

SB 101-ENTITY TRANSACTIONS ACT

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CHAIR FRENCH announced the consideration of SB 101.

SENATOR PASKVAN, sponsor, spoke to the following sponsor statement as he introduced SB 101:

Senate Bill 101 conforms to the Uniform Law Commissioners' Model Entity Transaction Act (META). If implemented in the State of Alaska, this legislation will help facilitate transactions between more than one form of entity, improve the existing business climate in Alaska, and help reduce unnecessary administrative and legal burdens currently imposed on Alaska companies.

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.

Because of the lack of clear statutory authority allowing transactions between more than one form of entity, these transactions have often required the use of multiple indirect steps, as opposed to a single transaction.

Senate Bill 101 will offer new statutory authority to permit cross-entity transactions in order to remain responsive to the needs of Alaskan companies and should be enacted in order to allow Alaska businesses the opportunity to engage in cross-entity transactions.

Adopting SB 101 will be an important step towards bringing Alaska more into the mainstream of statutory business law.

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SENATOR WIELECHOWSKI joined the committee.

SENATOR PASKVAN informed the committee that he initially introduced this legislation during the 26th Legislature, but after one hearing he yielded to requests by the Department of Commerce, Community and Economic Development (DCCED) and the Department of Law (DOL) to hold the complex bill and work on it over the Interim. That hard work, he stated, is reflected in SB 101.

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JEFF STEPP, Staff to Senator Paskvan, reviewed the contents of the bill packet to highlight the rigorous and professional reviews that the 50-page bill had undergone. In addition to the eight-page sectional summary is a memorandum from attorney Steve Miller with Sherman & Howard L.L.C. advocating for an update of Alaska business statutes. Page 2 of the memo depicts the four-step process that an Alaska corporation currently must initiate in order to merge with a limited liability company. First, a corporation must form a foreign limited liability company; second, it must merge the Alaska limited liability company into the foreign limited liability company; third, it must convert 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 finally, it must merge the foreign corporation into an Alaska corporation. The goal of SB 101 is to accomplish such inter-entity transactions in a single step.

The bill packets also contain the Uniform Law Commission's Entity Transaction Act Summary and the Council of State Governments (CSG) Suggested State Legislation for 2011. SB 101 is included in the CSG document, clearly demonstrating that it is timely in order to bring Alaska into the mainstream of statutory business law.

MR. STEPP noted that Uniform Law Commissioner Michael Geraghty was available online to explain the legislation in more detail and to answer the more technical questions. Teri Bannister, who drafted the legislation, was asked to be available to answer questions. Don Habeger, the Director of the Division of Corporations, Business and Professional Licensing Section with the DCCED, was available to address the fiscal note and speak to the department's view on implementing this legislation.

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CHAIR FRENCH asked Mr. Geraghty to provide his perspective of the legislation.

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MIKE GERAGHTY, Attorney, stated that he is a Uniform Law Commissioner (ULC) who has practiced in this jurisdiction for about 32 years. He explained that the American Bar Association (ABA) worked in conjunction with the Uniform Law Commission (ULC) in the drafting of the very complicated Model Entity Transaction Act (META). It was promulgated in 2005 and has been enacted in the District of Columbia and introduced in Alaska and Connecticut

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CHAIR FRENCH said he read that both Idaho and Kansas have passed this legislation as well.

MR. GERAGHTY said he would stand corrected if that were to be confirmed.

MR. STEPP directed attention to the Legislative Fact Sheet for the Entity Transactions Act in the packet. It reports that this legislation has been enacted in the District of Columbia, Idaho, and Kansas and it's been introduced in both Connecticut and Alaska. He cited the source as the Uniform Law Commission website.

MR. GERAGHTY said Mr. Stepp has obviously done his homework. He continued to say that he sent a copy of SB 101 to the ULC asking for formal input and Harry Haynsworth, who was the chair of the ULC committee that drafted the Model Entity Transaction Act (META), reviewed the bill and expressed satisfaction that it was consistent with the spirit and intent of META. What's particularly appealing about SB 101, Mr. Geraghty noted, is that it allows for cross-entity transactions as opposed to current law where one entity typically has to dissolve in order for the transfer to happen.

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MR. GERAGHTY said SB 101 addresses basically four types of transactions or transfers. One type is a merger between different types of entities - corporation, partnership, limited partnership, and Limited Liability Company, for example. A second type is a conversion of one entity into another. The holders of the limited partnership convert to a corporation, for example. A third type of transaction is an interest exchange in which the shareholders or partners transfer their interest in the entity they hold for shares in a new corporation they've formed. The fourth type of transaction is a domestication. This

is an entity organized in one state that will morph into an entity under the laws of another state. SB 101 requires the receiving state to have provisions in its laws that allow the new entity to be recognized.

MR. GERAGHTY said this bill is complex because the details of each type of transfer have to be addressed, but at heart the effort is to protect all interests. Whatever plan is used, it must be submitted to the division of corporations and put on file and the plan must be followed scrupulously. The provisions and protections were carefully crafted to ensure that the existing business interests are protected and that it is not a vehicle to avoid or abate creditors. These transactions have to be done for legitimate business purposes.

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CHAIR FRENCH asked for an explanation of the difference between a model act and a uniform act. His understanding is that this is a model act.

MR. GERAGHTY replied he didn't want to speculate and would therefore prefer to submit the answer in writing.

CHAIR FRENCH asked if any consumer groups had expressed concern that this act would in any way put consumers at a disadvantage in dealing with businesses. There seems to be good alignment in the business community.

MR. GERAGHTY said he hadn't heard any concerns from consumer groups but he only distributed the initial bill to the law community, not other potential stakeholders.

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CHAIR FRENCH asked why this is a matter of state rather than federal law and if there is similar law on the federal books.

MR GERAGHTY said he doesn't believe that federal law has ever occupied this field. Business organization has typically been left to individual states and that's one reason that the Uniform Law Commission was established.

SENATOR COGHILL asked if this change would relieve responsibility for advertizing purposes. He added that it took some time to realize that "foreign" refers to outside the state and not outside the country.

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MR. GERAGHTY clarified that there is no way to escape liability under these conversions. He also confirmed that the term "foreign" does in fact refer to other states.

SENATOR COGHILL asked if DCCED is the entity that ultimately would say that a particular plan conforms to this law.

MR. GERAGHTY said he would defer to Ms. Bannister, but he believes that the review would typically fall to the attorney who is doing the paperwork and giving advice on the conversion or transaction. However, no conversion will occur until all the members of the Limited Liability Company consent to the conversion.

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CHAIR FRENCH asked Ms. Bannister to comment.

TERI BANNISTER, Attorney, Legislative Legal Services, Legislative Affairs Agency, explained that a conversion usually takes place privately, but sometimes a document must be filed with DCCED to register what has changed. With regard to liability, she confirmed that there is no elimination of liability regardless of the kind of transaction. Most consumer protection laws are drafted to cover any type of person so the type of change doesn't matter.

SENATOR COGHILL said it sounds as though it's more like registration or notice of a change in behavior.

MS. BANNISTER clarified that there is no automatic registration for these transactions. However, sometimes it's necessary to file documents to reflect the change in form in order to comply with current statutes.

CHAIR FRENCH recapped that these mergers don't require the blessing of the state or any person other than the entities involved.

MS. BANNISTER agreed that no blessing is required.

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SENATOR WIELECHOWSKI asked if there is any danger of companies changing status to avoid legal liability.

MS. BANNISTER said she doesn't see any obvious danger because the bill identifies to whom the liabilities are transferred.

CHAIR FRENCH noted that the term "entity" is defined on page 39 and it excludes an "individual" and "testamentary trusts." He asked why can't a person can't be an entity.

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MR. GERAGHTY said a person can form a corporation or limited liability company so people can form entities and once they do that they can take advantage of the bill to convert to another entity. But an individual by himself doesn't take advantage of any business entity form that is currently recognized. That's the reason that the bill would logically exempt an individual. Obviously, an individual can form a business entity and once they've done so they would be free to take advantage of the bill when it's enacted. But the bill wouldn't apply to an individual by himself who hasn't taken advantage of forming any entity to do business.

MS. BANNISTER said it was a deliberate choice and the commentary on the Model Entity Transactions Act may outline the reasons. She offered to review the commentary.

CHAIR FRENCH asked if trust law practitioners are pleased that the definition of "entity" excludes a testamentary, inter vivos, or charitable trust.

MR. GERAGHTY said he didn't receive any commentary from that sector when he circulated the bill last year. He added that trusts typically aren't utilized as a form under which a business would operate.

CHAIR FRENCH noted that Senator Paskvan pointed out that on page 39, line 17, the definition of "entity" includes a "business trust or statutory trust entity."

SENATOR WIELECHOWSKI asked for the rationale behind the language on page 1, lines 8-10.

MS. BANNISTER said that's a conforming amendment to make the new provisions apply to national banks.

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MR. GERAGHTY clarified that when he said that trusts aren't typically used for business, he was referring to a family trust. He has no knowledge of a business trust.

SENATOR COGHILL pointed out that Section 30 on page 49 is the repealer section.

CHAIR FRENCH asked Senator Paskvan to summarize the progress of the similar legislation that was filed last year.

SENATOR PASKVAN explained that it received one hearing in Senate Labor and Commerce and after further discussion with the DOL and DCCED it was deemed prudent to rework the legislation. That work, which occurred at both the national and local levels, has taken about a year. At this point there appears to be consensus that using the Model Entity Transaction Act - as compared to a uniform law concept - and incorporating the nuances of Alaska law is the best way to accommodate it for Alaska.

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DON HABEGER, Director, Division of Corporations, Business, and Professional Licensing, Department of Commerce, Community and Economic Development (DCCED), stated that the department delayed the legislation last year as it looked at the model act under SB 304 and the nuances in Alaska corporate law. Staff from DCCED also worked with the DOL to address how the legislation would affect other pieces of statute such as cemetery associations and nonprofits set forth in Section 5 on page 2.

The division has determined that it has an appropriate administrative role and SB 101 clearly spells out the criteria for grading any documents that come in. The division foresees no problems if the legislation were to be implemented. DCCED staff contacted the two jurisdictions that have implemented this model legislation and learned that about 200 entities in Idaho have taken advantage of the Act. Kansas was unable to offer any statistics. DCCED estimates that between 40 and 50 entities will take advantage of the Act in the state of Alaska. Current staffing can accommodate this level of activity.

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SENATOR COGHILL noted the July 1, 2013 timeline for implementing regulations under the Act and asked if he has a feel for the scope of regulation that might be required.

MR. HABEGER replied it may be as simple as setting fees for the documents they receive.

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CHAIR FRENCH announced he would hold SB 101 in committee for further consideration.