the surviving entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

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

After a plan of merger or membership exchange has been adopted and approved as required by this act, and before articles of merger or membership exchange shall be signed on behalf of each party to the merger or membership exchange by any officer or other duly authorized representative. The articles shall set forth: are effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, the plan may be abandoned in the same manner as the plan was approved by:

(1) a domestic nonprofit corporation; or

(2) a merging domestic eligible entity if the organic law of the entity does not provide for amendment of a plan of merger.

If a plan of merger is abandoned after articles of merger have been delivered to the secretary of state for filing before the articles are effective, articles of abandonment, signed by a party to the plan, must be delivered to the secretary of state for filing before the articles of merger are effective. The articles of abandonment take effect on filing, and the merger is abandoned and does not become effective. The articles of abandonment must contain:

(1) the names of the parties to the plan of merger or membership exchange;

(2) the date on which the articles of incorporation of the survivor of a merger or an exchanging nonprofit corporation are amended, or if a new corporation is created as a result of a merger, the amendments to the articles of incorporation of the survivor or exchanging corporation or the articles of incorporation of the new corporation: merger were filed by the secretary of state; and

(3) if the plan of merger or membership exchange required approval by the members of a domestic nonprofit corporation that was a party to the merger or membership exchange.
exchange, a statement that the plan was duly approved by the members and, if
voting by any separate voting group was required, by each such separate voting
group, in the manner required by this [act] and the articles of incorporation or
bylaws;
(4) if the plan of merger or membership exchange did not require approval by the
members of a domestic nonprofit corporation that was a party to the merger or
membership exchange, a statement to that effect; and
(5) as to each foreign nonprofit corporation or eligible entity that was a party to the
merger or membership exchange, a statement that the participation of the foreign
corporation or eligible entity was duly authorized as required by the organic law
of the corporation or eligible entity.
(b3) Terms of articles of merger or membership exchange may be made
dependent on facts objectively ascertainable outside the articles. a statement that the merger has
been abandoned in accordance with this Section 1.20(c)1224.
(e) Articles of merger or membership exchange must be delivered to the secretary of state for
filing by the survivor of the merger or the acquiring corporation or eligible entity in a
membership exchange and shall take effect at the effective time provided in Section 1.23.
Articles of merger or membership exchange filed under this section may be combined
with any filing required under the organic law of any domestic eligible entity involved in
the transaction if the combined filing satisfies the requirements of both this section and
the other organic law.

Source Note: Model Nonprofit Corporation Act, 3rd Ed.
(2008), §§ 11.02(e) and 11.08. Cf: Model Business
Corporation Act (2016 Revision), § 11.02(g) and 11.08.

CROSS-REFERENCES

Approval of merger, § 1222.
“Deliver” defined, § 102.
Effective time and date of filing, § 163.
Filing requirements, § 160.

OFFICIAL COMMENT

Under Section 1224, unless otherwise provided in the plan of merger, a merging
domestic nonprofit corporation may abandon the transaction without member approval, even
though the transaction has been previously approved by the corporation’s members. Section
1224 also provides default rules for domestic eligible entities to amend or abandon a plan of
merger if the eligible entity’s organic law does not provide for amendment of a plan of merger.
The power of a party under Section 1224 to abandon a transaction without member approval
does not affect any contract rights that other parties may have.

The functions of the board of directors under this section may be vested by the articles of
incorporation or bylaws in a designated body either to the exclusion of, or jointly with, the board
of directors.
§ 1225. ARTICLES OF MERGER; EFFECTIVE DATE OF MERGER.

(a) Articles of merger must be signed by each merging entity, except as provided in Section 1223 (short-form merger), and delivered to the secretary of state for filing.

(b) Articles of merger must contain:

(1) the name, governing jurisdiction, and type of entity of each merging entity;

(2) the name, governing jurisdiction, and type of entity of the surviving entity;

(3) if the articles of merger are not to be effective upon filing, the later date and time on which they will become effective as determined in accordance with Section 163 (effective time and date of filing);

(4) a statement that the merger was approved by each domestic merging nonprofit corporation if any, in accordance with this [Subchapter] 12B, by each domestic merging entity, if any, in accordance with its organic law and organic rules, and by each foreign merging entity, if any, in accordance with the law of its governing jurisdiction;

(5) if the surviving entity exists before the merger and is a domestic filing entity, any amendment to its public organic record approved as part of the plan of merger;

(6) if the surviving entity is created by the merger and is a domestic filing entity, its public organic record, as an attachment;

(7) if the surviving entity is created by the merger and is a domestic limited liability partnership, its statement of qualification, as an attachment; and

(8) if the surviving entity is a foreign entity that is not a registered foreign entity, a mailing address for the surviving entity to which the secretary of state may send any process served on the secretary of state pursuant to Section 1226(e) (effect of merger).

(c) In addition to the requirements of Section 1225(b), articles of merger may contain any other provision not prohibited by law.

(d) If the surviving entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic record.

(e) A plan of merger that is signed by all the merging entities and meets all the requirements of Section 1225(b) may be delivered to the secretary of state for filing instead of articles of merger and on filing has the same effect. If a plan of merger is filed as provided in this
Section 1225(a), references in this [Subchapter] 12B to articles of merger refer to the plan of merger filed under this Section 1225(e).

(f) Articles of merger are effective on the date and time of filing or the later date and time specified in the articles of merger.

(g) If the surviving entity is a domestic entity, the merger becomes effective when the articles of merger are effective. If the surviving entity is a foreign entity, the merger becomes effective on the later of:

1. the date and time provided by the organic law of the surviving entity; or
2. when the articles are effective.

Source Note: Subsections (a) and (c) are patterned after Model Nonprofit Corporation Act, 3rd Ed. (2008), § 11.06. Cf. Model Business Corporation Act, 3d. Ed. (2002) § 11.06 and are derived from Revised Model Nonprofit Corporation Act (1987) § 11.04. Subsection (b) is new. (2016 Revision), § 11.06.

CROSS-REFERENCES

Approval of merger or share exchange, see § 11.041222. “Deliver Corporation” and “domestic nonprofit corporation” defined, see § 1.40102. “Eligible entity” defined, see § 1.22102. “Filing requirements,” see § 1.20160. “Foreign nonprofit corporation” defined, §102. Short-form merger, see § 11.051223. “Organic law” and “organic rules” defined, § 102. “Public organic record” defined, §102. Voting by voting group, see §§ 7.24 725 and 7.25726. “Voting group” defined, see § 1.40102.

OFFICIAL COMMENT

The filing of articles of merger or membership exchange makes the transaction a matter of public record. The requirements of filing are set forth in Sections 1.20 through 1.25. The effective time of Under Section 163, the articles are effective on the date and at the time of their filing, unless otherwise specified. Under Section 1.23, a document may specify a delayed effective time and date, and if it does so the document become effective at the time and date specified, except that a later effective date is specified in the articles within the limits provided in Section 163. Under Section 163, a delayed effective date may not be later than the 90th day after the date the document is filed.
Section 1225(b)(1) and (2) – The names of foreign entities set forth in the articles of merger will generally be their names in their governing jurisdiction, except that if a foreign entity has been required to adopt a different name in order to register to do business in the adopting state, Chapter 13 requires that when the entity does business in the state it must use the name adopted for purposes of registering to do business. Engaging in a merger under Chapter 12 will be part of the business done by the entity in the state and the name of the entity set forth in the articles of merger will thus need to be the name under which the entity has registered to do business. Use of the name under which the entity has registered to do business will allow the records in the filing office to associate the registration of the entity to do business with the articles of merger.

Section 1225(b)(4) – The statement required by Section 1225(b)(4) that the plan of merger was approved by each entity in accordance with Subchapter 12B necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of each merging entity.

Section 1225(b)(6) and (7) – The public organic record of a domestic surviving entity created by the merger that is attached to the articles of merger becomes the original, officially filed text of the public organic record of the surviving entity when the articles of merger take effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity. Similarly, a statement of qualification for a domestic limited liability partnership created by the merger that is attached to the articles of merger does not need to be filed separately.

Section 1225(d) – Organic laws typically require an initial filing that creates an entity to be signed by the person serving as the incorporator or other organizer. Section 1225(d), however, provides that the public organic record of the surviving entity does not need to be signed since it is itself attached to a signed record. Section 1225(d) also permits the public organic record of the surviving entity to omit any provision that is not required to be included in a restatement of the public organic record. Pursuant to this provision, for example, the public organic record of a business corporation created as the surviving entity in the merger would not need to state the name and address of each incorporator even though that information would be required by Section 2.02(a)(4) of the Model Business Corporation Act if the corporation were being incorporated outside the context of the merger.

Section 1225(g) – A merger in which the surviving entity is a domestic entity takes effect when the articles of merger take effect. A merger in which the surviving entity is a foreign entity will usually also take effect when the articles of merger take effect because the practice is to coordinate the filings that need to be made when a merger involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time. Because of the possibility, however, that the filing in the foreign jurisdiction will take effect at a different time, Section 1225(g) provides that the merger transaction itself will take effect at the later of (i) when the articles of merger take effect, and (ii) when the merger takes effect under the law of the foreign jurisdiction. That rule avoids the possibility that the merger will take effect in the
domestic jurisdiction before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domestic entity would cease to exist before it has been merged into the foreign entity.

It is only necessary for the filing office to record the effective date of the statement of merger and the filing office does not need to be concerned with the effective date of the merger itself. Persons wishing to determine the effective date of a merger involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

Some states require notice to the attorney general of transactions involving specific types of nonprofit entities, such as health care providers. See, e.g., Model Act for Nonprofit Healthcare Conversion Transactions prepared by the National Association of Attorneys General. States with such notice requirements should make sure that they are adequately integrated with the procedures in the Act.

§ 11.071226. EFFECT OF MERGER OR MEMBERSHIP EXCHANGE.

(a) Subject to Sections 11.01(b), (c), and (d), when a merger under this [Subchapter] 12B becomes effective:

(1) the domestic or foreign nonprofit corporation or eligible entity that is designated in the plan of merger as the surviving entity continues or comes into existence, as the case may be;

(2) the separate existence of every domestic or foreign nonprofit corporation or eligible entity that is merged into the surviving entity ceases to exist;

(3) all property owned by, and every contract and other right possessed by, each domestic or foreign nonprofit corporation or eligible entity that merges into the surviving entity vests in the surviving entity without transfer, reversion, or impairment;

(4) all debts, obligations, and other liabilities of each domestic or foreign nonprofit corporation or eligible entity that is merged into the surviving entity are debts, obligations, and other liabilities of the surviving entity;

(5) the name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger, except as otherwise provided by law or the plan of merger, all the rights, privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

(6) if the surviving entity exists before the merger;
(i) all its property continues to be vested in it without transfer, reversion, or impairment;

(ii) it remains subject to all its debts, obligations, and other liabilities; and

(iii) all its rights, privileges, immunities, powers, and purposes continue to be vested in it;

(iv) its public organic record, if any, is amended to the extent provided in the articles of merger; and

(6) the articles of incorporation and bylaws or its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger;

(7) the name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(7A) if the articles of incorporation and bylaws or organic records of a surviving entity is created by the merger become effective; and

(8) the memberships of each corporation that is a party to the merger, and the eligible interests in an eligible entity that is a party to a merger, that are to be converted under the plan of merger into memberships, eligible interests, securities, or obligations; rights to acquire memberships, eligible interests, securities, or obligations; cash; other property or other consideration; or any combination of the foregoing; are converted.

(i) its private organic rules are effective;

(h) Subject to Sections 11.01(b), (c), and (d), when a membership exchange becomes effective:

(ii) if it is a filing entity, its public organic record is effective; and

(1) the memberships or eligible interests in the exchanging entity that are to be exchanged under the plan of membership exchange into memberships, eligible interests, securities, or obligations; rights to acquire memberships, eligible interests, securities, or obligations; cash; other property or other consideration; or any combination of the foregoing; are exchanged; and

(iii) if it is a limited liability partnership, its statement of qualification is effective; and

(2) the articles of incorporation and bylaws or organic records of the exchanging entity are amended to the extent provided in the plan of membership exchange.

(9) the interests in each merging entity which are to be converted in the merger are converted, and the interest holders of those interests are entitled only to the rights
provided to them under the plan of merger and to any appraisal rights they have under Section 1204 (appraisal rights) and the merging entity’s organic law.

(b) Except as otherwise provided in the organic law or organic rules of a merging entity, a merger under this [Subchapter] 12B does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the merging entity.

(c) A person who When a merger under this [Subchapter] 12B becomes effective, a person that did not have interest holder liability with respect to any of the merging entities and becomes subject to owner interest holder liability for some or all of the debts, obligations, or liabilities of any with respect to a domestic entity as a result of the merger or membership exchange has owner has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that arise are incurred after the merger becomes effective time of the articles of merger or membership exchange.

(d) The effect of When a merger or membership exchange on the owner becomes effective, the interest holder liability of a person who had owner liability for some or all of the debts, obligations, or liabilities of a party to the merger or membership exchange is as follows: that ceases to hold an interest in a domestic merging entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The merger or membership exchange does not discharge any owner interest holder liability under the organic law of the entity in which the person was a member, shareholder, or interest holder domestic merging entity to the extent any such owner the interest holder liability arose was incurred before the merger became effective time of the articles of merger or membership exchange.

(2) The person does not have owner interest holder liability under the organic law of the entity in which the person was a member, shareholder, or interest holder prior to the merger or membership exchanged domestic merging entity for any debt, obligation, or other liability that arises is incurred after the merger becomes effective time of the articles of merger or membership exchange.

(3) The provisions of the organic law of any entity for which the person had owner liability before the merger or membership exchange continue the domestic merging entity continues to apply to the release, collection, or discharge of any owner interest holder liability preserved by paragraph under Section 1226(d)(1), as if the merger or membership exchange had not occurred.

(4) The person has whatever rights of contribution from any other person person as are provided by law other than this act or the organic law of the entity for which the person had owner liability rules of the domestic merging entity with respect to any owner interest holder liability preserved by paragraph under Section 1226(d)(1), as if the merger or membership exchange had not occurred.
(e) A devise, bequest, gift, grant or promise contained in a will or other instrument, in
trust or otherwise, made before or after a merger, to or for any of the parties to the merger, shall
inure to the survivor, subject to the express terms of the will or other instrument. When a merger
under this [Subchapter] 12B becomes effective, a foreign entity that is the surviving entity may
be served with process in this state for the collection and enforcement of any debts, obligations,
or other liabilities of a domestic merging entity in accordance with applicable law.

(f) When a merger under this [Subchapter] 12B becomes effective, the registration to
do business in this state of any foreign merging entity that is not the surviving entity is canceled.

Source Note: Patterned after Model Nonprofit
Corporation Act, 3rd Ed. (2008), § 1.07. Cf Model
Subsection (a) derived from Revised Model
Nonprofit Corporation Act (1987) § 11.05.
Subsection (e) derived from Revised Model
Revision), § 11.07.

CROSS-REFERENCES

“Corporation” and “domestic nonprofit corporation” defined, §102.
Effective time and date of merger or membership exchange, see § 1.23163.
“Eligible entity” defined, §102.
“Foreign nonprofit corporation” defined, §102.
“Governor” defined, §102.
“Organic law” and “organic rules” defined, §102.
“Interest holder liability” defined, §102.
“Proceeding” defined, see §1.40102.

OFFICIAL COMMENT

Under Section 11.07(a)(1), in the case of a merger the survivor and the parties that
merge into the survivor become one. The survivor automatically becomes the owner of all real
and personal property and becomes subject to all the liabilities, actual or contingent, of each
other party that is merged into it to the merger. A merger is not a conveyance, transfer, or
assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited
conveyance, transfer, or assignment. It does not give rise to a claim that a contract with a party to
the merger is no longer in effect on the ground of nonassignability, unless the contract
specifically provides addresses that it does not survive a merger issue. All pending proceedings
involving either the survivor or a party whose separate existence ceased as a result of the merger
are continued. The survivor has the right to pursue any claims that any of the parties to the
merger had the right to pursue. Under Section 11.07(a)(5), the name of the survivor may be, but
need not be, substituted in any pending proceeding for the name of a party to the merger whose
separate existence ceased as a result of the merger. The substitution may be made whether the
survivor is a complainant or a respondent, and may be made at the instance of either the survivor
or an opposing party. Such a substitution has no substantive effect, because whether or not the
survivor’s name is substituted it succeeds to the claims of, and is subject to the liabilities of, any party to the merger whose separate existence ceased as a result of the merger.

In contrast to a merger, a membership exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring entity the assets of the exchanging entity, or render the acquiring entity liable for the liabilities of the exchanging entity.

The statement in Section 1226(a)(9) regarding the rights of former interest holders is not intended to preclude an otherwise proper question concerning the validity of the merger.

Under Section 11.07(a)(8), on the effective date of a merger the former members of a nonprofit corporation that is merged into the survivor are entitled only to the rights provided in the plan of merger, which would include any rights they have as holders of any consideration they properly acquire in the merger. Similarly, under Section 11.07(b), on the effective date of a membership exchange the former members of a corporation whose memberships are acquired are entitled only to the rights provided in the plan of membership exchange, including any rights they have as holders of the consideration they acquire. These provisions are not intended to preclude an otherwise proper question concerning the validity of the merger or membership exchange.

Section 1226(d) sets forth the impact of a merger on interest holder liability. Section 1222(a)(9) sets forth when approval of a merger requires the consent of members who would otherwise become subject to new interest holder liability.

If a person becomes subject to owner liability as a result of a merger or membership exchange, Section 11.07(c) limits that owner liability to debts, obligations, and liabilities arising after the merger or membership exchange. Prior to that time, the personal liability of the person will be limited to the extent and as provided in the organic law applicable prior to the transaction. A person may always agree, of course, to assume greater personal liability than that imposed by this section.

Section 11.07(d) preserves liability only for owner liabilities to the extent they arise before the merger or membership exchange. Owner liability is not preserved for subsequent changes in an underlying liability, regardless of whether a change is voluntary or involuntary.

Under Section 11.04(g), a merger cannot have the effect of making any member of a domestic nonprofit corporation subject to owner liability for the obligations or liabilities of any other person or entity unless each such member has signed a separate record consenting to become subject to owner liability.

This section does not address the issue that could arise in a merger where a person who had authority to bind a party to the merger loses that authority because of the merger and yet purports to act to bind the survivor of the merger. For example, in a merger of a general partnership into a nonprofit corporation, a person who is a general partner but does not become an officer of the corporation will lose the authority of a general partner to bind the business to obligations incurred in the ordinary course, but might purport to commit the corporation to such an obligation in dealing with a person who does not have knowledge of the merger. Instances in which this occurs are rare and, in the limited instances in which it does occur, general principles of agency law are sufficient to resolve the problems created.

§ 11.08. ABANDONMENT OF A MERGER OR MEMBERSHIP EXCHANGE
(a) Unless otherwise provided in a plan of merger or membership exchange or in the organic law of a foreign nonprofit corporation or a domestic or foreign eligible entity that is a party to a merger or a membership exchange, after the plan has been adopted and approved as required by this [chapter], and at any time before the merger or membership exchange has become effective, it may be abandoned by a domestic nonprofit corporation that is a party thereto without action by its members, in accordance with any procedures set forth in the plan of merger or membership exchange or, if no such procedures are set forth in the plan, in the manner determined by the board of directors, subject to any contractual rights of other parties to the merger or membership exchange.

(b) If a merger or membership exchange is abandoned under subsection (a) after articles of merger or membership exchange have been filed with the secretary of state but before the merger or membership exchange has become effective, a statement that the merger or membership exchange has been abandoned in accordance with this section, executed on behalf of a party to the merger or membership exchange by an officer or other duly authorized representative, shall be delivered to the secretary of state for filing prior to the effective date of the merger or membership exchange. Upon filing, the statement shall take effect and the merger or membership exchange shall be deemed abandoned and shall not become effective.


CROSS-REFERENCES
Approval of merger or membership exchange, see § 11.04.
“Deliver” defined, see § 1.40.
Effective time and date of filing, see § 1.23.
Filing requirements, see § 1.20.

OFFICIAL COMMENT
Under Section 11.08, unless otherwise provided in the plan of merger or membership exchange, a party to a merger or membership exchange may abandon the transaction without member approval, even though the transaction has been previously approved by the party’s members. The power of a party under Section 11.08 to abandon a transaction without member approval does not affect any contract rights that other parties may have.

The functions of the board of directors under this section may be vested by the articles of incorporation or bylaws in a designated body either to the exclusion of, or jointly with, the board of directors.

CHAPTER 9
DOMESTICATION AND CONVERSION
Subchapter
A. Preliminary Provisions
B. Domestication
C. For-profit Conversion
D. Foreign For-profit Domestication and Conversion
E. Entity Conversion

INTRODUCTORY OFFICIAL COMMENT TO CHAPTER 9
This chapter provides a series of procedures by which a domestic nonprofit corporation may become a different form of entity or, conversely, an entity that is not a domestic nonprofit corporation may become a domestic nonprofit corporation. These various types of procedures
are as follows:

- **Domestication.** The procedures in Subchapter 9B permit a corporation to change its state of incorporation, thus allowing a domestic nonprofit corporation to become a foreign nonprofit corporation or a foreign nonprofit corporation to become a domestic nonprofit corporation.

- **For-profit Conversion.** The procedures in Subchapter 9C permit a domestic nonprofit corporation to become either a domestic business corporation or a foreign business corporation.

- **Foreign For-profit Domestication and Conversion.** The procedures in Subchapter 9D permit a foreign business corporation to become a domestic nonprofit corporation.

- **Entity Conversion.** The procedures in Subchapter 9E permit a domestic nonprofit corporation to become a domestic or foreign unincorporated entity, and also permit a domestic or foreign unincorporated entity to become a domestic nonprofit corporation.

The provisions of this chapter apply only if a domestic nonprofit corporation is present either immediately before or immediately after a transaction. Some states may wish to generalize the provisions of this chapter so that they are not limited to transactions involving a domestic nonprofit corporation, for example, to permit a domestic limited partnership to become a domestic limited liability company. The Model Entity Transactions Act prepared jointly by the American Bar Association Section of Business Law and the National Conference of Commissioners on Uniform State Laws is such a generalized statute.

The procedures of this chapter do not permit the combination of two or more entities into a single entity. Transactions of that type must continue to be conducted under Chapter 11 or 12 as a merger or transfer of assets, respectively.

[Subchapter] A C

PRELIMINARY PROVISIONS INTEREST EXCHANGE

§ 9.01. Definitions

§ 9.02. Excluded transactions

§ 1230. Interest exchange authorized.

§ 1231. Plan of interest exchange.

§ 1232. Approval of interest exchange.

§ 1233. Amendment or abandonment of plan of interest exchange.

§ 1234. Articles of interest exchange; effective date of interest exchange.

§ 1235. Effect of interest exchange.

§ 9.03. Restrictions and required approvals

§ 1230. INTEREST EXCHANGE AUTHORIZED.

§ 9.01. DEFINITIONS

In this [chapter]:

(1a) “Conversion” means a transaction authorized by Except as otherwise provided in this section, by complying with [Subchapter] 12A (preliminary provisions) and this [Subchapter] 12C, D, or E:

(2) “Converting corporation” means the domestic or foreign nonprofit or business corporation that approves a conversion pursuant to this [chapter] or its organic law.
(1) A domestic nonprofit corporation may acquire all of one or more classes or series of interests of a domestic or foreign nonprofit corporation or eligible entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests, or securities, or any combination of the foregoing; or

(2) All of one or more class of memberships of a domestic membership corporation may be acquired by another entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing.

(3) “Converting entity” means the domestic or foreign entity that approves a conversion pursuant to Section 9.50 or its organic law.

(2) All of one or more class of memberships of a domestic membership corporation may be acquired by another entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing.

(4) “Domestication” means a transaction authorized by [Subchapter] B.

(b) Except as otherwise provided in this Section 1120, by complying with the provisions of [Subchapter] 12A and this [Subchapter] 12C applicable to foreign eligible entities, a foreign eligible entity may be the acquiring or acquired entity in an interest exchange under this [Subchapter] 12C if the interest exchange is authorized by the law of the foreign entity’s governing jurisdiction.

(5) “Domestic corporation” means the domestic nonprofit corporation that adopts a plan of domestication pursuant to Section 9.21 or the foreign nonprofit corporation that approves a domestication pursuant to its organic law.

(c) If a protected agreement of a domestic nonprofit corporation contains a provision that applies to a merger of the corporation but does not refer to an interest exchange, the provision applies to an interest exchange in which the corporation is the acquired entity as if the interest exchange were a merger until the provision is amended after the enactment date.

(6) “Domestication” means a transaction authorized by [Subchapter] B.

(d) If the organic law or organic rules of a domestic eligible entity do not provide procedures for the approval of an interest exchange, a plan of interest exchange may nonetheless be adopted and approved by the unanimous consent of all of the interest holders of the eligible entity, and the interest exchange may thereafter be effected as provided in the other provisions of [Subchapter] 12A and this [Subchapter] 12C;

(7) “Surviving corporation” means the corporation as it continues in existence immediately after consummation of a for-profit conversion pursuant to [Subchapter] C, a foreign for-profit conversion and domestication pursuant to [Subchapter] D, or an entity conversion pursuant to [Subchapter] E.

(8) “Surviving entity” means the unincorporated entity as it continues in existence immediately after consummation of an entity conversion pursuant to [Subchapter] E.

Source Note: Patterned after Model Entity Transactions Nonprofit Corporation Act § 102, 3rd Ed. (2008), § 11.03(6a) = (f), (9), (10), (11), and (37g) Cf. Model Business Corporation Act (2016 Revision), § (a) – (c).
OFFICIAL COMMENT

This section supplies definitions applicable to Chapter 9. The definitions in Section 1.40 also apply to this chapter.

Subchapter 12C does not restrict or limit on terms or conditions of an interest exchange, except for the requirement in Section 1230(a) that the acquiring entity must acquire all the interests of the acquired class or series of interests. However, interests of the acquired class or series owned at the effective time of the interest exchange by the acquiring entity or any of its parents or their wholly owned subsidiaries may be excluded from the exchange.

Section 1230 does not apply, of course, to the acquisition of a nonprofit corporation without members. In such a case, control of the corporation can be transferred by means of an amendment to its articles of incorporation or bylaws changing the manner in which the directors are selected.

§ 9.02. EXCLUDED TRANSACTIONS

This chapter may not be used to effect a transaction that:
(1) [converts a nonprofit insurance company to a for-profit stock corporation:]
(2)
(3)

Source Note: Patterned after Model Business Corporation Act, 3d Ed. § 9.01.

OFFICIAL COMMENT

The purpose of this section is to prohibit certain transactions from being effectuated under Chapter 9. A state should use this section to (i) list all the situations in which the state has enacted specific legislation governing the conversion of domestic nonprofit corporations that are of a particular type or that do business in a regulated industry to any other form of corporation or to an unincorporated entity, or (ii) otherwise restrict conversions of domestic nonprofit corporations. The conversion of a nonprofit insurance company to a for-profit stock corporation has been listed as a possible example of such a transaction, since most states have separate statutes that govern such a conversion.

§ 9.03. RESTRICTIONS AND REQUIRED APPROVALS

(a) If a domestic or foreign nonprofit corporation or eligible entity may not be a party to a merger or sale of its assets without the approval of the [attorney general], the [department of insurance] or the [public utility commission], the corporation or eligible entity shall not be a party to a transaction under this chapter without the prior approval of that [agency].

(b) Property held in trust by an entity or that is a charitable asset may not be diverted from its purpose by any transaction under this chapter unless the entity obtains an appropriate order of [court] [the attorney general] specifying the disposition of the property to the extent required by and pursuant to the law of this state on cy pres or otherwise dealing with the nondiversion of charitable assets.

(c) Unless an entity that is a party to a transaction under this chapter obtains an appropriate order of [court] [the attorney general] under the law of this state on cy pres or otherwise
dealing with the nondiversion of charitable assets, the transaction may not affect:
(1) any restriction imposed upon the entity by its organic records that may not be
amended by its board of directors, governors, members, or interest holders or by a
designated body;
(2) any restriction imposed upon property held by the entity by virtue of any trust
under which it holds that property; or
(3) the existing rights of persons other than members, shareholders, or interest
holders of the entity.

(d) A person who is a member, interest holder, or otherwise affiliated with a charitable
corporation or an unincorporated entity with a charitable purpose may not receive a direct
or indirect financial benefit in connection with a transaction under this [chapter] to which
the charitable corporation or unincorporated entity is a party unless the person is itself a
charitable corporation or unincorporated entity with a charitable purpose. This
subsection does not apply to the receipt of reasonable compensation for services
rendered.

(e) A devise, bequest, gift, grant, or promise contained in a will or other instrument, in trust
or otherwise, made before or after a transaction under this [chapter], to or for the entity
that is the subject of the transaction, shall inure to the entity as it continues in existence
after the transaction, subject to the express terms of the will or other instrument.

Source Note: Subsections (a)-(d) patterned after Model
Business Corporation Act, 3d Ed. § 9.02. Subsection (e)
patterned after Revised Model Nonprofit Corporation Act

CROSS-REFERENCES
Appeal from secretary of state’s refusal to file document, see § 1.26
“Domestic nonprofit corporation” defined, see § 1.40.
Filing duty of secretary of state, see § 1.25.

OFFICIAL COMMENT
Section 9.03(a) applies to those nonprofit corporations or other entities that are charitable
and require approval before transferring restricted property or that conduct regulated activities
such as insurance or the provision of public utility services and are incorporated or organized
under general laws instead of under special laws applicable only to entities conducting the
regulated activity. Examples of those types of nonprofit entities in many states include health
maintenance organizations subject to regulation as insurance companies and rural electric
cooperatives subject to regulation as public utilities. Because the provisions of Chapter 9 are
new, there is a possibility that existing state laws that require regulatory approval of mergers by
those types of entities may not be worded in a fashion that will include the transactions
authorized by this chapter.

The purpose of Section 9.03(a) is to ensure that transactions under Chapter 9 will be
subject to the same regulatory approval as mergers or sales of assets, in contrast to Section 9.02
which is an outright prohibition on conducting certain transactions under Chapter 9. The list of
agencies in subsection (a) should be conformed to the laws of the enacting state. The
consequences of violating subsection (a) will be the same as in the case of a merger
consummated without the required approval.

As in the case of laws regulating particular industries, a state’s laws governing the
nondiversion of charitable property to other uses may not be worded in a fashion that will
include all of the transactions authorized by this chapter. To prevent the procedures in this
chapter from being used to avoid restrictions on the use of property held in trust by nonprofit
entities or that is a charitable asset, Section 9.03(b) requires approval of the effect of transactions
under this chapter by the appropriate arm of government having supervision of nonprofit entities.

[Subchapter] B

DOMESTICATION

§ 9.20. Domestication

PLANT OF INTEREST EXCHANGE.

§ 9.22. Articles of domestication.
§ 9.23. Effect of domestication.

§ 9.20. DOMESTICATION

(a) A foreign nonprofit corporation may become a domestic nonprofit corporation only if the
domestication is authorized by the law of the foreign jurisdiction.

(b) A domestic nonprofit corporation may become a foreign nonprofit corporation if
the domestication is permitted by the laws of the foreign jurisdiction. Regardless of whether the
laws of the foreign jurisdiction require the adoption of a plan of domestication, the domestication
must be approved by the adoption by the corporation of a plan of domestication in the manner
provided in this [subchapter] by approving a plan of interest exchange under this
[Subchapter] 12C by approving a plan of interest exchange. The plan must be in a record and
contain:

(c) The plan of domestication must include:

(1) a statement of the jurisdiction in which the name of the corporation is to be
domesticated;

(2) the terms and conditions of the domestication, name, governing jurisdiction,
and type of entity of the acquiring entity;

(3) the manner and basis of canceling or reclassifying the memberships of the corporation
following its domestication into memberships, interests, securities, obligations, money, other property,
rights to acquire memberships, cash, other property, interests or securities, or any combination of the foregoing;
and

(4) any proposed amendments to:

(i) the articles of incorporation of the corporation; and

(ii) the bylaws of the corporation;

(5) the other terms and conditions of the interest exchange; and

(46) any desired amendments to other provision required by the law of this state
or the articles of incorporation or bylaws of the corporation following its domestication.
(d) The plan of domestication may also include a provision that the plan may be amended prior to filing the document required by the laws of this state or the other jurisdiction to consummate the domestication; except that, subsequent to approval of the plan by the members, the plan may not be amended without the approval of the members to change:

(b) In addition to the requirements of Section 1231(a), a plan of interest exchange may contain any other provision not prohibited by law.

(1) the amount or kind of memberships, obligations, rights to acquire memberships, cash, or other property to be received by the members under the plan;

(2) the articles of incorporation as they will be in effect immediately following the domestication, except for changes permitted by Section 10.05 or by comparable provisions of the laws of the other jurisdiction; or

(3) any of the other terms or conditions of the plan if the change would adversely affect any of the members in any material respect.

(e) Terms of a plan of domestication interest exchange may be made dependent upon facts objectively ascertainable outside the plan in accordance with Section 1.20(c). (extrinsic facts in filed record).

(f) If any debt security, note or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred or executed by a domestic nonprofit corporation before [the effective date of this subchapter] contains a provision applying to a merger of the corporation and the document does not refer to a domestication of the corporation, the provision shall be deemed to apply to a domestication of the corporation until such time as the provision is amended subsequent to that date.

(g) See Sections 9.02 (prohibited transactions) and 9.03 (restrictions and required approvals).

Source Note: Patterned after Model Nonprofit Corporation Act, 3rd Ed. (2008), § 11.03(d) and (f). Cf Model Business Corporation Act, 3d Ed. (2016 Revision), § 9.201.03(d) and (e).

CROSS-REFERENCES

Abandonment of domestication interest exchange, see § 9.24.1233.
Approval of plan, see § 9.24.1232.
Articles of domestication interest exchange, see § 9.22.1234.
Articles of incorporation following domestication, see § 9.22(b)601.
“Domestic nonprofit corporation” defined, see § 1.40.
Effect of domestication interest exchange, see § 9.23.1235.
Excluded transactions, see § 9.02.
“Foreign nonprofit corporation” defined, see § 1.40.
“Organic law” defined, see § 1.40.

OFFICIAL COMMENT
1. **Applicability**

   Whether and on what terms a foreign nonprofit corporation or a foreign eligible entity is authorized to enter into a membership exchange with a domestic nonprofit corporation is a matter that is governed by the laws under which that corporation or eligible entity is organized or by which it is governed, not by Subchapter 12C. Therefore, Section 1231 applies only to adoption of a plan of membership exchange by a domestic nonprofit corporation (or a domestic eligible entity as provided in Section 1230(d)).

   This subchapter authorizes a foreign nonprofit corporation to become a domestic nonprofit corporation. It also authorizes a domestic nonprofit corporation to become a foreign nonprofit corporation. In each case, the domestication is authorized only if the laws of the foreign jurisdiction permit the domestication. Whether and on what terms a foreign nonprofit corporation is authorized to domesticate in this state are issues governed by the laws of the foreign jurisdiction, not by this subchapter.

   If the organic law of a domestic eligible entity (including a domestic business corporation) does not expressly authorize it to engage in a membership exchange with a nonprofit corporation, the domestic eligible entity will nonetheless have that power pursuant to Section 1230(a). If the organic law of a domestic eligible entity provides procedures for the adoption, approval, and effectuation of a merger with any type of entity, but not for a membership exchange, the merger procedures will apply to a membership exchange with a nonprofit corporation. If the organic law of a domestic eligible entity does not provide procedures for any type of merger or interest exchange, the procedures of this chapter will apply pursuant to Section 1230(d). If the persons who manage the business and affairs of an eligible entity are the same as its interest holders, then a single approval by those persons will be sufficient under Section 1231.

   A foreign corporation is not required to have in effect a valid certificate of authority under Chapter 15 in order to domesticate in this state.

   The terms of a merger involving a nonprofit corporation frequently provide for a contribution to be made by another party either to the nonprofit corporation itself or to a related entity. It is anticipated that a similar practice will develop with respect to membership exchanges, and thus Section 1231(b) permits that type of provision to be included in a plan of membership exchange.

   If a domesticating corporation has established its exempt status with the Internal Revenue Service, the domesticated corporation may be considered a new entity by the IRS and may need to refile if its exempt status does not carry over.

2. **Terms and Conditions of Domestication**

   This subchapter imposes virtually no restrictions or limitations on the terms and conditions of a domestication, except for those set forth in Section 9.20(d) concerning provisions in a plan of domestication for amendment of the plan after it has been approved by the members and those in Sections 9.02 and 9.03. Memberships in a domestic nonprofit corporation that domesticates in another jurisdiction may be reclassified into memberships, obligations, rights to acquire memberships, cash or other property. The articles of incorporation may be amended by the articles of domestication in any way deemed appropriate. When a foreign nonprofit
corporation domesticates in this state, the laws of the foreign jurisdiction determine which of the
foregoing actions may be taken.

Section 9.20(c) requires that the terms and conditions of the domestication be set forth in
the plan of domestication. The plan of domestication is not required to be publicly filed, and the
articles of domestication that are filed with the secretary of state by a foreign nonprofit
corporation domesticating in this state are not required to include a plan of domestication. See
Section 9.22.

The list in Section 9.20(c) of required provisions in a plan of domestication is not
exhaustive and the plan may include any other provisions that may be desired.

3. AMENDMENTS OF ARTICLES OF INCORPORATION

A nonprofit corporation’s articles of incorporation may be amended in a domestication.
Under Section 9.20(c)(4), a plan of domestication of a domestic nonprofit corporation proposing
to domesticate in a foreign jurisdiction may include amendments to the articles of incorporation
and should include, at a minimum, any amendments required to conform the articles of
incorporation to the requirements for articles of incorporation of a corporation incorporated in
the foreign jurisdiction. It is assumed that the foreign jurisdiction will give effect to the articles
of incorporation as amended to the same extent that it would if the articles had been
independently amended before the domestication.

The laws of the foreign jurisdiction determine whether and to what extent a foreign
nonprofit corporation may amend its articles of incorporation when domesticating in this state.
Following the domestication of a foreign corporation in this state, of course, its articles of
incorporation may be amended under Chapter 10.

4. ADOPTION AND APPROVAL; ABANDONMENT

The domestication of a domestic nonprofit corporation in a foreign jurisdiction must be
adopted and approved as provided in Section 9.21. Under Section 9.24, the board of directors of
a domestic nonprofit corporation may abandon a domestication before its effective date even if
the plan of domestication has already been approved by the corporation’s members.

5. TRANSITIONAL RULE

Because the concept of domestication is new, a person contracting with a nonprofit
corporation or loaning it money who drafted and negotiated special rights relating to the
transaction before the enactment of this subchapter should not be charged with the consequences
of not having dealt with the concept of domestication in the context of those special rights.
Section 9.20(f) accordingly provides a transitional rule that is intended to protect such special
rights. If, for example, a corporation is a party to a contract that provides that the corporation
cannot participate in a merger without the consent of the other party to the contract, the
requirement to obtain the consent of the other party will also apply to the domestication of the
corporation in another jurisdiction. If the corporation fails to obtain the consent, the result will
be that the other party will have the same rights it would have if the corporation were to
participate in a merger without the required consent.

The purpose of Section 9.20(f) is to protect the third party to a contract with the
corporation, and Section 9.20(f) should not be applied in such a way as to impair
unconstitutionally the third party’s contract. As applied to the corporation, Section 9.20(f) is an
exercise of the reserved power of the state legislature set forth in Section 1.02.

The transitional rule in Section 9.20(f) ceases to apply at such time as the provision of the
agreement or debt instrument giving rise to the special rights is first amended after the effective
date of this subchapter because at that time the provision may be amended to address expressly a
domestication of the corporation.

A similar transitional rule governing the application to a domestication of special voting rights of directors and members and other internal corporate procedures is found in Section 9.21(7).

§ 9.21. ACTION ON A PLAN

1232. APPROVAL OF DOMESTICATION INTEREST EXCHANGE.

(a) In the case of a domestication of a domestic nonprofit corporation in a foreign jurisdiction that is the acquired entity in an interest exchange, the plan of interest exchange must be adopted in the following manner:

(1) The plan of domestication interest exchange must first be adopted by the board of directors. The board may set conditions for the approval of the plan of interest exchange by the members or the effectiveness of the plan of interest exchange. If the corporation is the acquired entity and does not have any members entitled to vote on the interest exchange, a plan of interest exchange is adopted by the corporation when it has been adopted by the board.

(2) After adopting the plan of domestication the board of directors must submit the plan. Except as provided in Section 1232(a)(1), the plan of interest exchange shall then be approved by the members. In submitting the plan of interest exchange to the members for their approval, if there are members entitled to vote on the plan, the board of directors must also transmit to the members a recommendation approval. The board shall recommend that the members approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must inform the members of the basis for that determination.

(3) The board of directors may condition its submission of the plan of domestication to the members on any basis.

(3) If the approval of plan of interest exchange is required to be approved by the members, and if the approval is to be given at a meeting, the corporation must notify each member entitled to vote of the meeting of members at which the plan of domestication is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. The notice must include or be accompanied by a copy of the articles of incorporation and bylaws as they will be in effect immediately after the domestication.

(54) Unless the articles of incorporation or bylaws, or the board of directors acting pursuant to paragraph Section 1232(3a)(1), require a greater vote or a greater number of votes to be present, the quorum, approval of the plan of domestication by the members interest exchange requires the approval of the members at a meeting at which a quorum exists consisting of a majority of the votes entitled to be cast on the plan, and, if any class of members memberships is entitled to vote as a separate group on the plan of interest exchange, the approval of each such separate voting group at a meeting at which a quorum of the voting group exists consisting of a majority of the votes entitled to be cast on the interest exchange by that voting group.
(5) Subject to Section 1232(a)(6) separate voting by voting groups on a plan of interest exchange is required:

(i) by each class of members that:

(ii) are to be reclassified under the plan of domestication into a different class of memberships, or into obligations, rights to acquire memberships, cash, other property, or any combination of the foregoing:

(A) are included in the exchange, with each class constituting a separate voting group; or

(iiB) would be entitled to vote as a separate group on a provision of the plan that, if contained in the articles of incorporation, would require action by separate voting groups under Section 10.04904 (voting on amendments by voting groups) or Section 922 (bylaw amendments requiring member approval); or

(iii) if the voting group is entitled under the articles of incorporation or bylaws to vote as a separate group to approve an amendment of the articles or a plan of interest exchange.

(7) If any provision of the articles of incorporation, bylaws, or an agreement to which any of the directors, members of a designated body, or members are parties, adopted or entered into before the effective date of this subchapter, applies to a merger of the corporation and that document does not refer to a domestication of the corporation, the provision shall be deemed to apply to a domestication of the corporation until such time as the provision is amended subsequent to that date.

(6) The articles or bylaws may expressly limit or eliminate the separate voting rights provided in Section 1232(a)(5) (i)(A) as to any class of memberships, except when the plan of interest exchange includes what is or would be in effect an amendment subject to Section 1232(a)(5)(i)(B).

(7) Unless the articles of incorporation or bylaws otherwise provide:

(i) approval of a plan of interest exchange by the members of a domestic nonprofit corporation is not required if the corporation is the acquiring entity in the interest exchange; and

(ii) memberships that will not be exchanged under the plan of interest exchange are not entitled to vote on the plan.

(8) If as a result of an interest exchange one or more members of a domestic nonprofit corporation would become subject to new interest holder liability, approval of the plan of interest exchange requires the signing in connection with the interest exchange, by each such member, of a separate consent in a record to become subject to such new interest holder liability.
unless in the case of a member that already has interest holder liability with respect to the
corporation:

(i) the new interest holder liability is with respect to a domestic or
foreign nonprofit corporation (which may be a different or the same domestic corporation in
which the person is a member); and

(ii) the terms and conditions of the new interest holder liability are
substantially identical to those of the existing interest holder liability (other than for changes that
eliminate or reduce such interest holder liability).

(9) In addition to the adoption and approval of the plan of interest exchange
by the board of directors and members as required by this section, the plan of interest exchange
must also be approved in a record by any person or group of persons whose approval is required
under Section 930 (approval by third persons) to amend the articles of incorporation or bylaws.

(b) See Section 1203 (required approvals).

Source Note: Patterned after Model Nonprofit
Corporation Act, 3rd Ed. (2008), § 11.04. Cf Model
Business Corporation Act, 3d Ed. (2016 Revision), §
9.24-11.04.

CROSS-REFERENCES
Abandonment of domesticationinterest exchange, see § 9.24.123.
Director standards of conduct, § 830.
Director standards of liability, § 831.
Contents of plan of domestication ................................................................. Notice
generally, see § 9.20.103.
Notice of members meeting, § 705.
“Domestic nonprofit corporationRecord” defined, see § 1.40.102.
Supermajority quorum and voting requirements, § 726.
Voting by voting groups generally, §§ 724 and 725.
Voting by voting group on amendment of articles of incorporation, § 904.
Voting entitlement of members generally, § 721.
“Foreign nonprofit corporationVoting group” defined, see § 1.40.102.
“Voting power” defined, § 102.

OFFICIAL COMMENT

1. IN GENERAL
This section sets forth the rules for adoption and approval of a plan of domestication of a
domestic nonprofit corporation to a foreign jurisdiction. The manner in which the domestication
of a foreign nonprofit corporation in this state must be adopted and approved will be controlled
by the laws of the foreign jurisdiction. The provisions of this section follow generally the rules
in Chapter 11 for adoption and approval of a plan of merger or membership exchange.
A plan of domestication must be adopted by the board of directors. Although Section 9.21(2) permits the board to refrain from making a recommendation to the members that they approve the plan, that does not change the underlying requirement that the board first adopt the plan before it is submitted to the members. Separate approval by the members of a plan of domestication is required if there are members entitled to vote on a domestication.

2. Voting by Separate Groups

Section 9.21(6) provides that a class of members has a right to vote on a plan of domestication as a separate voting group if, as part of the domestication, the class would be reclassified into other memberships, obligations, rights to acquire memberships, cash or other property. A class of members also is entitled to vote as a separate voting group if the class would be entitled to vote as a separate group on a provision in the plan that, if contained in an amendment to the articles of incorporation, would require approval by that class under Section 10.04. In this latter case, a class will be entitled to vote as a separate voting group if the terms of that class are being changed, or if the memberships of that class are being reclassified into memberships of any other class. It is not intended that immaterial changes in the language of the articles of incorporation made to conform to the usage of the laws of the foreign jurisdiction will alone create an entitlement to vote as a separate group.

Under Section 10.04, and therefore under Section 9.21(6), if a change that requires voting by separate voting groups affects two or more classes in the same or a substantially similar way, the relevant classes will vote together, rather than separately, on the change. For the mechanics of voting where voting by voting groups is required under Section 9.21(6), see Sections 7.24 and 7.25. A plan of merger or interest exchange must be adopted by the board of directors.

Thereafter, the board must submit the plan to the members for their approval, except as provided in Section 1232(a)(1). The functions of the board of directors under Section 1232 may be vested by the articles of incorporation or bylaws in a designated body either to the exclusion of, or jointly with, the board of directors.

If a domestication would amend the articles of incorporation to change the voting requirements on future amendments of the articles, the transaction must also be approved by the vote required by Section 7.26.

Section 1223(a)(2) requires the board of directors of a membership corporation, after having adopted the plan of interest exchange, to submit the plan to the members for approval, except as provided in Section 1232(a)(1). When submitting the plan, the board of directors must make a recommendation to the members that the plan be approved, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should make no recommendation. For example, the board of directors may make such a determination where there is not a sufficient number of directors free of a conflicting interest to approve the transaction or because the board of directors is evenly divided as to the merits of a transaction but is able to agree that members should be permitted to consider the transaction. If the board of directors makes such a determination, it must describe the conflict of interest or special circumstances, and communicate the basis for the determination, when submitting the plan to the members. The exception for conflicts of interest or other special circumstances is intended to be sparingly available. Generally, members should not be asked to act on an interest exchange in the absence of a recommendation by the board of directors. The exception is not intended to relieve the board of directors of its duty to consider carefully the proposed transaction and the interests of members.
3. Quorum and Voting

Section 1231(a)(1) permits the board of directors to condition its submission of a plan of interest exchange on any basis. Among the conditions that a board might impose are that the plan will not be deemed approved unless it is approved by a specified vote of the members (which may be higher than the vote that would otherwise be required), or by one or more specified classes of members, voting as a separate voting group, or by a specified percentage of disinterested members. The board is not limited, however, to conditions of these types. If the members object to a condition imposed by the board, their remedy is to change the members of the board.

Section 1231(5a)(4) provides that approval of a plan of domestication interest exchange requires approval of the members at a meeting at which there exists a quorum consisting of a majority of the votes entitled to be cast on the plan. Section 1231(5) also provides that exists a quorum consisting of at least a majority of the votes entitled to be cast on the plan by that class exists. If a quorum is present, then under Sections 7.24724 and 7.25725 the plan will be approved if more votes are cast in favor of the plan than against it by each the voting group or separate voting groups entitled to vote on the plan.

In lieu of approval at a member meeting of the members, approval can be given by the consent of all the members entitled to vote on the domestication merger or membership exchange, under the procedures set forth in Section 7.04704.

4. Transitional Rule

Section 1231(a)(8) requires any member who will become subject to owner liability to sign a record consenting to becoming subject to owner liability, which consent must be separate from the plan of interest exchange. Although the transactions that produce this result will be infrequent, Section 1231(a)(8) is an important protective provision in those instances where owner liability may arise. An example of such a transaction is a merger of a nonprofit corporation into an unincorporated nonprofit association in a state where members of such an association are not protected from personal liability for debts or obligations of the association.

Because the concept of domestication is new, persons who drafted and negotiated special rights for directors or members before the enactment of this subchapter should not be charged with the consequences of not having dealt with the concept of domestication in the context of those special rights. Section 9.21(7) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, the articles of incorporation provide that the corporation cannot participate in a merger without a supermajority vote of the members, that supermajority requirement will also apply to the domestication of the corporation in another jurisdiction.

The purpose of Section 9.21(7) is to protect persons who negotiated special rights for directors or members whether in a contract with the corporation or in the articles of incorporation or bylaws, and Section 9.21(7) should not be applied in such a way as to impair
unconstitutionally the rights of any party to a contract with the corporation. As applied to the corporation, Section 9.21(7) is an exercise of the reserved power of the state legislature set forth in Section 1.02.

§ 1233. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE.

The transitional rule in Section 9.21(7) ceases to apply at such time as the provision of the articles of incorporation, bylaws or agreement giving rise to the special rights is first amended after the effective date of this subchapter because at that time the provision may be amended to address expressly a domestication of the corporation.

(a) A plan of interest exchange may be amended only with the consent of each party to the plan, except as otherwise provided in the plan and before articles of interest exchange have taken effect.

A similar transitional rule with regard to the application to a domestication of special contractual rights of third parties is found in Section 9.20(f).

(b) A domestic acquired nonprofit corporation may approve an amendment of a plan of interest exchange:

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

§ 9.22. ARTICLES OF DOMESTICATION

(a) Articles of domestication must be signed on behalf of the domesticating corporation by any officer or other duly authorized representative. The articles must set forth:

(i) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests, or securities, or any combination of the foregoing, to be received by any of the interest holders of the acquired entity under the plan;

(ii) the articles of incorporation or bylaws that will be in effect immediately after the interest exchange becomes effective, except for changes that do not require approval of the members under this act, the articles or bylaws; or

(iii) any other terms or conditions of the plan, if the change would adversely affect the member in any material respect.

(c) After a plan of interest exchange has been approved and before articles of interest exchange are effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic acquired nonprofit corporation may abandon the plan in the same manner as the plan was approved.
If a plan of interest exchange is abandoned after articles of interest exchange have been delivered to the secretary of state for filing and before the articles are effective, articles of abandonment, signed by the acquired entity, must be delivered to the secretary of state for filing before the articles of interest exchange are effective. The articles of abandonment take effect on filing, and the interest exchange is abandoned and does not become effective. The articles of abandonment must contain:

1. The name and jurisdiction of incorporation of the domesticating acquired nonprofit corporation;
2. The name and jurisdiction of incorporation of the domesticated entity on which the articles of interest exchange were filed by the secretary of state; and
3. If the domesticating corporation is a domestic nonprofit corporation, a statement that the plan of domestication was approved in accordance with this subchapter or, if the domesticating corporation is a foreign nonprofit corporation, a statement that the domestication was approved in accordance with the law of its jurisdiction of incorporation.

If the domesticated corporation is a domestic nonprofit corporation, the articles of domestication shall either contain all of the provisions that Section 2.02(a) requires to be set forth in articles of incorporation and any other desired provisions that Section 2.02(b) and (c) permits to be included in articles of incorporation, or shall have attached articles of incorporation. In either case, provisions that would not be required to be included in restated articles of incorporation may be omitted, except that the name and address of the initial registered agent of the domesticated corporation must be included. The name of the domesticated corporation must satisfy the requirements of Section 4.01.

Source Note: Model Nonprofit Corporation Act, 3rd Ed. (2008), §§ 11.03(e) and 11.08. Cf. Model Business Corporation Act (2016 Revision), §§ 11.03(f) and 11.08.

CROSS-REFERENCES

Approval of interest exchange, § 1232.
“Corporation” and “domestic nonprofit corporation” defined, § 102.
“Deliver” defined, § 102.
Effective time and date of filing, § 163.
Filing requirements, § 160.

OFFICIAL COMMENT

Under Section 1223, unless otherwise provided in the plan of interest exchange, a party to an interest exchange may abandon the transaction without member approval, even though the transaction has been previously approved by the party’s members. The power of a party under Section 1223 to abandon a transaction without member approval does not affect any contract rights that other parties may have.
The functions of the board of directors under this section may be vested by the articles of incorporation or bylaws in a designated body either to the exclusion of, or jointly with, the board of directors.

§ 1234. ARTICLES OF INTEREST EXCHANGE; EFFECTIVE DATE OF INTEREST EXCHANGE.

(a) If a domestic nonprofit corporation, or a domestic eligible entity whose organic law does not provide for interest exchanges, is the acquired entity, articles of interest exchange must be signed by the acquired entity and delivered to the secretary of state for filing.

(b) Articles of interest exchange must contain:

1. The name of the acquired entity;

2. The name, governing jurisdiction, and type of entity of the acquiring entity;

3. If the articles of domestication must be delivered to the secretary of state for filing, and take effect at the interest exchange are not to be effective upon filing, the later date and time on which they will become effective determined in accordance with Section 163 (effective time provided in Section 1.23 and date of filing);

4. A statement that the plan of interest exchange was approved by the acquiring entity in accordance with this [Subchapter] 12C; and

5. Any amendments to the acquired entity’s public organic record approved as part of the plan of interest exchange.

(c) In addition to the requirements of Section 1234(b), articles of interest exchange may contain any other provision not prohibited by law.

(d) A plan of interest exchange that is signed by the acquired entity and meets all the requirements of Section 1234(b) may be delivered to the secretary of state for filing instead of articles of interest exchange and on filing has the same effect. If a plan of interest exchange is filed as provided in this Section 1234(d), references in this [Subchapter] 12C to articles of interest exchange refer to the plan of interest exchange filed under this Section 1234(d).

(e) Articles of interest exchange are effective on the date and time of filing or the later date and time specified in the articles.

(f) If the domesticating corporation is a qualified foreign nonprofit corporation, its certificate of authority is cancelled automatically on the becomes effective date of its domestication when the articles of interest exchange are effective.
CROSS-REFERENCES

Approval of interest exchange, § 1232.
“Deliver” defined, see § 1.40102.
Effect of domestication, see § 9.23.
Filing fees, see § 1.22162.
Filing requirements, see § 1.20160.
Voting by voting group, §§ 724 and 725.
“Foreign nonprofit corporation Voting group” defined, see § 1.40102.

Restrictions and required approvals, see § 9.03.

OFFICIAL COMMENT

The filing of articles of domestication under this section makes the domestication a matter of public record. It also makes of public record the articles of incorporation of the domesticated corporation if it is a domestic nonprofit corporation. If a domesticating foreign corporation is authorized to transact business in this state, Section 9.22(d) automatically cancels its certificate of authority.

The filing requirements for articles of domestication are set forth in Section 1.20. Interest exchange makes the transaction a matter of public record. The effective time of the articles is the effective time of their filing, unless otherwise specified. Under Section 1.23163, a document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified, except that a delayed effective date may not be later than the 90th day after the date the document is filed. The filing of articles of domestication terminates the status of a domesticating corporation that is a corporation incorporated under the laws of this state. Once the articles of domestication have become effective, the corporation will no longer be in good standing in this state. The domesticated corporation may, however, apply for a certificate of authority as a foreign corporation under Subchapter 15A.

Where a foreign nonprofit corporation domesticates in this state, the filing required to terminate its status as a corporation incorporated under the laws of the foreign jurisdiction is determined by the laws of that jurisdiction.

When the articles of interest exchange are effective under Section 1234(c), the interest exchange transaction occurs under Section 1234(f) if the acquired entity is a domestic entity.

To avoid any question about a gap in the continuity of its existence, it is recommended that a corporation use a delayed effective date provision in its domestication filings in both this state and the foreign jurisdiction, or otherwise coordinate those filings, so that the filings become effective at the same time.

Some states require notice to the attorney general of transactions involving specific types of nonprofit entities, such as health care providers. See, e.g., Model Act for Nonprofit Healthcare
Conversion Transactions prepared by the National Association of Attorneys General. States with such notice requirements should make sure that they are adequately integrated with the procedures in the act.

As Section 9.20(c)(4) makes clear, a corporation may amend its articles of incorporation in connection with a domestication. Because the articles of domestication will either contain or have attached to them an integrated set of articles of incorporation, the articles of domestication will have the effect of restating the articles of incorporation.

§ 9.231235. EFFECT OF DOMESTICATION INTEREST EXCHANGE.

(a) Except as otherwise provided in Section 9.03, when a domestication becomes effective:

(1) the title to all real and personal property, both tangible and intangible, of the domesticating corporation remains in the domesticated corporation without reversion or impairment; interests in the acquired entity that are the subject of the interest exchange are converted, and the holders of those interests are entitled only to the rights provided to them under the plan of interest exchange;

(2) the liabilities of the domesticating corporation remain the liabilities of the domesticated corporation; acquiring entity becomes the interest holder of the interests in the acquired entity stated in the plan of interest exchange to be acquired by the acquiring entity;

(3) an action or proceeding pending against the domesticating corporation continues against the domesticated corporation as if the domestication had not occurred; the public organic documents of the acquired entity is amended to the extent provided in the articles of interest exchange; and

(4) the articles of domestication, or the articles of incorporation attached to the articles of domestication, constitute the articles of incorporation of a foreign corporation domesticating in this state; private organic rules of the acquired entity are amended to the extent provided in the plan of interest exchange.

(5) the memberships in the domesticating corporation are reclassified into memberships, obligations, rights to acquire memberships, or cash or other property in accordance with the terms of the domestication, and the members are entitled only to the rights provided by those terms; and

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

(6) the domesticating corporation is deemed to:
(c) When an interest exchange becomes effective, a person that did not have interest
holder liability with respect to the acquired entity and becomes subject to interest holder liability
with respect to a domestic entity as a result of the interest exchange has interest holder liability
only to the extent provided by the organic law of the entity and only for those debts, obligations,
and other liabilities that are incurred after the interest exchange becomes effective.

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

(d) When an interest exchange becomes effective, the interest holder liability of a
person that ceases to hold an interest in the acquired entity with respect to which the person had
interest holder liability is subject to the following rules:

(ii) be the same corporation without interruption as the domesticating
corporation.

(b) The interest holder liability of a member in a foreign nonprofit corporation that is
domesticated in this state is as follows:

(1) The domestication interest exchange does not discharge any interest holder
liability under the laws of the foreign jurisdiction this [Act] to the extent any such the interest
holder liability arose was incurred before the interest exchange became effective time of the
articles of domestication.

(2) The member person does not have interest holder liability under the laws
of the foreign jurisdiction this [Act] for any debt, obligation, or other liability of the corporation
that arises is incurred after the interest exchange becomes effective time of the articles of
domestication.

(3) The provisions of the laws of the foreign jurisdiction continue this [Act]
continues to apply to the release, collection, or discharge of any interest holder liability preserved
by paragraph under Section 1235(d)(1), as if the domestication interest exchange had not
occurred.

(4) The member person has whatever rights of contribution from any other
member person as are provided by the laws of the foreign jurisdiction law other than this [Act] or
the organic rules of the acquired entity with respect to any interest holder liability preserved by
paragraph under Section 1235(d)(1), as if the domestication interest exchange had not occurred.

Source Note: Patterned after Model Nonprofit
Corporation Act, 3rd Ed. (2008), § 11.07. Cf Model
Business Corporation Act, 3d Ed. (2016 Revision), §
9.24 11.07.

CROSS-REFERENCES

“Domestic Corporation” and “domestic nonprofit corporation” defined, see § 1.40 102.
Effective time and date of interest exchange, § 163.
“Eligible entity” defined, § 102.
“Foreign nonprofit corporation” defined, see § 1.40 102.
“Governor” defined, § 102.
“Organic law” and “organic rules” defined, § 102.
“Interest holder liability” defined, see § 1.40.

OFFICIAL COMMENT

When a nonprofit corporation is domesticated in this state under this subchapter, the corporation becomes a domestic corporation with the same status under this act as if it had been originally incorporated under this act. Thus, the domesticated corporation will have all of the powers, privileges, and rights granted to corporations originally incorporated in this state and will be subject to all of the duties, liabilities, and limitations imposed on domestic nonprofit corporations. Except as provided in Section 9.23(b), the effect of domesticating a corporation of this state in a foreign jurisdiction is governed by the laws of the foreign jurisdiction. See Section 9.20(b).

A domestication is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer, or assignment. Nor does it give rise to a claim that a contract with the corporation is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a domestication.

Section 9.23(a)(1)-(3) and (b) are similar to Section 11.07(a)(3)-(5) and (c) with respect to the effects of a merger. Although Section 9.23(a)(1)-(3) would be implied by the general rule stated in Section 9.23(a)(6) even if not stated expressly, those rules have been included to avoid any question as to whether a different result was intended.

Section 9.23(b) preserves liability only for interest holder liabilities to the extent they arise before the domestication. Interest holder liability is not preserved for subsequent changes in an underlying liability, regardless of whether a change is voluntary or involuntary.

§ 9.24. ABANDONMENT OF A DOMESTICATION

(a) Unless otherwise provided in a plan of domestication of a domestic nonprofit corporation, after the plan has been adopted and approved as required by this [subchapter], and at any time before the domestication has become effective, it may be abandoned by the board of directors without action by the members.

(b) If a domestication is abandoned under subsection (a) after articles of domestication have been filed with the secretary of state but before the domestication has become effective, a statement that the domestication has been abandoned in accordance with this section, signed by an officer or other duly authorized representative, must be delivered to the secretary of state for filing prior to the effective date of the domestication. The statement takes effect upon filing and the domestication is abandoned and does not become effective.

(c) If the domestication of a foreign nonprofit corporation in this state is abandoned in accordance with the laws of the foreign jurisdiction after articles of domestication have been filed with the secretary of state, a statement that the domestication has been abandoned, signed by an officer or other duly authorized representative, must be delivered to the secretary of state for filing. The statement takes effect upon filing and the domestication is abandoned and does not become effective.

Source Note: Patterned after Model Business Corporation Act, 3d Ed. § 9.25.

CROSS-REFERENCES

Approval of domestication, see § 9.21.
“DeliverProceeding” defined, see § 1.40.102.

“Domestic nonprofit corporation” defined, see § 1.40.
Effective time and date of filing, see § 1.23.
Filing requirements, see § 1.20.
“Foreign nonprofit corporation” defined, see §1.40.

OFFICIAL COMMENT

Unless otherwise provided in a plan of domestication, a domestic nonprofit corporation proposing to domesticate in another jurisdiction may abandon the transaction without member approval, even though the domestication has been previously approved by the members. Whether or not the domestication of a foreign nonprofit corporation in this state may be abandoned is determined by the laws of the foreign jurisdiction.

In contrast to a merger, an interest exchange does not vest in the acquiring entity the assets of the acquired entity, or render the acquiring entity liable for the liabilities of the acquired entity. The statement in Section 1235(a)(1) regarding the rights of former interest holders is not intended to preclude an otherwise proper question concerning the validity of the interest exchange.

11 by reason of entering into an agreement that is governed by this chapter.

Section 1235(d) sets forth the impact of an interest exchange on interest holder liability.
Section 1232(a)(8) sets forth when approval of an interest exchange requires the consent of members who would otherwise become subject to interest holder liability.

[Subchapter] 12D
FOR-PROFIT CONVERSION
DOMESTICATION

§ 1241. Plan of domestication.
§ 9.31. Action on a plan of for-profit conversion1242 Approval of domestication.
§ 9.321243. Articles of for-profit conversiondomestication; effectiveness.
§ 1244. Amendment of plan of domestication; abandonment.
§ 9.331245. Effect of for-profit conversiondomestication.
§ 9.34. Abandonment of a for-profit conversion.

§ 9.30. FOR-PROFIT CONVERSION1240. DOMESTICATION

(a) By complying with the provisions of [Subchapter] 12A (preliminary provisions) and this [Subchapter] 12D applicable to foreign nonprofit corporations, a foreign nonprofit corporation may become a domestic nonprofit corporation, if the domestication is permitted by the organic law of the foreign corporation.

(ab) ABy complying with the provisions of [Subchapter] 12A and this [Subchapter] 12D, a domestic nonprofit corporation may become a domestic business foreign nonprofit corporation pursuant to a plan of for-profit conversion.
domestication, (b) A domestic nonprofit corporation may become a foreign business
corporation if the for-profit conversion is permitted by the laws of the foreign
jurisdiction. Regardless of whether the laws of the foreign jurisdiction require the
adoption of a plan of for-profit conversion, the foreign for-profit conversion shall be approved by
the adoption by the domestic nonprofit corporation of a plan of for-profit conversion in the
manner provided in this [subchapter].

(c) The plan of for-profit conversion must include:
(1) the terms and conditions of the conversion;
(2) the manner and basis of:
   (i) issuing at least one share in the corporation following its conversion; and
   (ii) otherwise reclassifying the memberships in the corporation, if any,
        following its conversion into shares and other securities, obligations,
        rights to acquire shares or other securities, cash, other property, or any
        combination of the foregoing;
(3) any desired amendments to the articles of incorporation or bylaws of the
    corporation following its conversion; and
(4) if the domestic nonprofit corporation is to be converted to a foreign business
    corporation, a statement of the jurisdiction in which the corporation will be
    incorporated after the conversion.

(d) The plan of for-profit conversion may also include a provision that the plan may be
amended prior to filing articles of for-profit conversion, except that subsequent to
approval of the plan by the members the plan may not be amended without the approval
of the members to change:
(1) the amount or kind of shares and other securities, obligations, rights to acquire
    shares or other securities, cash, or other property to be received by the members
    under the plan;
(2) the articles of incorporation as they will be in effect immediately following the
    conversion, except for changes permitted by Section 10.05; or
(3) any of the other terms or conditions of the plan if the change would adversely
    affect any of the members in any material respect.

(e) Terms of a plan of for-profit conversion may be made dependent upon facts objectively
ascertainable outside the plan in accordance with Section 1.20(e).  

(f) If any debt security, note, or similar evidence of indebtedness for money
borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred, or executed
by a domestic protected agreement of a domestic domesticating nonprofit corporation in effect
immediately before [the domestication becomes effective date of this subchapter] contains a
provision applying to a merger of the corporation and the document agreement does not refer to a
for-profit conversion domestication of the corporation, the provision shall be deemed to apply to a
for-profit conversion applies to a domestication of the corporation as if the domestication were a
merger until such time as the provision is first amended subsequent to that after the enactment date.

(gd) See Sections 9.02 (prohibited transactions) and 9.03 (required approvals).

CROSS-REFERENCES

Abandonment of for-profit conversiondomestication, see § 9.34 1244.
Approval of plan, see § 9.31 1242.
Articles of for-profit conversiondomestication, see § 9.32 1243.
“Domestic business corporation” defined, see § 1.40.
“Domestic nonprofit corporation” defined, see § 1.40 102.
Effect of for-profit conversiondomestication, see § 9.33 1245.
“Enactment date” defined, § 1201.
Excluded transactions, see § 9.02 1202.
“Interest holder liability” defined, § 102.
“Foreign businessnonprofit corporation” defined, see § 1.40 102.
“Organic law” defined, § 102.
“MembershipProtected agreement” defined, see § 1.40 1201.
Required approvals, § 1203.
“Voting group” defined, § 102.

OFFICIAL COMMENT

1. APPLICABILITY

Subchapter 12D authorizes a foreign nonprofit corporation to become a domestic nonprofit corporation and a domestic nonprofit corporation to become a foreign nonprofit corporation. In each case, the domestication is authorized only if the laws of the foreign jurisdiction permit it. Whether and on what terms a foreign corporation is authorized to domesticate in this state are issues governed by the organic law of the foreign corporation, not by Subchapter 12D. A foreign corporation is not required to have a valid registration to do business in this state under Chapter 13 to domesticate in this state.

This subchapter provides a procedure for a domestic nonprofit corporation to change its status from not-for-profit to for-profit and thus become a domestic business corporation. A domestication authorized by Subchapter 12D differs from a conversion under Subchapter 12E because a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

This subchapter also provides a procedure for a domestic nonprofit corporation to become a foreign business corporation, which is in effect a combination of a domestication and a for-profit conversion. However, Section 9.30(b) permits a domestic nonprofit corporation to become a foreign business corporation only if the laws of the foreign jurisdiction permit the transaction.

A separate procedure is provided in Subchapter 9D for a foreign business corporation to become a domestic nonprofit corporation.

2. TERMS AND CONDITIONS OF FOR-PROFIT CONVERSION
This subchapter imposes virtually no restrictions or limitations on the terms and conditions of a for-profit conversion, except for (i) those set forth in Sections 9.02 and 9.03, (ii) the requirements in Section 9.30(d) concerning provisions in a plan of for-profit conversion for amendment of the plan after it has been approved by the members, and (iii) the requirement in Section 9.30(c)(2)(i) that at least one share be issued by the corporation in connection with the conversion. In addition, other law such as the Internal Revenue Code may limit or prohibit for-profit conversions.

So long as at least one share in the corporation is outstanding following the conversion, memberships in a domestic nonprofit corporation that converts to a business corporation may be reclassified into other securities, obligations, rights to acquire shares or other securities, cash or other property.

Section 9.30(c) requires that the terms and conditions of the conversion be set forth in the plan of for-profit conversion. The plan of for-profit conversion is not required to be publicly filed, and the articles of for-profit conversion that are filed with the secretary of state are not required to include a plan of for-profit conversion. See Section 9.32.

The list in Section 9.30(c) of required provisions in a plan of for-profit conversion is not exhaustive and the plan may include any other provisions that may be desired. Special rules for “protected agreements”—certain documents and agreements in effect before the “enactment date” as defined in Section 1201.

3. AMENDMENTS OF ARTICLES OF INCORPORATION

A nonprofit corporation’s articles of incorporation will need to be amended in its conversion to a business corporation so that the articles satisfy the requirements for articles of a business corporation. See Section 9.32(b). Similarly, where a domestic nonprofit corporation converts to a foreign business corporation, the articles of incorporation will need to be amended to conform to the law of the foreign jurisdiction on the contents of articles of incorporation for a nonprofit business corporation.

4. ADOPTION AND APPROVAL; ABANDONMENT

The conversion of a domestic nonprofit corporation to a business corporation must be adopted and approved as provided in Section 9.31. Under Section 9.34, the board of directors of a domestic nonprofit corporation may abandon a conversion to for-profit status before its effective date even if the plan of for-profit conversion has already been approved by the corporation’s members.

5. TRANSITIONAL RULE

Because the concept of for-profit conversion is new, a person contracting with a corporation or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this subchapter should not be charged with the consequences of not having dealt with the concept of for-profit conversion in the context of those special rights. Section 9.30(f) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, a corporation is a party to a contract that provides that the corporation cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to the conversion of the corporation to a domestic or foreign business corporation. If the corporation fails to obtain the consent, the result will be that the other party will have the same rights it would have if the
The purpose of Section 9.30(f) is to protect the third party to a contract with the corporation, and Section 9.30(f) should not be applied in such a way as to impair unconstitutionally the third party’s contract. As applied to the corporation, Section 9.30(f) is an exercise of the reserved power of the state legislature set forth in Section 1.02.

The transitional rule in Section 9.30(f) ceases to apply at such time as the provision of the agreement or debt instrument giving rise to the special rights is first amended after the effective date of this subchapter because at that time the provision may be amended to address expressly a for-profit conversion of the corporation.

A similar transitional rule governing the application to a for-profit conversion of special voting rights of directors and members and other internal corporate procedures is found in Section 9.31(6).

§ 9.311241. ACTION ON A PLAN OF FOR-PROFIT CONVERSION/DOMESTICATION

In the case of a conversion of a (a) a domestic nonprofit corporation to a domestic or may become a foreign business nonprofit corporation by approving a plan of domestication, The plan of domestication must include:

(1) the name of the domesticating corporation;
(2) the name and governing jurisdiction of the domesticated corporation;
(3) the manner and basis of converting the memberships, if any, of the domesticating corporation into memberships, obligations, rights to acquire memberships, cash, other property, or any combination of the foregoing;
(4) the proposed articles of incorporation and bylaws of the domesticated corporation; and
(5) the other terms and conditions of the domestication.

(b) In addition to the requirements of Section 1241(a), a plan of domestication may contain any other provision not prohibited by law.

(c) The terms of a plan of domestication may be made dependent upon facts objectively ascertainable outside the plan in accordance with Section 105 (extrinsic facts in filed record).

Source Note: Model Entity Transactions Act (2007) (Last Amended 2013), § 502. Cf: Model Nonprofit Corporation Act, 3rd Ed. (2008), § 9.20(c) and (e); and Model Business Corporation Act (2016 Revision), § 9.20(c) and (e).
Under Section 1241(a)(4), a domestic nonprofit corporation’s plan of domestication must include the domesticated corporation’s proposed articles of incorporation and bylaws, which should comply with the organic law of the foreign jurisdiction into which it is domesticating. In the case of a domestic corporation domesticating into a foreign jurisdiction, the Act places no separate limitations on the provisions that the proposed articles of incorporation and bylaws may contain, and they may be substantially identical to or completely different from those of the domesticating corporation. However, the content of the proposed articles may affect the approvals required for the plan of domestication. See the approval requirements in Section 1242(a)(6) with respect to certain changes in the articles of incorporation, and Section 1242(a)(7) with respect to interest holder liability with respect to the domesticated corporation.

§ 1242. APPROVAL OF DOMESTICATION

(1a) The plan of for-profit conversion of a domestic nonprofit corporation to be the domesticating corporation must be adopted by the board of directors in the following manner:

(1) The plan of domestication must first be adopted by the board of directors. The board may set conditions for approval of the plan of domestication by the members or the effectiveness of the plan of domestication. If the domesticating corporation does not have any members entitled to vote on the plan of domestication, a plan of domestication is adopted by the corporation when it has been adopted by the board of directors pursuant to this Section 1242(a)(1).

(2) After adopting the plan of for-profit conversion, except as provided in Section 1242(a)(1), the plan of domestication must then be approved by the members. In submitting the plan of domestication to the members for approval, the board of directors must submit the plan to the members for their approval if there are members entitled to vote on the plan. The board of directors must also transmit to the members a recommendation that the members approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the members its so proceeding.

(3) The board of directors may condition its submission of the plan of for-profit conversion to the members on any basis.

(4) If the approval of the plan of domestication is required to be approved by the members, and if the approval is to be given at a meeting, the corporation must notify each member entitled to vote of the meeting of the members at which the plan of for-profit conversion of the corporation is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan of domestication and must contain or be accompanied by a copy or summary of the plan. The notice shall include or be accompanied by a copy of the articles of incorporation and the bylaws as they will be in effect immediately after the for-profit conversion of the corporation.
Unless the articles of incorporation or bylaws, or the board of directors acting pursuant to paragraph Section 1242(3a)(i), require a greater vote or a greater number of votes to be present, the quorum, approval of the plan of for-profit conversion by the members domestication requires the approval of the members at a meeting at which a quorum exists consisting of a majority of the votes entitled to be cast on the plan, and, if any class of membership is entitled to vote as a separate group on the plan of merger, the approval of each class of members entitled to vote, voting as a separate voting group at a meeting at which a quorum of the voting group exists consisting of a majority of the votes entitled to be cast on the plan by that voting group.

(6) If any provision of the articles of incorporation, bylaws or an agreement to which any of the directors or members are parties, adopted or entered into before the effective date of this subchapter, applies to a merger of the corporation and the document does not refer to a for-profit conversion of the corporation, the provision shall be deemed to apply to a for-profit conversion of the corporation until such time as the provision is amended subsequent to that date.

(5) Subject to Section 1242(a)(6), separate voting by voting groups on a plan of domestication is required:

Source Note: Patterned after Model Business Corporation Act, 3d Ed. § 9.31.

(i) by each class of memberships that:

CROSS-REFERENCES

(A) one to be converted under the plan of domestication into security interests, obligations, rights to acquire securities or interests, cash, other property, or any combination of the foregoing; or

Abandonment of for-profit conversion, see § 9.34.

(B) is entitled to vote as a separate group on a provision in the plan that constitutes a proposed amendment to the articles or bylaws of the domesticated corporation that requires action by separate voting groups under Section 904 (voting on amendments by voting groups) or Section 922 (bylaw amendments requiring member approval); or

Contents of plan of for-profit conversion, see § 9.30.

(ii) if the voting group is entitled under the articles or bylaws to vote as a group to approve a plan of domestication.

“Domestic business corporation” defined, see § 1.40.

(6) The articles or bylaws may expressly limit or eliminate the separate voting rights provided in Section 1242(a)(5)(i)(A) as to any class of members, except when the plan includes what would be in effect an amendment subject to Section 1242(a)(5)(i)(B).

“Domestic nonprofit corporation” defined, see § 1.40.
(7) If as a result of a domestication one or more members of the domesticating corporation would become subject to new interest holder liability, approval of the plan of domestication requires the signing in connection with the domestication, by each such member, of a separate consent in a record to become subject to such new interest holder liability, unless in the case of a member that already has interest holder liability with respect to the domesticating corporation, the terms and conditions of the new interest holder liability with respect to the domesticated corporation are substantially identical to those of the existing interest holder liability (other than for changes that eliminate or reduce such interest holder liability).

“Foreign business corporation” defined, see § 1.40.

(8) In addition to the adoption and approval of the plan of domestication by the board of directors and members as required by this section, the plan of domestication must also be approved in a record by any person or group of persons whose approval is required under Section 930 (approval by third persons) to amend the articles or bylaws.

OFFICIAL COMMENT

(b) See Section 1203 (required approvals).

1. IN GENERAL

This section sets forth the rules for adoption and approval of a plan of for-profit conversion of a domestic nonprofit corporation to a domestic or foreign business corporation.

A plan of for-profit conversion must be adopted by the board of directors. Although Section 9.31(2) permits the board to refrain from making a recommendation to the members that they approve the plan, that does not change the underlying requirement that the board first adopt the plan before it is submitted to the members. Separate approval by the members of a plan of for-profit conversion is required if there are members entitled to vote on the transaction.

2. QUORUM AND VOTING

Section 9.31(5) provides that if the corporation has more than one class of members, approval of a for-profit conversion requires the approval of each class voting as a separate voting group at a meeting at which there exists a quorum consisting of at least a majority of the votes entitled to be cast on the plan by that class. If a quorum is present, then under Sections 7.24 and 7.25 the plan will be approved if more votes are cast in favor of the plan than against it by each voting group entitled to vote on the plan. If the members of a corporation are not divided into two or more classes or series, all of the members together will constitute a single class for purposes of Section 9.31(5).

In lieu of approval at a meeting of the members, approval can be given by the consent of all the members entitled to vote on the conversion, under the procedures set forth in Section 7.04.

3. TRANSITIONAL RULE

Because the concept of for-profit conversion is new, persons who drafted and negotiated special rights for directors or members before the enactment of this subchapter should not be charged with the consequences of not having dealt with the concept of for-profit conversion in the context of those special rights. Section 9.31(6) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, the articles of incorporation provide that the corporation cannot participate in a merger without a supermajority vote of the members, that supermajority requirement will also apply to the conversion of the corporation to a domestic or foreign business corporation.

The purpose of Section 9.31(6) is to protect persons who negotiated special rights for
directors or members whether in a contract with the corporation or in the articles of incorporation or bylaws, and Section 9.31(6) should not be applied in such a way as to impair unconstitutionally the rights of any party to a contract with the corporation. As applied to the corporation, Section 9.31(6) is an exercise of the reserved power of the state legislature set forth in Section 1.02.

The transitional rule in Section 9.31(6) ceases to apply at such time as the provision of the articles of incorporation, bylaws or agreement giving rise to the special rights is first amended after the effective date of this subchapter because at that time the provision may be amended to address expressly a for-profit conversion of the corporation.

A similar transitional rule with regard to the application to a for-profit conversion of special contractual rights of third parties is found in Section 9.30(f).

§ 9.32. ARTICLES OF FOR-PROFIT CONVERSION

(a) Articles of for-profit conversion must be signed on behalf of the converting corporation by any officer or other duly authorized representative. The articles must set forth:

(1) if the surviving corporation is a domestic business corporation, the name of the corporation immediately before the filing of the articles of for-profit conversion and if that name does not satisfy the requirements of the Model Business Corporation Act, or the corporation desires to change its name in connection with the conversion, a name that satisfies the requirements of the Model Business Corporation Act;

(2) if the surviving corporation is a foreign business corporation, its name after the conversion and its jurisdiction of incorporation; and

(3) a statement that the plan of for-profit conversion was duly approved by the members in the manner required by this act and the articles of incorporation.

(b) If the surviving corporation is a domestic business corporation, the articles of for-profit conversion shall either contain all of the provisions that the Model Business Corporation Act requires to be set forth in articles of incorporation of a domestic business corporation and any other desired provisions permitted by the Model Business Corporation Act, or shall have attached articles of incorporation that satisfy the requirements of the Model Business Corporation Act. In either case, provisions that would not be required to be included in restated articles of incorporation of a domestic business corporation may be omitted, except that the name and address of the initial registered agent of the business corporation must be included.

(c) The articles of for-profit conversion must be delivered to the secretary of state for filing, and take effect at the effective time provided in Section 1.23.


CROSS-REFERENCES

"Deliver" defined Abandonment of domestication, see § 1.40 1244.
"Domestic business corporation" defined Contents of plan of domestication, see § 1.40 1242.
"Domestic nonprofit corporation" defined, see § 1.40 102.
Effect of nonprofit conversion, see § 9.33.
Filing fees, see § 1.22.
Filing requirements, see § 1.20.
Restrictions and required approvals, see § 9.03.

OFFICIAL COMMENT

The filing of articles of for-profit conversion makes the conversion of a domestic nonprofit corporation to a domestic or foreign business corporation a matter of public record. Where a domestic nonprofit corporation is converting to a foreign business corporation, the filing required in the foreign jurisdiction is determined by the laws of that jurisdiction. When a conversion to a foreign business corporation is effective, the converting corporation will no longer be a domestic nonprofit corporation in good standing in this state.

The filing requirements for articles of for-profit conversion are set forth in Section 1.20. Under Section 1.23, a document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified, except that a delayed effective date may not be later than the 90th day after the date the document is filed.

The articles of incorporation that must be included in or attached to the articles of for-profit conversion will satisfy the requirements of [the Model Business Corporation Act] for incorporating a business corporation.

This section assumes that all business corporations are incorporated under the same law. If that is not the case, appropriate changes must be made to this section so that the type of business corporation that will result from the conversion is made clear.

§ 9.33. EFFECT OF FOR-PROFIT CONVERSION

[(a)] Except as otherwise provided in Section 9.03, when a conversion of a domestic nonprofit corporation to a domestic or foreign business corporation becomes effective:

(1) the title to all real and personal property, both tangible and intangible, of the corporation remains in the corporation without reversion or impairment;

(2) the liabilities of the corporation remain the liabilities of the corporation;

(3) an action or proceeding pending against the corporation continues against the corporation as if the conversion had not occurred;

(4) the articles of incorporation of the domestic or foreign business corporation become effective;

(5) the memberships of the corporation are reclassified into shares or other securities, obligations, rights to acquire shares or other securities, or into cash or other property in accordance with the plan of conversion, and the members are entitled only to the rights provided in the plan of for-profit conversion; and

(6) the corporation is deemed to:

(i) be a domestic or foreign business corporation for all purposes; and

(ii) be the same corporation without interruption as the nonprofit corporation.

[(b)] The interest holder liability of a member in a domestic nonprofit corporation that converts to a domestic business corporation is as follows:

(1) The conversion does not discharge any interest holder liability of the member as a member of the nonprofit corporation to the extent any such interest holder liability arose before the effective time of the articles of for-profit conversion.

(2) The member does not have interest holder liability for any debt, obligation or liability of the business corporation that arises after the effective time of the articles of for-profit conversion.
The laws of this state continue to apply to the collection or discharge of any interest holder liability preserved by paragraph (1), as if the conversion had not occurred.

The member has whatever rights of contribution from other members are provided by the laws of this state with respect to any interest holder liability preserved by paragraph (1), as if the conversion had not occurred.

A member who becomes subject to interest holder liability for some or all of the debts, obligations, or liabilities of the business corporation has interest holder liability only for those debts, obligations, or liabilities of the business corporation that arise after the effective time of the articles of for-profit conversion.

Source Note: Patterned after Model Business Corporation Act, 3d Ed. § 9.33.

CROSS-REFERENCES
“Domestic business corporation” defined, see § 1.40.
“Domestic nonprofit corporation” defined, see § 1.40.
“Interest holder liability” defined, see § 1.40
“Organic law” defined, § 102.
“Membership Voting group” defined, see § 1.40.

OFFICIAL COMMENT

When a nonprofit corporation is converted under this subchapter to a domestic business corporation, the corporation has the same status as if it had been originally incorporated under the Model Business Corporation Act. Thus, the converted corporation will have all of the powers, privileges, and rights granted to business corporations originally incorporated as such in this state and will be subject to all of the duties, liabilities, and limitations imposed on domestic business corporations.

Section 1242 sets forth the rules for adoption and approval of a plan of domestication of a domestic nonprofit corporation into a foreign jurisdiction. The manner in which the domestication of a foreign corporation into this state must be adopted and approved will be controlled by the organic law of the foreign corporation.

A for-profit conversion is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer, or assignment. Nor does it give rise to a claim that a contract with the corporation is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion.

When submitting a plan of domestication to the members, the board of directors generally must recommend the transaction. The board, however, might exercise the exception under Section 1242(a)(2) where the number of directors having a conflicting interest makes it inadvisable for the board to recommend the domestication or where the board is evenly divided as to the merits of the domestication but is able to agree that the members should be permitted to consider it.

Section 1242(a)(1) permits the board of directors to condition its submission of a plan of domestication to the members or the effectiveness of the plan of domestication. Among the
conditions that a board of directors might impose are that the plan will not be deemed approved
unless it is approved by a specified vote of the members, or by one or more specified classes or
series of memberships, voting as a separate voting group, or by a specified percentage of
disinterested members.

Section 1242(a)(4) sets forth quorum and voting requirements applicable to a member
vote to approve a plan of domestication. Section 1242(a)(4) also provides that each class or
series of members has a right to vote on a plan of domestication as a separate voting group.
Section 1242(a)(6) permits the articles of incorporation or bylaws to expressly limit or eliminate
separate voting as a voting group for any class or series of memberships on a plan of
domestication unless the articles of incorporation of the foreign domesticated corporation into
which the corporation would be domesticated include what would be an amendment requiring
separate group voting under Section 904 or 922 if it had been done as an amendment of that
domestic corporation’s articles or bylaws.

Section 9.33(a)(1)-(3) are similar to Section 11.07(a)(3)-(5) applies only in
situations where a member of a domestic nonprofit corporation is becoming subject to “interest
holder liability,” as defined in Section 102, with respect to the effects of a merger. Although
Section 9.33(a)(1)-(3) would be implied by the general rule stated in Section 9.33(a)(6) even if
not stated expressly, those rules have been included to avoid any question as to whether a
different result was intended. Approval of a domestication that would
have such a result generally requires the written consent of each such member who becomes
subject to such interest holder liability. The exception is the limited case where the member has
interest holder liability with respect to the domesticating corporation, and the terms and
conditions of the member’s interest holder liability with respect to the domesticated corporation
are substantially identical to those existing prior to the domestication.

Section 9.33(b) and (c) are optional provisions that will not be needed in most states.
Those provisions should be included only when the statutory laws of a state impose some form
of personal liability on the shareholders of a business corporation that is not imposed on
members of a nonprofit corporation, or the reverse. Section 9.33(c) preserves liability only for
interest holder liabilities to the extent they arise before the conversion. Interest holder liability is
not preserved for subsequent changes in an underlying liability, regardless of whether a change is
voluntary or involuntary.

§ 9.34. AMENDMENT OR ABANDONMENT OF A FOR-PROFIT
CONVERSION PLAN OF DOMESTICATION; ABANDONMENT

(a) Unless otherwise provided in a plan of for-profit conversion of a domestic nonprofit
corporation, after the plan has been adopted and approved as required by this
[subchapter], and at any time before the for-profit conversion has become effective, it
may be abandoned by the board of directors without action by the members.

(a) A plan of domestication of a domestic nonprofit corporation may be amended,
except as otherwise provided in the plan and before articles of domestication have taken effect.
(b) A domestic nonprofit corporation may approve an amendment of a plan of
domestication:

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

(2) in the manner provided in the plan, except that a member that was entitled
to vote on or consent to approval of the plan is entitled to vote on or consent to any amendment
of the plan that will change:

(i) the amount or kind of memberships, securities, obligations, money
rights to acquire memberships, securities, money, other property, or any combination of the
foregoing, to be received by any of the members of the domesticating corporation under the plan;

(ii) the articles of incorporation or bylaws of the domesticated
corporation that will be in effect immediately after the domestication becomes effective, except
for changes that do not require approval of the members of the domesticated corporation under
its organic law or its proposed articles or bylaws as set forth in the plan; or

(iii) any of the other terms or conditions of the plan, if the change
would adversely affect the member in any material respect.

(b) After a plan of domestication has been approved and before the articles of
domestication have become effective, the plan may be abandoned as provided in the plan. Unless
prohibited by the plan, a domestic nonprofit corporation may abandon the plan in the same
manner as the plan was approved by the corporation without action by its members in
accordance with any procedures set forth in the plan or, if no such procedures are set forth in the
plan, in the manner determined by the board of directors.

(bc) If a for-profit conversiondomestication is abandoned under subsection (a) after
articles of for-profit conversiondomestication have been filed with delivered to the secretary of
state for filing but before the for-profit conversion has become effective, a statement that the for-
profit conversion has been abandoned in accordance with this section, signed by an officer or
other duly authorized representative of the domesticating nonprofit corporation, must be delivered to the secretary of state for filing prior to
therefore the articles of domestication are effective date of the for-profit conversion. The
statement takes The articles of abandonment take effect upon filing, and the for-profit
cconversiondomestication is abandoned and does not become effective. The articles of
abandonment must contain:

(1) the name of the domesticating corporation;

(2) the date on which the articles of domestication were filed by the secretary
of state; and
(3) a statement that the domestication has been abandoned in accordance with this section.


CROSS-REFERENCES

Approval of for-profit conversion domestication, see § 9.311242.

Deliver” defined, see § 1.40102.

“Domestic business nonprofit corporation” defined, see § 1.40102.

Effective time and date of filing, see §§ 1.23 and 9.32(e) 163.

Filing requirements, see § 1.24 160.

“Foreign nonprofit corporation” defined, § 102.

OFFICIAL COMMENT

Unless otherwise provided in a plan of for-profit conversion domestication, a domestic nonprofit corporation proposing to convert to for-profit status domesticate in another jurisdiction may abandon the transaction without member approval, even though the conversion domestication has been previously approved by the members.

Whether or not the domestication of Subchapter D

FOREIGN FOR-PROFIT DOMESTICATION AND CONVERSION

§ 9.40. Foreign for-profit domestication and conversion.

§ 9.41. Articles of domestication and conversion.

§ 9.42. Effect of foreign for-profit domestication and conversion.

§ 9.43. Abandonment of a foreign for-profit domestication and conversion.

§ 9.40. FOREIGN FOR-PROFIT DOMESTICATION AND CONVERSION

A foreign business corporation may become a domestic nonprofit corporation if the domestication and conversion is permitted by the law of the foreign jurisdiction.

Source Note: Patterned after Model Business Corporation Act, 3d Ed. § 9.40.

CROSS-REFERENCES

Abandonment of foreign for-profit domestication and conversion, see § 9.43.

Articles of domestication and conversion, see § 9.41.

Articles of incorporation following domestication and conversion, see § 9.41(b).

“Domestic nonprofit corporation” defined, see § 1.40.

Effect of foreign for-profit domestication and conversion, see § 9.42.

Excluded transactions, see § 9.02.

“Foreign business corporation” defined, see § 1.40.

OFFICIAL COMMENT

This subchapter authorizes a foreign business corporation to become a domestic-nonprofit corporation. The manner in which a foreign business corporation may be domesticated in this state and converted to a domestic nonprofit corporation must be adopted and approved will be
controlled may be abandoned is determined by the laws of the foreign jurisdiction.

The domestication of a foreign nonprofit corporation in this state as a domestic business corporation is outside the scope of this act. Similarly, the conversion of a foreign nonprofit corporation to a domestic unincorporated entity is also outside the scope of this act.

§ 9.41244. ARTICLES OF DOMESTICATION AND CONVERSION; EFFECTIVE DATE

(a) After the conversion of a foreign business corporation to a domestic nonprofit corporation has been authorized as required by the laws of the foreign jurisdiction, articles of domestication and conversion shall be signed by any officer or other duly authorized representative. The articles shall set forth:

    (a) Articles of domestication must be signed by the domesticating corporation and delivered to the secretary of state for filing.

(1) the name of the corporation immediately before the filing of the articles of domestication and conversion and, if that name is unavailable for use in this state or the corporation desires to change its name in connection with the domestication and conversion, a name that satisfies the requirements of Section 4.01;

(b) The articles of domestication must contain:

    (1) the name and governing jurisdiction of the domesticating corporation;

    (2) the name and governing jurisdiction of incorporation of the corporation immediately before the filing of the articles of domestication and conversion and the date the corporation was incorporated in that jurisdiction, the domesticated corporation; and

    (3) if the domesticating corporation is a domestic nonprofit corporation, a statement that the plan of domestication was approved in accordance with this [Subchapter] 12D or, if the domesticating corporation is a foreign nonprofit corporation, a statement that the domestication and conversion of the corporation in this state was duly authorized as required by the laws of the jurisdiction in which the corporation was incorporated immediately before its domestication and conversion in this state was approved in accordance with its organic law.

(b) The articles of domestication and conversion shall either contain all of the provisions that Section 2.02(a) requires to be set forth in articles of incorporation and any other desired provisions that Section 2.02(b) and (c) permits to be included in articles of incorporation, or shall have attached articles of incorporation. In either case, provisions that would not be required to be included in restated articles of incorporation may be omitted, except that the name and address of the initial registered agent of the domestic business corporation must be included.

(4) If the domesticated corporation is a domestic nonprofit corporation, its articles of incorporation, as an attachment, except that provisions that would not be required to be included in restated articles of incorporation may be omitted from the articles of the domesticated corporation and the articles do not need to be signed.
(e) The articles of domestication and conversion must be delivered to the secretary of state for filing, and take effect at the effective time provided in Section 1.23.

(d) In addition to the requirements of Section 1244(b), articles of domestication may contain any other provision not prohibited by law.

(d) If the foreign business corporation is authorized to transact business in this state under the foreign qualification provision of the Model Business Corporation Act, its certificate of authority shall be cancelled automatically on the effective date of its domestication and conversion.

(e) If the domesticated corporation is a domestic nonprofit corporation, the domestication becomes effective when the articles of domestication are effective. If the domesticated corporation is a foreign nonprofit corporation, the domestication becomes effective on the later of:

1. the date and time provided by the organic law of the domesticated corporation; or
2. when the articles are effective.


CROSS-REFERENCES

“Deliver” defined, see § 1.40.
“Domestic nonprofit corporation” defined, see § 1.40 102.
“Domesticated corporation” defined, §1201.
“Domesticating corporation” defined, §1201.
Effect of domestication and conversion, see § 9.421245.
Filing fees, see § 1.22.
Filing requirements, see § 1.29160.
“Foreign business corporation Organic law” defined, see § 1.40 102.
Required approvals, § 1203.

OFFICIAL COMMENT

The filing of articles of domestication and conversion under this section makes the domestication of a foreign business corporation in this state and its conversion to nonprofit status a matter of public record.  If the domesticated corporation is a domestic corporation, it also makes its articles of incorporation a matter of public record.  If the foreign corporation is authorized to transact business in this state, Section 9.41(d) automatically cancels its certificate of authority.
This section only applies in the situation where a foreign business corporation is
domesticating in this state and converting to nonprofit status. The domestication of a foreign
business corporation in this state as a domestic business corporation is not within the scope of
this act.

The filing requirements for articles of domestication and conversion filing are set forth in
Section 1.20160. Under Section 1.23, a document may specify a delayed date, the articles of
domestication are effective at the time of filing unless a later effective date is specified, except that in the articles within
the limits provided in Section 163. Under Section 163, a delayed effective date may not be later
than the 90th day after the date the document is filed. To avoid any question about a gap in the
continuity of its existence, it is recommended that a corporation use a delayed effective date
provision in its domestication and conversion filings in both this state and the foreign
jurisdiction, or otherwise coordinate those filings, so that the filings become effective at the
same time.

When the articles of domestication are effective under Section 1244(e), the domestication
transaction occurs if the domesticated entity is a domestic nonprofit corporation. A
domestication in which the domesticated entity is a foreign nonprofit corporation will usually
also take effect when the articles of domestication take effect because the best practice will be to
coordinate the filings that need to be made in each jurisdiction so that they take effect at the same
time. Because of the possibility, however, that the filing in the foreign jurisdiction will take
effect at a different time, Section 1244(e) provides that the domestication transaction itself will
take effect at the later of (i) when the articles of domestication take effect, and (ii) when the
domestication takes effect under the law of the foreign jurisdiction. This rule avoids the
possibility that the domestication will take effect in the domestic jurisdiction before it takes
effect in the foreign jurisdiction, which would produce the undesirable result that the
domesticating domestic nonprofit corporation would cease to appear as an active entity on the
records of this state before it appears as its active domesticated self on the records of the foreign
jurisdiction.

It is only necessary for the filing office to record the effective date of the articles of
domestication and the filing office does not need to be concerned with the effective date of the
domestication itself. Persons wishing to determine the effective date of a domestication will be
able to do so by consulting the records of the filing offices in each jurisdiction.

§ 9.421245. EFFECT OF FOREIGN FOR-PROFIT DOMESTICATION-AND
CONVERSION

(a) When a domestication and conversion of a foreign business corporation to a
domestic nonprofit corporation becomes effective:

(1) the title to all real and personal property, both tangible and intangible, of
the corporation remains in the property owned by, and every contract right possessed by, the
domesticating corporation are the property and contract rights of the domesticated corporation
without transfer, reversion, or impairment;
(2) all debts, obligations, and other liabilities of the domesticating corporation remain the debts, obligations, and other liabilities of the domesticated corporation;

(3) an action or proceeding pending against the name of the domesticated corporation continues against themay but need not be substituted for the name of the domesticating corporation as if the domestication and conversion had not occurred in any pending proceeding;

(4) the articles of domestication and conversion, or the articles of incorporation attached to the articles of domestication and conversion, constitute the articles of incorporation of the domesticated corporation become effective;

(5) the memberships, securities of the domesticating corporation are reclassified into memberships, obligations, rights to acquire memberships or securities of the corporation, or cash or other property shall be issued or paid as provided pursuant to the laws of the foreign jurisdiction; and in accordance with the terms of the domestication, and the members of the domesticating corporation are entitled only to the rights provided to them by those terms; and

(6) the domesticated corporation is deemed to:

   (i) be a domesticated corporation for all purposes; and

   (ii) be the same corporation without interruption as the foreign business corporation.; and

   (iii) deemed to have been incorporated on the date the domesticating corporation was originally incorporated.

(b) Except as otherwise provided in the organic law or organic rules of a foreign nonprofit corporation that is the domesticating corporation, the interest holder liability of a shareholder of the foreign business corporation who becomes a member of the domestic nonprofit corporation in a foreign corporation that is domesticated into this state who had interest holder liability in respect of the domesticating corporation before the domestication and conversion becomes effective shall be as follows:

(1) The domestication and conversion does not discharge any interest holder liability under the laws of the foreign jurisdiction to the extent any such prior interest holder liability with respect to any interest holder liabilities that arose before the domestication becomes effective time of the articles of domestication and conversion.

(2) The member does not have interest holder liability under the laws of the foreign jurisdiction for any debt, obligation or liability of the corporation that arises after the effective time of the articles of domestication and conversion.
The provisions of the laws of the foreign jurisdiction organic law of the domesticating corporation shall continue to apply to the collection or discharge of any interest holder liabilities preserved by paragraph Section 1245(b)(1), as if the domestication and conversion had not occurred.

The member shall have such rights of contribution from other members persons as are provided by the laws of the foreign jurisdiction organic law of the domesticating corporation with respect to any interest holder liabilities preserved by paragraph Section 1245(b)(1), as if the domestication and conversion had not occurred.

The member shall not, by reason of such prior interest holder liability, have interest holder liability with respect to any interest holder liabilities that are incurred after the domestication becomes effective.

(c) A shareholder of a foreign business corporation member who becomes subject to interest holder liability for some or all of the debts, obligations or liabilities of the domesticated corporation as a result of the domestication and conversion in this state shall have such interest holder liability only for those debts, obligations or liabilities of the corporation that arise after the time of the articles of domestication and conversion.

(d) A domestication does not constitute or cause the dissolution of the domesticating corporation.


CROSS-REFERENCES

“Domestic nonprofit Domesticated corporation” defined, see § 1.40 1201.
“Foreign business Domesticating corporation” defined, see § 1.40 1201.
“Interest holder liability” defined, see § 1.40 102.
“Organic law” and “organic rules” defined, § 102.

OFFICIAL COMMENT

When a The domesticated corporation is domesticated in this state and converted to nonprofit status under this subchapter, the corporation becomes a domestic the same entity as the domesticating corporation, and it continues without interruption. It becomes a nonprofit corporation in the resulting jurisdiction with the same status as if it had been originally incorporated under this act. Thus, the The domesticated nonprofit corporation will have has all of the powers, privileges, and rights granted to corporations originally incorporated in this state and will be subject to all of the duties, liabilities, and limitations imposed on domestic nonprofit corporations.
Thus, a domestication and conversion under this subchapter is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer, or assignment. Nor does it give rise to a claim that a contract with the corporation is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a domestication or conversion.

See, however, Section 1240(c) with respect to special rules regarding protected agreements. All pending proceedings involving the domesticating corporation are continued.

Section 9.42(a)(1)-(3) are similar to Section 11.07(a)(3)-(5) with respect to the effects of a merger. Although Section 9.42(a)(1)-(3) would be implied by the general rule stated in Section 9.42(a)(6) even if not stated expressly, those rules have been included to avoid any question as to whether a different result was intended.

Section 9.42(b) preserves the interest holder liability of members of the domesticating foreign corporation only for interest holder liabilities to the extent they arise before the domestication and conversion becomes effective. Interest holder liability is not preserved for subsequent changes in an underlying liability, regardless of whether a change is voluntary or involuntary. Section 1245(c) similarly provides that interest holder liability with respect to the domesticated corporation only relates to interest holder liabilities that arise after the domestication.

Section 9.42(e) is an optional provision that will not be needed in most states. It should be included only when the statutory laws of a state impose personal liability on the members of a nonprofit corporation that is not imposed on the shareholders of a business corporation.

§ 9.43 ABANDONMENT OF A FOREIGN FOR-PROFIT DOMESTICATION AND CONVERSION

If the domestication and conversion of a foreign business corporation to a domestic nonprofit corporation is abandoned in accordance with the laws of the foreign jurisdiction after articles of domestication and conversion have been filed with the secretary of state, a statement that the domestication and conversion has been abandoned, signed by an officer or other duly authorized representative, must be delivered to the secretary of state for filing. The statement takes effect upon filing and the domestication and conversion is abandoned and does not become effective.

Source Note: Patterned after Model Business Corporation Act, 3d Ed. § 9.43.

CROSS REFERENCES

“Deliver” defined, see § 1.40.
“Domestic nonprofit corporation” defined, see § 1.40.
Effective time and date of filing, see § 1.23.
Filing requirements, see § 1.20.
“Foreign business corporation” defined, see § 1.40.

OFFICIAL COMMENT

Whether or not the domestication and conversion of a foreign business corporation may be abandoned is determined by the laws of the foreign jurisdiction.

[Subchapter] E

ENTITY CONVERSION

§ 9.50 Entity conversion authorized.

Conversion.
§ 9.50. **ENTITY 1250. CONVERSION AUTHORIZED**

(a) By complying with [Subchapter] 12A (preliminary provisions) and this [Subchapter] 12E, a domestic nonprofit corporation may become a domestic unincorporated entity pursuant to a plan of entity conversion:

1. a domestic eligible entity; or

(b) A domestic nonprofit corporation may become a foreign unincorporated eligible entity if the entity conversion is permitted by the laws of the foreign jurisdiction.

(b) By complying with [Subchapter] 12A, this [Subchapter] 12E and applicable provisions of its organic law, a domestic eligible entity may become a domestic nonprofit corporation if the conversion is authorized by the law of the foreign entity’s governing jurisdiction.

(c) A domestic unincorporated entity may become a domestic nonprofit corporation. If the organic law or organic rules of a domestic unincorporated eligible entity do not provide procedures for, but do not prohibit, the approval of an entity conversion, the plan of conversion must be adopted and may nonetheless be approved, and the entity conversion effected, in the same manner as a merger of the unincorporated entity, and its interest holders will be entitled to appraisal rights if appraisal rights are available upon any type of merger under the organic law of the unincorporated eligible entity. If the organic law or organic rules of a domestic unincorporated eligible entity do not provide procedures for the approval of either an entity conversion or a merger, a plan of entity conversion must be adopted and approved, the entity conversion effected, and appraisal rights exercised, in accordance with the procedures in this [subchapter]. Without limiting the by the unanimous consent of all the interest holders of the eligible entity. In either case, the conversion thereafter may be effected as provided in the other provisions of this subsection, a domestic unincorporated entity whose organic law does not provide procedures for the approval of an entity conversion is subject to subsection (e) and Section 9.52(7). For purposes of applying this [subchapter]-[Subchapter] 12A.

1. the unincorporated entity, its interest holders, interests and organic records taken together, are deemed to be a domestic nonprofit corporation, members, memberships and articles of incorporation, respectively and vice versa, as the context may require; and

2. if the business and affairs of the unincorporated entity are managed by a group of persons that is not identical to the interest holders, that group is deemed to be the board of directors.
(d) **By complying with the provisions of [Subchapter] 12A and this [Subchapter] 12E applicable to foreign unincorporated entities, a foreign eligible entity may become a domestic nonprofit corporation if the organic law of the foreign jurisdiction authorizes eligible entity permits it to become a nonprofit corporation in another jurisdiction.**

(e) If any debt security, note, or similar evidence of indebtedness for money borrowed, whether secured or unsecured, or a contract of any kind, issued, incurred, or executed by a protected agreement of a domestic nonprofit corporation before the effective date of this subchapter, applies to a merger, or a domestic eligible entity whose organic law does not provide for conversions, that is the converting entity in effect immediately before the conversion becomes effective contains a provision applying to a merger or change of control of the corporation or entity and the document agreement does not refer to an entity a conversion of the corporation or entity, the provision shall be deemed to apply to an entity applies to a conversion of the corporation or entity as if the conversion were a merger, until such time as the provision is first amended subsequent to that after the enactment date.

(f) **See Sections 9.02 (prohibited transactions) and 9.03 (restrictions and required approvals).**

**Source Note:** Patterned after Model Business Corporation Act, 3d Ed. (2016 Revision), § 9.509.30.

**CROSS-REFERENCES**

“Converted entity” defined, § 1201.

“Converting entity” defined, § 1201.

“Domestic Corporation,” “nonprofit corporation,” “domestic corporation” and “domestic nonprofit corporation” defined, see § 1.40 102.

“Domestic-unincorporated” and “eligible entity” defined, see § 1.40 102.

“Enactment date” defined, § 1201.

Excluded transactions, see § 9.02 1202.

“Foreign-unincorporated” and “eligible entity” defined, see § 1.40 102.

“Interest holder” defined, see § 1.40 102.

“Interest holder Membership” defined, see § 1.40 102.

“Organic document law” and “organic rules” defined, see § 1.40 102.

“Organic law Protected agreement” defined, see § 1.40 1201.

Required approvals, § 1203.

**OFFICIAL COMMENT**

1. **Scope of Subchapter**

Subchapter 12E authorizes a domestic nonprofit corporation to become a domestic eligible entity. It also authorizes a domestic nonprofit corporation to become a foreign eligible entity, but only if the conversion is permitted by the laws under which the foreign eligible entity will be organized. Further, Subchapter 12E authorizes a domestic or foreign eligible entity to become a domestic nonprofit corporation. Whether and on what terms a foreign eligible entity is authorized to convert is governed by its organic law. If a foreign eligible entity is so authorized,
it must comply with the provisions of this Subchapter 12E applicable to foreign entities. For example, it must file articles of conversion under Section 1253(a), and Section 1253(b) requires its articles of incorporation to meet the requirements of Section 202.

Subject to certain restrictions which are discussed below, this subchapter authorizes the following types of conversion:

1. a domestic nonprofit corporation to a domestic unincorporated entity,
2. a domestic nonprofit corporation to a foreign unincorporated entity,
3. a domestic unincorporated entity to a domestic nonprofit corporation,
4. a foreign unincorporated entity to a domestic nonprofit corporation.

This subchapter provides for the conversion of a domestic unincorporated entity only to a domestic nonprofit corporation because the conversion of a domestic unincorporated entity to another form of unincorporated entity or to a domestic or foreign business corporation would be outside of the scope of this act. This subchapter similarly does not provide for the conversion of a foreign corporation or unincorporated entity to a domestic unincorporated entity. States may nonetheless wish to consider generalizing the provisions of this subchapter to authorize those types of conversions.

2. PROCEDURAL REQUIREMENTS

The concept of entity conversion as authorized by this subchapter is not found in many laws governing the incorporation or organization of corporations and unincorporated entities. In recognition of that fact, the rules in this section vary depending on whether the corporation or unincorporated entity desiring to convert pursuant to this subchapter is incorporated or organized under the laws of this state or of some other jurisdiction.

If the organic law of under which a domestic unincorporated eligible entity is organized does not expressly authorize it to convert to a domestic nonprofit corporation, it is intended that the first sentence of subsection (c) will provide the necessary authority. Until such time as the various organic laws of each form of unincorporated entity have been amended to provide procedures for adopting and approving a plan of entity conversion, subsection (c) provides those procedures by reference to the procedures for mergers under the organic law of the unincorporated entity or, if there are no such merger provisions, by reference to the provisions of this subchapter applicable to domestic nonprofit corporations. Section 1250(c) provides procedures for such an entity to adopt and effect a plan of conversion.

Subsection (d) provides that a foreign unincorporated entity may convert to a domestic nonprofit corporation pursuant to this subchapter only if the law under which the foreign unincorporated entity is organized permits the conversion. This rule avoids issues that could arise if this state authorized a foreign unincorporated entity to participate in a transaction in this state that its home jurisdiction did not authorize. This subchapter does not specify the procedures that a foreign unincorporated entity must follow to authorize a conversion under this subchapter on the assumption that if the organic law of the foreign unincorporated entity authorizes the conversion that law will also provide the applicable procedures and any safeguards considered necessary to protect the interest holders of the unincorporated entity.

Section 1250(e) provides special rules about “protected agreements”—certain documents and agreements in effect before the date (defined as the “enactment date”) of Chapter 12 (or any similar predecessor statute).
3. **TRANSITIONAL RULE**

Because the concept of entity conversion is new, a person contracting with a corporation or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this subchapter should not be charged with the consequences of not having dealt with the concept of entity conversion in the context of those special rights. Section 9.50(e) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, a corporation is a party to a contract that provides that the corporation cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to the conversion of the corporation to a domestic or foreign unincorporated entity. If the corporation fails to obtain the consent, the result will be that the other party will have the same rights it would have if the corporation were to participate in a merger without the required consent.

The purpose of Section 9.50(e) is to protect the third party to a contract with the corporation, and Section 9.50(e) should not be applied in such a way as to impair unconstitutionally the third party’s contract. As applied to the corporation, Section 9.50(e) is an exercise of the reserved power of the state legislature set forth in Section 1.02.

The transitional rule in Section 9.50(e) ceases to apply at such time as the provision of the agreement or debt instrument giving rise to the special rights is first amended after the effective date of this subchapter because at that time the provision may be amended to address expressly an entity conversion of the corporation.

Section 9.50(e) will also apply in the case of an unincorporated entity whose organic law does not provide procedures for the approval of an entity conversion because Section 9.50(e) treats such an unincorporated entity as a nonprofit corporation for purposes of Section 9.50(e).

A similar transitional rule governing the application to an entity conversion of special voting rights of directors and members and other internal corporate procedures is found in Section 9.52(6).

§ 9.511251. **PLAN OF ENTITY CONVERSION**

(a) A plan of entity domestic nonprofit corporation may convert to an eligible entity under this [Subchapter] 12E by approving a plan of conversion. A domestic eligible entity whose organic law does not provide for conversions may convert to a domestic nonprofit corporation under this [Subchapter] 12E by approving a plan of conversion. In either case, the plan of conversion must include:

(1) a statement of the name and type of unincorporated entity the surviving entity will be and, if it will be a foreign unincorporated entity, its jurisdiction of organization; the converting entity;

(2) the terms and conditions of the conversion name, governing jurisdiction, and type of entity of the converted entity;

(3) the manner and basis of converting the memberships in the domestic nonprofit corporation following its conversion into interests of the converting entity, if any, into eligible interests or other securities, obligations, rights to acquire interests or other securities, cash, other property, or any combination of the foregoing; and
(4) the other terms and conditions of the conversion;

(5) the converted entity’s proposed public organic record, if any; and

(46) the full text of the organic rules of the converted entity that are to be in a
record, as they will be in effect immediately following the conversion, of the organic
documents of the surviving entity becomes effective.

(b) The plan of entity conversion may also include a provision that the plan may be
amended prior to filing articles of entity conversion, except that subsequent to approval of the
plan by the members the plan may not be amended to change:

In addition to the requirements of
Section 1251(a), a plan of conversion may contain any other provision not prohibited by law.

(1) the amount or kind of memberships or other securities, interests, obligations,
rights to acquire memberships, securities or interests, cash, or other property to be
received under the plan by the members;

(2) the organic documents that will be in effect immediately following the
conversion, except for changes permitted by a provision of the organic law of the
surviving entity comparable to Section 10.05; or

(3) any of the other terms or conditions of the plan if the change would adversely
affect any of the members in any material respect.

(c) Terms The terms of a plan of entity conversion may be made dependent upon facts
objectively ascertainable outside the plan in accordance with Section 1.20(e) (extrinsic facts
in filed record).

Source Note: Patterned after Model Business

CROSS-REFERENCES

Abandonment of entity Amendment or abandonment of plan of conversion, see §
conversion, see § 9.51 1254.
Application to domestic unincorporated eligible entities, see § 9.50(e)1250.
Approval of plan, see § 9.52 1252.
“Domestic nonprofit corporation” defined, see § 1.40.
“Domestic unincorporated entity” defined, see § 1.40.
Effect of entity conversion, see § 9.54 1255.
“Foreign unincorporated Eligible entity” defined, see § 1.40 102.
“Interest” defined, see § 1.40 102.
“Interest holder” defined, see § 1.40.
“Organic documents” defined, see § 1.40 102.
“Surviving-entity” defined, see § 9.50(e)(2).
“Unincorporated entity” defined, see § 1.40.

OFFICIAL COMMENT
1. TERMS AND CONDITIONS OF ENTITY CONVERSION

Under Section 1251(a)(5), the plan of conversion must include the organic rules of the converted entity that are to be in a record. Those organic rules should comply with the organic law governing the converted entity. Section 1251(a) lists the mandatory provisions that must be in the plan. Section 1251(b) authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

This subchapter imposes virtually no restrictions or limitations on the terms and conditions of an entity conversion, except for those set forth in Section 9.51(b) concerning provisions in a plan of entity conversion for amendment of the plan after it has been approved by the members and those imposed under Section 9.03. Memberships in a domestic nonprofit corporation that converts to an unincorporated entity may be reclassified into interests or other securities, obligations, rights to acquire interests or other securities, cash or other property. The capitalization of the entity will need to be restructured in the conversion and its organic documents or articles of incorporation may be amended by the articles of entity conversion in any way deemed appropriate. When a foreign unincorporated entity converts to a domestic nonprofit corporation, the laws of the foreign jurisdiction determine which of the foregoing actions may be taken.

Section 9.51(a) requires that the terms and conditions be set forth in the plan of entity conversion. The plan of entity conversion is not required to be publicly filed, and the articles of entity conversion that are filed with the secretary of state are not required to include a plan of entity conversion. See Section 9.53.

The list in Section 9.51(a) of required provisions in a plan of entity conversion is not exhaustive and the plan may include any other provisions that may be desired.

2. ADOPTION AND APPROVAL; ABANDONMENT

The conversion of a domestic nonprofit corporation to a foreign unincorporated entity must be adopted and approved as provided in Section 9.52. Under Section 9.55, the board of directors of a domestic nonprofit corporation may abandon an entity conversion before its effective date even if the plan of entity conversion has already been approved by the corporation’s members.

§ 9.52. ACTION ON A PLAN

(a) In the case of an entity conversion of a domestic nonprofit corporation to a domestic or foreign unincorporated entity, an eligible entity, or of a domestic eligible entity whose organic law does not provide for conversions to a domestic nonprofit corporation, the plan of conversion must be adopted in the following manner:

(1) The plan of entity conversion must first be adopted by the board of directors. The governors may set conditions for approval of the plan of conversion by the members or the effectiveness of the plan of conversion. If the converting entity does not have any interest holders entitled to vote on the conversion, a plan of conversion shall be deemed adopted by the corporation when it has been adopted by the governors.
(2) After adopting except as provided in Section 1252(a)(1), the plan of entity conversion, the board of directors must submit the plan to the members for their approval if there are members entitled to vote on the plan. The board of directors must also transmit to the members a recommendation that the members must then be approved by the interest holders. In submitting the plan of conversion to the interest holders for approval, the governors must recommend that the interest holders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the members the basis for that determination.

(3) The board of directors may condition its submission of the plan of entity conversion to the members on any basis.

(4) If the plan of conversion is required to be approved by the interest holders, and if the approval of the members is to be given at a meeting, the corporation must notify each member entitled to vote of the meeting of members at which the plan of entity conversion is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan of conversion and must contain or be accompanied by a copy or summary of the plan. The notice must include or be accompanied by a copy of the organic documents that are to be in a record as they will be in effect immediately after the entity conversion.

(5) Unless the articles of incorporation, the bylaws, or the board of directors acting pursuant to paragraph (3), requires a greater vote or a greater number of votes to be present, the approval of the plan of entity conversion by the members requires the approval of each interest holder at a meeting at which a quorum exists consisting of a majority of the votes entitled to vote, voting as a cast on the plan and the approval of each separate voting group at a meeting at which a quorum of the voting group exists is present consisting of a majority of the votes entitled to be cast on the plan by that voting group.

(6) In addition to the adoption and approval of the plan of conversion by the governors and interest holders as required by this Section 1252, the plan of conversion must also...
be approved in a record by any person or group of persons whose approval is required under
Section 930 (approval by third persons) to amend the articles of incorporation or bylaws of a
converting entity that is a domestic nonprofit corporation.

(b) See Section 1203 (required approvals).

Source Note: Patterned after Model Business
Corporation Act, 3d Ed. (2016 Revision), § 9.529.32.

CROSS-REFERENCES

Abandonment of entity conversion, see § 9.54.1254.
Application to domestic unincorporated eligible entities, see § 9.50(e).1250.
Contents of plan of entity conversion, see § 9.51.1251.
“Domestic nonprofit corporation” defined, see § 1.40.
“Domestic unincorporated Eligible entity” defined, see § 1.40.102.
“Foreign unincorporated entity” defined, see § 1.40.
“Interest holder liability” defined, see § 1.40.102.
“Organic records” defined, see § 1.40.102.
“Voting group” defined, § 102.

OFFICIAL COMMENT

1. IN GENERAL

This section Section 1252 sets forth the rules for adoption and approval of a plan of entity
conversion by a domestic nonprofit corporation. The manner in which a domestic unincorporated
entity must adopt and approve a plan of entity conversion will be controlled by its organic or by
the application of the provisions of this subchapter by analogy as provided in Section 9.50(e).
The manner in which the conversion of a foreign unincorporated eligible entity to a domestic
nonprofit corporation must be adopted and approved will be controlled by the laws of the
foreign jurisdiction. The provisions of this section follow generally the rules in Chapter 11
for adoption and approval of a plan of merger or membership exchange. The manner in which the
conversion of a domestic eligible entity to a domestic nonprofit corporation must be adopted and
approved will be controlled by the organic law of the eligible entity, as supplemented by Section
1250(b), if applicable.

A When submitting a plan of entity conversion must be adopted by shareholders, the
board of directors. Although Section 9.52(2) permits the board to refrain from making a
recommendation to the members that they approve the plan, that does not change the underlying
requirement that the board adopt the plan before it is submitted to the members. Separate
approval by the members of a plan of entity conversion is required if there are members entitled
to vote on the conversion. The board might exercise the exception where the number of directors having a
conflicting interest makes it inadvisable for the board to recommend the conversion or where the
board is evenly divided as to the merits of the conversion but is able to agree that shareholders
should be permitted to consider it.
2. QUORUM AND VOTING

Section 1252(a)(1) permits the board of directors to condition its submission of a plan of conversion to the members or the effectiveness of the plan of conversion. Among the conditions that a board of directors might impose are that the plan will not be deemed approved unless it is approved by a specified vote of the members, or by one or more specified classes or series of members, voting as a separate voting group, or by a specified percentage of disinterested members.

Section 9.52(5) provides that if the corporation has more than one class of 1252(a)(4) sets forth quorum and voting requirements applicable to a member vote to approve a plan of conversion. It requires both the vote of the members entitled to vote, approval of an entity conversion requires the approval on the plan, and the vote of each class or series of members voting as a separate voting group at a meeting at which there exists a quorum consisting of at least a majority of the votes entitled to be cast on the plan by that class. If a quorum is present, then under Sections 7.24 and 7.25 the plan will be approved if more votes are cast in favor of the plan than against it by each voting group entitled to vote on the plan. If the members of a corporation are not divided into two or more classes, all of the members together will constitute a single class for purposes of Section 9.52(5).

In lieu of approval at a meeting of the members, member approval can may be given by the consent of all the members entitled to vote on the domestication, under the procedures set forth in Section 7.04704.

3. TRANSITIONAL RULE

Because the concept of entity conversion is new, persons who drafted and negotiated special rights for directors or members before the enactment of this subchapter should not be charged with the consequences of not having dealt with the concept of entity conversion in the context of those special rights. Section 9.52(7) accordingly provides a transitional rule that is intended to protect such special rights. If, for example, the articles of incorporation provide that the corporation cannot participate in a merger without a supermajority vote of the members, that supermajority requirement will also apply to the conversion of the corporation to a domestic or foreign unincorporated entity.

The purpose of Section 9.52(6) is to protect persons who negotiated special rights for directors or members whether in a contract with the corporation or in the articles of incorporation or bylaws, and Section 9.52(6) should not be applied in such a way as to impair unconstitutionally the rights of any party to a contract with the corporation. As applied to the corporation, Section 9.52(6) is an exercise of the reserved power of the state legislature set forth in Section 1.02.

The transitional rule in Section 9.52(6) ceases to apply at such time as the provision of the articles of incorporation, bylaws or agreement giving rise to the special rights is first amended after the effective date of this subchapter because at that time the provision may be amended to address expressly an entity conversion of the corporation.

Section 9.52 (a)(6) will also apply in the case of an unincorporated entity whose organic law does not provide procedures for the approval of an entity conversion because Section 9.50(c) treats such an unincorporated entity as applies only in situations where a member of a domestic nonprofit corporation for purposes of Section 9.52(6), is becoming subject to “interest holder liability,” as defined in Section 102, with respect to the converted entity. Approval of a
A similar transitional rule with regard to the application to an entity conversion of special contractual rights of third parties is found in Section 9.50(e).

§ 1253.  AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION

(a) A plan of conversion of a domestic nonprofit corporation, or a domestic eligible entity whose organic law does not provide for conversions, may be amended, except as otherwise provided in the plan, and before articles of conversion have become effective.

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

(2) in the manner provided in the plan, except an interest holder that was entitled to vote on or consent to approval of the plan is entitled to vote on or consent to any amendment of the plan that will change:

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

(ii) the organic rules of the converted entity that will be in effect immediately after the conversion becomes effective, except for changes that do not require approval of the interest holders of the converted entity under its organic law or organic rules; or

(iii) any of the other terms or conditions of the plan, if the change would adversely affect the member in any material respect.

(b) After a plan of conversion has been approved and before the articles of conversion are effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic nonprofit corporation or domestic eligible entity whose organic law does not provide for conversions may approve abandonment in the same manner as the plan was approved.

(c) If a plan of conversion is abandoned after articles of conversion have been delivered to the secretary of state for filing and before the articles are effective, articles of abandonment, signed by the converting entity, must be delivered to the secretary of state for filing before the articles of conversion become effective. The articles of abandonment take effect on filing, and the conversion is abandoned and does not become effective. The articles of abandonment must contain:

(1) the name and governing jurisdiction of the converting entity;
(2) the date on which the articles of conversion were filed by the secretary of state; and

(3) a statement that the conversion has been abandoned in accordance with this Section 1253.

Source Note: Model Business Corporation Act (2016 Revision), § 9.34.

CROSS-REFERENCES

“Domestic nonprofit corporation” defined, § 102.
“Interests” defined, § 102.
“Organic law” and “organic rules” defined, § 102.

OFFICIAL COMMENT

Section 1253(a)(2) permits the plan of conversion to be amended in the manner provided in the plan, subject to certain cases requiring a shareholder vote on the amendment. If the plan has no provisions with respect to its amendment, it may be amended under Section 1253(a)(1) in the same manner as it was approved.

Under Section 1253(b), unless otherwise provided in the plan of conversion, a domestic nonprofit corporation may abandon a conversion without member approval, even though the transaction has been previously approved by the members. The power of a foreign or domestic eligible entity to abandon a conversion will be determined by its organic law.

§ 9.531254. ARTICLES OF ENTITY CONVERSION; EFFECTIVE DATE

(a) After the Articles of conversion of a domestic nonprofit corporation to, or a domestic or foreign unincorporated entity has been adopted and approved as required by this [act], articles of entity conversioneligible entity whose organic law does not provide for conversions, must be signed on behalf of by the converting corporation by any officer or other duly authorized representative. The articles must: entity and delivered to the secretary of state for filing.

(1) set forth the name of the corporation immediately before the filing of the articles of entity conversion and the name to which the name of the corporation is to be changed, which shall be a name that satisfies the organic law of the surviving entity if the surviving entity is a domestic entity;

(b) The articles of conversion must contain:

(2) state the type of unincorporated entity that the surviving entity will be and its jurisdiction of organization;

(31) state that the plan the name, governing jurisdiction, and type of entity conversion was duly approved in the manner required by this [act] of the converting entity;
(4) if the surviving entity is a domestic filing entity, either contain all of the
provisions required to be set forth in its public organic record and any other
desired provisions that are permitted, or have attached a public organic record.
(2) the name, governing jurisdiction, and type of entity of the converted entity;

(b) After the conversion of a domestic unincorporated entity to a domestic nonprofit
corporation has been adopted and approved as required by the organic law of the
unincorporated entity, articles of entity conversion must be signed on behalf of the
unincorporated entity by any officer or other duly authorized representative. The articles
must:
(3) if the converting entity is:

(1) set forth the name of the unincorporated entity immediately before the filing of
the articles of entity conversion and the name to which the name of the
unincorporated entity is to be changed, which shall be a name that satisfies the
requirements of Section 4.01;

(i) a domestic nonprofit corporation or a domestic eligible entity

whose organic law not provide for conversions, a statement that the plan of conversion was
approved in accordance with this [Subchapter] 12E; or

(ii) set forth a foreign nonprofit corporation or any other eligible entity,

a statement that the plan of entity conversion was duly approved by the corporation or entity in
accordance with its organic law of the unincorporated entity;

(3) either contain all of the provisions that Section 2.02(a) requires to be set forth in
articles of incorporation and any other desired provisions that Section 2.02(b) and
(c) permits to be included in articles of incorporation, or have attached articles of
incorporation.

(4) If the converted entity is:

(c) After the conversion of a foreign unincorporated entity to a domestic nonprofit
corporation has been authorized as required by the laws of the foreign jurisdiction,
articles of entity conversion shall be executed on behalf of the foreign unincorporated
entity by any officer or other duly authorized representative. The articles must:

(i) a domestic filing entity, its public organic record, as an attachment,

except that provisions that would not be required to be included in a restated public organic
record may be omitted; or

(ii) a domestic limited liability partnership, its statement of

qualification, as an attachment;

(iii) a foreign eligible entity that is not a registered foreign entity, a

mailing address for the surviving entity to which the secretary of state may send any process
served on the secretary of state pursuant to Section 1255(e) (effect of conversion).
(c) In addition to the requirements of Section 1254(b), the articles of conversion may contain any other provision not prohibited by law.

(d) If the converted entity is:

(1) set forth the name of the unincorporated entity immediately before the filing of the articles of entity conversion and the name to which the name of the unincorporated entity is to be changed, which shall be a name that satisfies a domestic nonprofit corporation, its articles of incorporation must satisfy the requirements of Section 4.01-202 (articles of incorporation), except that the articles do not need to be signed, and provisions that would not be required to be included in restated articles may be omitted; or

(2) domestic eligible entity, its public organic record, if any, must satisfy the requirements of the organic law of this state, except that the public organic record does not need to be signed, and provisions that would not be required to be included in restated public organic record may be omitted.

(e) A plan of conversion that is signed by the converting entity and meets all of the requirements of Section 1254(b) may be delivered to the secretary of state for filing instead of articles of conversion and on filing has the same effect. If a plan of conversion is filed as provided in this Section 1254(e), references in this [Subchapter] 12E to articles of conversion refer to the plan of conversion filed under this Section 1254(e).

(f) The articles of conversion are effective on the date and time of filing or the later date and time specified in the statement of conversion.

(g) If a converted entity is a domestic entity, the conversion becomes effective when the articles of conversion are effective. With respect to a conversion in which the converted entity is a foreign eligible entity, the conversion itself becomes effective at the later of:

(1) the date and time provided by the organic law of that eligible entity; or

(2) set forth the jurisdiction under the laws of which the unincorporated entity was organized immediately before the filing of the articles of entity conversion and the date on which the unincorporated entity was organized in that jurisdiction; become effective.

(3) set forth a statement that the conversion of the unincorporated entity was duly approved in the manner required by the law of the foreign jurisdiction; and

(4) either contain all of the provisions that Section 2.02(a) requires to be set forth in articles of incorporation and any other desired provisions that Section 2.02(b) and (c) permits to be included in articles of incorporation, or have attached articles of incorporation; except that, in either case, provisions that would not be required to be included in restated articles of incorporation of a domestic nonprofit corporation may be omitted.

(d) The articles of entity conversion must be delivered to the secretary of state for filing, and take effect at the effective time provided in Section 1.23. Articles of entity conversion
filed under Section 9.53(a) or (b) may be combined with any required conversion filing under the organic law of the domestic unincorporated entity if the combined filing satisfies the requirements of both this section and the other organic law.

(e) If the converting entity is a foreign unincorporated entity that is authorized to transact business in this state under a provision of law similar to [Chapter] 15, its certificate of authority or other type of foreign qualification is cancelled automatically on the effective date of its conversion.


CROSS-REFERENCES

“Deliver” defined, see § 1.40.
“Domestic nonprofit corporation” defined, see § 1.40 102.
“Domestic unincorporated entity” defined, see § 1.40.
Effect of entity conversion, see § 9.55 1255.
Effective time and date of filing, § 163.
“Filing Eligible entity” defined, see § 1.40 102.
“Filing feesentity” defined, see § 1.22 102.
Filing requirements, see § 1.20 160.
“Foreign unincorporated entity” defined, see § 1.40.
“Organic law” defined, see § 1.40 102.
“Public organic record” defined, see § 1.40 102.
Restrictions and requiredRequired approvals, see § 9.03 1203.

“Surviving entity” defined, see § 9.50(e)(2).
“Unincorporated entity” defined, see § 1.40.

OFFICIAL COMMENT

The filing of articles of entity conversion makes the conversion a matter of public record. Where the surviving converted entity is organized under the laws of this state, the filing also makes of a public record of its articles of incorporation or public organic record. If the converting entity is a foreign unincorporated entity that is authorized to transact business in this state, Section 9.53(e) automatically cancels its certificate of authority.

The filing requirements for articles of entity conversion filing are set forth in Section 1.20 160. Under Section 1.23, a document may specify a delayed 163, the articles of conversion are effective time and on the date, and if it does so the document becomes effective at the time of filing unless a later effective date is specified, except in the articles within the limits provided in Section 163. Under that section, a delayed effective date may not be later than the 90th day after the date the document is filed. In cases where an entity is changing the jurisdiction in which it is incorporated or otherwise organized, it is recommended that the entity use a delayed effective date provision in its entity conversion filings in both this state and the foreign jurisdiction, or otherwise coordinate those filings, so that the filings becoming effective at the same time. This will avoid any question about a gap in the continuity of its existence that might
otherwise arise as a result of those filings taking effect at different times, Section 1254(f) provides when the conversion becomes effective.

If a conversion involves a domestic unincorporated entity whose organic law also requires a filing to effectuate the conversion, Section 9.53(d) permits the filings under that organic law and this act to be combined so that only one document need be filed with the secretary of state.

It is only necessary for the filing office to record the effective date of the articles of conversion and the filing office does not need to be concerned with the effective date of the conversion itself. Persons wishing to determine the effective date of a conversion involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

§ 9.541255. EFFECT OF ENTITY CONVERSION

(a) Except as otherwise provided in Section 9.03, when a conversion under this subchapter becomes effective:

(1) the title to all real and personal property, both tangible and intangible, of the converting entity remains in the surviving entity without transfer, reversion or impairment;

(2) the debts, obligations and other liabilities of the converting entity remain the debts, obligations and other liabilities of the surviving entity;

(3) an action or proceeding pending against except as otherwise provided by law or the plan of conversion, all the rights, privileges, immunities, powers, and purposes of the converting entity continues against the surviving entity as if the conversion had not occurred remain vested in the converting entity;

(4) the name of the converted entity may be substituted for the name of the converting entity in any pending action or proceeding;

(5) in the case of a surviving entity that is a filing entity, its articles of incorporation or public organic record and its private organic rules become effective;

(6) the converted entity’s private organic rules are effective;

(7) in the case of a surviving entity that is a nonfiling entity, its private organic rules become effective; converted entity is a limited liability partnership, its statement of qualification is effective;

(8) the memberships or interests of the converting entity are reclassified into memberships, interests, other securities, obligations, rights to acquire memberships, interests or securities, or into cash or other property in accordance with the plan of terms of the conversion;
and the members or interest holders of the converting entity are entitled only to the rights provided to them under the terms of the conversion and to any appraisal rights they may have under section 1204 (appraisal rights) and the converting entity’s organic law of the converting entity; and

(79) the surviving converted entity is deemed to:

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

(ii) be the same nonprofit corporation or unincorporated entity without interruption as the converting entity; and

(iii) deemed to have been incorporated or otherwise organized on the date that the converting entity was originally incorporated or organized.

(b) A member who becomes subject to interest holder liability for some or all of the debts, obligations or liabilities of the surviving entity has interest holder liability only for those debts, obligations or liabilities of the surviving entity that arise after the effective time of the articles of entity conversion. Except as otherwise provided in the organic law or organic rules of a converting entity, a conversion under this [Subchapter] 12E does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the converting entity.

(c) The When a conversion under this [Subchapter] 12E becomes effective, a person that did not have interest holder liability of an interest holder in an unincorporated entity that converts to a domestic nonprofit corporation is as follows: with respect to the converting entity and becomes subject to interest holder liability with respect to a domestic converted entity as a result of the conversion has interest holder liability only to the extent provided by the organic law of that entity and only for those debts, obligations, and other liabilities that are incurred after the conversion becomes effective.

(d) When a conversion becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic converting entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The conversion does not discharge any interest holder liability under the organic law of the unincorporated converting entity to the extent any such interest holder liability arose was incurred before the conversion became effective time of the articles of entity conversion.

(2) The interest holder person does not have interest holder liability under the organic law of the unincorporated converting entity for any debt, obligation, or other liability of the corporation that arises is incurred after the conversion becomes effective time of the articles of entity conversion.
(3) The provisions of the organic law of the unincorporated converting entity continue to apply to the release, collection, or discharge of any interest holder liability preserved by paragraph under Section 1255(d)(1); as if the conversion had not occurred.

(4) The interest holder person has whatever rights of contribution from any other interest holders person as are provided by law other than this [Act] or the organic law rules of the unincorporated converting entity with respect to any interest holder liability preserved by paragraph under Section 1255(d)(1); as if the conversion had not occurred.


CROSS-REFERENCES

“Converting Eligible entity” defined, see § 9.50(e)(1) 102.
“Domestic nonprofit corporation” defined, see § 1.40.
“Domestic unincorporated entity” defined, see § 1.40.
“Filing entity” defined, see § 1.40 102.
“Foreign unincorporated entity Interest” defined, see § 1.40 102.
“Interest holder” defined, see § 1.40 102.
“Interest holder liability” defined, see § 1.40 102.
“Nonfiling entity” defined, see § 1.40 102.
“Organic law” and “organic rules” defined, see § 1.40 102.
“Private organic rules” defined, see § 1.40 102.
“Public organic record” defined, see § 1.40 102.

“Surviving entity” defined, see § 9.50(e)(2).
“Unincorporated entity” defined, see § 1.40.

OFFICIAL COMMENT

This section provides for the effect of an entity conversion. An entity The converted entity is the same entity as the converting entity, and it continues without interruption. It becomes the new type of entity in the specified governing jurisdiction with the same status as if it had been originally incorporated or organized there. The converted entity will be subject to the organic law for that entity in that jurisdiction and will be subject to all of the duties, liabilities, and limitations imposed on such entities in that jurisdiction. Thus, a conversion is not a conveyance, transfer, or assignment. It does not give rise to claims of reverter or impairment of title based on a prohibited conveyance, transfer, or assignment. Nor does it give rise to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive an entity conversion. See, however, Section 1250(e) with respect to special rules regarding protected agreements. All pending proceedings involving the converting entity are continued.

Section 9.54(a)(1)-(3) and (b) are similar to Section 11.07(a)(3)-(5) and (c) with respect to the effects of a merger. Although Section 9.54(a)(1)-(3) would be implied by the general rule stated in Section 9.54(a)(7) even if not stated expressly, those rules have been included to avoid any question as to whether a different result was intended.
Section 9.541255(c) preserves liability provides that interest holder liability with respect to a domestic nonprofit corporation or eligible entity that is the converted entity only relates to interest holder liabilities that arise after the conversion. Section 1255(d) similarly preserves the interest holder liability of interest holders in an eligible entity that converts to a domestic corporation only for interest holder liabilities to the extent they arise before the conversion becomes effective. Interest holder liability is not preserved for subsequent changes in an underlying liability, regardless of whether a change is voluntary or involuntary.

This section does not address the issue that could arise in an entity conversion where a person who had authority to bind the converting entity loses that authority because of the conversion and yet purports to act to bind the surviving entity. For example, in a conversion of a general partnership into a corporation, a person who is a general partner but does not become an officer of the corporation will lose the authority of a general partner to bind the business to obligations incurred in the ordinary course, but might purport to commit the corporation to such an obligation in dealing with a person who does not have knowledge of the conversion. Instances in which this occurs will be rare and, in the limited instances in which it does occur, general principles of agency law are sufficient to resolve the problems created.

§ 9.55. ABANDONMENT OF AN ENTITY CONVERSION

(a) Unless otherwise provided in a plan of entity conversion of a domestic nonprofit corporation, after the plan has been adopted and approved as required by this subchapter, and at any time before the entity conversion has become effective, it may be abandoned by the board of directors without action by the members.

(b) If an entity conversion is abandoned after articles of entity conversion have been filed with the secretary of state but before the entity conversion has become effective, a statement that the entity conversion has been abandoned in accordance with this section, signed by an officer or other duly authorized representative, must be delivered to the secretary of state for filing prior to the effective date of the entity conversion. Upon filing, the statement takes effect and the entity conversion is abandoned and does not become effective.

Source Note: Patterned after Model Business Corporation Act, 3d Ed. § 9.55.

CROSS-REFERENCES
Approval of entity conversion, see § 9.52.
“Deliver” defined, see § 1.40.
“Domestic nonprofit corporation” defined, see § 1.40.
Effective time and date of filing, see § 1.23.
Filing requirements, see § 1.20.

OFFICIAL COMMENT

Unless otherwise provided in a plan of entity conversion, a domestic nonprofit corporation proposing to convert to an unincorporated entity may abandon the transaction without member approval, even though it has been previously approved by the members. Whether or not the conversion of an unincorporated entity to a domestic nonprofit corporation may be abandoned is determined by the law under which the unincorporated entity is organized, except that the rule of this section will apply to the extent provided in Section 9.50(c).
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