

# **Conversion from One Entity to Another**

Prepared and Presented by:

**Jeffrey C. O'Brien**  
Mansfield, Tanick & Cohen, PA



# Advanced Partnerships, LLCs and LLPs: Organization and Operation in Minnesota

## I. Introduction

### A. Why Does It Matter? Reasons for Conversion From One Entity to Another

Shareholders of corporations, partners in partnerships and members of limited liability companies (“LLCs”) often want to convert from one form of entity to another<sup>1</sup>. Traditionally such conversions were accomplished through a series of contributions and distributions of property out of the old organization and into the new organization<sup>2</sup>. With the advent of the LLC and revision to partnership laws, statutes have been amended to permit direct merger or conversion of one organization into another<sup>3</sup>. Several private letter rulings have considered the effect of a conversion of a partnership or other form of organization into an LLC.<sup>4</sup>

Perhaps the most significant development motivating conversions among entity types is the fairly recent and rapid development of the LLC entity form. Wyoming created the first LLC statute around 1977, but the LLC form did not become the “preferred” choice of entity until the IRS issued

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<sup>1</sup> Robert R. Keatinge, “Choice of Entity”, *Minnesota State Bar Association Advanced Business Planning*, September 16, 2005, p. 6.

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.*, citing Priv Ltr Ruls 9010027 (conversion of a limited partnership into an LLC), 9010067 (conversion of corporation into an LLC), 9129019 (merger of four partnerships into an LLC), 9210019 (merger of a Texas limited partnership into a Texas LLC), and 9226035 (conversion of a state A general partnership to a state B LLC).

rulings in the late 1980's clarifying the partnership tax treatment afforded to an LLC and, finally, in 1995, when all fifty states had enacted some form of LLC governing statute. The IRS' "check the box" regulations in 1997 made the LLC the predominant and most desirable entity form and, as a consequence, many existing entities sought to convert to this structure for its tax advantages and flexibility.

Another changing area of the law motivating entity conversions are the statutes governing partnerships, limited partnerships and limited liability partnerships. For example, Minnesota became one of the first states in January 2005 to adopt the Uniform Limited Partnership Act 2001.

## **B. Types of Conversions**

In general, entity conversions are accomplished through one of the following methods:

1. Conversions upon formation (such as the conversion of a sole proprietorship or de facto partnership to an LLC);
2. Conversions between entity types;
3. Mergers of different entity types; or
4. A change of entity domicile.

## **II. Conversions and Mergers Involving LLCs**

**A. Advantages of an LLC.** The LLC business form has become the preferred entity choice for a variety of businesses. An LLC has tax

advantages as a pass-through entity. Furthermore, and most importantly, the LLC provides flexibility and contractual advantages not found in other entity forms<sup>5</sup>. An LLC is the only formal entity structure that can be tailored and customized to specifically meet the unique needs of the participants, and also remains flexible enough to accommodate future changes in those needs<sup>6</sup>.

**B. Tax Paradigms: “Assets Over”, “Assets Up” and “Interest Over” Forms.** Most LLC statutes permit the merger of LLCs with other LLCs and many permit merger of LLCs with other business forms<sup>7</sup>. While the tax consequences of such mergers will differ depending on whether the parties to the merger are all partnerships or some are corporations, there are three (3) basic paradigms for the tax treatment of mergers: the “assets over”, “assets up” and “interest over” forms.

**1. “Assets Over” Form.<sup>8</sup>**

Under the assets over form, the assets of a disappearing entity are contributed by the disappearing entity to the surviving entity (the first step) in exchange for interests in the surviving entity (the

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<sup>5</sup> Joseph F. Schlueter, “An Analysis of the Changing Landscape Regarding the Tax Treatment of Options, Warrants, and Compensatory Interests for Partnerships and LLCs”, *The Effective Use of LLCs*, Minnesota State Bar Association, October 11, 2005, p. 5.

<sup>6</sup> *Id.*, at p. 6. As an example, an LLC may have multiple classes of membership interests and retains its pass-through taxation. *Id.* On the other hand, a corporation with more than one class of stock will be taxed as a subchapter C corporation. *Id.*

<sup>7</sup> Keatinge at p. 6.

<sup>8</sup> Partnership mergers under state law or in any form other than assets up, will be treated by default as an assets over merger. Keatinge at p. 12.

second step) followed by a liquidating distribution by the disappearing entity to its members of interests in the surviving organization (the third step).<sup>9</sup> Under this form of merger a terminating partnership will not recognize gain or loss upon contribution of its property to the resulting partnership in exchange for interests in the resulting partnership.<sup>10</sup> “The basis of the partners in the terminating partnership in their interests in the surviving partnership will be equal to their basis in their interests in the terminating partnership. The distribution of the interests in the surviving partnership to the partners of the terminating partnership will not trigger gain under IRC §§ 704(c)(1)(B) or 737.”<sup>11</sup>

## 2. “Assets Up” Form.

Under the assets up form of merger, the assets of the disappearing entity are distributed in liquidation to the members of the disappearing entity (step one), followed by a contribution by those members to the surviving entity (step two) in exchange for interests in the surviving entity (step three).<sup>12</sup> Under the assets-up form, partners could recognize gain when the terminating partnership distributes the assets to the partners. In contrast, under

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<sup>9</sup> *Id.* at p. 7.

<sup>10</sup> *Id.* at p. 8, citing IRC § 721.

<sup>11</sup> *Id.* at p. 8-9, citing IRC § 722 and Treas. Reg. §§ 1,704-4(c)(4), 1.737-2(b).

<sup>12</sup> Keatinge at p. 10.

the assets-over form, gain under IRC §§ 704(c)(1)(B) and 737 is not triggered. Under the “assets-up” form, because the adjusted basis of the assets contributed to the surviving partnership or LLC is determined first by reference to IRC § 732, and then IRC § 723, in certain circumstances, the adjusted basis of the assets contributed may not be the same as the adjusted basis of the assets in the terminating partnership. These circumstances occur if the partners’ aggregate adjusted basis of their interests in the terminating partnership does not equal the terminating partnership’s adjusted basis in its assets. Under the assets-over form, because the resulting partnership’s adjusted basis in the assets it receives is determined solely under Section 723, the adjusted basis of the assets in the resulting partnership is the same as the adjusted basis of the assets in the terminating partnership.<sup>13</sup>

### 3. “Interest Over” Form.

Under the interest over form of merger a contribution of interests in the disappearing entity is made by the members of the disappearing entity (step one) in exchange for interests in the resulting entity (step two) followed by a liquidation of the disappearing entity (step three).<sup>14</sup> By default, interest over form

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<sup>13</sup> *Id.* at p. 11.

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

partnership mergers are treated by the IRS as assets over mergers.<sup>15</sup>

### C. Conversion of a Sole Proprietorship into an LLC.

1. The most basic entity conversion involving an LLC occurs when a previously existing unincorporated business (i.e., a sole proprietorship) converts to an LLC.

Two recent developments have made it possible to organize a sole proprietorship into an LLC (thereby obtaining the benefit of the LLC's liability shield) while preserving the sole proprietorship tax status: (i) the Internal Revenue's 1997 "check the box regulations" and (ii) the subsequent amendment of state LLC statutes permitting one member LLCs<sup>16</sup>.

The "check the box" regulations, adopted in January 1997, specify that unless an election is made, a one-member LLC is disregarded for federal tax purposes<sup>17</sup>. If the one member is a corporation, the LLC is treated as a division of the corporation<sup>18</sup>.

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<sup>15</sup> RIN 1545-AX32, 2000-1 C.B. 455, 65 FR 1572.

<sup>16</sup> Mark J. Silverman, Lisa M. Zarlenga and Derek E. Cain, *Use of Limited Liability Companies in Corporate Transactions*, 449 PLI/Tax 239, 292-293 (October-November 1999).

<sup>17</sup> Treas. Reg. § 301.7701-3(b)(ii).

<sup>18</sup> *Id.* Prior to January 1, 1997, the entity classification regulations, referred to as the Kintner Regulations, applied a four (4) factor test for determining whether an entity was classified as a corporation or a partnership for federal tax purposes. A business entity was classified as a corporation if it had more than two (2) of the following "corporate characteristics": (1) limited liability; (2) centralization of management; (3) free transferability of interests; and (4) continuity of life. Old Treas. Reg. § 301.7701-2.

2. The conversion of a sole proprietorship into an LLC is a straightforward process. The owner transfers to the LLC all assets and liabilities of the sole proprietorship in exchange for 100% of the LLC membership interests. The sole proprietorship assets are transferred to the LLC pursuant to a bill of sale, and contracts, debts, and liabilities may be transferred to the LLC pursuant to an assignment and assumption agreement.<sup>19</sup>
3. A conversion to an LLC benefits the former sole proprietorship with limited liability in lieu of personal liability to the sole proprietor.

**D. Conversion of a Partnership into a LLC**

**1. A partnership is converted into an LLC through one of the following methods:**

- a. The partners can contribute their partnership interests to an LLC in exchange for LLC membership interests. This exchange is followed by a liquidation of the partnership and a distribution of partnership assets (the LLC membership interests) to the Partners. Finally, the

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<sup>19</sup> See Appendix, Exhibits A and B, respectively, for sample Bill of Sale and Assignment and Assumption Agreements.

partnership goes through the process of dissolution. This is the “interest over” form.

b. Alternatively, a partnership could transfer its assets and liabilities to an LLC in exchange for 100% of the LLC membership interests. This transfer is followed by a liquidating distribution of the partnership’s assets (the LLC membership interests) and liabilities to the partners resulting in dissolution of the partnership. This is the “assets over” form.

c. **Under either method outlined above, the partnership is essentially the organizer of the LLC.<sup>20</sup> The partnership will have to follow the ordinary LLC formation process, including filing articles of organization with the Secretary of State.<sup>21</sup>**

## **2. Contributions**

a. In general, conversion is treated as a tax-free contribution of property from the existing partnership to the newly formed entity. Subject to any restrictions in the articles of organization or a member control agreement (and only

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<sup>20</sup> Minn. Stat. § 322B.105.

<sup>21</sup> Minn. Stat. § 322B.115.

when authorized by the board of governors or pursuant to a member control agreement), a limited liability company may accept contributions, make contribution agreements, and make contribution allowance agreements.<sup>22</sup> Accordingly, a person or entity is permitted to make a contribution to a limited liability company in the following ways:

1. by paying money or transferring the ownership of an interest in property to the limited liability company, or rendering services to or for the benefit of the limited liability company; or
  2. through a written obligation signed by the person or entity to pay money or transfer ownership of an interest in property to the limited liability company or to perform services to or for the benefit of the limited liability company.
- b. However, no purported contribution is to be treated or considered a contribution, unless the board of governors accepts the contribution on behalf of the limited liability company and the contribution and its value are both

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<sup>22</sup> Minn. Stat. § 322B.105.

accurately reflected in the required records of the limited liability company.

- c. The determinations of the board of governors as to the amount or fair value of the contribution are presumed to be proper if they are made in good faith and on the basis of accounting methods, or a fair valuation or other method, reasonable in the circumstances.

- 1. Governors who are present and entitled to vote, and who, intentionally or without reasonable investigation, fail to vote against approving a consideration that is unfair to the limited liability company, or overvalue property or services received or to be received by the limited liability company as a contribution, are jointly and severally liable to the limited liability company for the benefit of the then members who did not consent to and are damaged by the action, to the extent of the damages of those members.

**3. Terms of membership interests:**

- a. All membership interests of an LLC must be of one class and without series unless the articles of organization or a

member control agreement establish, or authorize the board of governors to establish, more than one class or series within classes<sup>23</sup>.

- b. All membership interests must also be ordinary membership interests entitled to vote as provided by Minnesota law and have equal rights and preferences in all matters not otherwise provided for by the board of governors unless the articles of organization or a member control agreement have fixed the relative rights and preferences of different classes and series.<sup>24</sup>
- c. All membership interests must share profits and losses and be entitled to distributions.

#### **4. Advantages of Conversion of a Partnership to a LLC**

- a. The primary advantages of conversion to a LLC are flow through taxation and limited liability for LLC members. Conversion to a LLC does not produce taxable gain for a former partner, so long as his interests in the new LLC

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<sup>23</sup> By contrast, a corporation with multiple classes of stock requires the corporation to be taxed as a C corporation, carrying the income tax penalty of double taxation, while remaining nowhere near as flexible as an LLC in the ability to adopt future changes. See Schlueter at p. 6.

<sup>24</sup> See Minn. Stat. § 322B.356,

remain equivalent to his interests in the terminating partnership.<sup>25</sup>

#### **5. Tax Treatment of the Conversion of a Partnership to a LLC**

General and limited partnerships may convert without incurring termination as long as subsequent to the conversion, the former partnership's business continues and each partner's interests in the profits, losses and capital of the new partnership remain the same.<sup>26</sup> "The partners are deemed to exchange their old interests for the new interests; *their outside bases will not change if their shares in the new partnership's liabilities remain the same.* Consistent with treating LLCs as partnerships for tax purposes, the [IRS] has ruled privately, that partnerships converting to LLCs do not terminate solely be reason of the conversion."<sup>27</sup>

In Revenue Ruling 95-37, the [IRS] ruled on a conversion of a general partnership into an LLC. The general partnership contributed all of its assets to the LLC in exchange for all the ownership interests in the LLC, with the LLCs assuming all of the obligations of the partnership. The partnership then dissolved, liquidated, and distributed membership interests to the

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<sup>25</sup> See Rev. Rul. 95-37. 1995-17 I.R.B. 10.

<sup>26</sup> See Rev. Rul. 84-52, 1984-1 CB 157, 158.

<sup>27</sup> Keatinge at p. 5, emphasis added, citing Rev. Rul. 84-53, 1984-1 CB 159 and Priv. Ltr. Ruls 9029019, 9119029 and 901002789.

partners in the same proportion as their interests in the partnership. *The ruling stated that the conversion of a general partnership to an LLC is analogous to the conversion of a general partnership interest to a limited partnership interests under Revenue Ruling 84-52.* It went on to hold that no termination would result under IRC § 708, that, except as provided in IRC § 752, no gain or loss would be recognized by members on the contribution, and that the resulting LLC may use the same employee identification number as the partners.<sup>28</sup>

**E. Conversion of a Corporation into an LLC**

- 1. A corporation may become a domestic limited liability company, and a domestic limited liability company may become a corporation, in each case pursuant to a plan of conversion.<sup>29</sup>**
  
- 2. Pursuant to Minnesota law a plan of conversion must contain<sup>30</sup>:**
  - a. The name of the converting organization;**
  - b. The name of the converted organization;**

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<sup>28</sup> Keatinge at p. 14, emphasis added, citing Rev. Rul. 95-37, 1995-1 CB 130 and Rev. Rul. 84-52, 1984-1 CB 157.

<sup>29</sup> Minn. Stat. § 302A.681.

<sup>30</sup> Minn. Stat. § 302A.683.

- c. Whether the converted organization is a corporation or a limited liability company;
- d. The terms and conditions of the proposed conversion;
- e. The manner and basis of converting each ownership interest in the converting organization into ownership interests in the converted organization or, in whole or in part, into money or other property;
- f. A copy of the proposed articles of incorporation or articles of organization of the converted organization; and
- g. Any other provisions with respect to the proposed conversion that are deemed necessary or desirable.

### **3. Board Approval**

- a. A resolution containing the plan of conversion must be approved by the affirmative vote of a majority of the directors or governors present at a meeting of the board of directors or the board of governors of the converting organization.<sup>31</sup> The plan must then be submitted at a

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<sup>31</sup> Minn. Stat. § 302A.685, subd. 1.

regular or a special meeting to the owners of the converting organization.<sup>32</sup>

**i. Written notice must be given to every owner of the converting organization, whether or not entitled to vote at the meeting, not less than 14 days or more than 60 days before the meeting.**

a. The written notice must state that a purpose of the meeting is to consider the proposed plan of conversion.

b. A copy or short description of the plan of conversion must be included in or enclosed with the notice.

#### **4. Articles of Conversion<sup>33</sup>**

**a. Upon receiving board approval for a plan of conversion, Minnesota law requires that articles of conversion be prepared.<sup>34</sup> The articles of conversion must contain:**

**ii. The plan of conversion;**

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

<sup>33</sup> Refer to Exhibit C for Sample Articles of Conversion.

<sup>34</sup> Minn. Stat. § 302A.687.

- iii. The name of the converting organization immediately before the filing of the articles of conversion and its name following conversion<sup>35</sup>;
- iv. The type of organization that the converted organization will be;
- v. A statement that the plan of conversion has been approved by the converting organization pursuant to Minnesota Statutes, Chapter 302A, Section 685; and
- vi. A copy of the articles of incorporation or the articles of organization of the converted organization.

**b. The articles of conversion must be signed on behalf of the converting organization and filed with the secretary of state.**

- i. Filing of the articles of conversion is also deemed to be a filing with the secretary of state

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<sup>35</sup> The name must satisfy the laws applicable to the converted organization.

of the articles of incorporation or the articles of organization of the converted organization.

- ii. The secretary of state then issues a certificate of conversion and a certificate of incorporation or a certificate of organization to the converted organization or its legal representative.

#### **5. Effective Date of Conversion**

- a. Conversion is effective when the articles of conversion are filed with the secretary of state or on a later date or at a later time specified in the articles of conversion.

#### **6. Abandonment of Conversion Pursuant to Minnesota law<sup>36</sup>:**

- a. After a plan of conversion has been approved and before the effective date of the plan, it may be abandoned:
  - i. If the owners of the converting organization entitled to vote on the approval of the plan approve the abandonment by majority vote;
  - ii. If the plan itself provides for abandonment and all conditions for abandonment set forth in the plan are met;

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<sup>36</sup> Minn. Stat. § 302A.689

**iii.** By a resolution of the board of directors or governors of the converting organization which is approved by a majority of the board members present; or

**iv. By Articles of Abandonment**

**a.** If articles of conversion have been filed with the secretary of state, but have not yet become effective, the converting organization can file with the secretary of state articles of abandonment that contain:

**i.** The name of the converting organization;

**ii.** The provision of this section under which the plan is abandoned; and

**iii.** If the plan is abandoned by board resolution, the text of the resolution abandoning the plan.

## **7. Effect of Conversion**

**a. A converted organization is for all purposes the same organization as the converting organization when it was originally incorporated or organized.**

**b. A conversion becomes effective when:**

**i.** If the converted organization is a corporation, the converted organization has all the rights, privileges, immunities, and powers, and is subject to all the duties and liabilities, of a corporation;

**ii.** If the converted organization is a limited liability company, the converted organization has all the rights, privileges, immunities, and powers, and is subject to all the duties and liabilities, of a limited liability company.

**iii.** All property owned by the converting organization remains vested in the converted organization.

- iv. All debts, liabilities, and other obligations of the converting organization continue as obligations of the converted organization.
- v. Any action or proceeding pending by or against the converting organization may be continued as if the conversion had not occurred.
- vi. All rights, privileges, immunities, and powers of the converting organization remain vested in the converted organization.

**8. Effect on Shareholders<sup>37</sup>**

- a. When a conversion becomes effective, each share or membership interest in the converting organization is deemed to be converted into shares or membership interests in the converted organization or, in whole or in part, into money or other property to be received under the plan by the shareholders or the members. This is subject to any dissenters' rights.

- b. In general, the basic methods for converting a corporation into an LLC are:**

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<sup>37</sup> Minn. Stat. § 302A.691

- i. The shareholders can contribute their shares of stock in the corporation in exchange for LLC membership interests, followed by a liquidating distribution of the corporation's assets into the LLC<sup>38</sup>;
- ii. A corporation can contribute all of its assets and liabilities to an LLC in exchange for LLC membership interests, followed by a liquidating distribution of the LLC membership interests to the shareholders; or
- iii. The corporation can dissolve and liquidate by distributing all of its assets, liabilities and business to the shareholders, followed by a contribution of the assets, liabilities and business to an LLC in exchange for LLC membership interests.<sup>39</sup>

## **9. Tax Treatment of the Conversion of a Corporation to a LLC**

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<sup>38</sup> See Priv. Ltr. Rul's 9404021 (Jan. 28, 1994) and 9409016 (March 4, 1994).

<sup>39</sup> Any corporate conversion should be carefully analyzed because there could be taxable gain to the corporation and/or the shareholders.

- a. Since the Internal Revenue Code and corresponding Treasury Regulations generally do not provide for a tax-free reorganization of a corporation into an LLC, the conversion of an existing corporation to an LLC requires the liquidation of the corporation.**
- b. Due to the dual taxation of C corporations, conversion transactions can lead to a tax loss.
- c. However, a conversion transaction might not generate a tax loss in the stock of an S corporation. Losses pass-through to S corporation shareholders and reduce the tax basis of their stock, leaving less opportunity to recognize a loss on liquidation. Moreover, S corporations already pass through losses to their investors, so the LLC form would not add a benefit in that respect.
- d. For federal tax purposes, neither the former corporation nor the resulting LLC recognize any gain from the contribution of corporation property to the LLC for purposes of conversion. As a result of the conversion the former corporation takes a substituted basis in the interests of the new LLC, equivalent to its basis in its

former assets, now contributed to the LLC. Shareholders of the former corporation recognize gain upon distribution of the LLC interests in complete liquidation, and have a basis of the fair market value of the new LLC's interests.<sup>40</sup>

- e. “[Private Letter Ruling] 9701029 describes in detail the tax consequences of the conversion of a corporation into an LLC. Under the private letter ruling, the merger of a corporation into an LLC is treated as a transfer by the corporation of its assets to [the] LLC in exchange for [the] LLC’s assumption of the corporations liabilities and the corporations receipt of interests in the LLC, followed by a distribution of the LLC interests to the shareholders in a taxable liquidation of the corporation under IRC § 331. Neither the corporation nor the LLC recognizes gain as a result of the contribution of the property to the LLC, and the corporation takes a substituted basis in the interest in the LLC equal to its basis in the assets contributed to the LLC. The corporation and the shareholders will recognize gain on the distribution of the LLC interests to the shareholders in complete liquidation.

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<sup>40</sup> See Priv. Ltr. Rul. 97011029 (Jan. 3, 1997).

The shareholders will take a fair market value basis in the LLC interest. The distribution in liquidation will constitute a termination of the LLC under IRC § 708(b)(1)(B) and will constitute a transfer within the meaning of IRC § 743, and because the LLC had made an election under IRC § 754, the LLC will adjust the basis of its assets under IRC §§ 743 and 755 as a result of X's liquidation. The private letter ruling also discusses the consequences of the termination of the LLC for tax purposes under the former regulations under IRC § 708.<sup>41</sup>

 **Practice Tip**

Another option is to maintain the existing corporation for established operations while transferring new business into an LLC. Although this method does not convert an existing corporation to an LLC, it avoids liquidation of the corporation.

Under either method of conversion, however, both the corporation and its shareholders could recognize gain with respect to appreciated assets distributed by

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<sup>41</sup> Keatinge at p. 23, citing Rev. Rul. 68-289, 1968-1 CB 314, Rev. Rul. 69-6, 1969-1 CB 104, Rev. Rul. 86-73, 1986-1 CB 282, and IRC §§ 721 and 722.

the liquidated corporation.<sup>42</sup> Although an existing corporation's shareholders' capital losses can be used to offset total recognized gain resulting from the liquidation of the corporation, the resulting tax consequences may still outweigh the advantages sought by conversion.

**F. Conversion of an LLC to a Corporation**

1. In very limited circumstances, certain advantages may support the conversion of an LLC to a corporation.

The tax rates on taxpayers with 'qualified production activities income' were further reduced in 2004. There is a deduction from taxable income (or, in the case of an individual, adjusted gross income) that is equal to a portion of the taxpayer's 'qualified production activities income.' For taxable years beginning after 2009, the deduction is equal to 9% of the lesser of (1) the qualified production activities income of the taxpayer for the taxable year, or (2) taxable income (determined without regard to this provision) for the taxable year. For taxable years beginning in 2005 and 2006, the deduction is three percent of income and, for taxable years beginning in 2007, 2008 and 2009, the deduction is 6% of

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<sup>42</sup> I.R.C. §§ 331 and 336.

income. The deduction is limited to 50% of the W-2 wages paid by the taxpayer during the calendar year that ends in such taxable year. Thus, in taking advantage of the reduced rates, the amount of W-2 wages paid by a taxpayer is important.<sup>43</sup>

2. Minnesota Statutes § 322B.78 refers to the conversion provisions of Minnesota Statutes §§ 302A.681 – 302A.691 for the procedure of converting an LLC to a corporation; the procedure is the same as discussed above for conversion of a corporation to an LLC with the difference being that a corporation is the surviving entity.

3. The tax consequences of such a conversion must be carefully analyzed.

On an LLC's becoming a corporation, the treatment of change will turn on the method used to incorporate the LLC. Revenue Ruling 84-111, explains the concepts attributable to the incorporation of a partnership. Under Revenue Ruling 84-111, the form of the incorporation determines the tax consequences. There are three methods in which an LLC may be incorporated, in addition to incorporation by operation of law such as through statutory merger or conversion, an LLC may be incorporated by:

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<sup>43</sup> Keatinge at p. 2, citing IRC § 199.

(1) the contribution of assets by the LLC to the corporation followed by a distribution of the stock of the corporation in liquidation (although the term “assets over method” is not used in Revenue Ruling 84-111, the transaction in which the disappearing organization makes a contribution to the surviving entity followed by a distribution of the interests in the surviving entity in liquidation of the disappearing entity is described in the partnership merger regulations . . . as the ‘assets over method’), (2) a distribution of the assets of the LLC in liquidation followed by a contribution of the assets to the corporation (the ‘assets up method’ described in Revenue Ruling 84-111 . . . ); or (3) the contribution of the interests in the LLC to the corporation in exchange for interests in the surviving organization, followed by the liquidation of the LLC (either in fact or constructively as a result of it having only one member)(the interests over method described in Revenue Ruling 84-111).<sup>44</sup>

When an LLC treated as a partnership for tax purposes merges with or converts into a corporation, there is a risk of recognition of gain if the LLC is subject to liabilities or if the members do not own 80% or more of the stock of the corporation after the merger or conversion. If the members do now own at

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<sup>44</sup> Keatinge at p. 24-25, citing Rev. Rul. 84-111, 1984-2 CB 88.

least 80% of the stock, the gain deferral provisions of IRC § 351 will not apply and the members will recognize gain or loss measured by the difference between their basis in the assets contributed and the fair market value of the stock received.<sup>45</sup>

#### **G. Merger of Corporation into a Limited Liability Company**

1. A Minnesota LLC can merge with another LLC or a corporation under Minnesota law.<sup>46</sup> A merger practically results in a conversion of the LLC to a corporation where the corporation is the surviving entity. Partnerships, on the other hand, cannot merge with LLCs or corporations under Minnesota law, although some states (Delaware, for example) permit LLC and partnership mergers.
2. A merger involving a Minnesota LLC requires a plan of merger that is approved by the governors and members, and filing of Articles of Merger with the Secretary of State. A plan of merger must be approved by each constituent organization. In Minnesota, a plan of merger must be approved by the board of governors and by the members of an LLC.<sup>47</sup>

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<sup>45</sup> *Id.* at p. 25.

<sup>46</sup> Minn. Stat. § 322B.70, subd. 1.

<sup>47</sup> Minn. Stat. § 322B.72, subd. 1.

**a. A plan of merger must contain the following four required provisions:**

- i.** The name of the LLC and the name of each constituent organization involved, and the name of the surviving organization;
- ii.** The terms and conditions of the merger;
- iii.** The manner and basis for converting the ownership interests of the constituent organizations into ownership interests of the surviving organization (or ownership interests of any other entity), and/or into cash or other property; and
- iv.** Any amendments to the Articles of Organization or Articles of Incorporation of the surviving organization.

**b.** The board of governors must approve resolutions containing the plan of merger. Unless otherwise required under the organizational documents, the plan must be approved by a majority of the governors present at a board meeting.

- c. Unless otherwise required under the organizational documents, the plan of merger must also be approved at a regular or special LLC member meeting by the members holding a majority of the membership interests entitled to vote.<sup>48</sup>
  
- d. Written notice of the member meeting must be given to all LLC members, regardless of their voting rights. The notice must be sent 14 to 60 days prior to the meeting date, and it must include a copy or short description of the plan and indicate that the purpose of the meeting is to consider the proposed plan of merger.<sup>49</sup>
  
- e. After the plan of merger has been approved on behalf of each constituent organization in the merger, articles of merger must be signed on behalf of each constituent organization and filed

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<sup>48</sup> Minn. Stat. § 322B.72, subd 2.

<sup>49</sup> Minn. Stat. § 322B.72, subd. 1.

with the Secretary of State, together with a \$60 filing fee.<sup>50</sup>

- f. The articles of merger must contain a copy of the plan of merger, and must state that the plan has been approved on behalf of each constituent organization.

### **3. Tax Treatment**

“[Private Letter Ruling] 9404021 considered a merger between an LLC and a corporation. In the ruling, a Louisiana corporation (P) had a wholly owned subsidiary (S). P formed another subsidiary (H) and P and H formed a Louisiana LLC which was equally owned by P and H. S was then merged with the LLC. The ruling held that the merger of S with and into the LLC would be treated as: (1) a transfer by S of its assets to the LLC in exchange for the LLC’s assumption of S’s liabilities and S’s receipt of an increased interest in the items of income, gain, deduction, or loss of the LLC; followed by, (2) a distribution of S’s interest in the LLC to P in complete liquidation of S within the meaning of IRC § 332. The initial transfer of S’s assets to the LLC would be tax free under § 721

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<sup>50</sup> Minn. Stat. § 322B.73, subd. 1-2.

and the subsequent liquidation would be tax free under IRC § 332. Thus, as a result of the fact that the assets and liabilities stayed within an affiliated group of corporations, the taxpayer was able to move assets from a corporation to a passthrough entity without the current recognition of gain. Transactions of this sort could be useful where licensing, nontax tax law, or state taxation would be more favorable if applied to an LLC than to a corporation.”<sup>51</sup>

#### **H. Merger of an LLC into a Corporation**

1. Due to the fact that Minnesota law permits mergers of LLCs with other LLCs and corporations, a merger practically results in a conversion of the LLC to a corporation where the corporation is the surviving entity.<sup>52</sup> Minnesota law permits the merger of a corporation with an LLC.<sup>53</sup> Therefore, a merger with an LLC may practically result in a conversion of the corporation to an LLC where the LLC is the surviving entity. Remember, a conversion of this sort will require careful tax analysis.

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<sup>51</sup> Keatinge at p. 23-24, citing Rev. Rul. 69-6, 1969-1 CB 104, and Priv. Ltr. Ruls. 9404021 and 9409016.

<sup>52</sup> Minn. Stat. § 322B.70.

<sup>53</sup> Minn. Stat. § 302A.601, subd. 4.

2. The tax treatment of the merger of an LLC into a corporation will vary depending on the form of merger; the form of incorporation of the LLC will determine the tax consequences of the merger.<sup>54</sup>

### **I. Dealing with Dissenters Rights.**

An adverse tax consequence may occur when a partner in the terminating partnership does not want to become a partner in the resulting partnership and would like to receive money or property instead of an interest in the resulting partnership.”<sup>55</sup> Minnesota law provides that a plan of merger or plan of conversion for a LLC creates dissenters rights.<sup>56</sup> Specifically, when faced with a plan of merger or of conversion an LLC member has the right to dissent from the conversion or merger and collect payment on the fair market value of that member’s interests in the LLC.<sup>57</sup> “[T]he receipt of cash or property by that partner [or member] should be treated as a sale of that partner interest in the terminating partnership to the resulting partnership, not a disguised sale of the terminating partnership’s assets. Accordingly, [if the agreement of merger] specifies that the resulting partnership is purchasing the existing partner’s interest in the terminating partnership and the amount paid for the interest, the

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<sup>54</sup> Rev. Rul. 84-111, 1984-2 CB 88; for a more detailed analysis refer to II. Section F of this article.

<sup>55</sup> *Id.* at p. 15.

<sup>56</sup> Minn. Stat. § 322B.383, subd. 3 and 5 (1993).

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

transaction will be treated as a sale of the existing partner's interest to the resulting partnership.<sup>58</sup>

**J. Conversion of a LLP into a LLC.** The conversion of a limited liability partnership (“LLP”) to an LLC proceeds in the same manner as the conversion of a general partnership to an LLC<sup>59</sup>. One difference, however, is that the statement of qualification must be canceled in conjunction with the conversion<sup>60</sup>.

### **III. Conversions Involving Partnerships**

#### **A. Conversions of General Partnerships to Limited Partnerships**

1. A general partnership may be converted to a limited partnership pursuant to Minnesota law.<sup>61</sup> After all partners approve the conversion, the partnership has to file a certificate of limited partnership.<sup>62</sup>

**a. Pursuant to Minnesota law the certificate must include<sup>63</sup>:**

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<sup>58</sup> Keatinge at p. 15.

<sup>59</sup> NOTE that Uniform Partnership Act of 1994 (codified at Minn. Stat. Chapter 323A) includes a limited liability partnership within the definition of “partnership”. Minn. Stat. § 323A.0101(8).

<sup>60</sup> Minn. Stat. §§ 323A.1001(e), 323A.0105(d).

<sup>61</sup> Minn. Stat. § 323A.0902.

<sup>62</sup> Minn. Stat. § 321.1105.

<sup>63</sup> Minn. Stat. § 321.1105.

- i. A statement that the partnership was converted to a limited partnership from a partnership;
- ii. its former name; and
- iii. a statement of the number of votes cast by the partners for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion under the partnership agreement.

**b. The conversion takes effect when the certificate of limited partnership is filed or at any later date specified in the certificate.**

## **B. Conversions of General Partnerships to Limited Liability Partnerships**

1. A general partnership may become a limited liability partnership.<sup>64</sup> The terms and conditions on which a general partnership becomes a limited liability partnership must be

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<sup>64</sup> Minn. Stat. § 323A.0903.

approved by the vote necessary to amend the partnership agreement.

**a. After approval, a partnership may become a limited liability partnership by filing a statement of qualification. The statement must contain:**

- i.** The name of the partnership;
- ii.** The street address, including the zip code, of the partnership's chief executive office and, if different, the street address, including the zip code, of an office in this state, if any;
- iii.** If the partnership does not have an office in this state, the name and street address, including the zip code, of the partnership's agent for service of process (The agent of a limited liability partnership for service of process must be an individual who is a resident of this state or other person authorized to do business in this state);

iv. A statement that the partnership elects to be a limited liability partnership; and

v. A deferred effective date, if any.

**2. Status as a limited liability partnership**

a. The status of a partnership as a limited liability partnership is effective on the later of the filing of: The Statement of Qualification; or a date specified in the Statement of Qualification.

b. The status remains effective, regardless of changes in the partnership, until it is canceled or revoked.<sup>65</sup>

c. The status of a partnership as a limited liability partnership and the liability of its partners is not affected by errors or later changes in the information required to be contained in the statement of qualification.

d. The filing of a statement of qualification establishes that a partnership has satisfied all conditions precedent to the qualification of the partnership as a limited liability partnership. An amendment or cancellation of

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<sup>65</sup> See Minn. Stat. §§ 323A.0105, subd. d, and 323A.1003.

a statement of qualification is effective when it is filed or on a deferred effective date specified in the amendment or cancellation.

- e. The name of a limited liability partnership must meet the standard put forth by Minnesota law in Chapter 302A, Section 115, except that the name must include "Registered Limited Liability Partnership," "Limited Liability Partnership," "R.L.L.P.," "L.L.P.," "RLLP," or "LLP."

### **3. Tax Treatment**

When a partnership converts to a registered limited liability partnership, assuming that both the partnership and limited liability partnership are properly classified as partnerships and that all of the partners in the partnership continue as partners in the registered limited liability partnership, the conversion will generally not result in a termination of the partnership under IRC § 708, and for federal income tax purposes the registered limited liability partnership will be considered a continuation of the partnership.<sup>66</sup>

## **C. Conversions of Limited Partnerships to General Partnerships**

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<sup>66</sup> Keatinge at p. 14.

**1. A limited partnership may be converted to a general partnership pursuant to Minnesota law.<sup>67</sup>**

- a.** Unless there is a contrary provision in the limited partnership agreement, the terms and conditions of a conversion from a limited partnership to a general partnership must be approved by all of the partners.
- b.** After the conversion is approved by the partners, the limited partnership must cancel its certificate of limited partnership. The conversion only takes effect when the certificate of limited partnership is canceled.

**2. Conversions of Limited Partnerships Generally**

- a.** Prior to January 1, 2005, businesses could choose whether they wanted to be governed by the Minnesota Uniform Limited Partnership Act of 1976 or the Minnesota Uniform Limited Partnership Act of 2001. However, as of January 1, 2005, the 2001 Act must be followed when forming Limited Partnerships.

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<sup>67</sup> Minn. Stat. § 323A.0903.

b. Since January 1, 2005, Limited Partnership conversions have become more complex. Minnesota Statutes, Chapter 321, Section 1102 applies to any current conversions where the converting or converted organization is a limited partnership subject to the rules of the Limited Partnership Act. If the converting organization is a limited partnership, the partners are subject to the duties and obligations of the Limited Partnership Act, including obligations of good faith and fair dealing.

**3. Conversion of a limited partnership is appropriate only if:**

- a. The other organization involved in the conversion and its governing statute authorize the conversion;
- b. The conversion is not prohibited by the law of the jurisdiction that enacted the governing statute; and
- c. The other organization complies with its governing statute in effecting the conversion.

**d. The limited partnership must also have a plan of conversion on record. The plan of conversion must include:**

- i. The name and form of the organization before conversion;
- ii. The name and form of the organization after conversion;
- iii. The terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration; and
- iv. The organizational documents of the converted organization.
- v. **Due to the limited personal liability shield provided by a limited**

**partnership, all partners must consent to a plan of conversion.<sup>68</sup>**

**vi. The plan of conversion may be amended subject to the terms of the plan itself.<sup>69</sup>** However, these conversion requirements can be modified ahead of time in the partnership agreement.<sup>70</sup>

**vii. Finally, a limited partnership that is attempting conversion has to deliver Articles of Conversion to the secretary of state. These must include<sup>71</sup>:**

- a.** A statement that the limited partnership has been converted into another organizational form;
- b.** The name and form of the organization and a

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<sup>68</sup> Minn. Stat. § 321.1104.

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

<sup>70</sup> Minn. Stat. § 321.1110.

<sup>71</sup> Minn. Stat. § 321.1104. See Exhibit F of the Appendix for sample Articles of Conversion.

statement of its  
governing statute;

**c.** The date the conversion  
is effective under the  
governing statute of the  
converted organization;

**d.** A statement that the  
conversion was  
approved;

**e.** A statement that the  
conversion was  
approved as required by  
the governing statute of  
the converted  
organization; and

**f.** If the converted  
organization is a foreign  
organization not  
authorized to transact  
business in this state, the

street and mailing  
address of an office  
which the secretary of  
state may use for  
reference and service.

**D. Conversions of Limited Partnerships to Limited Liability Limited Partnerships**

**1. History**

**a. 1976 Uniform Limited Partnership Act**

- i. In order to form a limited Liability Limited Partnership under the 1976 Limited Partnership Act, a Limited Partnership must have already filed a valid certificate of limited partnership in the office of the secretary of state.<sup>72</sup>
- ii. Subsequently, the limited partnership becomes a limited liability limited partnership by completing a two-step process.<sup>73</sup> First, the limited partnership must obtain approval of the terms and

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<sup>72</sup> Minn. Stat. § 322A.11.

<sup>73</sup> Minn. Stat. § 322A.88.

conditions under which the limited partnership elected limited liability limited partnership status by the vote necessary to amend its limited partnership agreement. Next, the limited partnership must file a statement of qualification pursuant to Minnesota law<sup>74</sup>, and must comply with statutory name requirements as pertain to a limited liability limited partnership<sup>75</sup>.

**b. Uniform Limited Partnership Act of 2001**

- i. The Limited Partnership Act was revised in 2001, and it governs all limited partnerships formed after January 1, 2005.
- ii. Under the new structure, a limited liability limited partnership can be formed directly in the certificate of limited partnership.<sup>76</sup>

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<sup>74</sup> Minn. Stat. § 323A.1001, subd. c.

<sup>75</sup> Minn. Stat. § 322A.02, subd. a(1).

<sup>76</sup> Minn. Stat. §321.021, subd. 4.

iii. A limited liability limited partnership formed under the 1976 Act at Minnesota Statutes, Chapter 322A, Section 88 can be grandfathered in under the 2001 Act.<sup>77</sup> However, if such a limited liability limited partnership wishes to convert into any new entity after January 1, 2005, it will have to follow the provisions of the 2001 Act.

## **2. Effect of Conversion**

a. In general, a limited liability limited partnership continues to be the same entity that existed before the conversion.<sup>78</sup> However, the limited liability shield provided by Minnesota law applies to both the general and limited partners of a limited liability limited partnership.<sup>79</sup> Note that under the new statutory regime, the limited liability shield can still apply to limited partners even if the limited partner is participating in

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<sup>77</sup> See Minn. Stat. §§ 321.0102, subd. 9 and 321.1206, subd. b, c and f.

<sup>78</sup> Minn. Stat. §321.1105.

<sup>79</sup> Minn. Stat. §§ 323A.0306, subd. c and 323A.0307, subd. d.

some of the management and control of the business.<sup>80</sup>

### **3. Tax Treatment of Partnership Conversions**

- a. A general partnership or limited partnership that has been converted to a different type of partnership is, for all purposes, the same entity that existed before the conversion.<sup>81</sup> When a conversion takes effect, all property owned by the converting partnership or limited partnership remains vested in the converted entity. All obligations of the converting partnership or limited partnership continue as obligations of the converted entity, and an action or proceeding pending against the converting partnership or limited partnership may be continued as if the conversion had not occurred.

### **4. Effects of Conversion on Partners**

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<sup>80</sup> Minn. Stat. § 321.0303.

<sup>81</sup> See Minn. Stat. §§ 323A.0904 and 321.1105.

**a. General Partners**

- i. A general partner who becomes a limited partner as a result of conversion is liable as a general partner for an obligation incurred by the partnership before the conversion takes effect.
- ii. If a third party entering into a transaction with the limited partnership reasonably believes that the limited partner is a general partner, the limited partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect.
- iii. The limited partner's liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner.

**b. Limited Partners**

- i. A limited partner who becomes a general partner as a result of conversion remains liable only as a limited partner for an obligation incurred by the limited partnership before the conversion takes effect.
- ii. The partner is only liable as a general partner for an obligation of the partnership incurred after the conversion takes effect.

## **V. Mergers Involving Partnerships**

**A. Pursuant to an approved plan of merger, a partnership may be merged with one or more partnerships or limited partnerships.<sup>106</sup> The plan of merger must set forth:**

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<sup>106</sup> Minn. Stat. § 323A.0905.

1. The name of each partnership or limited partnership that is a party to the merger;
2. The name of the surviving entity into which the other partnerships or limited partnerships will merge;
3. Whether the surviving entity is a partnership or a limited partnership and the status of each partner;
4. The terms and conditions of the merger;
5. The manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or part; and
6. The street address, including the zip code, of the surviving entity's chief executive office.
  - a. In general or limited liability partnerships, the plan of merger must be approved by all of the partners or a number or percentage specified for merger in the partnership agreement. In a limited partnership, the plan must be approved by the vote required for approval of a merger by the law of the state or foreign jurisdiction in which the limited partnership is organized.

- b.** After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.
- c.** The merger takes effect on the later of the following:

  - i.** approval of the plan of merger by all parties to the merger;
  - ii.** the filing of all documents required by law to be filed as a condition to the effectiveness of the merger; or
  - iii.** Any effective date specified in the plan of merger.
- d.** When a merger takes effect, the separate existence of every partnership or limited partnership that is a party to the merger, other than the surviving entity, ceases.<sup>107</sup>

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<sup>107</sup> Minn. Stat. § 323A.0906.

- e.** All property owned by each of the merged partnerships or limited partnerships vests in the surviving entity, and all obligations of every partnership or limited partnership that is a party to the merger become the obligations of the surviving entity.
- f.** An action or proceeding pending against a partnership or limited partnership that is a party to the merger may be continued as if the merger had not occurred, or the surviving entity may be substituted as a party to the action or proceeding.
- g.** The secretary of state of Minnesota is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger.
- h.** The surviving entity shall, as part of the merger documents, state the mailing address, including the zip code, of its chief executive office.

### **C. Obligations**

1. A partner of the surviving partnership or limited partnership is liable for all obligations of a party to the merger for which the partner was personally liable before the merger.
2. Such a partner is also liable for all other obligations of the surviving entity incurred before the merger by a party to the merger, but those obligations may be satisfied only out of property of the entity.
3. A partner of the surviving partnership or limited partnership is also liable for all obligations of the surviving entity incurred after the merger takes effect, but those obligations may be satisfied only with property of the entity if the partner is a limited partner.
4. If the obligations incurred before the merger by a party to the merger are not satisfied out of the property of the surviving partnership, the general partners of that party immediately before the effective date of the merger must contribute the amount necessary to satisfy that party's obligations to the surviving entity as if the merged party were dissolved.

5. A partner of a party to a merger who does not become a partner of the surviving partnership or limited partnership is dissociated from the entity, as of the date the merger takes effect.
6. The surviving entity shall cause the partner's interest in the entity to be purchased.<sup>108</sup>
7. The surviving entity is bound by an act of a dissociated general partner<sup>109</sup>, and the partner is liable for transactions entered into by the surviving entity after the merger takes effect.<sup>110</sup>
  - a. After a merger, the surviving partnership must file a statement that one or more partnerships or limited partnerships have merged into the surviving entity.<sup>111</sup>
  - b. A statement of merger must contain:
    - i. the name of each partnership or limited partnership that is a party to the merger;

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<sup>108</sup> Pursuant to Minn. Stat. § 323A.0701 or another statute specifically applicable to that partner's interest with respect to a merger.

<sup>109</sup> Minn. Stat. § 323A.0702.

<sup>110</sup> Minn. Stat. § 323A.0703.

<sup>111</sup> Minn. Stat. § 323A.0907.

**ii.** the name of the surviving entity into which the other partnerships or limited partnerships were merged;

**iii.** the street address, including the zip code, of the surviving entity's chief executive office and of an office in this state, if any; and

**iv.** whether the surviving entity is a partnership or a limited partnership.

**c.** Property of the surviving partnership is property held in the name of the surviving entity upon filing a statement of merger. Real property of the surviving partnership or limited partnership is property held in the name of the surviving entity upon recording a certified copy of the statement of merger.

**d.** A filed statement of merger, executed and declared to be **accurate** pursuant to Minnesota

law, operates with respect to the partnerships or limited partnerships named.<sup>112</sup>

**D. Special Issues for Limited Partnership Merger**

1. In addition to the principles outlined above, there are some additional provisions under the 2001 Limited Partnership Act to be considered.
2. A limited partnership merges with one or more other organizations pursuant to Minnesota Statutes, Chapter 321, Section 1106. However, the governing statute of each of the other organizations must authorize such a merger, and the law of a jurisdiction that enacted any of those governing statutes cannot prohibit the merger. Each of the other organizations must comply with its governing statute in effecting the merger.
3. The merging limited partnership must have a plan of merger on record. The plan must include:
4. The name and form of each constituent organization;
  - a. The name and form of the surviving organization and, if the surviving organization is

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<sup>112</sup> Minn. Stat. § 323A.0105, subd. c.

to be created by the merger, a statement to that effect;

- b.** The terms and conditions of the merger, including the manner and basis for converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration;
- c.** If the surviving organization is to be created by the merger, the surviving organization's organizational documents;
- d.** If the surviving organization is not to be created by the merger, any amendments to be made by the merger to the surviving organization's organizational documents.<sup>113</sup>

- 5.** Due to the limited personal liability shield provided by a limited partnership, all partners must consent to the plan of merger.<sup>114</sup> The plan of conversion may be amended subject to the terms of the plan itself.<sup>115</sup> However, these conversion

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<sup>113</sup> Minn. Stat. § 321.1106.

<sup>114</sup> Minn. Stat. § 321.1107.

<sup>115</sup> *Id.*

requirements can be modified ahead of time in the partnership agreement.<sup>116</sup>

6. After each constituent organization has approved a merger, Articles of Merger must be signed on behalf of each preexisting constituent limited partnership, by each general partner listed in the certificate of limited partnership, and each other preexisting constituent organization, by an authorized representative. The Articles of Merger must include:
  - a. The name and form of each constituent organization and the jurisdiction of its governing statute;
  - b. The name and form of the surviving organization, the jurisdiction of its governing statute, and, if the surviving organization is created by the merger, a statement to that effect;
  - c. The date the merger is effective under the governing statute of the surviving organization;
  - d. If the surviving organization that is to be created by the merger will be a limited partnership, the

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<sup>116</sup> Minn. Stat. § 321.1110.

limited partnership's certificate of limited partnership;

- e. If the surviving organization that is to be created by the merger will be an organization other than a limited partnership, the organizational document that creates the organization;
- f. If the surviving organization preexists the merger, any amendments provided for in the plan of merger for the organizational document that created the organization, there must be a statement as to each constituent organization that the merger was approved as required by the organization's governing statute;
- g. If the surviving organization is a foreign organization not authorized to transact business in this state, the street and mailing address of an office which the secretary of state may use for the purposes of Minnesota Statutes Chapter 321, Section 1109, Subsection b; and

h. Any additional information required by the governing statute of any constituent organization.

**7. Each constituent limited partnership must then deliver the articles of merger to the office of the Secretary of State for filing.**

8. The merger will be effective when the articles of merger are filed with the Secretary of State, or on a later date specified in the Articles of Merger. The Secretary of State will issue a certificate of merger to the surviving organization.

a. Upon the date of a merger, the constituent organizations become a single legal entity (the surviving organization), and the separate legal existence of all other constituent organizations ceases.<sup>123</sup> All the assets and liabilities of the deceased constituent organizations become

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<sup>123</sup> Minn. Stat. § 322B.75, subd. 2(1-2).

vested with the surviving organization.<sup>124</sup> If an LLC was a constituent organization but not the surviving organization, the articles of merger serve as the notice of dissolution and articles of termination.<sup>125</sup>



### **Practice Tip**

Submit proposed articles of merger to the Secretary of State for advance approval especially if this is the first merger submission.

## **VI. Change of Entity Domicile**

- A. Purposes.** In certain circumstances, the owners of an entity may desire to change the domicile of the entity; i.e., with regard to an LLC, the members may wish to change a Minnesota LLC to a Delaware LLC.
- B. How Accomplished.** An entity's domicile can be accomplished via (i) formation of an entity of the same name in the new state; coupled with (ii) merger of the existing entity into the new entity. **NOTE:** the merger provisions in each state must be complied with to properly effect the change.

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<sup>124</sup> Minn. Stat. § 322B.75, subd. 2(5).

<sup>125</sup> Minn. Stat. § 322B.75, subd. 2(3).

## APPENDIX

<b><u>Exhibit</u></b>	<b><u>Description</u></b>
<b>A</b>	<b>Bill of Sale – Sole Proprietorship to LLC</b>
<b>B</b>	<b>Assignment and Assumption Agreement – Sole Proprietorship to LLC</b>
<b>C</b>	<b>Articles of Conversion – Corporation to LLC</b>
<b>D</b>	<b>Certificate of Limited Partnership</b>
<b>E</b>	<b>LLP Statement of Qualification</b>
<b>F</b>	<b>Articles of Conversion – Limited Partnership to General Partnership</b>
<b>G</b>	<b>Articles of Merger – Corporation to LLC</b>
<b>H</b>	<b>Statement of Merger, Partnership</b>

**Exhibit A – Bill of Sale – Sole Proprietorship to LLC**

**BILL OF SALE**

For good and valuable consideration, the undersigned, **BETA BUSINESS**, a sole proprietorship, (hereinafter referred to as “Assignor”), without recourse to the undersigned individually, hereby and herewith sells, assigns, transfers, conveys and delivers to **ACME BUSINESS MACHINES, LLC**, a Minnesota limited liability company (“Assignee”), all right, title and interest in and to all assets comprising the Assignor including.

Assignor covenants that: (i) they are the sole and lawful owner of the Assets, (ii) the Assets are free and clear of all security interests, liens, pledges, encumbrances, claims and charges whatsoever and there are no restrictions on transfer of the Assets, (iii) they have full power and authority to execute, deliver and sell the Assets to Assignor and this Bill of Sale is valid and legally binding on Assignor, and (iv) upon due execution hereof, Assignee shall receive valid and exclusive title to the Assets free and clear of any security interests, liens, pledges, encumbrances, claims or charges of whatsoever type or nature.

IN WITNESS WHEREOF, Assignor has caused this Bill of Sale to be executed by its duly authorized representative effective as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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(“Assignor”)

**Exhibit B - Assignment and Assumption Agreement – Sole Proprietorship to LLC**

**ASSIGNMENT AND ASSUMPTION AGREEMENT**

This Assignment and Assumption Agreement (“Assignment”) is entered into by and among **BETA BUSINESS**, a sole proprietorship (hereinafter referred to as "Assignor") and **ACME BUSINESS MACHINES, LLC**, a Minnesota corporation (hereinafter referred to as “Assignee”).

1. Assignor, for good and valuable consideration, the receipt and adequacy of which is acknowledged, hereby assigns and transfers to Assignee all of Assignor’s right, title and interest in and to all of the contracts, commitments and/or obligations listed on Exhibit “A” attached hereto (the “Assumed Obligations”).
2. Assignee hereby assumes and agrees to pay, perform, assume and discharge any and all of the obligations of Assignor arising out of or related to the Assumed Obligations.

IN WITNESS WHEREOF, the undersigned have caused this Assignment and Assumption to be executed and delivered as of the day and year first above written.

ASSIGNOR:

**BETA BUSINESS**

By \_\_\_\_\_

ASSIGNEE:

**ACME BUSINESS MACHINES, LLC**

By \_\_\_\_\_

**Exhibit C - Articles of Conversion – Corporation to LLC**

**ARTICLES OF CONVERSION  
OF  
ACME BUSINESS MACHINES, INC.  
INTO  
ACME BUSINESS MACHINES, LLC**

These Articles of Conversion relate to the conversion of **ACME BUSINESS MACHINES, INC.**, a Minnesota corporation, into **ACME BUSINESS MACHINES, LLC**, a Minnesota limited liability company.

1. The plan of conversion, dated as of \_\_\_\_\_, 20\_\_, is attached hereto as *Exhibit A*.
2. The name of the converting organization is **ACME BUSINESS MACHINES, INC.**. The name of the converted organization shall be **ACME BUSINESS MACHINES, LLC**.
3. The converted organization shall be a limited liability company governed by Chapter 322B of the Minnesota Statutes.
4. The plan of conversion has been approved by the converting organization pursuant to Section 302A.685 of the Minnesota Statutes.
5. The articles of organization attached as Exhibit One to the plan of conversion shall be the articles of organization of the converted organization.
6. The conversion provided for herein shall be effective at \_\_\_\_\_ on \_\_\_\_\_, 20\_\_.

DATED: \_\_\_\_\_, 20\_\_.

**ACME BUSINESS MACHINES, INC.**

By:

\_\_\_\_\_  
Its:

## EXHIBIT A TO ARTICLES OF CONVERSION

### PLAN OF CONVERSION

This Plan of Conversion is adopted by **ACME BUSINESS MACHINES, INC.**, a Minnesota corporation (the "Company"), as of this \_\_\_ day of \_\_\_\_\_, 20\_\_.

WHEREAS, the board of directors of the Company has determined that it is advisable and in the best interests of the Company and its shareholders to convert (the "Conversion") the Company from a Minnesota corporation into a Minnesota limited liability company (the "Converted Organization").

WHEREAS, in order to effect the Conversion, the board of directors has approved, and the shareholders of the Company have thereafter adopted, this Plan of Conversion.

1. Conversion. Pursuant to Section 302A.681 of the Minnesota Statutes, the Company shall be converted into the Converted Organization. The name of the Converted Organization shall be "**ACME BUSINESS MACHINES, LLC.**"
2. Effective Time. The Conversion shall be effective at \_\_\_\_\_ on \_\_\_\_\_, 20\_\_ (the "Effective Time").
3. Organizational Documents. The articles of organization attached as Exhibit One hereto shall be the Articles of Organization of the Converted Organization.
4. Board of Governors and Managers. The directors of the Company holding office immediately before the Effective Time shall constitute the board of governors of the Converted Organization. The officers of the Company holding office immediately before the Effective Time shall be the managers of the Converted Organization with such titles as are set forth on Annex II hereto.
5. Conversion of Capital Stock. At the Effective Time, each share of common stock of the Company, par value \$\_\_\_ per share, shall, by virtue of the conversion and without any action on the part of the holder thereof, be converted into one unit of membership interest in the Converted Organization.

6. Articles of Conversion. In accordance with this Plan of Conversion and for the purposes of effecting the Conversion, the Corporate Secretary shall file articles of conversion, which articles shall contain a copy of this Plan of Conversion and the Annexes hereto, with the Minnesota Secretary of State.

**ACME BUSINESS MACHINES, INC.**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

**Exhibit D - Certificate of Limited Partnership**

**CERTIFICATE OF LIMITED PARTNERSHIP**

This Certificate of Limited Partnership relates to the registration of **ACME BUSINESS MACHINES**, a general partnership as a limited partnership pursuant to Minn. Stat. § 322A.11.

1. The name of the registering organization is **ACME BUSINESS MACHINES**. The name of the registered limited partnership is **ACME BUSINESS MACHINES, LP**.
2. The registered organization shall be a limited partnership governed by Chapter 322A of the Minnesota Statutes.
3. The address of the office of **ACME BUSINESS MACHINES, LP** is as follows:

\_\_\_\_\_  
\_\_\_\_\_

4. The address of the agent for service of process for **ACME BUSINESS MACHINES, LP** is as follows:

\_\_\_\_\_  
\_\_\_\_\_

5. The latest date upon which the limited partnership is to dissolve is \_\_\_\_\_, 20\_\_\_\_.

Dated: \_\_\_\_\_, 20\_\_\_\_.

**ACME BUSINESS MACHINES**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

**6. Exhibit E - LLP Statement of Qualification**

**MINNESOTA SECRETARY OF STATE  
LIMITED LIABILITY PARTNERSHIP  
STATEMENT OF QUALIFICATION  
CHAPTER 323A**

**PLEASE TYPE OR PRINT IN BLACK INK.**

**Please read the instructions on the reverse side before completing.**

**Fee: \$135**

1. List the Partnership name :

\_\_\_\_\_

2. Address of the partnership's chief executive office:

\_\_\_\_\_  
\_\_\_\_\_

Complete Street Address or Rural Route and Rural Route Box Number City State ZIP  
**(Please note: PO Box is unacceptable)**

3. List office of partnership in Minnesota, if different from item 2:

\_\_\_\_\_  
\_\_\_\_\_

Complete Street Address or Rural Route and Rural Route Box Number City State ZIP  
**(Please note: PO Box is unacceptable)**

4. If there is no office in Minnesota, list name and address of agent of partnership in Minnesota for service of process:

Agent Name: \_\_\_\_\_

\_\_\_\_\_

Complete Street Address or Rural Route and Rural Route Box Number City State ZIP  
**(Please note: PO Box is unacceptable)**

5. This partnership elects to be a limited liability partnership.

6. The effective date of this filing if different from the date of filing, is:

\_\_\_\_\_.

7. I certify that I am a partner authorized to sign this document on behalf of this partnership and I further certify that by signing this document I am subject to the penalties of perjury as set forth in Minnesota Statutes, section 5.15 as if I had signed this document under oath. Note that this statement must be signed/executed by at least two (2) partners.

\_\_\_\_\_  
Signature of a partner  
Print name and daytime telephone number

\_\_\_\_\_

Signature of a partner  
Print name and daytime telephone number

**Exhibit F - Articles of Conversion – Limited Partnership to General Partnership**

**ARTICLES OF CONVERSION  
OF  
ACME LIMITED PARTNERSHIP  
INTO  
ACME PARTNERSHIP**

These Articles of Conversion relate to the conversion of **ACME LIMITED PARTNERSHIP**, a Minnesota limited partnership, into **ACME PARTNERSHIP**, a Minnesota general partnership.

- 7. The plan of conversion, dated as of \_\_\_\_\_, 20\_\_, is attached hereto as *Exhibit A*.
- 8. The name of the converting organization is **ACME LIMITED PARTNERSHIP**. The name of the converted organization shall be **ACME PARTNERSHIP**.
- 9. The converted organization shall be a general partnership governed by Chapter 323A of the Minnesota Statutes.
- 10. The plan of conversion has been approved pursuant to Section 321.1104 of the Minnesota Statutes.
- 11. The conversion provided for herein shall be effective at \_\_\_\_\_ on \_\_\_\_\_, 20\_\_.

DATED: \_\_\_\_\_, 20\_\_.

**ACME LIMITED PARTNERSHIP**

By:

\_\_\_\_\_  
Its:

**EXHIBIT A TO ARTICLES OF CONVERSION**

**PLAN OF CONVERSION**

This Plan of Conversion is adopted by **ACME LIMITED PARTNERSHIP**, a Minnesota limited partnership (the "Partnership"), as of this \_\_\_ day of \_\_\_\_\_, 20\_\_.

WHEREAS, all of the partners of the Partnership (the "Partners") have determined that it is advisable and in the best interests of the Partnership to convert (the "Conversion") the Partnership from a Minnesota limited partnership into a Minnesota general partnership (the "Converted Organization").

WHEREAS, in order to effect the Conversion, the Partners have approved and adopted this Plan of Conversion.

7. Conversion. Pursuant to Section 321.1102 of the Minnesota Statutes, the Partnership shall be converted into the Converted Organization. The name of the Converted Organization shall be "**ACME PARTNERSHIP.**"
8. Effective Time. The Conversion shall be effective at \_\_\_\_\_ on \_\_\_\_\_, 20\_\_ (the "Effective Time").
9. Organizational Documents. The partnership agreement attached as Exhibit One hereto shall be the partnership agreement for the Converted Organization.
10. Conversion of Partnership Interests. At the Effective Time, every one percent (1%) of the Partnership's limited partnership interests and general partnership interests shall be converted into one percent (1%) of general partnership interest in the Converted Organization.
11. Articles of Conversion. In accordance with this Plan of Conversion and for the purposes of effecting the Conversion, the Partnership shall file articles of conversion, which articles shall contain a copy of this Plan of Conversion and the Annexes hereto, with the Minnesota Secretary of State.

**ACME LIMITED PARTNERSHIP**

By: \_\_\_\_\_

Its: \_\_\_\_\_

**Exhibit G - Articles of Merger – Corporation to LLC**

**ARTICLES OF MERGER**

Pursuant to Section 302A.615 of the Minnesota Business Corporation Act and Section 322B.73 of the Minnesota Limited Liability Company Act, **ACME BUSINESS MACHINES, LLC**, a Minnesota limited liability company (“Surviving Organization”), and **ACME BUSINESS MACHINES, INC.**, a Minnesota corporation (the “Disappearing Organization”), the undersigned, hereby certify as follows:

1. The Agreement and Plan of Merger (“Plan”), attached hereto as *Exhibit A*, has been adopted by the Surviving Organization and by the Disappearing Organization;
2. The effective date of the merger shall be at the close of business on \_\_\_\_\_, 20\_\_; and
3. The Plan has been approved by each organization in accordance with the provisions of Section 302A.613 of the Minnesota Business Corporation Act and Section 322B.72 of the Minnesota Limited Liability Company Act.

IN WITNESS WHEREOF, the undersigned have caused these Articles of Merger to be executed by a duly authorized officer as of the \_\_\_ day of \_\_\_\_\_, 20\_\_.

Surviving Organization:

**ACME BUSINESS MACHINES,  
LLC**

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_

Disappearing Organization:

**ACME BUSINESS MACHINES,  
INC.**

\_\_\_\_\_  
Its: \_\_\_\_\_

## EXHIBIT A TO ARTICLES OF CONVERSION

### AGREEMENT AND PLAN OF MERGER

This agreement and Plan of Merger (“Agreement”) is effective as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and among **ACME BUSINESS MACHINES, LLC**, a Minnesota limited liability company (the “Surviving Organization”), and **ACME BUSINESS MACHINES, INC.**, a Minnesota corporation (the “Disappearing Organization”) (the Surviving Organization and Disappearing Organization may sometimes hereinafter be collectively referred to as the “constituent Organizations.”)

#### RECITALS

WHEREAS, the authorized membership interest units of the Surviving Organization, as set forth in its Articles of Organization, which are filed in the office of the Secretary of State of Minnesota, consists of \_\_\_\_\_ (##,###) units of membership interests; and

WHEREAS, the authorized common stock of the Disappearing Organization, as set forth in its Articles of Incorporation, as amended, which are filed in the office of the Secretary of State of Minnesota, consists of \_\_\_\_\_ (##,###) shares of common stock having \_\_\_\_\_ (\$##.##) par value; and

WHEREAS, the board of governors and members of the Surviving Organization and the board of directors and shareholders of the Disappearing Organization deem a merger of the Surviving Organization and the Disappearing Organization pursuant to the terms hereof desirable and in the best interests of their respective organizations; the board of governors and members of the Surviving Organization and the board of directors and shareholders of the Disappearing Organization, by resolutions duly adopted in accordance with the laws of the State of Minnesota, have approved this Agreement;

NOW THEREFORE, the parties hereto, by and between their respective shareholders and/or members, as applicable and board of directors and/or board of governors, as applicable, hereby agree as follows:

#### AGREEMENT

1. Merger. At the Effective Time (as defined herein below), and in accordance with the terms of this Agreement and the Minnesota Business Corporation Act and the Minnesota Limited Liability Company Act, the Surviving Organization shall merge with and into the Disappearing Organization, and said Disappearing Organization shall be merged with and into the Surviving Organization (such transaction being referred to as the “merger”). The separate existence of the Disappearing Organization shall thereupon cease, and the Surviving Organization shall be the surviving

