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Practical Considerations for Effecting a Timely Merger or Conversion

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There are many reasons why the shareholders or members of a business entity might want to merge or convert to a different entity type or change their state of domicile. While this article will provide general information on matters considered when the owners of a business entity make these kinds of decisions, the primary focus will be on the *practical* administrative tasks and challenges related to filing the necessary certificates with the Secretaries of State to update the public record with the successor merged or converted entity.

Before detailing these practical considerations, following are some examples of why a company may want to consider changing its form and/or jurisdiction of organization¹:

General Partnership or Limited Partnership: Merger or Conversion to Corporation or Limited Liability Company (“LLC”)

Partners of a General Partnership or Limited Partnership experiencing significant growth may want to seek increased limited liability protection by changing the entity type. In a General Partnership all partners have personal liability exposure for the debts, liabilities and obligations of the partnership. In a Limited Partnership, while the Limited Partners (a/k/a, the owners of the Limited Partnership) benefit from limited liability protection up to the amount of their investment in the Limited Partnership, the General Partners, who are responsible for running the business of the Limited Partnership, do not have that protection and are exposed to personal liability.

The corporate or LLC structure offers additional protection by limiting the shareholders’ or members’ liability to the amount of their investment with the directors, officers and managers not being liable for the debts and other obligations of the corporation or LLC.

Corporation Merger Into/Conversion to LLC

In the past decade, Secretary of State records have indicated that formation of LLCs has surpassed the number of corporations formed. In the last Annual Report published by the Delaware Division of Corporations, 71% of new entity formations were LLCs vs. 22% as corporations. The pass through

¹ Examples included in this article are for illustrative purposes and do not address all of the business and legal considerations that should be addressed when making a decision on merging or converting your business entity.

tax benefits, flexibility in management of the LLC structure and limited liability benefits afford a company the key benefits of both a corporation and partnership in the LLC structure. In addition, there is a significant increase in the comfort level of the use of the LLC structure in all types of financial transactions by banks and licensing authorities, which has contributed to the increase in new formations, mergers and conversions using the LLC form.

LLC Merger Into/Conversion to Corporation and Change of Domicile

Members of a limited liability company may want to change entity type and domicile in order to interest new investors. For example, a California LLC may want become a Delaware corporation because investors are more comfortable investing in a Delaware corporation to have access to Delaware's Chancery Court and years of established precedents. In this example, the change in entity type and domestic state of formation can be effected by either merger or conversion.

How to Change Entity Type or Domicile

Once you have agreement and a plan for merger or conversion, along with any other statutorily required documentation, a simple submission of a Certificate of Merger or Conversion in the relevant domestic state or states will effect the change of entity type and/or jurisdiction of formation. This part of the process is fairly simple.

The challenging part is coordinating the timing and paperwork required in each of the other states the merging or converting entity is doing business in at the Secretary of State level, if qualified, and updating any other public record filings, i.e., business licenses on record with any state, county or local authority.

State Requirements Vary Greatly

The requirements for effecting a merger or conversion vary substantially from state to state, which can complicate the process. One example that highlights this is California, which does not permit the conversion of a domestic corporation into an entity formed in another state. Therefore, in order to convert from a California domestic corporation (CA Corp.) to a Delaware LLC, the CA Corp. will have to convert first to a California LLC (CA LLC) then have the CA LLC convert to a Delaware LLC.

Another example of varying state requirements is when a Delaware corporation qualified in nine states wants to merge into a Delaware LLC. The chart on the next page illustrates the complexity regarding what documents need to be filed in this situation:

DELAWARE CORPORATION QUALIFIED IN SELECT STATES MERGING OR CONVERTING INTO A DELAWARE LIMITED LIABILITY COMPANY

(see Notes below)

STATE	MERGER: WHAT TO FILE?	CONVERSION: WHAT TO FILE?
Delaware (Domestic State)	File Certificate of Merger <i>IMPORTANT NOTE: Corporation must file and pay final annual report and franchise tax</i>	File Certificate of Conversion and Certificate of Formation concurrently. <i>IMPORTANT NOTE: Conversion will not be accepted if not submitted with the Certificate of Formation</i>
Alaska	File Certified Copy of the merger filed in home state	File Articles of Conversion and Certificate of Registration of LLC. Attach certified copy of Certificate of Conversion from domestic state.
Arkansas	File Certified Copy of the merger filed in home state	File Application for Authority of LLC. Attach certified copy of Certificate of Conversion from domestic state.
California	File Other Business Entity Certificate	File Certificate Withdrawal and simultaneous qualification.
Colorado	File online Statement of Foreign Entity Withdrawal	File Statement of Change
Georgia	File Application for Withdrawal of Certificate of Authority for the non-survivor corporation; no filing required for the survivor LLC.	File Application for Amended Certificate of Authority and Application for Certificate of Authority of Foreign LLC and a certified copy of Certificate of Conversion from domestic state.
Kentucky	File Certificate of Withdrawal	File an Amended Certificate of Authority (Corporate Form) to change entity from Corp. to LLC. Filed document must be recorded on the county level where registered agent is located.
Louisiana	File Certificate of Fact Reciting Merger	File Certificate Re: Conversion to terminate the DE corporation. Also file an Amended Certificate of Authority to "convert" to the DE LLC.
New Jersey	File Certificate of Merger/Consolidation (Form UMC-1)	File Certificate of Withdrawal Request for Tax Clearance is also required (<i>estimated 6-12 months to obtain</i>) Filing of Certificate of Authority of surviving converted DE LLC is permitted with name consent from the DE corporation prior to obtaining tax clearance and completing the withdrawal for the DE corporation.
West Virginia	File Certified Copy of the merger filed in home state	Two Options Available: 1 - File Certificate of Conversion or 2 - File Formal Withdrawal and simultaneous qualification

Notes:

1. Requirements may change; please contact NCR to request updated information.
2. Issuance of tax clearance to permit the withdrawal may take a while and, as a result, may cause a conflict with the name of an LLC in a state. You may have to file an assumed/fictitious name until the tax clearance is granted and the dissolution of the corporation is filed.

This data is provided for informational purposes only, is subject to change and is not to be taken as legal advice.

As the chart illustrates, even with a “simple” Delaware to Delaware merger or conversion, the requirements in all the states involved vary greatly. In your real life transactions, it is prudent to be aware of which states may require tax clearance, whether name clearance is required for the surviving entity and the timing related to coordinating all of the filings in advance of your desired effective date of the merger or conversion. Creating a chart that also includes the timeframe to complete filings and the associated fees well in advance of your merger or conversion filing date will assist you in minimizing surprises when you proceed with your filings and can also serve as a checklist for you as you complete the filings in each state. Coordinating with a service company to obtain current information and fees might be a helpful consideration to allow you to focus on the other important business related matters resulting from the merger or conversion.

Don't Forget Business Licenses!

While not covered in this article, the same considerations relating to requirements, timing and effect on continuing business licenses are critical. It is well known to many of us who have worked on these types of transactions that business license requirements and timing also vary greatly from state to state. You want to be certain that there are no obstacles or timing issues in any of your foreign jurisdictions, where qualified, or in any state, county and local jurisdictions where you have licenses registered that have an effect on continuing business in the new entity form or state.

Research in Advance = Less Stress

As you can see, the number of steps and documents you need to obtain and file to effect a merger or a conversion can make the process very time-consuming and complicated. **Developing a solid plan by researching all state filing and business license requirements in advance of your merger or conversion date will keep you organized and will minimize the chances of any unpleasant surprises and unnecessary stress.**

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