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## Memorandum

### PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

To: Bonnie Paskvan  
From: Steve Miller, Sherman & Howard L.L.C.  
Date: January 16, 2009  
Re: Update of Alaska Business Statutes

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#### **BACKGROUND**

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

Many states have addressed this need by providing new legislation to facilitate transactions between more than one form of entity. Some states have added provisions in their individual entity laws to authorize entities organized under each law to convert to other forms of entities or to allow mergers between entity forms. For example, Delaware has adopted separate provisions in both its General Corporation Law and its Limited Liability Company Act that, functioning together, allow a merger between a corporation and a limited liability company. See DEL. CODE ANN. tit. 8, §§ 263,264 (2008) (corporations), DEL. CODE ANN. tit. 6, §§ 18-209 (2008) (limited liability companies). Other states have taken a more comprehensive approach and have chosen to enact new statutes that address cross-entity mergers and conversions in one act and central location. These statutes, known as “junction box” statutes, contain provisions

allowing all types of corporate and unincorporated entities to engage in mergers, conversions, and, in some cases, interest exchanges and domestication transactions. See ALA. CODE §§I 10-15-1 to -7 (2007); COLO. REV. STAT. ANN. §§ 7-90-101 to -604 (West 2008).

### ALASKA LAW

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

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

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

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

While it may be theoretically possible to attain many of the same results accomplished by a comprehensive inter-entity merger or conversion statute without having such a statute available, it is certainly much more efficient and economical to accomplish inter-entity transactions in a single step. As noted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in connection with the adoption of the Model Entity Transactions Act (discussed *infra*):

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

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

### **MODEL & STATE LAW PROVISIONS**

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

Given the inherent limitations in the acts previously adopted, NCUSSL and the ABA set out to draft a comprehensive junction box statute that would allow differing forms of entities to merge with each other or convert to other entity forms. The Model Entity Transactions Act ("META"), the most recent version of which is attached to this memorandum as Appendix A, originally was adopted by NCCUSL and the ABA in 2004 and provides a comprehensive statutory framework that addresses all varieties of cross-entity transactions. Under META, all types of corporate and unincorporated organizations may engage in mergers, conversions,

interest exchanges (essentially a triangular merger accomplished without the use of a transitory third party), and domestications (a transaction in which an existing entity moves its jurisdiction of organization to another state while still retaining whatever form it had before the domestication).

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

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

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

## **RECOMMENDATIONS & CONCLUSION**

Alaska is in need of new statutory authority to permit cross-entity transactions in order to remain responsive to the needs of Alaskan companies. While Alaska could adopt a patchwork of legislative amendments to its existing entity laws, adoption of a comprehensive junction box statute would help to avoid inconsistencies and conflicts between existing statutes. META is a

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general statute that is designed to fit with any state's existing entity laws and should be enacted in an appropriate form in Alaska in order to allow Alaska businesses the opportunity to engage in cross-entity transactions. Adopting META, or enacting similar provisions adopted by other states, would be an important step towards bringing Alaska more into the mainstream of statutory business law.