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ALABAMA'S NEW BUSINESS AND NONPROFIT ENTITIES CODE

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INTRODUCTION TO THE NEW ENTITIES CODE

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INTRODUCTION TO THE NEW ENTITIES CODE

On January 1, 2011, Alabama's New Business and Nonprofit Entities Code (the "Entities Code") will become effective. At that point, all practitioners will need to become fluent in how to maneuver within the new structure of the Entities Code that will govern all entities organized in Alabama or otherwise operating in Alabama. The Entities Code is intended to bring together certain aspects that affect most forms of entities into a centralized location. This central portion is commonly referred to as the "Hub" and is set forth in Chapter 1 of the Entities Code (§10A-1). The specific provisions and concepts that apply to a specific entity type are separated into separate chapters, which are commonly referred to as "Spokes." In some instances, the specific chapter for an entity has retained the same chapter designation in the new "Spoke." For example, provisions dealing with corporations, presently contained in Chapter 2 of Title 10, will also be in Chapter 2 of the new Entities Code. However, many of the chapter numbers will have changed in the new Chapter 10A that encompasses the Entities Code.

The drafters of the Entities Code intended for the changes to be primarily non-substantive. Their goal was to simply bring together the common provisions of the various types of entities into a central "Hub" while leaving the specific laws related to the various entities unchanged within the specific "Spoke". However, many of the provisions that were common to all entities were not always consistent in all regards. The result is that there are instances where substantive changes were made. In some instances, such as with mergers and conversions, there continue to be dual provisions that can apply under both the "Hub" and a particular "Spoke."

The following types of business entities are now covered by and included within the Entities Code:

1. Alabama Business Corporation Act – Chapter 2;
2. Non-Profit Corporation Act – Chapter 3;
3. Alabama Professional Corporations Act – Chapter 4;

4. Alabama Limited Liability Company Act – Chapter 5;

5. Alabama Revised Partnership Act – Chapter 8;

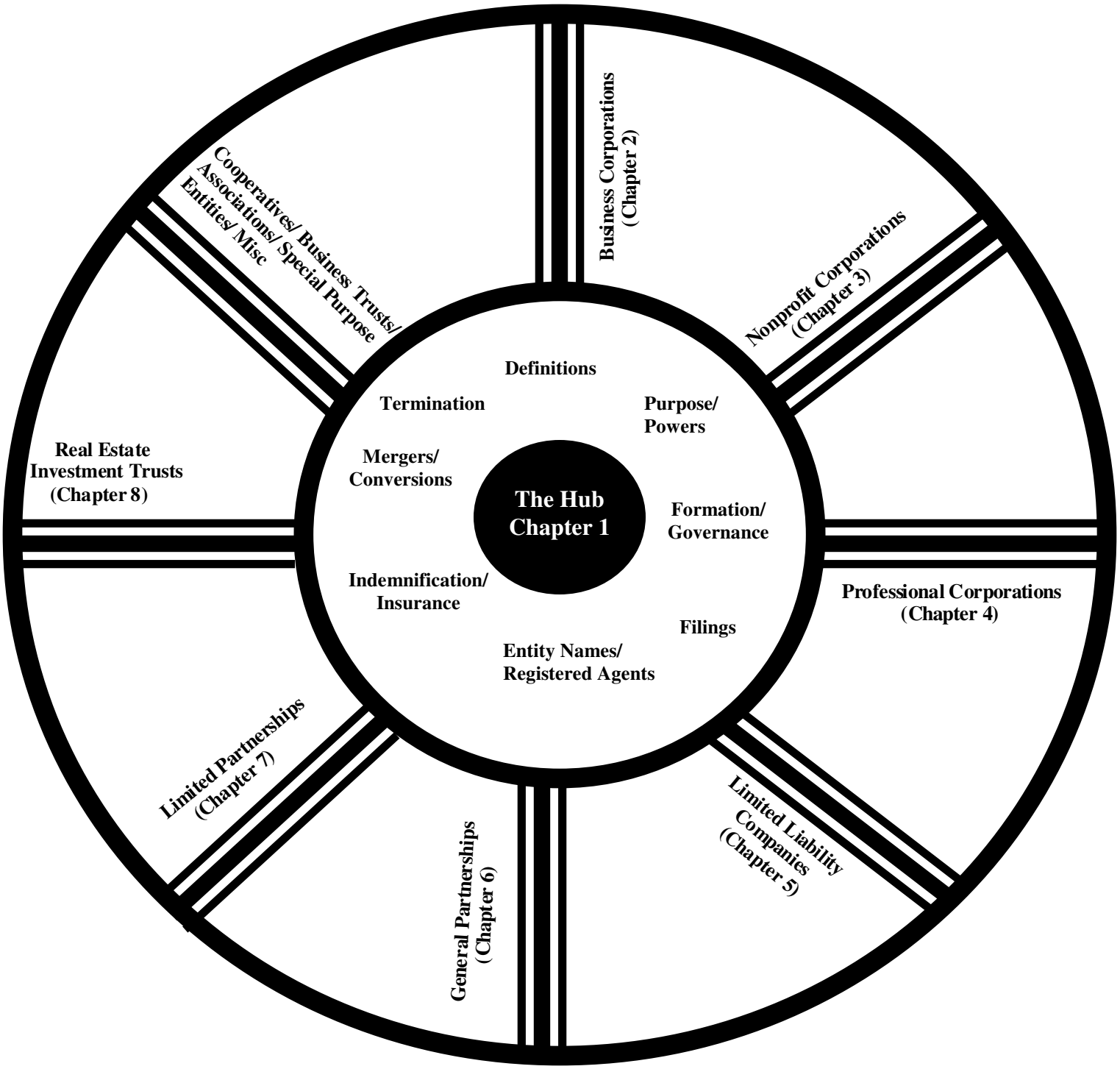
6. Alabama Revised Limited Partnership Act – Chapter 9;

7. Alabama Real Estate Investment Trust Act – Chapter 10; and

8. Other existing provisions of Alabama statues governing domestic and foreign business and non-profit entities and associations.

The general format of the new Entities Code and its "Hub" and "Spoke" structure is illustrated in the attached chart.

NEW BUSINESS AND NONPROFIT ENTITIES CODE
"HUB" AND "SPOKE" STRUCTURE



THE "HUB" PART 1
DEFINITIONS, FILINGS AND OTHER PROCEDURAL MATTERS
(CHAPTER 1 OF THE ENTITIES CODE)

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A. Introduction to Chapter 1

The purpose of Chapter 1 is to act as "the Hub" for the rest of the Entities Code. Chapter 1 includes provisions and concepts that are common to most forms of Entities and applies to all Entities formed under or governed by Chapters 2 to 11 (Business Corporations, Nonprofit Corporations, Professional Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Real Estate Investment Trusts, and Employee Cooperative Corporations). To navigate the Entities Code, one should first look to Chapter 1 of the Entities Code for general provisions and then refer to the specific chapter governing a particular Entity for further information and to determine whether any provisions differ or conflict with those in Chapter 1. Under §10A-1-1.02(c), if a provision in Chapter 1 conflicts with a provision in another chapter, the provision in the entity-specific chapter supersedes the provision in Chapter 1.

B. Definitions: Article 1

The Entities Code employs several new terms that are important to know for navigating the Code and also uses new terminology to replace existing terms and concepts. Several of the terms defined in §10A-1-1.03 are derived from definitions used in former entity-specific acts, and some of those are made Entity generic in this section and therefore applicable to all chapters and Entity types.[1] It is important to refer to the definitional section when determining the meaning or application of an Entities Code provision. Additionally, practitioners should use the new terminology when drafting filing instruments and Bylaw provisions. **NOTE**: although defined terms are not capitalized in the Entities Code, they are capitalized here for greater clarity; additionally,

[1] Examples of terms that have been defined in other sections and are now restated with Entity generic vocabulary are: "affiliate," "certification," and "distribution."

while the defined terms are presented in alphabetical order in §10A-1.1.03 of the Entities Code, they are presented in a logical sequence here for the convenience of the reader.

(1) Entity. A Domestic Entity or Foreign Entity.

(2) Domestic Entity. An Organization formed and existing under this title.

(3) Foreign Entity. An Organization formed and existing under the laws of a jurisdiction other than this state.

(4) Organization. A Corporation, Limited or General Partnership, Limited Liability Company, Business Trust, Real Estate Investment Trust, joint venture, joint stock company, Cooperative, Association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for profit, nonprofit, domestic, or foreign.

- **NOTE**: that the definition of Organization, and therefore Entity, does NOT include (i) trusts (other than business trusts), (ii) two or more persons with joint or common economic interests, or (iii) governments. This is a change from the prior Model Business Corporation Act. 10-2B-1.40(11).

(5) Filing Entity. A Domestic Entity that is a Corporation, Limited Partnership, Limited Liability Company, Professional Association, employee cooperative corporation, or Real Estate Investment Trust.

(6) Nonfiling Entity. A Domestic Entity that is not a Filing Entity. The term includes a domestic General Partnership, a registered limited liability partnership, and a Nonprofit Association.

(7) Foreign Filing Entity. A Foreign Entity that registers or is required to register as a Foreign Entity under §10A-1-7.01(a)(1).

(8) Professional Entity. A Professional Association, Professional Corporation, or Professional Limited Liability Company.

(9) Organizer. A person, who need not be an Owner or Member of the Entity, who, having the capacity to contract, is authorized to execute documents in connection with the formation of the Entity.

(10) Owner. includes shareholder, partner, Member, and owner of an equity interest:

(A) with respect to a foreign or domestic business corporation or real estate investment trust, a shareholder;

(B) with respect to a foreign or domestic partnership, a partner;

(C) with respect to a foreign or domestic limited liability company or association, a member; and

(D) with respect to another foreign or Domestic Entity, an owner of an equity interest in that Entity.

(11) Member.

(A) in the case of a Limited Liability Company governed by Chapter 5, a person reflected in the required records of a Limited Liability Company or as the Owner of some governance rights of a membership interest in the limited liability company as provided in §10A-5-1.02(e);

(B) in the case of a Nonprofit Corporation governed by Article 3, a person having membership rights in a Corporation in accordance with its Governing Documents as provided in §10A-3-1.02(6);

(C) in the case of an employee cooperative corporation governed by Chapter 11, a natural person who, as provided in §10A-11-1.02(5), has been accepted for membership in and owns a membership share in an employee cooperative; and

(D) in the case of a Nonprofit Association, a person who, as provided in §10A-17-1.02(1), may participate in the selection of persons authorized to manage the affairs of the Nonprofit Association or in the development of its policy.

(12) Certificate of Formation. the document required to be filed publicly under Article 3 to form a Filing Entity; and if appropriate, a Restated Certificate of Formation and all amendments of an original or Restated Certificate of Formation.

- **NOTE**: Under §10A-1-1.06, Certificate of Formation is synonymous with several other terms found in previous entity-specific acts. A reference to Certificate of Formation includes, in the case of a Corporation, articles of incorporation, certificate of incorporation, and charter; in the case of Limited Partnership, a certificate of limited partnership; in the case of a Limited Liability Company, articles of organization; and in the case of a Business Trust or a Real Estate Investment Trust, declaration of trust and, similarly, a reference to articles of incorporation, certificate of incorporation, charter, certificate of limited partnership, or articles of organization includes a Certificate of Formation.

(13) Certificate of Termination. Any document, such as articles of dissolution in the case of a Corporation, or certificate of cancellation, in the case of a Limited Partnership, required by law to be filed publicly with respect to an Entity's dissolution and the winding up of its affairs or the end of its existence. In the case of an Entity whose separate existence ceases as a result of a merger, the articles of merger shall constitute the Certificate of Termination.

- **NOTE**: Under §10A-1-1.06, a reference to Certificate of Termination includes, in the case of a Corporation or a Limited

Liability Company, articles of dissolution, and in the case of a Limited Partnership, a certificate of cancellation; similarly, a reference to articles of dissolution or certificate of cancellation includes Certificate of Termination and certificate of dissolution and, similarly, a reference to Certificate of Termination includes articles of dissolution and certificate of dissolution.

(14) Filing Instrument. An instrument, document, or statement that is required or authorized by this title to be filed by or for an Entity with the Filing Officer in accordance with Article 4.

(15) Filing Officer. The officer with whom a filing instrument is required or permitted to be filed under Article 4 or under any other provision of this title.

(16) Governing Documents.

(A) in the case of a Domestic Entity:

(i) the Certificate of Formation for a Domestic Filing Entity or the document or agreement under which a Domestic Nonfiling Entity is formed; and

(ii) the other documents or agreements, including bylaws, partnership agreements of Limited Partnerships, operating agreements of Limited Liability Companies, or the like similar documents, adopted by the Entity under this title to govern the formation or the internal affairs of the Entity; or

(B) in the case of a Foreign Entity, the instruments, documents, or agreements adopted under the law of its jurisdiction of formation to govern the formation or the internal affairs of the Entity.

(17) Governing Person. A person serving as part of the Governing Authority of an Entity.

(18) Governing Authority. A person or group of persons who are entitled to manage and direct the affairs of an Entity under this title and the Governing Documents of the Entity, except that if the Governing Documents of the Entity or this title divide the authority to manage and direct the affairs of the Entity among different persons or groups of persons according to different matters, Governing Authority means the person or group of persons entitled to manage and direct the affairs of the Entity with respect to a matter under the Governing Documents of the Entity or this title. The term includes the board of directors of a Corporation, by whatever name known, or other persons authorized to perform the functions of the board of directors of a Corporation, the General Partners of a General Partnership or Limited Partnership, the Managers of a Limited Liability Company that is managed by managers, the Members of a Limited Liability Company that is managed by Members who are entitled to manage the company, and the trust managers of a Real Estate Investment Trust. The term does not include an Officer who is acting in the capacity of an Officer.

(19) Affiliate. A person who controls, is controlled by, or is under common control with another person. An Affiliate of an individual includes the spouse, or a parent or sibling thereof, of the individual, or a child, grandchild, sibling, parent, or spouse of any thereof, of the individual, or an individual having the same home as the individual, or a trust or estate of which an individual specified in this sentence is a substantial beneficiary; a trust, estate, incompetent, conservatee, protected person, or minor of which the individual is a fiduciary; or an Entity of which the individual is director, general partner, agent, employee or the Governing Authority or member of the Governing Authority.

(20) Fundamental Business Transaction. A merger, interest exchange, conversion, or sale of all or substantially all of an Entity's assets.

(21) Subsidiary. An Entity or Organization at least 50 percent of:

(A) the Ownership or membership interest of which is owned by a Parent Entity or Parent Organization; or

(B) the voting power of which is possessed by a Parent Entity or Parent Organization.

(22) Parent Entity or Parent Organization. An Entity or Organization that:

(A) owns at least 50 percent of the Ownership Interest or Membership Interest of a Subsidiary; or

(B) possesses at least 50 percent of the voting power of the Owners or Members of a Subsidiary

Other synonymous terms to be aware of:

- a reference to certificate of merger includes articles of merger and a reference to articles of merger includes certificate of merger;
- a reference to authorized capital stock includes authorized shares;
- a reference to capital stock includes authorized and issued shares, issued share, and stated capital;
- a reference to a certificate of registration, certificate of authority, and permit to do business includes registration;
- a reference to stock and shares of stock includes shares;
- a reference to stockholder includes shareholder; and
- a reference to no par stock includes shares without par value.

C. Certificates of Formation and Amendments: Article 3

Article 3 of Chapter 1 deals with the formation and governance of all Entities generally.

(1) Formation of Filing and Nonfiling Entities.

Under §10A-1-3.01, to form any kind of Filing Entity, a Certificate of Formation must be filed in accordance with Article 4. The Filing Entity comes into existence when the Certificate of Formation takes effect and filing the Certificate of Formation is conclusive evidence of (1) the formation and existence of the Filing Entity, (2) the satisfaction of all conditions precedent to the formation of the Filing Entity, and (3) the authority of the Filing Entity to transact business in this state.

The formation and existence of a Domestic Filing Entity that is a Converted Entity in a Conversion or that is to be created under a plan of merger takes effect and commences on the effectiveness of the Conversion or merger, as appropriate. §10A-1-3.06.

Under §10A-1-3.02, the requirements for formation and determination of existence of Nonfiling Entities are governed by the chapter which applies to that specific Entity, and therefore one should also look to those applicable chapters for the relevant requirements.

(2) Certificate of Formation.

The Entities Code states several requirements for the Certificate of Formation for all Filing Entities generally. Under §10A-1-3.05, the Certificate may include any provision not inconsistent with law relating to the organization, ownership, governance, business, or affairs of the Filing Entity, and *must* state:

(a) The name of the Filing Entity being formed;

(b) The type of Filing Entity being formed;

(c) If the Filing Entity is not a Limited Partnership, the purpose or purposes for which the Filing Entity is formed, which

may be stated as "any lawful purpose for which a [name type of Entity] may be formed under the Entities Code;"

(d) The period of duration, if the Entity is not formed to exist perpetually. Pursuant to §10A-1-3.03, a Domestic Filing Entity exists perpetually unless otherwise provided in the Governing Documents;

(e) The street address and, if different, the mailing address of the initial registered office of the Filing Entity and the name of the initial registered agent of the Filing Entity at the office;

(f) The name and address of each:

(A) Organizer for the Filing Entity, unless the Entity is formed under a plan of conversion or merger; or

(B) General Partner, if the Filing Entity is a Limited Partnership;

(g) If the Filing Entity is formed under a plan of Conversion or merger, a statement to that effect and, if formed under a plan of Conversion, the name, address, date of formation, prior form of organization, and jurisdiction of formation of the Converting Entity; and

(h) Any other information required by entity-specific chapters of the Entities Code.

Additionally, under §10A-1-3.04, in the case of a Limited Partnership, each General Partner must sign the Certificate of Formation.

For all other Filing Entities, one or more Organizers must sign the Certificate of Formation.

(3) Amending the Certificate of Formation.

Division B of Article 3 sets out the general provisions dealing with amendments and restatements of Certificates of Formation; it is also important to look to the entity-specific chapters for further requirements.

Under §10A-1-3.11, a Filing Entity may amend its Certificate of Formation, provided that (1) the amended Certificate of Formation only includes provisions that would be permitted at the time of the amendment if the amended Certificate of Formation were a newly filed original Certificate of Formation, *or* provided that (2) the amended Certificate of Formation only effects a change, exchange, reclassification, or cancellation in membership or ownership interest or the rights of owners or members of the Filing Entity.

Under §10A-1-3.12, unless the Governing Documents or another entity-specific chapter provides otherwise, the Governing Authorities of the Entity shall have the power, without Owner or Member action, to adopt one or more amendments to the Entity's Certificate of Formation:

(a) to delete the name and address of Organizers or persons listed in the original Certificate of Formation as initial Governing Persons, other than the name and address of each General Partner of a Limited Partnership;

(b) to delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;

(c) to change the Entity name by adding, deleting, or changing a geographical attribution in the name, or by substituting:

(i) in the case of a Corporation, the word "corporation" or "incorporated" or an abbreviation of one of the words for a similar word or abbreviation;

(ii) in the case of a Professional Corporation, the words "professional corporation" for the abbreviation thereof, or the abbreviation for the words;

(iii) in the case of a Professional Association in existence on December 31, 1983, the words "professional association" for the abbreviation thereof, or the abbreviation for the words;

(iv) in the case of a Limited Partnership, the word "limited" or "limited partnership" for an abbreviation of one of the words for a similar word or abbreviation;

(v) in the case of a Limited Liability Company, the words "limited liability company" or the abbreviation thereof, or the abbreviation for the words; or

(d) to make any other change to the Certificate of Formation expressly permitted by this title to be made without Owner or Member action.

To amend its Certificate of Formation, a Filing Entity must sign and file a Certificate of Amendment or a Restated Certificate of Formation, which are discussed below.

(4) Certificate of Amendment.

Under §10A-1-3.14, (and by reference, §10A-1-4.11), a Certificate of Amendment takes effect upon filing, but it does not affect any existing causes of action against the Entity, any pending suits to which the Entity is a party, or any existing right of a person other than an Owner. Additionally, if the name of the Entity is changed, a suit against the former name is not abated.

Section 10A-1-3.13 of the Entities Code states several general requirements for what must be included in the certificate of amendment that is filed with the judge of probate. A certificate of amendment for a Filing Entity must state:

(a) the name of the Filing Entity;

(b) the type of the Filing Entity;

(c) the date the Certificate of Formation was filed, and the date of all prior amendments, and the filing office or offices where filed;

(d) for each provision of the Certificate of Formation that is added, altered, or deleted, an identification by reference or description of the added, altered, or deleted provision and, if the provision is added or altered, a statement of the text of the amended or added provision;

(e) that the amendment or amendments have been approved in the manner required by applicable chapter of the Entities Code and the Governing Documents of the Entity; and

- **NOTE**: it is important to look to the applicable chapter for further requirements on what the proper

method for approval is. For example, §10A-2-10.03 requires that, for Business Corporations, the shareholders entitled to vote on the amendment must approve the amendment by a majority vote. This should be stated in the certificate of amendment.

(f) all other information required by the provisions of this title applicable to the Filing Entity to be in the certificate of amendment.

(5) Restated Certificate of Formation.

In addition to being able to file a Certificate of Amendment, an Entity has the power, under §10A-1-3.15, to restate its Certificate of Formation. Under §10A-1-3.18, (and by reference, §10A-1-4.11), a Restated Certificate of Formation takes effect upon filing with the proper office and on that date the original Certificate of Formation and each prior amendment or restatement of the Certificate of Formation is superseded, and the most recent restated Certificate of Formation is the effective one.

The actual procedure for restating a Certificate of Formation is governed by the chapter that applies to the particular Entity type, but Chapter 1 does provide several requirements for what must be included in the Restated Certificate of Formation which represent a substantial expansion of certain practices that were previously allowed and utilized in connection with amending and restating filings. Under §10A-1-3.17, a Restated Certificate of Formation must:

(a) accurately state the text of the previous Certificate of Formation, regardless of whether it was the original or not;

(b) state each previous amendment to the Certificate being restated that is carried forward; and

(c) state each new amendment to the Certificate being restated.

The Restated Certificate of Amendment, unlike the original Certificate of Amendment, is not required to include the name and address of each Organizer (if the Entity is a Limited Partnership, it must list the name and address of each General Partner), or any other information that other chapters state may be omitted. If the Restated Certificate of Formation does not make new amendments requiring Owner approval for the Restatement, the Entities Code requires that the Restated Certificate of Formation be accompanied by a statement:

(a) that the Restated Certificate of Formation accurately states the text of the Certificate of Formation being restated, as amended, restated, and corrected (except for the information that is allowed to be omitted).

(b) that the restated Certificate *does not* make a new amendment requirement Owner approval; and

(c) that the Governing Persons have adopted the restatement in the manner required by the applicable chapter of the Entities Code.

NOTE: Again, it is essential that practitioners look to the entity-specific chapter as well when filing a Restated Certificate of Formation to determine the manner required for that specific Entity type, and to see whether that chapter requires any other information be included in the Restated Certificate of Formation

(§10A-1-3.17 requires that any information required by another chapter must be included in the applicable document).

If the Restatement does include a new amendment which requires Owner approval for restating the Certificate of Amendment, the restatement must:

(a) include a statement that each new amendment has been made in accordance with the Entities Code;

(b) identify, by reference or description, each added, altered, or deleted provision;

(c) include a statement that each amendment has been approved in the manner required by the entity-specific chapter of the Entities Code and the Governing Documents, including the same information required for an amendment to a Certificate of Formation regarding Owner approval of the amendment; and

(d) include a statement that the Restated Certificate of Formation accurately states the text of the Certificate of Formation being restated and each amendment to the Certificate of Formation that is in effect and does not include any other change in the Certification of Formation being restated, except for the information that is allowed to be omitted.

D. Filings: Article 4

Chapter 4 contains the general provisions that are applicable to the execution and submission of a Filing Instrument. It is also important to look to the entity-specific chapter for more information.

(1) Signature.

Section 10A-1-4.01 requires that a Filing Instrument be signed by the person or persons required by the Entities Code to execute (and verify, if required) the Filing Instrument. The person authorized to sign is not required to show evidence of the person's authority. The execution of a Filing Instrument constitutes an affirmation by the signer that the facts therein are true. If the person with authority to sign refuses to do so, any person adversely affected may petition the circuit court and the court, if it finds it is proper, shall order the appropriate Filing Office (either judge of probate or Secretary of State) to record a Filing Instrument.

Thus, it is essential that practitioners look to the applicable chapter in determining who has the authority to sign the Filing Instrument and whether it must be verified. For example, Chapter 2, governing Business Corporations, requires that a Filing Instrument be signed by the chair of the board of directors, by its president, or by another of its officers. Section 10A-2-2.10 also provides who should sign in other scenarios: if no directors selected, an incorporator must sign; if the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary. The person executing must sign the document and, print their name and state the capacity in which he or she signs, but the Entities Code does not require that the Filing Instrument for a Corporation contain the corporate seal, an attestation by the secretary or an assistant secretary, or an acknowledgement, verification, or proof.

(2) Forms.

The Business Corporation Act listed the various forms the Secretary of State made available and stated that the forms must be used if the Secretary of State required it. Under 1-A-1-4.05 of the Entities Code, the Secretary of State *may* adopt forms for a filing instrument and

currently the Secretary of State website states that it will make changes as they are required by §10A, which does not go into effect until January, 2011. A person is not required to use a form adopted by the Secretary of State unless the Entities Code specifically requires it.

(3) Delivery and filing location.

Section 10A-1-4.03 requires that, unless another section sets a specific time, an Entity should "promptly" file all required Filing Instruments with the proper office. Under §10A-1-4.02, unless another provision of the Entities Code requires that the Filing Instrument be filed with the Secretary of State, the following documents must be delivered to the judge of probate for filing:

(a) Certificates of Formation and any amendments or restatements;

(b) Certificates of Termination;

(c) Certificates of Revocation of Termination;

(d) Certificates of Correction to any Filing Instrument required to be delivered to the office of the judge of probate for filing; and

(e) any other Filing Instrument required or permitted under the Entities Code to be delivered to the judge of probate for filing.

All of the Filing Instruments listed in 1-4 above (for amendments to Certificates of Formation, only if the name of the Entity is changed) must be accompanied by an additional exact or conformed copy, so that the judge of probate can transmit a certified copy to the Secretary of State. The judge of probate will transmit the certified copy to the Secretary of

State within 10 days. In the case of articles of merger, conversion, or share exchange (which must be filed with the Secretary of State, as listed below), the Secretary of State shall promptly transmit a certified copy of the documents to the office of the judge of probate of the county in which each of the Entities' Certificates of Formation are filed.

The following Filing Instruments must be filed with the Secretary of State, not the judge of probate:

(a) Certificates of Merger, Articles of Consolidation, and Articles of Share Exchange;

(b) registration of a Foreign Entity for authority to transact business in this state;

(c) the annual report of a Business Corporation (which is required by §10A-2-16.22 for all domestic corporations and foreign corporations authorized to business in this state), together with the required fee;

(d) for corporations created by an act of the Legislature prior to the Constitution of Alabama of 1901, or for Entities which have resulted from a merger, a share exchange, or conversion, all Filing Instruments required by the Entities Code to be delivered to the judge of probate for filing shall be delivered to the Secretary of State for filing;

(e) any other Filing Instrument, or articles of correction of Filing Instrument, required or permitted under the Entities Code to be delivered to the Secretary of State for filing; and

(f) any other Filing Instruments that must be filed but that the Entities Code does not specify the proper office for filing.

- **NOTE**: this is change from the section of the Business Corporation Act this is derived from, and the default filing office for any Filing Instrument for which the place of filing is not specified is now the office of the Secretary of State, not the office of probate.

If the applicable filing office finds that all requirements for the Filing Instrument have been met, fees have been paid, and the name has been reserved as required by §10A-1-5.11, if applicable, the office shall file it immediately upon delivery by:

For Partnership Statements, one must look to §10A-8-1.06, (§10A-1-4.02 actually cites to §10A-8-1.05, but this is a mistake). That section requires that duplicate originals of the statement be filed in the office of the judge of probate in the county where the partnership has its chief executive office, and one of them be forwarded to the Secretary of State. If the chief executive office is out of state, the statement should be filed with the office of the Secretary of State. A statement filed in the proper office has the effect of a recorded statement under this chapter with respect to real property located in that county.

(a) endorsing "filed," together with his or her name and official title and the date and time of receipt on the instrument and all copies required hereunder and on the receipt for the filing fee;

(b) accepting it into the filing system adopted by the judge or probate or Secretary of State and assigning the instrument a date of filing; and

(c) delivering a copy thereof, endorsed as provided in subdivision (1), with the filing fee receipt (or

acknowledgment of receipt of the instrument if no filing fee is required) to the Entity or its representative.

The Secretary of State is required to keep an alphabetical list of domestic and Foreign Entities that have filed Certificates of Formation or registrations for authority to transact business in this state with that office, together with the information contained in the Filing Instrument.

If the judge of probate or Secretary of State refuses to file a Filing Instrument, he or shall return it to the Entity within seven days after it was delivered, with a brief explanation of the refusal. The filing or refusing to file does not affect the validity or invalidity of the Filing Instrument, does not relate to the correctness or incorrectness of the information contained in the Filing Instrument, and does not create a presumption that the Filing Instrument is valid or invalid or that the information contained in it is correct or incorrect.

(4) When filings take effect.

The general rule under §10A-1-4.11 is that a Filing Instrument takes effect upon filing. One can choose to delay the effectiveness of a filing under §10A-1-4.12 by specifying a date no later than the 90th day after the instrument is signed, and then choosing a time other than 12:00 a.m. or p.m. One cannot delay the effectiveness of a reservation or registration of a name or a Certificate of Abandonment. §10A-1-4.14. Under §10A-1-4.15, when the judge of probate or Secretary of State affirms the filing of a Filing Instrument that has a delayed effective date, it must state the date and time at which the instrument takes effect.

If an instrument has not taken effect yet, the parties involved can abandon that Filing Instrument under §10A-1-4.13 by filing a Certificate of Abandonment. Once the Certificate of Abandonment is filed, the action

or transaction evidenced by the original Filing Instrument is abandoned and may not take effect. A Certificate of Abandonment must:

(a) be signed on behalf of each Entity that is a party to the action or transaction by the person authorized by this title to act on behalf of the Entity;

(b) state the nature of the filing instrument to be abandoned, the date of the instrument, and the parties to the instrument; and

(c) state that the filing instrument has been abandoned in accordance with the agreement of the parties.

(5) Correcting and Amending Filings.

Under §10A-1-4.21, if a Filing Instrument has any mistakes or inaccurate information, it may be corrected by filing a Certificate of Correction, which must be signed by the person authorized by the Entities Code to act on behalf of the Entity. This option is now available to LLC's, and previously it was not. A Certificate of Correction may not make any change that would have caused the judge of probate to determine the Filing Instrument did not conform with the Entities Code at the time of filing.

The Certificate of Correction must:

(a) state the name of the Entity;

(b) identify the Filing Instrument to be corrected by description and date of filing with the appropriate office;

(c) identify the inaccuracy, error, or defect to be corrected; and

(d) state in corrected form the portion of the Filing Instrument to be corrected.

The Certificate of Formation should be filed with whatever office the original Filing Instrument should have been filed with. Under §10A-1-4.25, after the Certificate of Correction is filed with the correct office, the Filing Instrument is considered to be corrected on the date it was originally filed, except as to a person who is adversely affected by the correction. In that case, the Filing Instrument is considered corrected the day the Certificate of Correction is filed. An acknowledgment of filing issued by the applicable office before a Filing Instrument is corrected, with respect to the effect of filing the original Filing Instrument, applies to the corrected Filing Instrument as of the date the corrected Filing Instrument is considered to have been filed under this section.

In addition to filing a Certificate of Correction, a Filing Instrument may be amended or supplemented to the extent that the entity-specific chapter allows for it. Thus, it is important for practitioners to look to applicable chapters to determine how Filing Instruments can be changed or supplemented.

(6) Filing Fees.

Section 10A-1-4.31 lists filing fees applicable to all Entities. This section brings together the various filing fee provisions currently scattered throughout Title 10 and rationalizes those fees so that the fee for filing a Certificate of Formation is the same no matter what type of Entity is being formed. The chart below includes the fees for the general Filing Instruments, as well as the Filing Instruments specific to Limited Liability Partnerships. Any document not specifically listed but that is required to be filed by the Entities Code will cost $25 to file.

One new aspect of the filing fees is the option to expedite the filing of the Certificate of Existence for all Entity types for $25. Under the current law, an application for a Certificate of Existence can be expedited for a For-Profit Corporation for $100 (10-2B-1.22), and for a Limited Liability Company for $10 (10-12-61), but otherwise this was not an option. According to the Secretary of State website, the processing time will be reduced to a matter of minutes and will all be done online for greater convenience. Name reservations for all Entity types can also be expedited for $25 and expediting any other documents costs an additional $100.

Filing Instrument	**Fee for State of Alabama**	**Fee for Judge of Probate** *When there are two separate fees, two separate checks should accompany the filing.
Certificate of Formation and Restated Certificate of Formation	$100	$50
Amendment to Certificate of Formation	$50	$25
Names Reservations: A. Less than 24 hours (expedited) B. 24 hours or more	 $25 $10	 No fee No fee
Certificate of Termination	$100	$50
Certificate of Merger; Articles of Consolidation or Share Exchange	$100	$50

Filing Instrument	**Fee for State of Alabama**	**Fee for Judge of Probate** *When there are two separate fees, two separate checks should accompany the filing.
Foreign Entity registration including registration of foreign Limited Liability Partnership	$150	No fee
Certificate of Existence: A. Less than 24 hours (expedited) B. 24 hours or more	$25 $10	No fee No fee
Registered Limited Liability Partnership registration	$100	$50
Registered Limited Liability Partnership annual report	$100	No fee
Partnership Statement (filing or certifying)	$25	$25
Any other document required or permitted to filed under the Entities Code	$25	$25

This section also establishes a fund in the State Treasury called the Secretary of State Entity Fund which will hold filing fees. Both the judge of probate and the Secretary of State charge $1.50 per page for copying and $5 for certifying a copy of any Filing Instrument.

E. Names of Entities, Registered Agents and Registered Officers: Article 5

Article 5 first addresses the rules regarding choosing, reserving, and registering an Entity name. Division A includes the various provisions pulled from former entity-

specific Acts that list the requirements for the names of that Entity type. In describing this section of Texas' new Business Organizations Code, the Texas Secretary of State office stated: "It is anticipated that the leading cause of rejection on any formation filing, regardless of the type of Entity, will continue to be the failure of the Entity name to meet the Entity name standards established by law and by the administrative rules adopted by the secretary of state." This is therefore an important section of the Entities Code.

(1) Rules for choosing a name.

Formation under a given name does not give the newly organized Entity the right to use the name in violation of another person's right, and the Entities Code makes this clear. Under §10A-1-5.01, filing a Certificate of Formation or reserving or registering a name does not authorize the use of a name if it violates the rights of another under the federal Trademark Act of 1946, Alabama Trademark Law, or common law. When the Secretary of State checks availability of an Entity name, it is only reviewing names of active Domestic and Foreign Filing Entities (plus name reservations and name registrations on file with the Secretary of State). The Secretary of State does not review state or federal trademark registrations, assumed names, or other sources that might indicate common law usage or reveal possible trade name or trademark infringement.

Advice about the availability of an Entity name provided by the Secretary of State over the phone or email is *preliminary* advice. The final decision on whether the name is available does not occur until the filing is made. Thus, it is best to advise clients to not make financial expenditures or execute documents using a name until the filing has been made and the name is officially approved.

Sections 10A-1-5.02 and 10A-1-5.03, set out limitations for what can be included in Entity names generally.

(a) Unauthorized purpose. Under §10A-1-5.02, a Filing Entity may not have a name that contains any word or phrase that indicates or implies that the Entity is engaged in a business that the Entity is not authorized by law to pursue.

(b) Same names. Under §10A-1-5.03, a Filing Entity may not have a name that is the same as or not distinguishable on the records of the Secretary of State from:

(i) The name of another existing Filing Entity or Registered Limited Liability Partnership with an effective current registration;

(ii) The name of a foreign Filing Entity that is registered under Article 7;

(iii) A name that is reserved under Division B of Article 5; or

(iv) A name that is registered under Division C of Article 5.

- An Entity can use a name that is already being used (either the same or not distinguishable from another name in the record of the Secretary of State) if the other Entity or person for whom the name is reserved or registered 1) consents in writing to giving up the name to the applicant and 2) changes its name, by using the proper method, to something that is distinguishable on the records of the Secretary of State from the name for which the application was made.

- Words, phrases, or abbreviations indicating the Entity type ("corporation," "corp.," "incorporated," etc.) should not be taken into account in determining whether a name is the same or not distinguishable on the records of the Secretary

of State from another Entity name, unless waived by the incumbent holder of the name.

- This section is derived from the Alabama Business Corporation Act and replaces the "deceptively similar" test (which the Texas Code retained) with the "distinguishable on the records of the Secretary of State" test.

After listing the general prohibitions, the next several sections state the name requirements for the various types of Entities.

(a) Corporations. Under §10A-1-5.04, the name of a Corporation or Foreign Corporation (does *not* cover a Nonprofit Corporation, Professional Corporation, bank, trust company, savings and loan association, or insurance company) must contain:

(i) "corporation" or "incorporated"; or

(ii) An abbreviation of one of those words.

- **NOTE**: there is a separate section for requirements for Professional Corporations.

(b) Limited Partnership. Under §10A-1-5.05, the name of a Limited Partnership or foreign Limited Partnership:

(i) Must contain: "limited" or "ltd." or "Limited Partnership" or "L.P." or "LP;" and

(ii) May not contain: "bank," "banking," "banker," "trust," "insurance," "insurer," or any abbreviation of any of them, or any word, phrase, or abbreviation that indicates or implies that the partnership is a corporation.

(iii) May not contain the name of a limited partner unless it is also the name of a general partner or the corporate name of a corporate general partner or the business of the limited partnership had been carried on under that name before the admission of that general partner.

(c) Limited Liability Company. Under §10A-1-5.06, the name of an LLC or foreign LLC doing business in this state must contain: "Limited Liability Company" or "LLC" or "L.L.C."

(d) Limited Liability Partnership. Under §10A-1-5.07, the name of an LLP must contain: "Registered Limited Liability Partnership," or the abbreviation "L.L.P." or "LLP"

(e) Professional Corporation. Under §10A-1-5.08, the name of a domestic or foreign Professional Corporation must:

(i) Contain "professional corporation" or "P.C." or "PC;" and

(ii) Must conform to any rule promulgated by a licensing authority having jurisdiction of a professional service described in the Certification of Formation of the Corporation.

(2) Reserving a name.

Under §10A-1-5.11, a person may reserve the exclusive use of a corporate name, including a fictitious name for a foreign corporation whose corporate name is not available, by delivering an application to the

Secretary of State for filing. Any person may file an application to reserve the exclusive use of a name.

- It can be beneficial to reserve the name if you anticipate a delay between the client's name selection and the submission of the Filing Instrument.

(a) How to reserve. To reserve a name, one must submit an application stating the name and address of the applicant, and the proposed name to be reserved. The application must be signed by the applicant or an agent or attorney of the applicant and be accompanied by the appropriate filing fee: $25 for expedited, and $10 for more than 24 hours. The application can be made by phone or internet if the Secretary of State allows.

(b) Prohibitions. Under §10A-1-5.12, the same rules regarding choosing a name that is the same as or not distinguishable on the records of the Secretary of State from an existing registered or reserved name applies here, and the Secretary of State will not reserve any name that has already been taken unless the current holder agrees to give up the name. If the name is reserved or registered, the current holder can transfer its reservation to the applicant under §10A-1-5.16, or consent in writing to the use of the name by the applicant pursuant to §10A-1-5.23(b).

(c) Duration of reservation. If the name listed in the application is eligible for reservation, the Secretary of State will reserve that name for the exclusive use of the applicant. §10A-1-5.13. That reservation lasts for 120 days after the application is accepted or until the applicant files a written notice of withdrawal of reservation with the Secretary of State, whichever is earlier. The 120 day period may be extended for another 120 days if, during the 30 days preceding the expiration of that reservation, the

person files a new application to reserve the name, and pays another filing fee. §10A-1-5.15.

(d) Transferring a name reservation. Under §10A-1-5.16, a person may transfer the person's reservation of the name by filing a Notice of Transfer with the Secretary of State. The Notice of Transfer must be signed by the person holding the name and state the name and address of the person to whom the name is being transferred.

(3) Registering a name.

(a) Foreign Entities. Under §10A-1-5.21, a Foreign Filing Entity that is not registered to do business in Alabama may apply to register its name under this division. To do so, the Foreign Entity must file an application with the Secretary of State that:

1. states that the Entity validly exists;

2. contains a brief statement of the nature of the Entity's purpose (which can simply be any lawful purpose) subject, however, to general restrictions under §233 of the Alabama Constitution;

3. sets out:

(A) the name of the Entity;

(B) the name of the jurisdiction under whose laws the Entity is formed; and

(C) the date the Entity was formed; and

4. is accompanied by the required filing fee ($150).

(b) Prohibitions. Under §10A-1-5.23, just as with name reservations, one cannot register a name that has already been registered,

reserved, or a name that is not distinguishable on the records of the Secretary of State from a name that is already registered or reserved. Also, as with reservations, the current holder of a name can consent to the applicant Entity using the name and choose a different one or can transfer the name to the applicant Entity under §10A-1-5.16.

(c) Duration. Once an Entity registers a name, it is effective for one year after the application is accepted for filing or until the Entity files a written notice of withdrawal of registration with the Secretary of State, whichever is earlier. Section 10A-1-5.24. The registration of a name can be extended for another year if, during the 90 days preceding the expiration of the registration, a person files a new application to register the name and pays the required filing fees.

(4) Registered Agents and Registered Offices.

(a) Registered Agent. Under §10A-1-5.31, each Filing Entity, Foreign Filing Entity, and Foreign Registered Limited Liability Partnership registered under Article 7 and any Registered Limited Liability Partnership that does not maintain a place of business in this state must designate and continuously maintain a Registered Agent in Alabama that may be served any process, notice, or demand required or permitted by law to be served on the Entity. The Agent may be an individual who is a resident of Alabama or a Domestic Entity or a Foreign Entity that is registered to do business in Alabama. The agent must maintain a business office at the same address as the Entity's Registered Office.

If an Entity fails to maintain a Registered Agent, or the Agent cannot be served, the Entity may be served with process as provided by the Alabama Rules of Civil Procedure. Section 10A-1-5.35.

(b) Registered Office. In addition to a registered agent, under §10A-1-5.31, each Entity listed above must maintain a Registered Office in Alabama. The Registered Office must be located at a place where process may be personally served on the Entity's Registered Agent (cannot be a mailbox service or a telephone answering service), but it does not have to be at the Filing Entity's place of business.

(c) Changes. Under §10A-1-5.32, an Entity may change its Registered Agent or Registered Office by filing a statement with the Secretary of State that sets out the name of the Entity, the name and street address of the Entity's Registered Agent, the name of the new Agent or address of new Office, whichever is applicable (if it be a change in Agent, there must also be included the new Registered Agent's written consent to the appointment), and a recitation that the change specified if authorized by the Entity, and that the street address of the Registered Agent and Registered Office are the same. For Domestic Filing Entities, the change to the Registered Agent or Office becomes effective upon the Secretary of State's acceptance of the statement and the Entity is not required to amend its Certificate of Formation or Registration as a Limited Liability Partnership, if applicable. In the case of a Foreign Filing Entity, a change in the Registered Agent or Office is effective upon the Secretary's acceptance of the statement, and the statement is also effective as an amendment of the Foreign Filing Entity's application for registration as a Foreign Entity under Article 7.

Under §10A-1-5.33, the Registered Agent may change its name, its address as the address of the Entity's Registered Office, or both, by filing a Statement of Change. The statement must be signed by the Registered Agent (or someone authorized to sign) and must contain:

1. the name of the Entity;

2. the name of the Entity's Registered Agent and the address at which the Agent maintained the Entity's Registered Office;

3. the new name of the Agent (if applicable);

4. the new address of the Office (if applicable); and

5. a recitation that the written notice of the change was given to the Entity 10 days before the date the statement is filed.

As with the statement filed by an Entity changing an Agent or Office, the change in the Agent's name or address made by the Agent is effective upon the Secretary of State's acceptance of the statement, and no other amendments are necessary. Additionally, the Entities Code allows an Agent to file a statement changing its name that applies to more than one Entity.

(d) Resignation of an Agent. Under §10A-1-5.34, a Registered Agent may resign by giving notice to the Entity (at the Entity's address most recently known to the Agent) and to the Secretary of State. Notice to the Secretary of State must be given before the 11th day after the day notice was given to the Entity and must include the address of the Entity, a statement that the Entity was given written notification of the resignation, and the date that notification was given. If the Agent gives proper notice to both the Entity and the Secretary of State the termination is effective on the 31st day after the date the Secretary of State receives the notice. The Secretary of State must notify the Entity of the Agent's resignation and file the resignation in the same way as other filings (in accordance with Article 4 except that no fee is necessary).

F. Foreign Entities : Article 7

(1) Registration.

(a) Who must register. The first two sections set out which Foreign Entities are required to register in Alabama in order to transact business in this state. Under §10A-1-7.01, if the Foreign Entity, if formed in this state, would be required to file a Certificate of Formation or if the Foreign Entity affords limited liability under the law of its jurisdiction of formation to any owner or member, it must register under this chapter and maintain that registration while transacting business in this state. This means that a corporation, limited partnership, limited liability company, professional association, employee cooperative corporation, or real estate investment trust and any other Entity that provides limited liability for its owners or members must register in the state. A foreign General Partnership, unincorporated nonprofit association, and any other type of Entity that does not fall within one of the above categories may transact business in Alabama without registering under this chapter unless other law requires it. §10A-1-7.02

Under §10A-1-7.03, if a Foreign Entity is eligible to register under another Alabama law to transact business in this state, but has not registered under that law, it may register under this chapter (unless it is prohibited) and it will give that Entity the authority provided by this chapter only.

(b) How to Register. The application for registration as a Foreign Entity must state:

(i) the Entity's name;

(ii) the Entity's type;

(iii) the Entity's jurisdiction of formation;

(iv) the date of the Entity's formation;

(v) that the Entity exists as a valid Foreign Filing Entity;

(vi) the date the Foreign Entity began or will begin to transact business in the state;

(vii) the street address and mailing address, if different, of the principal office of the Foreign Filing Entity; and

(viii) the street address and mailing address of its initial registered office and the name of its initial registered agent.

A foreign corporation is also required to file a copy of its articles or certificate of incorporation or association or other certificate of formation in the state or other jurisdiction under whose law it is incorporated.

(c) Effect of Registration. Under §10A-1-7.05, the registration is effective when the application filed under Article 4 takes effect, and it remains in effect until the registration terminates, is withdrawn, or is revoked. If the Secretary of State issues an acknowledgment that the Foreign Entity has filed an application, then it is considered conclusive evidence of the authority of the Entity to transact business in the state in accordance with §10A-1-7.04(b)(1).

(d) Amendments to Registration. According to §10A-1-7.06, a Foreign Entity has a duty to correct any inaccuracies or mistakes in its application. Such amendments may be made by filing an application for amendment of registration as provided by Article 4. An application for amendment must be filed promptly after the discovery that any statement in the application was false when made, but no later than 60 days after the discovery. Likewise, an application for amendment must be filed promptly, but no later than 90 days after the change, if a change in facts make the application inaccurate in any respect. Furthermore, a Foreign Entity must amend its registration to change its name, which may require adopting a name that is available or otherwise satisfies the requirements of Article 5.

(e) Entity Name. Section 10A-1-7.07 provides a list of means that an Entity may employ if the name of the Entity does not satisfy the requirements of Article 5.

(2) Withdrawal.

(a) Voluntary Withdrawal of Registration. Section 10A-1-7.11 provides that registered Foreign Entity may withdraw its registration at any time by filing a certificate of withdrawal as provided in Article 4. Such a certificate of withdrawal must state:

(i) the name of the Foreign Filing Entity as registered in this state;

(ii) the type of Entity and the Entity's jurisdiction of formation;

(iii) the street address and mailing address, if different, of the principal office of the Foreign Filing Entity;

(iv) that the Foreign Filing Entity no longer is transacting business in this state;

(v) a mailing address to which process may be mailed pursuant to the Alabama Rules of Civil Procedure;

(vi) a commitment that if the mailing address, the Foreign Entity will promptly amend to update the address; and

(vii) that any money due or accrued to the State has been paid or described the provisions that have been made for the payment of that money.

In the certificate of withdrawal, the Foreign Entity must also revoke the authority of the Entity's registered agent in the State to accept service of process. Furthermore, the Foreign Entity must consent that service of process in any action stating a cause of action arising in this state during the time the Foreign Filing Entity

was authorized to transact business in the State may be made on the Foreign Filing Entity in accordance with the Alabama Rules of Civil Procedure. A certificate from the Alabama Department of Revenue that all applicable taxes and fees have been paid must also be filed with the certificate of withdrawal.

(b) Grounds for Revocation. Under §10A-1-7.12, the Secretary of State may commence a proceeding to revoke the registration of a Foreign Entity if:

(i) the Entity does not deliver its annual report, if required by law, to the Secretary of State within 180 days after it is due;

(ii) the Entity does not pay within 180 days after they are due any applicable privilege or corporation share tax, qualification fee or admission tax, or interest or penalties imposed by this title or other law;

(iii) the Entity is without a registered agent or registered office in this state for 60 days or more;

(iv) the Entity does not file a statement of change of registered agent or registered office within 60 days of the change, or its registered agent does not file a change of name or change of address of the registered office with the Secretary of State within 60 days of change;

(v) an organizer, Governing Person, or agent of the Foreign Entity signed a document he or she knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing; or

(vi) the Secretary of State receives a duly authenticated certificate stating that the Entity has been dissolved or disappeared as the result of a merger.

(c) Procedure for Revocation. According to §10A-1-7.13(a), (b), if the Secretary of State determines that there is grounds for revocation, he or she shall serve the Foreign Entity with written notice of such determination. If the grounds for revocation are not corrected or it is not demonstrated to the reasonable satisfaction of the Secretary that each ground does not exist within 60 days after service of the notice, the Secretary of State may revoke the Entity's registration. This may be done by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date.

(d) Effect of Revocation. Under §10A-1-7.13(c), the authority of a Foreign Entity to transact business ceases on the date shown on the certificate revoking its certificate of authority. However, revocation of a Foreign Entity's registration does not terminate the authority of the registered agent of the Entity.

(e) Appeal from Revocation. An Entity may appeal revocation of its registration to the Circuit Court of Montgomery County within 30 days after service of the certificate of revocation is perfected. Attached to any appeal should be the Secretary of State's acknowledgment of its application for registration, if any, and the Secretary of State's certificate of revocation. The court's final decision may be appealed as in other civil proceedings.

(3) Consequences of Transacting Business without Registering.

(a) Transaction of business without registration; generally. Foreign Entities that transact business in this state cannot maintain any

action, suit, or proceeding in any court of this state until it has registered in this state. The failure of a Foreign Entity to register in this state will not impair the validity of its contract or acts, nor will it prevent it from defending any action, suit, or proceeding in any court of this state, unless otherwise provided as to a specific Entity in the chapter governing that specific Entity. If a Foreign Entity transacts business without registering, it will be deemed to have consented to service of process by registered mail for causes of action arising out of business conducted in this state or service of any notice or demand required or permitted by law. The registered mail must be addressed to the Foreign Entity at the office required to be maintained in the state or other jurisdiction where it is organized, or, if such an office is not required, at the principal office of the Entity. Service can also be completed by serving the Entity by any method permitted under §§10A-1-5.35 and 10A-1-5.36. The liability of an owner or owners of a Foreign Entity is governed by the laws of the state or other jurisdictions where it is organized. Limitations on liability are not waived solely by reason of transacting business in Alabama without registration. §10A-1-7.21.

(b) Transaction of business without registration; actions to restrain. The Attorney General may bring an action to restrain a Foreign Entity from transacting business in this state in violation of this title. §10A-1-7.22.

(c) Late filing fee. The Secretary of State can collect a late filing fee from a Foreign Filing Entity. The late filing fee is equal to the registration fee for the Entity for each year of delinquency if the Entity has transacted business in this state for more than ninety days. The Secretary of State may condition the effectiveness of a registration on the payment of the late filing fee. §10A-1-7.23.

(d) Requirements of other law. This article does not excuse a Foreign Entity from complying with the duties imposed under other law that relate to filing or registration requirements, including other chapters of this title. §10A-1-7.24.

(4) Business, Rights, and Obligations.

(a) Business of Foreign Entity. A Foreign Entity cannot conduct a business or activity in this state that this title does not permit the Domestic Entity to which it is most similar to conduct, unless other laws of this state authorize the Entity to conduct the business or activity. §10A-1-7.31.

(b) Rights and Privileges. A Foreign Nonfiling Entity or a Foreign Filing Entity registered under this article enjoys the same rights and privileges as the Domestic Entity to which it most closely corresponds. It does not enjoy greater rights than the Domestic Entity to which it most closely corresponds. §10A-1-7.32.

(c) Obligations and Liabilities. Subject to this title and other laws of this state in any matter that affects the transaction of intrastate business in this state, a Foreign Entity and any of its members, owners, or managerial officials are subject to the same duties, restrictions, penalties, and liabilities imposed its most closely corresponding Domestic Entity and its members, owners, or managerial officials. §10A-1-7.33.

(d) Right of Foreign Filing Entity to participate in the business of certain Domestic Entities. If a Foreign Filing Entity is a lawful owner or member of a Domestic Entity and it casts a vote or provides consent for that Domestic Entity, the vote or consent is not invalidated if the Foreign Filing Entity does not register to transact business in this state. The Foreign Filing Entity's participation in the management and control of the business and affairs of the Domestic Entity is likewise not invalidated by

its lack of registration to transact business in this state. However, its votes, consent, and participation are all subject to all laws governing a Domestic Entity, including antitrust laws of this state. §10A-1-7.34.

(e) Out of state business or property of Foreign Entity not subject to control or regulation. It is the intent of the Legislature and the policy of the State of Alabama to promote and encourage industry in Alabama because the public interest lies in the promotion of business and industry in this state. Specifically, the Legislature's intent is to induce Foreign Entities engaged in manufacturing, industrial, commercial, business, transportation, utility, public service, and research enterprises to locate the principal administrative office, principal distribution or manufacturing plant, or principal place of business within this state. This section is to be liberally construed to support this intent. When a Foreign Entity that only transacts a portion of its business within the state has located, or is in the process of locating, its principal administrative office, principal distribution or manufacturing plant, or principal place of business within this state, the authority, jurisdiction or power conferred by any laws of this state on any agency, commission, department, or instrumentality of the state to control or regulate the Foreign Entity, its business, property, securities, or obligations will not apply and will not be exercised with respect to property located in another state, business conducted outside the state, or the securities or obligations of the Foreign Entity as long as nothing in this title section will be construed to repeal, alter any of the provisions of Title 8 relating to securities. §10A-1-7.35.

(f) Right of eminent domain. Foreign Entities that have complied with the constitution and laws of this state as to doing business within the state have the same right of eminent domain and the same remedies for enforcing the rights of domestic corporations to which it is most similar. §10A-1-7.36.

(g) Extension of lines, tracks, ways, or works into state. Any Foreign Entity which has complied with the constitution and laws of this state for doing business within the state and which is engaged in constructing or operating a streetcar, electric light, telegraph, telephone or power lines, pipelines, or works in an adjoining state may extend its lines, tracks, ways, pipelines, or works into this state. It can connect such lines with other lines, pipelines, ways or works of similar or like character and to do so, can exercise the same rights, privileges, immunities, and remedies as to the right of eminent domain and condemnation proceedings as any Domestic Entity that is engaged in a similar business. §10A-1-7.37.

(5) Applicability of this title to certain Foreign Entities. This title apply to a Foreign Entity registered or granted authority to transact business in this state under: 1) a special statute that does not contain a provision regarding a matter provided for by this title with respect to a Foreign Entity or 2) another statute that specifically provides that the general law for the granting of a registration or certificate of authority to the Foreign Entity to transact business in this state supplements the special statute. Unless otherwise provided by such a special statute, a document required to be filed with the Secretary of State under special statute must be signed and filed in accordance with Article 4. §10A-1-7.41.

G. Conversions and Mergers: Article 8

(1) Conversion of business and nonprofit Entities. All of the following Entities can be converted into any other form of Entity pursuant to Article 8. **QUERY**: It is unclear whether conversion could be used to convert from an Alabama entity to the same type of entity in a different jurisdiction (e.g. Alabama LLC converted to Delaware LLC).

(a) A conversion of an Entity to any other form of Entity may be accomplished as provided below (§10A-1-8.01(a)):

(i) Corporations. The terms and conditions of a conversion of a corporation, other than a nonprofit corporation, to another Entity must be approved by all of the corporation's shareholders except as otherwise provided in the corporation's articles of incorporation; but the required shareholder approval vote can never be set at less than a majority of the votes entitled to be cast by each voting group entitled by law to vote separately on the conversion. If the articles of incorporation provide for approval of a conversion by less than all of a corporation's shareholders, approval of the conversion will be considered a corporate action subject to dissenter's rights pursuant to Article 13. No conversion of a corporation to a general or limited partnership can be completed without the written consent of each shareholder who is going to be a general partner in the converted Entity, regardless of any provision in the articles of incorporation of the converting corporation providing for less than unanimous shareholder approval for the conversion. The terms and conditions of a conversion of a nonprofit corporation with members with voting rights to another form of Entity must be approved by all the corporation's members who are entitled to vote thereon, unless otherwise provided in the corporation's certificate of formation. However, the certificate of formation can never provide for approval by less than a majority of the members entitled for vote thereon. If the converting nonprofit corporation has no members, or no members entitled to

vote thereon, the terms and conditions of the conversion must be approved by a unanimous vote of the board of directors of the converting nonprofit corporation, unless otherwise provided in the certificate of formation. However, the certificate of formation can never provide for approval by less than a majority of the board of directors. §10A-1-8.01(a)(1).

(**NOTE**: inconsistent use of "articles of incorporation" and "certificate of formation" in statute.)

(ii) Limited Partnerships. The terms and conditions of a conversion of a limited partnership to another Entity must be approved by all of the partners or as otherwise provided in the partnership agreement. No conversion of a limited partnership to a general partnership can be effected without the written consent of each limited partner who is to be a general partner in the converted Entity, regardless of any provision in the limited partnership agreement that would otherwise provide for approval of the conversion by less than all partners. §10A-1-8.01(a)(2).

(iii) Limited Liability Companies. The terms and conditions of a conversion of a limited liability company to another Entity must be approved by all of its Governing Documents. No conversion of limited liability company to a general or limited partnership can be effected without the written consent of each member who is to be a general partner in the converted Entity, regardless of any provision in its Governing Documents that provide for less than

unanimous member approval for the conversion. §10A-1-8.01(a)(3).

(iv) General Partnerships, Including Registered Limited Liability Partnerships. The terms and conditions of a general partnership to another Entity must be approved by all of the partners or as otherwise provided in the partnership agreement. No conversion of a registered limited liability partnership to a general or limited partnership can be effected without the written consent of each partner who is to be a general partner who would not enjoy limited liability in the converted Entity, regardless of any provision in its partnership agreement that provides for less than unanimous partner approval for the conversion. §10A-1-8.01(a)(4).

(v) Real Estate Investment Trusts. The terms and conditions of a conversion of a real estate investment trust to another Entity must be approved by all of the trust's shareholders except as otherwise provided in the trust's declaration of trust; however, the required shareholder approval vote can never be set at less than two-thirds of all votes entitled to be cast. No conversion of a real estate investment trust to a general or limited partnership can be effected without the written consent of each shareholder who is to be a general partner in the converted Entity, regardless of any provision in the declaration of trust of the converting real estate investment trust that provides for less than unanimous shareholder approval for the conversion. §10A-1-8.01(a)(5).

(vi) Other Entities. The terms and conditions of a conversion of the Entity into any other form of Entity must be approved by all owners of the converting Entity. No conversion of any Entity can be effected without the consent in writing of an owner of the converting Entity who has limited liability and who will become an owner without limited liability protection of the converted Entity. If the converting Entity does not have owners, the terms and conditions of the conversion must be unanimously approved by the Governing Authority of the converting Entity. §10A-1-8.01(a)(6).

(b) Under §10A-1-8.01(b), after the conversion is approved by the shareholders, partners, members, owners, directors, or other Governing Authority of the converting Entity pursuant to §10A-1-8.01(a), the following documentation and filing requirements apply (§10A-1-8.01(b)):

(i) if the conversion is to a corporation, limited liability company, limited partnership, real estate investment trust, or other Entity required to file a certificate of formation, the appropriate certificate of formation for the converted Entity must be filed in the office in which filing is required for the formation of the resulting Entity in accordance with Article 4. In addition to any information or statements otherwise required by law to be included in the certificate of formation, it must also include:

(A) a statement that the Entity was converted from another Entity;

(B) the former name of the converting Entity;

(C) the public office where the certificate of formation and certificate of termination, if any, of the converting Entity is filed;

(D) if the converted Entity is one in which one or more owners lack limited liability protection, a statement that each owner lacking limited liability protection has consented in writing to the conversion as required by this section; and

(E) a statement that the conversion was approved pursuant to this section.

(ii) if the conversion is to a general partnership or other Entity formed without filing a certificate of formation, no instrument is required to be filed under subdivision (1), but the converting Entity must comply with the certificate of termination requirements described below.

(iii) any converting Entity required to file a certificate of termination with respect to the end of its existence will file the certificate of termination in accordance with Article 4 in the office in which the certificate is required by law to be filed. In addition to any information otherwise required by law to be included in the certificate of termination, the certificate of termination must include the following:

(A) a statement that the converting Entity was converted to another Entity; and

(B) the new name of the converting Entity, and the public office where the new Entity's certificate of formation, if any, is filed.

(iv) a general partnership, or other Entity not required to file a certificate of termination, converting to another Entity is not required to file any certificate of termination that complies with subdivision (3) but the converted Entity is required to comply with the certificate of formation filing requirements, if any, of subdivision (1).

(c) Pursuant to §10A-1-8.01(c), a conversion takes effect as follows:

(i) if both a certificate of formation and a certificate of termination are required to be filed, upon the filing of the later of the two. If any certificate of formation is required to be filed pursuant to (b)(1), any certificate of termination required to be filed required pursuant to (b)(3) will not be deemed effective until the filing of the required certificate of formation.

(ii) if only a certificate of formation for the converted Entity or a certificate of termination of a converted Entity is required to be filed, upon the filing of whichever is required.

(iii) upon the delayed effective date if both of the following requirements is satisfied:

(A) a delayed effective date is specified in both the certificate of formation and certificate of termination, if both are required, and such a date is identical in both certificates. If only one certificate is required, a delayed effective date and time can be specified in that certificate; and

(B) whatever certificates are required are filed before the effective date specified (i.e. no retroactive dates).

(iv) if a delayed date is specified, and the aforementioned conditions are met, the conversion is effective at the close of business, unless a different hour is specified, on that date.

(v) if no certificate of formation or certificate of termination is required to be filed, the conversion takes effect as designated by the converting Entity.

(d) Under §10A-1-8.01(d), conversion has the following effects:

(i) A limited partnership, general partnership, corporation, limited liability company, real estate investment trust, or other Entity that has been converted pursuant to this chapter is for all purposes the same Entity that existed before the conversion. §10A-1-8.01(d)(1).

(ii) All property, real, personal, and mixed owned by the converting Entity; all public or private rights, immunities, and franchises of the converting Entity, and all debts or obligations due the converting Entity, are taken and ***deemed to be transferred*** and vested in the new Entity without the necessity of any deed or other instrument of conveyance, and without payment and without collection by any filing officer of any deed or other transfer tax or fee. A certified copy of any certificate of termination of the converting Entity, or a statement containing the information specified in (b)(3) if such a certificate is not required, may be filed in the office of the judge of probate in any county in which the converting Entity owned real property. The certificate or statement will be recorded without payment or fees. The probate judge is entitled to collect the filing fees prescribed

in this title. The filing will evidence chain of title, but lack of filing will not affect the converted Entity's title to the real property. §10A-1-8.01(d)(2)

(iii) The new Entity will be responsible and liable for all liabilities and obligations of the old Entity. The rights of creditors and any liens upon the old Entity's property will not be impaired by the conversion. An equity owner of the new Entity is liable for all obligations of the old Entity for which the Owner was personally liable for before the conversion. §10A-1-8.01(d)(3).

(iv) Any claim existing or any action or proceeding of any kind pending by or against the converting Entity may be prosecuted or continued as if the conversion had not occurred, or the converted Entity may be substituted in the action or proceeding for the converting Entity. §10A-1-8.01(d)(4).

(v) No owner of an Entity with limited liability protection will become an owner of an Entity without limited liability protection unless such owner has given written approval of the conversion. An owner with limited liability protection remains liable for any obligations incurred by the converting Entity before the conversion takes effect only to the extent the Owner would have been liable if the conversion had not occurred. An owner with limited liability protection who becomes an owner without limited liability protection is liable for an obligation of the converted Entity that is incurred after conversion to the extent provided for by the laws applicable to the new Entity. §10A-1-8.01(d)(5).

(vi) An owner without limited liability protection who as a result of the a conversion becomes an owner with limited liability protection remains liable for an obligation incurred by the old Entity before the conversion takes effect only to the extent the Owner would have been liable if the conversion had not occurred. §10A-1-8.01(d)(6).

(2) Mergers of Entities.

(a) Section 10A-1-8.02 provides that pursuant to an approved plan of merger, a corporation, limited partnership, limited liability company, general partnership, real estate investment trust, or any other Entity may merge with any other Entity or Entities, if the other Entity or Entities are the same or another form of Entity.

(b) Section 10-1-8.02(b) provides that a plan of merger must include the following:

(i) the name of each Entity that is a party to the merger.

(ii) the name of the surviving Entity into which the other Entity will merge;

(iii) the form of the surviving Entity and the status of each Entity's owners within the surviving Entity;

(iv) the terms and conditions of the merger;

(v) 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 in part; and

(vi) the street address of the surviving Entity's principal place of business.

(c) Under §10A-1-8.01(c), owners must approve and consent to a plan as follows:

(i) Corporations. The plan of merger must be approved in accordance with the procedures and by shareholder vote required by §10A-2-11.03 or §10A-2-11.04. If the articles of incorporation provide for approval of a merger by less than all of a corporation's shareholders, approval of the merger will constitute a corporate action subject to dissenter's rights pursuant to Article 13. No merger of a corporation into a general or limited partnership will be effected without the written consent of each shareholder who is to be a general partner in the resulting or surviving Entity, regardless of any provision in the articles of incorporation of the corporation that is a party to the merger providing for less than unanimous shareholder approval for the conversion. §10A-1-8.02(c)(1).

(ii) Limited Partnerships. The merger plan must be approved in writing by all of the partners or as otherwise provided in the partnership agreement. No merger of a limited partnership with a general partnership in which the general partnership is the surviving or resulting Entity will be effected without the written consent of each limited partner who is to be a general partner in the resulting or surviving Entity, regardless of any provision in the limited partnership agreement of the merging limited partners providing for less than unanimous shareholder approval for the conversion. §10A-1-8.02(c)(2).

(iii) Limited Liability Companies. The merger plan must be approved in writing by all of the limited liability company's members or as otherwise providing in the limited liability company's Governing Documents. No merger of a limited liability company with a general or limited partnership that is the surviving or resulting Entity will be effected without the written consent of each limited partner who is to be a general partner in the resulting or surviving Entity, regardless of any provision in the Governing Documents providing for less than unanimous shareholder approval for the conversion. §10A-1-8.02(c)(3).

(iv) General Partnerships, Including Registered Limited Liability Partnerships. The merger plan must be approved in writing by all of the partners or as otherwise provided in the partnership agreement. No merger of a general partnership into a general or limited partnership will be effected without the written consent of each partner who is to be a general partner without limited liability in the surviving or resulting Entity, regardless of any provision in the limited partnership agreement of the merging limited partners providing for less than unanimous shareholder approval for the conversion. §10A-1-8.02(c)(4).

(v) Real Estate Investment Trusts. The merger plan will be approved in writing by all of the trust's shareholders except as otherwise provided in the trust's declaration of trust, but the required shareholder vote for approval can never be set at less than two-thirds of all votes entitled to be cast. No merger of a real estate investment trust with a general or limited partnership that is to be the surviving or resulting

Entity will be effected without the written consent of each shareholder who is to be a general partner in the resulting or surviving Entity. §10A-1-8.02(c)(5).

(vi) Other Entities. In the case of any other Entity, the merger plan must be approved in writing by all owners of the Entity. No merger of the Entity will be effected without the written consent of any owner who has limited liability as an owner of an Entity prior to the merger and who will become an owner without limited liability of the surviving or resulting Entity. §10A-1-8.02(c)(6).

(d) Under §10A-1-8.02(d), 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, or if the plan does not provide for amendment or abandonment, in the same manner as required for the approval of the plan of merger originally.

(e) Section §10A-1-8.02(e) provides that the merger takes effect on the later of the following dates and times:

(i) the filing of the certificate of merger with the Secretary of State; and

(ii) any delayed effective date and time specified in the certificate of merger. If a delayed effective date is specified but not time is specified, the merger is effective at the close of business on that day.

(f) Section 10A-1-8.02(f) requires the certificates of merger to include the following:

(i) the names of each of the Entities which are to merge;

(ii) the public office where the certificate of formation, if required, of each of the parties to the merger is filed;

(iii) a statement that a merger plan has been approved and executed by each of the business Entities which are to merge;

(iv) if the surviving or resulting Entity is one in which one or more owners lack limited liability protection, a statement that each owner that will lose their limited liability protection in the new Entity has given written consent to the merger as required by this article;

(v) the name of the surviving or resulting Entity;

(vi) the date (or date and time) on which the merger becomes effective if it is not to be effective upon the filing of the certificate of merger;

(vii) that the merger plan is on file at a place of business of the surviving or resulting Entity, and will state the address thereof; and

(viii) that a copy of the merger plan will be furnished by the surviving or resulting Entity, on request and without cost, to any owner of any Entity which is a party to the merger.

(g) A certificate of merger will act as a certificate of termination for any Entity that is not the surviving or resulting Entity in the merger. §10A-1-8.02(g).

(h) The certificate of merger must be filed with the Secretary of State and must also be recorded in the office of the probate judge in the county in which the certificate of formation, if required, of each Domestic Entity that is a party to the merger is filed. When the

certificate of merger is filed with the Secretary of State, the matters covered by the certificate will be effective, and a copy of the certificate certified by the Secretary of State will be conclusive evidence of the matters covered within it. §10A-1-8.02(h).

(i) Under §10A-1-8.02(i), the merger of Entities will have the following effects:

(i) the separate existence of every Entity that is a party to the merger will cease, except that of the resulting or surviving Entity;

(ii) all property, real, personal, and mixed owned by each of the merged Entities; all public or private rights, immunities, and franchises of the merged Entities, and all debts or obligations due the merged Entities, are taken and ***deemed to be transferred*** and vested in the surviving or resulting Entity without the necessity of any deed or other instrument of conveyance, and without payment and without collection by any filing officer of any deed or other transfer tax or fee. A certified copy of any certificate of merger may be filed in the office of the judge of probate in any county in which any Entity that is a party to the merger owned real property. The certificate or statement will be recorded without payment or fees. The probate judge is entitled to collect the filing fees prescribed by §12-19-90. The filing will evidence chain of title, but lack of filing will not affect the converted Entity's title to the real property;

(iii) the surviving or resulting Entity will be responsible and liable for all liabilities and obligations of the Entities that are parties to the merger. However, the rights of creditors

and liens upon the property of the Entities that are parties to the merger are not impaired by the merger;

(iv) any claim existing or any action or proceeding of any kind pending by or against any Entity that is party to the merger may be prosecuted or continued as if the merger had not occurred, or the surviving or resulting Entity may be substituted in the action or proceeding for the converting Entity;

(v) service of process in an action or proceeding against a surviving or resulting Foreign Entity to enforce an obligation of a Domestic Entity that is a party to the merger may be made by registered mail addressed to the principal office of the surviving Entity as set forth in the merger plan or by any method provided by the Alabama Rules of Civil Procedure. Any notice or demand required or permitted by law to be served on a Domestic Entity may be served on the surviving or resulting Foreign Entity by registered mail addressed to the principal office of the surviving Entity as set forth in the plan of merger or in any other manner similar to he procedure provided by the Alabama Rules of Civil Procedure for the service of process;

(vi) no owner of an Entity with limited liability protection will become an owner of an Entity without limited liability protection unless such owner has given written approval of the merger. An owner with limited liability protection remains liable for any obligations incurred prior to the merger by an Entity that ceases to exist as a result of the merger to the extent the Owner would have been liable under the laws applicable to equity owners of the form of

Entity that ceased to exist if the merger had not occurred. An owner with limited liability protection who becomes an owner without limited liability protection is liable for an obligation of the surviving or resulting Entity that is incurred after the merger to the extent provided for by the laws applicable to the new Entity; and

(vii) an owner without limited liability protection of an Entity that ceases to exist as a result of a merger and becomes an owner with limited liability protection remains liable for obligations incurred before the merger takes effect by the Entity that ceases to exist.

(3) Nonexclusive application of article. Article 8 is not exclusive, but is cumulative to other laws and provisions of this title relating to mergers and conversions. Entities, including corporations, limited partnerships, limited liability companies, general partnerships, and real estate investment trusts, may be converted or merged in any other manner provided by law, including other provisions of this title. §10A-1-8.03.

(4) Merger with or conversion from a Foreign Entity.

(a) Under §10A-1-8.04(a), one or more Foreign Entities may merge with one or more Domestic Entities, and a Foreign Entity may convert to a Domestic Entity or a Domestic Entity may convert to a Foreign Entity if:

(i) the merger or conversion is permitted by the law of the state or country under whose law each Foreign Entity is formed and each Foreign Entity complies with that law in effecting the merger or conversion;

(ii) in the case of a conversion, the Foreign Entity complies with §10A-1.8.01(b)(1) discussing conversion rules if it is the converted Entity or §10A-1.8.01(b)(2) if it is the converting Entity; or

(iii) in the case of a merger, the Foreign Entity complies with of §10A-1.8.02(f) (discussing the requirements of the certificate of merger) if it is the surviving Entity of the merger.

(b) Section 10A-1-8.04(b) provides that upon the merger or conversion taking effect, the surviving Foreign Entity of a merger and the Foreign Entity resulting from the conversion is deemed:

(i) to consent that service of process in a proceeding to enforce any obligation or any dissenter's rights of equity owners can be made by registered mail addressed to the principal office of the surviving Entity as set forth in the merger plan or by any method provided by the Alabama Rules of Civil Procedure. Any notice or demand required or permitted by law to be served on the Domestic Entity may be served on the surviving or resulting Foreign Entity by registered mail addressed to the principal office of the surviving Entity as set forth in the merger plan or in any other manner similar to the procedure provided by the Alabama Rules of Civil Procedure for the service of process; and

(ii) to agree that it will promptly pay to dissenting equity holders the amount to which they are entitled under Alabama law.

H. Termination: Article 9

(1) Winding up.

Article 9 governs the winding up of Domestic Entities. In this section, a claim means the right to payment, damages, or property, whether liquidated or unliquidated, accrued or contingent, matured or unmatured. Winding up is defined as: the process of winding up the business and affairs of a Domestic Entity as a result of the occurrence of an event requiring winding up. §10A-1-9.01. What event triggers a wind up varies for each Entity type and is specified in the entity-specific chapters. Thus, one must look to the appropriate chapter for these rules. Section 10A-1-9.11.

Procedures. As soon as reasonably practicable after a Domestic Entity is dissolved, it must cease to carry on business (except what is necessary to wind up), collect and sell its property (to the extent it will not be distributed to owners or member), and perform any other required acts. During this process, the Entity may participate in litigation, and perform any other act appropriate for winding up, including sending notice to unknown claimants about the wind up.

(2) Provision for known and unknown claims.

Division C covering known and unknown claims does not apply to claims against general or limited partnerships.

(a) Known claims. Under §10A-1-9.21, a "known claim" or "claim" includes unliquidated claims, but not a contingent liability that has not matured so that there is no immediate right to bring suit. A dissolved Domestic Entity may dispose of known claims against it by notifying the known claimants in writing of the dissolution, any time after the effective date. The written notice must:

(i) describe information the must be included in a claim;

(ii) provide a mailing address where a claim can be sent;

(iii) state the deadline for receiving the claim, which may not be fewer than 120 days after the effective date of the written notice; and

(iv) state that the claim will be barred if not received by the deadline.

Known claims are barred if:

(i) the claimant received notice but did not deliver the claim by the deadline; or

(ii) the dissolved Domestic Entity rejected the claim and the claimant failed to enforce the claim within 90 days from the effective date of the rejection notice.

(b) Unknown claims. Section 10A-1-9.22 deals with unknown claims, and provides that a dissolved Domestic Entity may publish notice of its dissolution and request that persons with claims against the Entity present them in accordance with the notice. The notice must:

(i) be published in a newspaper of general circulation, in the county where the Entity's principal office (or registered office) is or was last located;

(ii) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(iii) state that a claim will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of notice.

If the dissolved Entity meets the requirements for publishing notice, the claim of the following claimants is barred unless the claimant enforces claim within two years of publication:

(i) claimant who did not receive written notice,

(ii) claimant who sent claim to Entity but did not act upon it; or

(iii) claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(c) Enforcement. A claim may be enforced against the dissolved Entity to the extent of its undistributed assets, or if the assets have been distributed in liquidation, against an owner of the terminated Entity to the extent of his or her pro rata share of the claim or the Entity assets distributed to him or her in liquidation, whichever is less, but an owner's total liability for all claims under this section may not exceed the total amount of assets distributed to him or her liquidation.

(3) Revocation and Reinstatement.

(a) Revocation of voluntary winding up. Under §10A-1-9.31, a Domestic Entity may choose to revoke a voluntary decision to dissolve the Entity. The approval for this revocation is governed by the entity-specific chapter and one should look to the appropriate chapter to determine the manner and time required for revoking a wind up. If the chapter does not specify a time, it must be done before the winding up of the Entity is complete.

(b) Reinstatement. The entity-specific chapters state grounds for reinstating a dissolved Entity, and §10A-1-9.32 lists additional grounds for reinstatement. An Entity may be reinstated if the legal existence of the Entity is necessary to:

(i) convey or assign property;

(ii) settle or release a claim or liability;

(iii) take an action; or

(iv) sign an instrument or agreement.

THE "HUB" PART II
GOVERNANCE, INDEMNIFICATION AND OTHER SUBSTANTIVE MATTERS (CHAPTER 1 OF THE ENTITIES CODE)

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A. Applicable Law: Article 1

Division B of Article 1 sets out the rules for what law will apply to an Entity. If an Entity has been formed by filing a Certificate of Formation in this state, in accordance with Article 4, Alabama law governs the formation and internal affairs of that Entity. If the Entity is formed by filing a Certificate of Formation with a foreign governmental authority, the law of that state governs formation, internal affairs, and liability of the members of that Entity. If the Entity is not formed by filing a Certificate of Formation (i.e., a general partnership), the law of the Entity's jurisdiction of formation will govern. This is a change from the Uniform Partnership Act which uses the law of the state where the chief executive office is located.

"Internal affairs" of an Entity includes the rights powers and duties of its Governing Authority, Governing Persons, Officers, Owners and Member and matters relating to its membership or ownership interest (not including the right to inspect Entity records).

B. Purposes and Powers of Domestic Entities: Article 2

Article 2 contains provisions relating to the purposes and powers of Domestic Entities, including the restrictions and limitations on such powers.

(1) Division A: Purpose.

Section 10A-1-2.01 sets out the general provision that a Domestic Entity may have any lawful purpose or purposes, unless otherwise restricted by another part of the Entities Code. Entities must comply with all other applicable provisions.

The prohibited purposes found in §10A-1-2.02 are derived from prohibitions implicit in the Alabama Limited Liability Company Act. Domestic Entities may not engage in a business or activity that is

expressly unlawful or prohibited, that cannot lawfully be engaged in by that Entity under state law, or that may not be engaged in without first obtaining a license and a license cannot be granted.

Under §10A-1-2.03, a Professional Entity may only engage in one type of professional services (and any ancillary services), unless the Entity is expressly authorized to provide more than one type of professional service under state law. Although not expressly stated, the exception provided in this section refers in part to §10A-4-2.01 which provides that Professional Corporations may be organized for the purposes of rendering professional services within a single profession, except that, the same professional corporation or not-for profit professional corporation may render medical, dental, and other health related services. This is an expansion of the rule previously found in §10-4-383 (The Professional Corporations Act), which only allowed for only medical and dental services to be provided by the same corporation. Thus, §10A-1-2.03 provides for an exception to the rule limiting a Professional Entity to one type of professional service and a legal practitioner should be prepared to provide reference to the specific law permitting the state joint practice.

(2) Division B: Powers of Domestic Entities.

(a) General Powers. Division B of Article 2 sets out the provisions relating to the powers of Domestic Entities generally. Under §10A-1-2.14, a Domestic Entity possesses these powers even if they are not listed in its Governing Documents. Under §10A-1-2.11, a Domestic Entity has the same powers as an individual to take action necessary or convenient to carry out its business and affairs, even if it is not expressly stated in the Governing Documents, provided that no other part of the Entities Code prohibits the action. Specifically, unless otherwise provided by the

Governing Documents or other provisions in the Entities Code, Domestic Entities have the power to:

(i) sue, be sued, complain and defend suit in its Entity name;

(ii) have and alter a seal and use the seal or a facsimile of it by impressing, affixing, or reproducing it;

(iii) purchase, lease, or otherwise acquire, receive, own, hold, improve, use, and deal in and with property or an interest in property;

(iv) sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of property;

(v) make contracts and guarantees;

(vi) incur liabilities, borrow money, issue notes, bonds, and other obligations which may be convertible into or include the option to purchase other securities or ownership interest in the Entity, and secure any obligation, or the obligations of other for whom it can make guarantees, whether or not a guarantee is made, by mortgaging or pledging its property, franchises, or income;

(vii) lend money, invest its funds, and receive and hold property as security for repayment;

(viii) acquire its own bonds, debentures, or other evidence of indebtedness or obligations;

(ix) acquire it own ownership interests, regardless of whether redeemable, and hold the Ownership interests as treasury ownership interest or cancel and dispose of the Ownership interests;

(x) be a promoter, Organizer, Owner, Partner, Member, Associate, or Manager of an Organization;

(xi) acquire, receive, own, hold, vote, use, pledge, and dispose of ownership interests in or securities issued by another person;

(xii) conduct its business, locate its offices, and exercise the powers granted by the Entities Code to further its purposes in or out of this state;

(xiii) lend money to, and otherwise assist, its managerial officials, owners, member, or employees as necessary or appropriate, provided, however, a nonprofit Entity shall not have the power to lend money to its officers or directors;

(xiv) elect or appoint officers, and agents of the Entity, establish the length of their terms, define their duties, and fix their compensation;

(xv) pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, and incentive plans for managerial officials, owners, members, or employees or former managerial officials, owners, members, or employees;

(xvi) indemnify and maintain liability insurance for managerial officials, owners, members, employees, and agents of the Entity or the Entity's affiliate;

(xvii) adopt and amend Governing Documents for managing the affairs of the Entity subject to applicable law;

(xviii) make charitable donations;

(xix) voluntarily wind up its business and terminate its existence;

(xx) transact business or take action that will aid government policy; and

(xxi) take other action necessary or appropriate to further the purposes of the Entity.

§10A-1-2.11.

(b) Creating Indebtedness. In addition to the above general powers, which were derived from the general powers listed in the Alabama Business Corporation Act, under §10A-1-2.12, unless otherwise provided by Governing Documents, or other provisions in the Entities Code, a Domestic Entity may create indebtedness for any consideration the Entity considers appropriate. This includes cash, property, a contract to receive property, debt of the Entity or another person, services, or a direct or indirect benefit realized by the Entity. The judgment of the Governing Authority of a Domestic Entity as to the value of the consideration the Entity receives for its indebtedness is conclusive, unless there is fraud.

(c) Business Transactions with Owner. Unless the Governing Documents state otherwise, an Owner may lend money to and transact any lawful business with the Entity and have the same rights and obligations as a person who is not an owner.

(d) Power to Make Guaranties. Under §10A-1-2.13, a Domestic Entity may make a guaranty on behalf of a parent, subsidiary, or affiliate of the Entity, or make a guaranty of the indebtedness of another person if the guaranty may reasonably be expected directly or indirectly to benefit the Entity. If the Governing Authority determines that a guaranty is reasonably expected to benefit the Entity, that decision is conclusive and is not subject to attack, but for a few exceptions set out in §10A-1-2.13(c).

(e) Seal. Under §10A-1-2.16, the seal of the Entity, may be a facsimile that may be engraved or printed on a bond, debenture, etc. If the security is authenticated with a manual signature of an authorized officer, the signature of any officer of the Domestic Entity may be a facsimile signature. Whether the signing officer is still an officer later will have no effect on the validity of the certificate.

(f) Limitation. A Domestic Entity may not exercise a power in a manner that is inconsistent with a limitation on the purposes or powers of the Entity contained in its Governing Documents, this title, or other law of this state. §10A-1-2.15.

C. Governance

(1) Rights of Governing Persons. Under §10A-1-3.21, Governing Persons are given two main rights:

(a) Right to Rely. When exercising a power or discharging a duty, a Governing Person, in good faith and with ordinary care, may rely on information, opinions, reports, or statements (including financial statements and other financial data), concerning a Domestic Entity or another person which is prepared by: an officer or employee of the Entity, legal counsel, accountant or CPA, investment banker, person who the Governing Person reasonably believes has professional expertise in the matter, or a committed of the Governing Authority the Governing Person is not a member of. There cannot be good faith reliance when the Governing Person has knowledge of a matter that makes reliance unwarranted.

(b) Entitlement to Contribution. A Governing Person held liable on a claim is entitled to contribution from each of the other Governing Persons held liable on the same claim.

(2) Officers. Under §10A-1-3.22, Officers should be elected or appointed in accordance with the Governing Documents of the Entity and have the powers and authorities provided by the Governing Documents or Governing Authority. Unless prohibited by another chapter or the Governing Documents, a person may hold any two or more offices of an Entity.

Regarding the removal of Officers, §10A-1-3.23 provides that unless the Governing Documents state otherwise, an Officer may be removed for or without cause by the Governing Authority or as required by the Governing Documents. The removal of the Officer does not prejudice any of his or her contract rights, and election or appointment of an Officer does not create contract rights by itself.

Under §10A-1-3.24, an Officer has the same "Right to rely" given to Governing Persons, but is not entitled to contribution in the same way Governing Persons are.

D. Recordkeeping

Chapter 1 provides a few generic requirements for recordkeeping, but this is an area mostly governed by the entity-specific chapters. It is important for practitioners to defer to the appropriate chapters for applicable recordkeeping rules, under §10A-1-3.31, each Domestic Entity must keep the records required by its Governing Documents or by the applicable chapter of the Entities Code.

(1) Owner's Access to Records.

For Entities other than Business Corporations (Chapter 2) and Professional Corporations (Chapter 4), which have their own set of rules for recordkeeping that should be deferred to, the books and records that an Entity maintains are subject to inspection and copying at the reasonable request, and at the expense of, any Owner or Member, or their attorney. The right of access extends to legal representatives of a deceased or

disabled Member or Owner. Former Owners and Members should also have access to the books and records pertaining to the period they were Owners or Members. An Entity's Governing Documents may not unreasonably restrict an Owner's or Member's right to information or access to records and any Agent or Governing Person who, without reasonable cause, refuses access to any Owner or Member (or their attorney) shall be personally liable to the Member or Owner for a penalty in an amount up to 10% of the value of the Ownership interest of the Owner or Member, plus any other damage or remedy. §10A-1-3.32.

(2) Governing Person's Access to Rewards. Under §10A-1-3.33, an Entity must provide Governing Persons (and their agents and attorneys) access to its books and records, including those required to be kept by other chapters in the Entities Code and other books and records of the Entity for any purpose reasonably related to the Governing Person's service as a Governing Person. Right of access includes the right to inspect and copy books and records during ordinary business hours, and an Entity may charge a reasonable fee for labor and materials. In addition to access to records, an Entity must furnish a Governing Person, without demand, any information about the Entity's affairs that is reasonably required for the proper exercise of the Governing Person's rights or duties. If requested, the Entity must provide the Governing Person any other information concerning the Entity's affairs, unless the request is unreasonable or improper. A court can require an Entity to give Governing Persons access to books and records if the Governing Person shows that: 1) he or she is a Governing Person, 2) the purpose for inspecting the books and records is reasonably related to the person's service as a Governing Person, or that the demand and information demanded are reasonable and proper under the circumstances, 3) the person has actually made a demand for the information (in the case of information as to the Entity's business affairs),

and 4) the Entity refused the Governing Person access to the books, records, or information sought.

E. Ownership Interest Certificates.

Under §10A-1-3.41, ownership interests in a Domestic Entity may be certificated or uncertificated, but the default status for whether the interest is certificated depends on the type of Entity. An ownership interest in a Business Corporation, Real Estate Investment Trust, or Professional Corporation must be certificated unless the Governing Documents of the Entity or a resolution adopted by the Governing Authority of the Entity states that the Ownership interests are uncertificated. If the Ownership interests get changed from certificated to uncertificated, a certificated ownership interest subject to the change only becomes an uncertificated ownership interest after the certificate is surrendered to the Domestic Entity. For all other types of Domestic Entities, ownership interests are uncertificated unless the Governing Documents of the Entity or another provision of the Entities Code states otherwise.

(1) Certificated Ownership Interests. Division E of Article 3 also sets out several requirements for what must be included on the certificate of ownership itself. Under §10A-1-3.42, a certificate representing ownership interest in a Domestic Entity *may* contain an impression of the seal of the Entity, or a facsimile there of, and *must* state on the front of the certificate:

(a) that the Domestic Entity is organized under the laws of this state;

(b) the name of the person to whom the certificate is issued;

(c) the number and class of ownership interests and the designation of the series, if any, represented by the certificate;

(d) if the Ownership interests are shares, the par value of each share represented by the certificate, or a statement that the shares are without par value;

(e) any restriction placed by or agreed to by the Domestic Entity, may also be listed on the back (even if not so noted, a restriction is enforceable against a person with actual knowledge of the restriction); and

(f) if the Domestic Entity is authorized to issue ownership interest of more than one class or series:

(i) the designations, preferences, limitations, and relative rights of the Ownership interests of each class or series to the extent they have been determined and the authority of the Governing Authority to make those determinations as to subsequent series; or

(ii) that the information required above is stated in the Domestic Entity's Governing Documents and that the Domestic Entity, on written request to the Entity's principal place of business or registered office, will provide a free copy of that information to the record holder of the certificate.

Section 10A-1-3.43 requires that all certificated ownership interests must be signed by the managerial official or officials of the Domestic Entity authorized by the Governing Documents to do so. If the person that signed the certificate is no longer a managerial official, the certificate will have the same effect. The Entities Code in §10A-1-3.44 requires that the Domestic Entity actually deliver the certificates to the Owners.

- **NOTE:** This is a new requirement that was not explicitly listed in the Alabama Business Corporations Act.

(2) Uncertificated Ownership Interests. Under §10A-1-3.45, the rights and obligations of the Owner of an uncertificated ownership interest are the same as the rights and obligations of the Owner of a certificated ownership interest of the same class and series. After a Domestic Entity issues or transfers an uncertificated ownership interest, a Domestic Entity must notify the Owner of the Ownership interest in writing of any information required under this division to be stated on a certificate representing the Ownership interest. Notice is not required if the required information is included in the Governing Documents of the Entity and the Owner of uncertificated ownership interest is provided with a copy of the Governing Documents.

F. Indemnification and Insurance.

Article 6 dealing with indemnification and insurance does not apply to general partnerships, limited liability companies, or nonprofit corporations. Thus, practitioners should look to the entity-specific chapters to find the applicable rules. However, the Entities Code does allow the Governing Documents of general partnerships and limited liability companies to adopt provisions of this article relating to indemnification, advancement of expenses, or insurance.

Article 6 begins with a Definitions section that applies to this article. Most significantly, instead of using the term "Entity," this article uses "Enterprise" which is defined as a Domestic Entity or an Organization subject to this articles, including a predecessor Domestic Entity or Organization. This term would not include general partnerships, LLCs, or nonprofit corporations.

(1) Indemnification.

(a) Mandatory. An Enterprise must indemnify a current or former Governing Person against reasonable expenses actually incurred in connection with a proceeding in which the person is a respondent because the person is or was a Governing Person if the person is

successful in the defense of the proceeding, or any claim, issue or matter in the proceeding, even if he or she was not successful on another claim, issue, or matter in the proceeding. §10A-1-6.11.

(b) Court-Ordered. A court may order an Enterprise to indemnify a current or former Governing Person to the extent the court determines that the person is fairly and reasonably entitled to it. The court may order indemnification even if the Governing Person is liable to the Enterprise or he or she improperly received a personal benefit. If the person is liable to the Enterprise or received an improper personal benefit, the indemnification is limited to reasonable expenses. §10A-1-6.12.

A Certificate of Formation or written partnership agreement of a Limited Partnership may restrict the circumstances under which the Enterprise/partnership must or may indemnify a person under this division.

(c) Permissive Indemnification. Division C governs permissive indemnification and advancement of expenses. Under §10A-1-6.21, an Enterprise may indemnify a current or former Governing Person, or delegate who was, is, or is threatened to be made a respondent in a proceeding to the extent permitted under the next section (6.22) if the amount of expenses is reasonable and the person:

(i) acted in good faith; and

(ii) reasonably believed:

(A) (if acting in official capacity) that the person's conduct was in the Enterprise's best interest;

- The Entities Code specifies that an action taken or omitted by a Governing Person or delegate with respect to an

employee benefit plan for a purpose reasonably believed by the person to be in the interest of the participants in the plan is for a purpose that is not opposed to the best interests of the Enterprise. Also, action taken or omitted by a delegate to another Enterprise for a purpose reasonably believed by the delegate to be in the best interest of the other Enterprise or its owner is for a purpose that is not opposed to the best interest of the Enterprise.

(B) (in all other cases) did not have a reasonable cause to believe the person's conduct was unlawful.

Under §10A-1-6.23, a majority of a quorum composed of the Governing Persons who are disinterested and independent decide whether the Governing Person seeking indemnification acted in good faith and under a reasonable belief that he or she was acting in the best interest of the Enterprise. A majority of the membership interest that are entitled to vote on the transactions constitute a quorum for purposes of this section.

If no quorum can be obtained, it will be decided by a majority vote of a committee of the board of directors of the Enterprise designated to act in the matter by a majority vote of the Governing Person and composed of at least one Governing Person who is disinterested and independent at the time of the vote. Special legal counsel may also make the determination of whether the action was in good faith and whether expenses were reasonable, but may not determine whether indemnification should be paid, that must be done by the quorum, the committee, or by a unanimous vote of the Owners or Members of the Enterprise.

A Governing Person may still be indemnified even if the proceedings are terminated by judgment, order, settlement, conviction, or a plea of nolo contendere or its equivalent.

Section §10A-1-6.22 sets out the general scope of permissive indemnification. Under this section, an Enterprise may (provided it does not conflict with Governing Documents) indemnify a current or former Governing Person, or delegate against a judgment, penalty, settlement or fine (including a tax assessed against the person regarding an employee benefit plan), and against reasonable expenses incurred in connection with the proceeding. However, if the person is found liable to the Enterprise or liable because the person improperly received a benefit, the indemnification is limited to reasonable expenses actually incurred and may not be made in relation to a proceeding in which the person has been found liable for:

1. willful or intentional misconduct in the performance of person's duties;
2. breach of person' duty of loyalty; or
3. an act or omission not committed in good faith that breaches a duty owed to the Enterprise.

- A person is only considered liable when there has been an order by the court and all appeals are exhausted or foreclosed by law.

(d) Advancement of Expenses. Under §10A-1-6.24, an Enterprise may (provided the Governing Documents allow it) pay or reimburse reasonable expenses incurred by a Governing Person that is threatened to be a respondent in a proceeding in advance of the final disposition of the proceeding without making the determination of good faith and reasonable belief after the Enterprise receives 1) a written affirmation by the person of the person's good faith belief that he or she has met the standard of conduct necessary for indemnification and 2) written undertaking

by or on behalf of the person to repay the amount paid or reimbursed if it is later determined the person should not be indemnified. The written undertaking does not have to be secured and may be accepted without regard to the person's ability to make the repayment.

(e) Non-Governing Parties. An Enterprise may indemnify or advance expenses to a person who is not a Governing Party as provided by the Governing Documents, action by the board of directors, a resolution by the Owners or Members, a contract, or common law. The same rules above for extent of indemnification applicable to Governing Parties apply to non-Governing Parties. A Certificate of Formation or Partnership Agreement may also restrict indemnification for non-Governing Parties. §10A-1-6.25.

In addition to indemnifying respondents, an Enterprise may pay or reimburse reasonable expenses incurred by a Governing Person, officer, employee, etc. that is required to appear as a witness or somehow participate in a proceeding related to the Enterprise, but not as the respondent.

(f) Reporting An Indemnification. If an Enterprise does choose to indemnify or advance expenses to a Governing Person, it must report this in writing to the Owners or Members of the Enterprise. The report must be made no later than the first anniversary of the date of the indemnification or advance and either with or before the notice or waiver of notice of the next meeting of the Owners or Members of the Enterprise and before the next submission to the Owners or Members of a consent to action without a meeting.

(2) Liability Insurance. Division D of Article 3 covers liability insurance and reporting requirements. Under §10A-1-6.31, an Enterprise may purchase

or procure or establish and maintain insurance or another arrangement to indemnify or hold harmless existing or former Governing Persons, delegates, offices, employees, or agents against any liability asserted against and incurred by the person in that capacity or arising out of the person's status in that capacity. The insurance may insure or indemnify regardless of whether the Enterprise would have had the power to indemnify the person against liability under other sections of the Entities Code described above.

In addition to purchasing or procuring or establishing and maintaining insurance or another arrangement, an Enterprise may create a trust fund, establish a form of self-insurance (including a contract to indemnify), secure the Enterprise's indemnity obligation by grant of a security interest or other lien on the assets of the Enterprise, or establish a letter of credit, guaranty, or surety arrangement. The Governing Authorities will make decisions as to the terms of the insurance or other arrangements but it does not subject the Governing Persons to liability on any ground, unless there is actual fraud.

THE BUSINESS CORPORATION AND PROFESSIONAL CORPORATION "SPOKES" (CHAPTERS 2 AND 4 OF THE CODE)

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I. BUSINESS CORPORATIONS

A. Definition of Business Corporation.

1. For purposes of the Hub, a "corporation" includes a business corporation, a nonprofit corporation and a professional corporation. § 10A-1-1.03(16).

2. A "business corporation" is a "corporation within the meaning of Section 10A-2-1.40(3) or Section 10A-2-1.40(9)." § 10A-1-1.03(4).

3. Corporations defined in §§ 10A-2-1.40(3) and 10A-2-1.40(9) are either domestic corporations incorporated under or subject to the provisions of Chapter 2 of the Entities Code, or foreign corporations incorporated under a law other than Alabama.

4. Formerly, the Alabama Business corporation Act used the phrase "for profit." Now, even though the definitions are somewhat circular, a "business corporation" means a corporation, domestic or foreign, that is not a nonprofit or professional corporation, and is subject to Chapter 2 of the Entities Code.

B. Basic Principles of the Hub to Keep in Mind.

1. Applicable Law.

(a) As noted in the Hub outline, Division B of Article 1 sets out the rules for what law will apply to an Entity. If an Entity has been formed by filing a Certificate of Formation in this state, in accordance with Article 4, Alabama law governs the formation and internal affairs of that Entity. If the Entity is formed by filing a Certificate of Formation with a foreign governmental authority, the law of that state governs formation, internal affairs, and liability of the members of that Entity. If the Entity is not formed by filing a Certificate of Formation (i.e., a general partnership), the law of the Entity's jurisdiction of formation will govern.

(b) "Internal affairs" of an Entity includes the rights, powers and duties of its Governing Authority, Governing Persons, Officers, Owners and Member and matters relating to its membership or ownership interest (not including the right to inspect Entity records).

(c) The Hub (to the extent applicable to business corporations) and the Spoke apply to all existing corporations. § 10A-2-17.01.

2. Synonymous Terms.

(a) Like the other "Spokes," the Chapter dealing with business corporations does not completely revise all of its terms in order to be consistent with the Hub.

(b) Accordingly, practitioners should note the provisions of § 10A-1-1.06:

Certificate of Formation	=	Articles of Incorporation
Certificate of Termination	=	Articles of Dissolution
Certificate of Merger	=	Articles of Merger
Stock	=	Shares

3. Conflict Between Hub and Spoke.

(a) The provisions of the Hub apply to all entities formed or governed by Chapter 2. § 10A-1-1.02(a).

(b) However, in the event of a conflict between any provision in the Hub and any provision in the Spoke, the provision in the Spoke, "to the extent of the conflict," supersedes the provision in the Hub. § 10A-1-1.08(c).

C. What Has Changed?

1. Name. The Alabama Business Corporation Act (the "ABCA") is now known as the Alabama Business Corporation Law (referred to in this outline as the "ABCL" or "Chapter 2"). § 10A-1-1.08(b).

2. Citations. The Alabama Business Corporation Law is now Chapter 2 of the Entities Code, and sections thereof will be cited as "§ 10A-2-___."

3. What Was Implicit is Now Explicit.

(a) The ABCL applies to "business corporations," defined in § 10A-1-1.03(4).

(b) The ABCL applies to "a domestic business corporation formed and existing under this title and to a foreign business corporation that is transacting business in this state, regardless of whether the foreign corporation is registered to transact business in this state." § 10A-2-1.01(b). **NOTE**: The applicability of the ABCL to foreign corporations is not intended to abrogate the doctrine of internal affairs. See § 10A-1-1.11.

4. Former Provisions of the ABCA Now Covered Under the Hub.

(a) Filing instruments. See Article 4 of Chapter 1. Most of former § 10-2B-1.20 has been moved to the Hub or eliminated, and §§ 10-2B-1.23, .24, .26 and .29 have been repealed.

(b) Certain definitions have been deleted from former § 10-2B-1.40 and are set forth in § 10A-1-1.03. Definitions specific only to the ABCL have been preserved in § 10A-2-1.40.

(c) Certificates of "ownership interest" are dealt with in § 10A-1-3.41 and 3.42; most of former ABCA § 10-2B-6.25 has been eliminated and ABCA § 10-2B-6.26 (uncertificated shares) has been repealed.

(d) Entity name requirements and reservations of names are covered by Article 5 of Chapter 1, particularly § 10A-1-5.04 as to business corporations. Former Article 4 of the ABCA, consisting of §§ 10-2B-4.01 through -4.03, has been repealed.

(e) Sections regarding known and unknown claims against a dissolved corporation, §§ 10-2B-14.06 and -14.07, have been moved to Division C of Article 9 of the Hub.

(f) Registered office and registered agents are now covered by Article 5 of Chapter 1. Former Article 5 of the ABCA, consisting of §§ 10-2B-5.01 through -5.04, has been repealed.

(g) Registration of foreign corporations is now covered (for the most part) by the Hub; accordingly, former §§ 10-2B-15.04 through -15.10 have been repealed. A foreign corporation that is authorized to transact business in Alabama on January 1, 2011 is not required to renew its registration. § 10A-2-17.02. However, it is important to note that the general rule against transacting business prior to registration and that the consequences of doing so remain:

(1) A foreign corporation may not transact business in this state until it registers with the Secretary of State as required by § 10A-1-7.01. § 10A-2-15.01.

(2) A foreign corporation transacting business in this state without registering or without complying with Chapter 14A of Title 40 (payment of business privilege tax) may not maintain a proceeding in this state without so registering and complying. All contracts or agreements made or entered into in this state by foreign

corporations prior to registering to transact business in this state shall be held void at the action of the foreign corporation or by any person claiming through or under the foreign corporation by virtue of the contract or agreement. § 10A-2-15.02(a). This "door closing" statute has been the law for some time in Alabama. With the adoption of the revised ABCA in 1994, the legislature attempted to repeal it, but the repeal was short-lived; the statute was amended in 1995 to bring back the old rule.

a. The effect of the statute has been watered down by a long line of cases holding that the Commerce Clause of the U. S. Constitution protects foreign corporations from the application of the statute when their activities are interstate. *See, e.g., J W. Hartlein Constr. co. v. Seacrest Associates, L.L.C.,* 749 So. 2d 459 (Ala. Civ. App. 1999); *Allstate Leasing Corp. v. Scroggins,* 541 So. 2d 17 (Ala. Civ. App. 1989) *(citing Green Tree Acceptance, Inc. v. Blalock,* 525 So. 2d 1366 (Ala. 1988)).

b. It is important to note, in deciding on a choice of business entity, that the statutes governing foreign limited partnerships and foreign limited liability companies do not have the same penal effect.

5. Filing Instruments.

(a) § 10A-2-2.02 eliminates those matters required to be set forth in the certificate of formation pursuant to § 10A-1-3.05.

(b) However, § 10A-2-2.02 provides for certain "supplemental" information that must be set forth in a certificate of formation constituting articles of incorporation:

(1) number of authorized shares

(2) names and addresses of initial directors

(3) the purpose or purposes for which the corporation is organized, which may be stated to be or to include the transaction of any lawful business

for which corporations may be incorporated under this chapter. See Constitutional discussion below.

6. Except to the extent limited in the articles of incorporation or bylaws, notice under the ABCL may now be given by e-mail, in addition to the other forms of communication formerly included in the ABCA. § 10A-2-1.41

D. What Has Not Changed?

1. Substantive Corporate Law. The provisions of the old ABCA remain intact regarding: preincorporation and *ultra vires* liabilities; authorization and issuance of shares; dividends; preemptive rights; shareholder meetings and voting; governance by the board of directors; directors' meetings and voting; directors' standard of conduct, fiduciary duties and conflicting interest transactions; amendments to articles and bylaws; mergers, share exchanges and sales of assets; dissenters' rights; and dissolution.

2. The Constitution Prevails. The lack of certainty arising from, and the burden placed on Alabama corporations in complying with, the following constitutional provisions are often viewed as disadvantages of incorporation in Alabama:

(a) Section 233 provides that "No corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation." Powers not expressly granted to a corporation in its organizational documents are *ultra vires. Alabama Red Cedar Co. v. Tennessee Valley Bank,* 200 Ala. 622, 76 So. 980 (1917).

(1) Notwithstanding the language of the Constitution, the Hub sets forth certain general powers possessed by all domestic entities, § 10A-1-2.11, and the ABCL states that the articles of incorporation "need not set forth any of the corporate powers enumerated in Sections 10A-1-2.11, 10A-1-2.12 and 10A-1-2.13." § 10A-2-2.02(c).

(2) Which controls: the Constitution or the ABCL? See § 10A-2-2.02(a)(3).

(3) See form of articles of incorporation, included herewith as Appendix A, which set forth purposes and powers in detail.

(b) Section 234 provides that the "stock and bonded indebtedness of corporations shall not be increased except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock, first obtained at a meeting to be held after thirty (30) days notice, given in pursuance of law."

(1) Only Alabama and Arkansas have this or similar provisions. *See* Article 12, Section 8 of the Constitution of the State of Arkansas, which prohibits private corporations from increasing their bonded indebtedness without the prior consent of their shareholders obtained at a meeting held after notice of not less than 60 days.

(2) Interpretations vary widely as to the meaning of "bonded indebtedness."

(3) *See* the definitive proxy statement of Southwestern Energy Co. dated March 29, 1996: "On the advice of Arkansas counsel, the Company believes that the term 'bonded indebtedness' includes only debt obligations of the Company represented by written evidences of indebtedness such as bonds, debentures, and interest-bearing notes with specific maturities of five (5) years or more whether or not secured by mortgages on specific property of the Company." The practical effect is that Alabama corporations must obtain shareholder approval with respect to any financing other than routine, short-term borrowings, in order to satisfy lenders and their counsel.

(4) With respect to a publicly held corporation, or a corporation with a large number of shareholders, the requirement is quite burdensome. *See, e.g.,* proxy statement of Energen Corporation dated December 20, 1996 (proposal to increase bonded indebtedness) and proxy statement of Just For Feet, Inc. dated July 3, 1997 (same).

(c) Section 237 provides that a corporation may not "issue preferred stock without the consent of the owners of two-thirds of the stock of said corporation." *But cf.* § 10A-2-6.02(a), which provides that the articles of incorporation may permit the board of directors to determine "the preferences, limitations, and relative rights" (within the limits set forth in Section 10A-2-6.01) of (i) any class of shares before the issuance of any shares of that class or (ii) one or more series within a class before the issuance of any shares of that series. In other words, "blank check" preferred shares are permitted, but the Constitution seems to take away what the ABCL allows.

(d) Also, practitioners should note that Section 241 defines the term "corporation" to include "all associations having the powers or privileges of corporations, not possessed by individuals or partnerships."

3. Inflexibility of Statutory Requirements Regarding Payment for and Issuance of Stock**.**

(a) § 10A-5-5.01 provides that the "contributions of a member to [a] limited liability company may be in cash, property, services previously rendered, or a promissory note or other binding obligation to pay cash, convey property, or to render services."

(b) In contrast, § 10A-2-6.21(b) provides that the "board of directors may authorize shares to be issued for consideration consisting of money, labor done or property actually received." A promissory note or an agreement to render services in the future may not be used as consideration for the purchase and issuance of

newly issued shares of capital stock, although they may be valid consideration for the re-issuance of treasury shares. *Brumfield v. Horn,* 547 So. 2d 415 (Ala. 1989).

4. Alabama's "Shareholder-Friendly" Provisions**.**

(a) Preemptive Rights. § 10A-2-6.30. Alabama is an "opt-out" state, meaning that the shareholders of a corporation have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation otherwise provide.

(b) Supermajority Voting. Two-thirds voting requirements on plans of merger or share exchange (§ 10A-2-11.03(e)) and on sale of assets other than in the regular course of business (§ 10A-2-12.02(e)).

(c) Written Consent. Shareholders in a domestic corporation may act by written consent instead of at a meeting, but the written consent must be unanimous. (§ 10A-2-7.04(d)).

(d) Dissenters' Rights. Shareholders in a domestic corporation have the right to dissent from, and obtain the payment of the fair value of their shares in the event of, any merger, any share exchange or any sale of substantially all the assets of the corporation. (§ 10A-2-13.02). This is not the case in many other states, including Delaware.

E. Drafting Corporate Organizational Documents

1. Articles of Incorporation**.**

(a) Filing**.**

(1) A certificate of formation constituting articles of incorporation is to be filed in the office of the probate judge of the county in which the

corporation is to have its initial registered office. § 10A-2-2.01.

(2) The filing shall include one copy for the probate judge and one copy to be transmitted by the probate judge to the Secretary of State. § 10A-1-4.02(b).

(b) Content of Articles of Incorporation.

(1) Required Provisions. § 10A-1-3.05(a); § 10A-2-2.02(a).

(2) Special or Permissive Provisions**.** § 10A-2-2.02(b).

a. Reservation to the shareholders of the right to adopt the initial bylaws.

b. Any provisions not inconsistent with law regarding managing the business and regulating the affairs of the corporation.

c. Provisions defining, limiting and regulating the powers of the corporation, its board of directors and shareholders.

d. A provision stating the par value for authorized shares. The concept of par value is anachronistic, because the legal capital rules under the ABCL do not contain any requirement for par value. The problem is that Section 229 of the Alabama Constitution requires the franchise tax to be in proportion to the amount of capital stock.

(3) Any provision that is required or permitted to be set forth in the bylaws may be in the articles.

(c) Other Matters Which the ABCL Either Requires or Permits

to be in the Articles of Incorporation.

(1) Duration. A corporation as a general rule has perpetual duration, but the articles may restrict or limit the duration of a corporation to a limited term. § 10A-2-3.02.

(2) Terms of classes or series of shares. As discussed above, the articles may contain a provision allowing the board of directors to determine the relative preferences, limitations and rights of classes or series of shares. § 10A-2-6.02(a).

(3) Denial of preemptive rights.

(4) § 10A-2-6.21(a) permits the articles of incorporation to reserve to the shareholders the right to approve the issuance of new shares, so there may be other ways a minority shareholder can be protected.

(5) Shareholder action without a meeting. As discussed, shareholders may take action by unanimous written consent rather than at a meeting. § 10A-2-7.04(a). The articles may deny this right, although since the requirement is for unanimous written consent (as opposed to majority written consent in Delaware, for example), there is no good reason to deny it.

(6) Quorum and voting requirements. The articles may contain provisions requiring greater or lesser quorum and voting requirements for shareholders than otherwise required. § 10A-2-7.25.

(7) Voting for directors. Unless otherwise provided in the articles, directors are elected by a majority of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present when the vote is taken, and shareholders do not have a right to cumulate their votes for directors. Accordingly, the articles may contain provisions altering the vote requirement or mandating cumulative

voting. § 10A-2-7.28.

(8) Number and election of directors.

a. The number of directors is to be fixed in accordance with the articles or the bylaws. The articles or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders, or, if the articles so provide, by the board of directors. § 10A-2-8.03(c).

b. Directors generally serve terms of one year; however, if there are nine or more directors, the articles may provide for staggering their terms by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be. Directors will then serve terms of two or three years. § 10A-2-8.06.

(9) Removal of directors. As a general rule, the shareholders may remove directors with or without cause; however, the articles may provide that directors may be removed only for cause. § 10A-2-8.08(a).

(10) Shareholder voting requirements. The articles may provide for a greater or lesser voting requirement by shareholders on certain matters.

(11) Indemnification.

a. The permissive and mandatory indemnification provisions are set forth in the ABCL at §§ 10A-2-8.50 through .58. However, the corporation may wish to consider adding indemnification provisions to the articles.

b. § 10A-2-8.58 provides that "Any

indemnification, or advance for expenses, authorized under this division shall not be deemed exclusive of and shall be in addition to that which may be contained in a corporation's articles of incorporation, bylaws, a resolution of its shareholders or board of directors, or in a contract or otherwise."

c. If the statute is amended, the corporation and its officers, directors and employees still have the protection afforded by the articles, although query whether or not indemnification set forth in the articles, bylaws or agreements can differ materially from that provided by the statute, as a matter of public policy.

(12) Limitation on liability of directors.

a. The articles may contain a provision limiting or eliminating, with certain exceptions, the liability of directors to the corporation and its shareholders for monetary damages for breach of their fiduciary duties. § 10A-2B-2.02(b)(3).

b. It is generally thought that this provision, which is now a part of most state corporation statutes, better enables a corporation to attract and retain as directors responsible individuals with the experience and background required to direct the corporation's business and affairs. It has become increasingly difficult for corporations to obtain adequate liability insurance to protect directors from personal losses resulting from suits or other proceedings involving them by reason of their service as directors. Such insurance is considered a standard condition of directors' engagement, particularly in public companies. However, coverage under such insurance is no longer routinely offered by insurers and many traditional insurance carriers have withdrawn from the market. To the extent such insurance is available, the scope of coverage is often restricted, the dollar limits of coverage are substantially reduced and the premiums have risen dramatically.

c. Traditionally, courts have not held directors to be insurers against losses a corporation may suffer as a consequence of directors' good faith exercise of their business judgment, even if, in retrospect the directors' decision was an unfortunate one. In the past, directors have had broad discretion to make decisions on behalf of the corporation under the business judgment rule.

d. The business judgment rule offers protection to directors who, after reasonable investigation, adopt a course of action that they reasonably and in good faith believe will benefit the corporation, but which ultimately proves to be disadvantageous. Under those circumstances, courts have typically been reluctant to subject directors' business judgments to further scrutiny.

e. Some court cases have, however, imposed significant personal liability on directors for failure to exercise an informed business judgment with the result that the potential exposure of directors to monetary damages has increased over the years. Consequently, legal proceedings against directors relating to decisions made by directors on behalf of corporations have significantly increased in number, cost of defense and level of damages claimed. Whether or not such an action is meritorious, the cost of defense can be well beyond the personal resources of a director.

f. Generally, this provision in the articles will state that to the fullest extent that the law now or hereafter permits the limitation or elimination of the liability of directors, no director will be liable to the corporation or its stockholders for monetary damages for any action taken, or any failure to take any action, or any failure to take any action, as a director, with the exception of those items specifically carved out by Section 2.02(b)(3).

See the form of Articles of Incorporation included herewith as Appendix A.

2. Bylaws.

(a) The bylaws may contain any provision for managing the business and affairs of the corporation that is not inconsistent with the articles or the law. § 10A-2-2.06(b).

(b) The ABCL does not contain many requirements for the specific content of a corporation's bylaws, although it does provide that a corporation has the officers described in its bylaws. § 10A-2-8.40(a). The following subjects typically are covered:

(1) Shareholders**.** Provisions regarding annual and special meetings, notice of meetings, fixing record dates, voting lists, quorum requirements for voting; proxies; voting of shares; and action without a meeting.

(2) Board of Directors. Provisions regarding the general powers of the board to manage the business and affairs of the corporation; number, tenure and qualification of directors; regular and special meetings; notice of meetings; waiver of notice; committees; quorum; manner of acting; action without a meeting; vacancies, resignations and removals; and place of meetings.

(3) Officers**.** Title and description of principal officers; election and term of office; and resignation, removal and vacancies.

(4) Shares**.** Issuance of share certificates; signatures on certificates; transfers of shares; and procedures for dealing with lost, destroyed or stolen certificates.

(5) Indemnification**.**

(6) Miscellaneous Provisions**.** Corporate seal; fiscal year, waiver of notice; and authority to execute instruments and documents.

(7) Method of Amending the Bylaws**.**

(c) Bylaw provisions specifically mentioned in the ABCL.

(1) Notice**.** Bylaws may limit the methods or means of communicating notices otherwise permitted by § 10A-2-1.41(b) in any manner which is not inconsistent with the ABCL.

(2) Annual Meeting**.** The bylaws should state the time and place for holding the annual meeting of shareholders. § 10A-2-7.01(c).

(3) Record Date**.** The fixing or the manner of fixing the record date for determining the shareholders entitled to vote at a meeting or to demand special meetings may be fixed in the bylaws. The record date may be not more than 70 days prior to the meeting or the action requiring a determination by shareholders. § 10A-2-7.07(b)

(4) Board of Directors**.**

a. Compensation. The bylaws may deny to the board of directors the right to fix its own compensation. § 10A-2-8.11.

b. Telephone meetings. The bylaws may prohibit the board of directors from holding telephonic meetings. Unless the bylaws provide otherwise, however, a director may participate by conference telephone. § 10A-2-8.20(b).

c. Notices of special board meetings. The bylaws may specify a longer or shorter period required for notice of special meetings of the board of directors. The statutory default provision is two days' notice. § 10A-2-8.22(b).

d. Quorum and voting requirements. The bylaws may specify a greater or lesser quorum and a greater voting requirement for

director action than otherwise required. The statutory default provision is a majority of the fixed number of directors for a quorum and the affirmative vote of a majority of directors present. § 10A-2-8.24.

e. Committees. The bylaws may deny authority to the board of directors to create committees, and may place limits on the authority of any committee. § 10A-2-8.25.

(5) Indemnification**.** The bylaws may contain provisions for indemnification. § 10A-2-8.58.

3. Shareholder Agreements**.**

(a) Agreements among shareholders allow the shareholders of a closely held corporation to set forth their agreements regarding such matters as:

(1) Restrictions on transfers of stock.

(2) Permitted transfers.

(3) Rights of first refusal in the event one shareholder wants to sell his shares to a third party.

(4) Rights of participation by minority shareholders in the decision by a majority shareholder to sell his stock to a third party.

(5) Representation by different shareholder groups on the

board of directors.

(6) S corporation distributions.

(7) Methods of valuing shares in the event of a sale.

(b) A shareholder agreement may be in conflict with certain provisions of the ABCL, and yet still be effective. § 10A-2-7.32(a) provides that an agreement is effective among the shareholders and the corporation even though it is inconsistent with one or more provisions of the Act in that it:

(1) Eliminates the authority of the board of directors or restricts the discretion or powers of the board of directors;

(2) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in Section 10A-2-6.40;

(3) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(4) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(5) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(6) Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) Requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or

contingency; or

(8) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

(c) To be effective, a shareholder agreement must be (§ 10A-2-7.32(b)):

(1) Set forth:

a. In the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or

b. In a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation; and

(2) Subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise.

(d) The existence of the shareholder agreement must be noted conspicuously on the front or back of each certificate for outstanding shares. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation must recall the outstanding certificates and either add the notation or issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate does not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the

agreement if its existence is noted on the certificate for the shares. An action to enforce the right of rescission must be commenced within the earlier of 90 days after discovery of the existence of the agreement or two years after the time of purchase of the shares. § 10A-2-7.32(c).

(e) A shareholder agreement that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement. § 10A-2-7.32(e). Query whether or not a provision in the articles of incorporation eliminating liability of the directors for breach of the duty of care would apply to the person to whom the directors' authority is delegated under the shareholder agreement.

(f) The existence or performance of a shareholder agreement shall not be grounds for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement. § 10A-2-7.32(f).

F. Operational Issues; Some Commonplace Problems

1. Minutes of Meetings: Are They Required? *Hypothetical No. 1:* You have just been retained by a corporation to represent it in connection with a project as to which there is a lack of unanimity among the shareholders and directors. You discover that the corporation has a minute book in name only; even though it has been in existence for ten years, there are no minutes of any meeting for the previous three years, during which the corporation, among other things, issued new shares, paid dividends and purchased property. Is this a problem?

(a) § 10A-2-16.01(a) provides that "A corporation shall keep

as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation."

(b) All records of the corporation must be maintained in written form or in a form capable of conversion into written form within a reasonable time.

(c) Failure to have minutes of meetings can obviously be cured, and the absence of minutes probably does not affect the validity of any action taken during the time that minutes were not kept. However, there is probably no presumption of the validity of such actions that the corporation may otherwise have enjoyed by keeping proper minutes.

2. Attendance at Meetings. *Hypothetical No. 2:* You represent Eat At Joe's, Inc. (the "Company"), a domestic corporation that owns and operates a restaurant. The Vice President, Chief Operating Officer and Executive Chef of the Company calls a special meeting of the board of directors, giving 24 hours notice by e-mail, for the purpose of approving the purchase of land on which to build a new restaurant. One director is not in favor of the project, but he comes to the meeting anyway and participates at length and quite vocally in the discussion. The project is approved, with the dissident director remaining silent during the vote. At the next meeting of the board held one month later for the purpose of discussing financing for the new project, the dissident director announces that the action taken at the prior meeting was illegal because improper and insufficient notice was given, and he wishes to have his dissent recorded. He has written a letter to that effect to the bank, and the bank's lawyer has called you to find out what is going on.

(a) Potential problems with the notice.

(1) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two days' notice of the date, time and place of the meeting. § 10A-2-8.22(b). The statute does not specify who has the power to call meetings of directors; presumably this will be set forth in the bylaws.

(2) While the e-mail delivery may have been problematic under the ABCA, e-mail is now specifically a permissible form of delivering notice § 10A-2-1.41(b).

(b) Problems with the dissident director's objection and dissent.

(1) § 10A-2-8.23(b): A director's attendance at or participation in a meeting:

a. Waives objection to lack of any required notice to him or her or defective notice of the meeting unless the director at the beginning of the meeting (or promptly upon his or her arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting; and

b. Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the director objects to considering the matter before action is taken on the matter.

(2) § 10A-2-8.24(d): A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

a. He or she objects at the beginning of the meeting (or promptly upon his or her arrival) to holding it or transacting business at the

meeting or, as to a matter required under the articles of incorporation or the bylaws to be included in the notice of the purpose of the meeting, he or she objects before action is taken on the matter;

b. His or her dissent or abstention from action taken is entered in the minutes of the meeting; or

c. He or she delivers written notice of his or her dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

3. Quorum and Voting at Meetings. *Hypothetical No. 3:* The Company has five directors. At the meeting described in No. 2 above, there are only 3 directors present, one of whom is on vacation in Florida but is present by telephone. Before the vote is taken on the land purchase, the vacationing director announces that his tee time has arrived, but that his son (who is not a director) has his proxy to vote in favor of the land purchase and anything else the proxy wants to vote for. He then hands the phone to Junior and heads for the first tee.

(a) Alabama law answers this question implicitly by requiring (i) attendance and participation by directors at a meeting at which all directors can hear each other, § 10A-2-8.20(b) or (ii) action by unanimous written consent, § 10A-2-8.21(a). In other words, the board can only take action **as a board**. The concept of board of directors as a deliberative body means that a director cannot fulfill his duty as a director through another individual, so proxy voting by directors should not be permitted. This has been the long-standing rule in Delaware. *See Lippman v. Kehoe Stenograph Co.,* 95 A. 895 (Del. Ch. 1915).

(b) § 10A-2-8.24(c) provides that "If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the

board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors. A director is, unless established to the contrary, presumed present for quorum purposes for the remainder of a meeting at which he or she has been present for any purpose." This constitutes a change from the older version of the ABCA, pursuant to which the withdrawal of a director from a meeting did not "break" a quorum. The law requires that a quorum be present "when a vote is taken," meaning that the departure of a director from a meeting could have the effect of breaking a quorum and not allowing a vote to be taken, or rendering ineffective any vote that is taken.

(c) Although the statute contains a presumption of a director's continuing presence, a director's vocal and obvious withdrawal from the meeting would be sufficient to rebut the presumption.

4. The Dissident Shareholder. *Hypothetical No. 4:* The board of directors of the Company approves the purchase of the land, and later approves construction financing and recommends that the shareholders approve an increase in the Company's bonded indebtedness under the Alabama Constitution. At a special meeting of shareholders called for that purpose (the Company has approximately 50 shareholders, so action by unanimous written consent is almost impossible), a shareholder who is not in favor of the proposal comes to the meeting with a copy of *Robert's Rules of Order Newly Revised* (10th edition). During the meeting, he (i) objects to consideration of the proposal because it did not receive a second; (ii) makes three points of order and four points of personal privilege; and (iii) during debate on the proposal, interrupts the Chairman and moves that the pending matter be tabled. He reminds the Chairman that under *Robert's Rules of Order* a motion to table is in order and is neither debatable nor amendable. What action should the Chairman take?

(a) Nothing in the ABCL requires knowledge of, or even compliance with, *Robert's Rules of Order,* and it is a misconception that a shareholders' meeting must be conducted like the Philomathean Society. § 10A-2-7.02(d) states that

"Only business within the purpose or purposes described in the meeting notice required by Section 10A-2-7.05(c) may be conducted at a special shareholders' meeting." If the notice of the meeting stated that the purpose of the meeting was to consider and vote upon a proposal to increase bonded indebtedness, then considering and voting is exactly what the shareholders should proceed to do, *Robert's Rules of Order* notwithstanding.

(b) Depending upon the number of shareholders and other factors, the lawyer might want to consider recommending the following language for inclusion in the bylaws:

> Conduct of Shareholders Meetings. Shareholders meetings shall be presided over by the Chairman of the Board, or, in his absence, by the President of the Corporation. The Secretary of the Corporation, or, in his absence, an Assistant Secretary, or, if no such officer is present, a person designated by the Chairman, shall act as Secretary of the meeting. The precedence of, and procedure on, motions and other procedural matters at such meetings shall be as determined by the Chairman, in his sole discretion, provided that he acts in a manner not inconsistent with law, with the Articles of Incorporation, or with these Bylaws.

II. PROFESSIONAL CORPORATIONS

A. What Has Changed?

1. Name. The Revised Alabama Professional Corporation Act is now known as the Alabama Professional Corporation Law (referred to in this outline as the "APCL" or "Chapter 4"). §§ 10A-1-1.08(b), 10A-4-1.01.

2. Citations. The Alabama Professional Corporation Law is now Chapter 4 of the Entities Code, and sections thereof will be cited as "§ 10A-4-___."

3. Former Provisions Now Covered Under the Hub.

(a) Certain definitions have been deleted from former § 10-4-382 and are set forth in § 10A-1-1.03. Definitions specific only to the ABCL have been preserved in § 10A-4-1.03.

(b) A "qualified person" (i.e., a person who is qualified to own shares of a professional corporation) under the APCL now includes a limited liability company in which all the members are qualified persons.

4. Purposes. Domestic professional corporations may be organized under this ~~article~~ chapter only for the purpose of rendering professional services and services ancillary thereto within a single profession, except that, the same professional corporation or not-for-profit professional corporation may render ~~both~~ medical, ~~and~~ dental ~~services~~, and other health related services; provided that in the case of a professional corporation, at least one shareholder of ~~such~~ the professional corporation is ~~a~~ duly licensed ~~medical professional and at least one shareholder is a duly licensed dental professional at the time both services are rendered, and each shareholder is a duly licensed medical or dental professional~~ to provide each professional service for which the professional corporation is organized, or, in the case of a not-for-profit professional corporation, all of the professional services rendered by ~~such~~ the corporation are rendered by persons duly licensed ~~medical professionals and duly licensed dental professionals~~ to render the professional service." § 10A-4-2.01.

B. What Has Not Changed?

1. "The provisions of the Alabama Business Corporation Law shall apply to professional corporations, domestic and foreign, except to the extent the provisions are inconsistent with the provisions of this chapter; provided, however, that in the case of not-for-profit professional corporations, domestic or foreign, the provisions of the Alabama Nonprofit Corporation Law shall apply except to the extent the provisions are inconsistent with the provisions of this chapter." § 10A-4-1.02.

2. Remaining substantive provisions of the APCL remain intact, with certain conforming language changes.

THE LIMITED LIABILITY COMPANY "SPOKE" (CHAPTER 5 OF THE CODE)

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INTRODUCTION: CHANGES IN STATUTORY LAW

The statutory language governing limited liability companies will be found at Ala. Code §10A-5-1.01 *et seq*., and it shall be known as the Alabama Limited Liability Company Law (the "LLC Law"). The statutory law of limited liability companies has remained largely untouched by the new Alabama Business and Nonprofit Entity Code. However, as previously discussed, several definitions and other provisions have been moved from the previous limited liability company statute to the "Hub." For example, the definitions of "bankrupt" (re-styled "debtor in bankruptcy"), "court", "manager", "organizer" and "person" have been relocated to the Hub. *See* Ala. Code § 10A-1-103. Additionally, some of the required contents of an LLC's Certificate of Formation (Articles of Organization) and the powers of an LLC have been relocated to the Hub. Therefore, it is essential that practitioners reference both the LLC Law and the Hub when dealing with LLCs. Attached as Exhibit A, please find a comparison version of the LLC Law, showing changes made to the previous limited liability company statute.

I. LIMITED LIABILITY COMPANY—A DEFINITION

An LLC is a "limited liability company." It, like the limited liability partnership, offers its members the same set of liability protections afforded corporate shareholders yet permits more flexibility in its structure. The flexibility offered by the LLC is, at the same time, both a benefit and a burden. One of the primary benefits derived from the LLC option is the ability to create arrangements among owners and management that are limited only by the creativity of the participants and their advisors. However, this ability to create unique and specifically tailored arrangements regularly results in higher costs to the owners and can increase the likelihood of unintended consequences.

II. CHOICE OF ENTITY FACTORS

A. Business LLC Law Considerations

(1) **Efficient Management Structure**:

Businesses may generally choose among three types of management: (1) representative management (as with a general corporate structure), (2) entrenched management (as with a limited partnership), and (3) direct management (as with a general partnership). The LLC Law allows LLC members to use the Certificate of Formation and Operating Agreement (jointly known as the "Governing Documents" of an LLC as discussed below) to fashion their company's management structure as any of the above. Although uncommon, the governing documents may be written to require a change in management structure upon the occurrence of a specified event. For example, upon the attainment of a financial goal or milestone, the Operating Agreement could provide for a transition into a different style of management. The ability to tailor the management structure of an LLC to fit the particular needs of a client should be one of the first considerations when selecting among LLCs, LLPs and corporations.

LLCs fall into one of two categories based on the selected management structure. The "member-managed" LLC is the default structure, and Ala. Code §10A-5-4.01 outlines the corresponding specifications, including the equal voting rights of each member. Accordingly, under a member-managed LLC, all members are vested with general agency powers and have the ability to bind the LLC (much like a general partnership).

When forming an LLC, a "manager-managed" structure may also be utilized. This structure allows for the appointment of managers who possess agency powers. In several ways, manager-managed LLCs may limit the members' agency powers. *See* Ala. Code §10A-5-3.03(b). Manager-managed LLCs share structural similarities with pure corporate management. Note that the Certificate

of Formation must state the intent to form a manager-managed structure, and the initial managers must be named in the Certificate of Formation. *See* Ala. Code § 10A-5-2.02(3). Any subsequent change in the structure requires an amendment to the Certificate of Formation, unless such a change is already planned for and expressed in the Certificate of Formation. Anyone interested in a centralized management structure should find the manager-managed LLC structure attractive. Business ventures conducive to a manager-managed LLC structure include: (1) high risk ventures, (2) leveraged real estate, and (3) any situation in which the majority of capital comes from passive investors.

(2) **Distributions/Allocations**:

LLCs also have the flexibility to determine the amount and timing of distributions of cash and property to owners. Even though the LLC Law establishes a relationship between distributions and allocations in providing for default rules, it is important to understand the differences. The rules governing distributions relate to the delivery of company cash and/or property to the owners. The rules governing allocations relate to how company profits, losses, deductions and credits are to be reported by the owners for tax purposes.

The statutory default for the allocation of profits, losses, etc. in an LLC is based upon the pro rata value of the capital contributions made by each member. *See* Ala. Code § 10A-5-5.03. Because a valid Operating Agreement must be in written form, this default allocation is dangerous for a member who contributes only services to the LLC and who is not guaranteed a share in the profits by the Operating Agreement. Also, an Operating Agreement that establishes how profits will be allocated must expressly outline how losses are to be allocated if it wishes to avoid the statutory default.

The default rule established by the LLC Law ties allocations to distributions by providing that distributions shall be made to members in proportion to the

members' rights to share in the profits of the company. As with most default rules, the Operating Agreement can, and often will, provide for different distribution rules.

(3) **Liability Issues**:

The ability to form a non-corporate limited liability entity has largely eliminated the need to discuss liability when choosing among the forms. Some questions, however, still remain.

(a) Cross-border operations: Some state LLP provisions only protect against vicarious liability, leaving partners vulnerable to liabilities under contractual obligations. Such is not the case with an LLC. Thus, when considering a business entity involved in cross-border operations, there may be significant, costly liability differences resulting from the choice of an LLP over an LLC.

(b) "Piercing the veil": The veil-piercing doctrine applicable to corporations also applies to LLCs, as explained in a recent federal court decision. *See* Filo America, Inc. v. Olhoss Trading Co., L.L.C., 321 F.Supp. 2d 1266 (M.D. Ala. 2004). In addition, there is some question as to whether the IRS's opinion that the standard for piercing the veil of single-member LLCs should be diminished will be adopted by the courts (see further discussion below in Section II.C.2).

B. Taxation

(1) Self-employment Tax:

The IRS has issued two sets of proposed regulations in an attempt to provide some guidance regarding the application of self-employment tax in the LLC context. The first set of regulations was met with much criticism because they

focused on voting rights in determining whether a member's distributive share of income (not merely distributions) was subject to self-employment taxes. Many commentators believe that the regulations erred in not focusing on the performance of services by the member. As a result of the criticism, in January of 1997 the IRS withdrew the first regulations and proposed new regulations (the "1997 Regulations"). The 1997 Regulations contained detailed rules to determine whether one was a "limited partner" which in turn would have determined whether one was subject to self-employment taxes. The 1997 Regulations would have allowed members, in certain circumstances, to bifurcate their interests into two classes with one class being subject to self-employment tax and the other class being akin to a limited partner, and thus not subject to the tax. The regulations would have also subjected all income of members in service businesses (i.e. law, accounting, medicine, architecture, engineering, etc.) to self-employment tax. The Taxpayer Relief Act of 1997 included a provision that prevented the proposed IRS Regulations from becoming effective. *See* TRA 97 § 935. Accordingly, there are currently no regulations defining when members are subject to self-employment taxes. It is reasonable to assume that in certain instances, such as when a member in a manager-managed LLC has no active role in the day-to-day operations of the LLC, that member will not be subject to self-employment taxes on income earned. How the rules are applied in specific situations is unclear, but it seems safe to assume that any new regulations will not be more restrictive that the 1997 Regulations.

(2) **State Tax:**

The Alabama Business Privilege Tax applies to all corporations and limited liability entities. The minimum amount of tax if $100 and the maximum amount is $15,000. The tax is based on the net worth of the entity. For a qualified family limited liability entity the tax is only $500. To fall within this exception, the

entity must be (i) owned at least 80% by an individual and his or her family and (ii) 90% of the assets must be used in a passive activity.

(3) **Annual Notice/Fee:**

LLCs are not required to file any type of annual notice nor are they required to pay any type of annual fee. This may be contrasted with LLP's which require the filing of annual notices. Failing to file the annual notice can result in the loss of liability protection possibly causing each of the partners to become personally liable for all obligations of the partnership.

(4) **Federal Tax Classification:**

Under the "check the box" regulations, owners of unincorporated entities are allowed to choose between corporate or partnership tax status and eligible entities with only one owner can elect either corporate or sole proprietor status. If no election is made the single owner entity is disregarded as an entity separate from its owner. *See* Treasury Regulation § 301.7701-3.

C. SMLLCs as Disregarded Entities

One of the greatest incentives to form an LLC is that it offers limited liability to its members. Under the check-the-box regulations, a single-member LLC ("SMLLC") is treated as a disregarded entity unless an affirmative election is made to be taxed differently. As a result, the sole member is treated as directly owning the LLC's assets, and the SMLLC does not exist for tax purposes separate from the owner. This means that transactions between the member and the SMLLC are ignored (e.g., transfer of assets to or from the entity by the owner, loans between the owner and the entity, etc.). The ability to have an entity that exists for state law purposes but that is a "tax nothing" can provide opportunities for creative planning but can also create potential pitfalls.

(1) **Asset Protection**:

One of the commonly cited uses of an SMLLC is as an asset protection tool. A bankruptcy court decision from Colorado, however, raises some questions about its effectiveness as an asset protection tool. *See* In re Albright, 291 BKRPTCY. RPTR. 538 (2003). The issue in Albright was whether the court would permit the bankruptcy trustee to substitute itself for the debtor as the sole member/manager of the LLC and cause the LLC to sell its assets and distribute the sale proceeds. The member of the LLC argued that the trustee was limited to obtaining a charging order, giving the trustee only the right to receive distributions from the LLC. The court granted the trustee complete control over the LLC and allowed it to sell the LLC's assets.

(2) **Piercing the Veil**:

Although an SMLLC may offer taxpayers many advantages, one disadvantage is that they may be more susceptible to the "piercing the veil" doctrine than multi-member LLCs. The IRS has indicated that because members of SMLLCs often possess the capital to pay liabilities rather than the LLCs themselves, veil piercing should be more readily available to the courts. Although the IRS has no jurisdiction over such matters, some commentators fear that the IRS's stance on this issue could pervade into the court system and lead to undesirable results for SMLLCs and their members.

(3) **Tax Planning**:

The ability to form an SMLLC that is disregarded for tax purposes provides an opportunity for additional tax planning. For example, a real estate developer could form a separate LLC for each development with each LLC wholly owned by the development company. The liability associated with each development can be contained within each separate LLC, but for tax purposes the profits and losses of all of the developments are combined. The net effect is to allow

consolidated returns. This same strategy can be pursued using S-corporations but requires specific steps to be taken to ensure the desired result is obtained. Another possible tax planning opportunity involves like kind exchanges with an SMLLC. Internal Revenue Code § 1031, which allows for tax-free like kind exchanges, prohibits exchanges of partnership interests from qualifying as a tax free exchange. However, since the existence of an SMLLC is ignored for tax purposes, the transfer of an interest in an SMLLC in exchange for either real property or an interest in another SMLLC will qualify for like kind exchange treatment so long as the underlying properties held by the LLCs qualify under Section 1031.

(4) **State Taxation**:

Section 10A-5-1.06 of the LLC Law provides that "for purposes of taxation…a domestic or foreign limited liability company shall be treated as a partnership unless it is classified otherwise for federal income tax purposes, in which case it shall be classified in the same manner as it is for federal income tax purposes." The statute provides very broadly that for purposes of "taxation" Alabama will follow the federal income tax classification of an entity. The section is not limited by its terms to state income tax purposes. Experience has shown that in connection with the recording of deeds transferring property to an SMLLC and for purposes of transferring motor vehicle titles to an SMLLC, the relevant governmental offices have not interpreted this statute to cover their taxes. However, the provision in the LLC Law could be interpreted as exempting taxpayers from any taxes that result from a transaction between the member and an SMLLC wholly owned by such member.

D. Midstream operational changes

(1) **Mergers:**

Domestic LLCs may merge with or into any other entity. *See* Ala. Code §10A-5-9.01. Except as otherwise provided in the Operating Agreement, a merger must be approved by all members. *See* Ala. Code §10A-5-9.01. The merging LLC must file Articles of Merger with the Secretary of State, signed by a member of the LLC. *See* Ala. Code §10A-5-9.02(a). The merger becomes effective when the Articles of Merger are filed unless a future effective date is provided in the Articles of Merger. *See* Ala. Code §10A-5-9.02(b). The Articles of Merger must also be filed with the Judge of Probate in the county in which the LLC is required to file its Certificate of Formation and in each county in which an LLC who is a party to the merger is required to file its Certificate of Formation. *See* Ala. Code §10A-5-9.04. All copies of the Articles of Merger are to be filed with the Secretary of State, who will then distribute them to the Judges of Probate in the appropriate counties.

Please note that Article 8 of the Hub (*see* Ala. Code §10A-1-8.01 *et seq.*) provides general merger and conversion procedures for all Alabama entities and overlaps with the merger provisions of the LLC Law, as well as the merger provisions of the other Spokes. Before undertaking a merger or other type of conversion of any entity, one should look at the merger statutes under the applicable Spokes providing for the formation of a particular entities involved (in the case of an LLC, the LLC Law) *and* the Hub to determine which is a more certain and advantageous procedural route as applied to a particular situation. For example, a merger of an LLC into a corporation is allowed by the LLC Law. *See* Ala. Code §10A-5-9.01. However, such a merger is not expressly allowed under Ala. Code §10A-2-11.01, as it only mentions the merger of a corporation into another corporation. But, Ala. Code §10A-1-8.02 allows any entity to merge with another. Therefore, to reduce uncertainty, in order to merge an LLC and a

corporation, a practitioner should use the merger procedures of Ala. Code §10A-1-8.01 *et seq.*

(2) **Conversions**:

LLCs may be converted to any other business form. *See* Ala. Code §10A-1-8.01(a)(3). The terms and conditions must be approved unanimously by the members unless otherwise provided in the Governing Documents. *See* Ala. Code §10A-1-8.01(a)(3). Conversion to a partnership (limited or otherwise) requires written consent of each member who is to be a general partner, notwithstanding the Governing Documents. *See* Ala. Code §10A-1-8.01(a)(3).

(3) **Dissolution:**

In a partnership-at-will, dissolution occurs upon the voluntary withdrawal of a partner. The personal liability exposure of each general partner justifies allowing each partner the right to dissolve an at-will partnership. Because LLCs offer limited liability protection to all members, no reason exists to allow LLC members the absolute right to dissolve the entity. As such, the default rule in the LLC Law provides that LLCs dissolve only when (1) a specified event occurs, (2) where there is the written consent of all the members, or (3) when there is no remaining member of the LLC. *See* Ala. Code § 10A-5-7.01.

(4) **Withdrawal/Cessation of Membership:**

The LLC Law does not include any right of a member of an LLC to voluntarily withdraw and demand a buyout of such member's interest. Thus, under the LLC Law, neither the LLC nor its members are obligated to purchase the interest of a former member whose membership has ceased. *See* Ala. Code §10A-5-5.05. (Note that in professional LLCs, a buyout obligation remains: *See* Ala. Code §10A-5-8.01(j)).

E. Additional Topics to Consider

(1) **Fiduciary Duties:**

The LLC Law establishes particular fiduciary duties between owners that include the duties of loyalty and care. *See* Ala. Code § 10A-5-3.03. Members are limited in their ability to waive these obligations. *See* Ala. Code § 10A-5-3.03. While the Governing Documents of LLCs can identify certain categories of activity that do not constitute violations of the duty of loyalty, broader exceptions to these duties may be created through the formation of a manager-managed LLC. In manager-managed LLCs, members who are not managers are only obliged to avoid disclosure and use of information to the detriment of the company. Consequently, when working with clients involved in numerous ventures, manager-managed LLCs present an attractive option that prevents possible conflicts of fiduciary duty that might arise otherwise.

(2) **Non-profit LLCs:**

Unlike some states, Alabama LLCs may be used for non-profit purposes. Although there is much left unresolved regarding this practice, it should be noted that LLPs require a profit motive, which eliminates the LLP as a vehicle for non-profit enterprises. *See* Ala. Code §10A-8-1.02(3).

(3) **Use by professionals:**

While Alabama allows professional entities to organize as S Corps, LLCs, and LLPs, many states impose minimum insurance and licensing requirements for professional LLPs. Thus, for multi-state professional practices, caution should be taken when considering which type of entity to choose. For professional services LLCs, *see* Ala. Code §10A-5-8.01.

III. FORMATION AND OPERATION

Prior to the passage of the LLC Law, the formation document of an LLC was known as the "Articles of Organization." However, the Hub uses the generalized term "Certificate of Formation" for the formation document of all filing entities in Alabama. *See* Ala. Code § 10A-1-1.03(7). The term Articles of Organization is still defined in Ala. Code § 10A-5-1.02(1) to establish that such term, if used, is synonymous with the term Certificate of Formation. It is possible that confusion may arise as to what type of entity is being referred to when the general term Certificate of Formation is utilized; however, the term Articles of Organization is not otherwise used in Ala. Code § 10A-5-1.01 *et seq*. to delineate it from all other types of Certificates of Formation. Ala. Code § 10A-5-1.02(1) also provides that a Certificate of Formation in combination with an Operating Agreement (described below) of an LLC may be jointly referred to as the "Governing Documents" of an LLC, which is a term generally defined at Ala. Code § 10A-1-1.03(40) for all Alabama entities.

A. Drafting Certificate of Formation

1. LLCs can be formed for any legal business purpose. *See* Ala. Code § 10A-1-2.01 and Ala. Code §10A-5-1.03. Most practitioners continue to include a specific purpose in order to ensure compliance with Ala. Constitution § 233.

[Note: Alabama Constitution § 233 states "No corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation". For this reason, practitioners usually state a specific purpose for a corporation in its formation documents. Because this section of the Alabama Constitution pre-dates the dawn of LLC's and may apply to LLC's by extension of the legislature's original intent and the provided definition of "corporation" in the Alabama Constitution, it is advisable to state that an

LLC may engage in any lawful activity in the state of Alabama, in addition to stating a more specific purpose in the Certificate of Formation.]

2. LLCs are formed by filing a Certificate of Formation with the Probate Court for the county where the LLC's initial registered office is located. *See* Ala. Code §10A-5-2.01. The Certificate of Formation must include the following required by Ala. Code §10A-1-3.05 of the Hub:

   (a) The name of the entity being formed.

   (b) The type of filing entity being formed (in this case, an LLC).

   (c) The purpose or purposes for which the limited liability company is organized, which may be stated to be or include any lawful purpose for an LLC.

   (d) The period of its duration, if not perpetual.

   (e) The street address and, if different, the mailing address of its initial registered office, and the name of its initial registered agent at that office.

   (f) The names and mailing addresses of the "organizers" of the LLC (which is defined in *Ala*. Code §10A-5-2.01 as a person, who need not be an owner or member of the entity, who, having the ability to contract, is authorized to execute documents in connection with the formation of the entity).

[Note: The obligation to include the names of the initial members has been removed from the requirements of the Certificate of Formation.]

The Certificate of Formation must also include the following (required by the LLC "spoke" Ala. Code §10A-5-2.02):

(a) The right, if given, of the member or members to admit additional members, and the terms and conditions of the admission.

(b) The circumstances, if any, under which the cessation of membership of one or more members will result in dissolution of the limited liability company.

[Note: Many forms incorrectly fail to address this issue.]

(c) If the limited liability company is to be managed by one or more managers, the Certificate of Formation shall so state and shall set out the names and the mailing addresses of the manager or managers who are to serve as managers until their successors are elected and begin serving.

As to the execution of the Certificate of Formation by an "organizer," note that Ala. Code §10A-1-4.01(c) of the Hub provides that the execution constitutes an affirmation that the facts therein are true under penalties for perjury. The organizer serves much the same role as a dummy incorporator in the corporate context. The use of an organizer also provides a mechanism for forming the LLC more quickly.

If the LLC is to have different classes of membership, the existence of the classes and their relative rights, powers and duties must be set forth in the Certificate of Formation. *See* Ala. Code § 10A-5-4.01(c). The failure to set out the existence of classes in the Certificate of Formation is a fairly common mistake because the requirement is not mentioned in § 10A-5-2.02 or 10A-1-3.05 of the Hub which detail what the Certificate of Formation must include.

B. Drafting the Operating Agreement

An Operating Agreement is an agreement among the members to "regulate or establish the affairs of the limited liability company, the conduct of its business, and the relations of its members." *See* Ala. Code §10A-5-4.03(a). Unlike some states, an Operating Agreement for Alabama LLCs must be in writing. However, there is no requirement that an LLC have an Operating Agreement – it is purely at the discretion of the members.[1] Notwithstanding the ability to forego entering into an Operating Agreement, it is unusual for an LLC to be formed without an Operating Agreement in place to govern the conduct of the LLC and its members. Without an Operating Agreement, the default rules of the LLC Law will govern the interaction of the LLC and its members. The LLC Law gives LLC members very broad authority to include whatever they wish in an Operating Agreement. "An operating agreement may contain any provisions regarding the affairs of a limited liability company and the conduct of its business that are not inconsistent with the laws of this state or the articles of organization." *See* Ala. Code §10A-5-4.03(a). Below is a brief discussion of several major components that should be included in most Operating Agreements.

(1) **Capital Contributions:**

Typically, the Operating Agreement will set out the amount of each member's initial capital contribution. Because a number of factors can hinge upon the amount of the member's capital contribution (e.g. percentage ownership interests, voting rights, rights to distribution, etc.), the attorney should make sure to include in the Operating Agreement the amount of the members' contributions or in correspondence to the

[1] Some commentators question the utility of an Operating Agreement in connection with the formation of an SMLLC. However, most practitioners still encourage the use of an Operating Agreement and simply have the parties to the agreement be the sole member and the company. These Operating Agreements tend to be very simple because there is generally no need to include the complex capital account maintenance provisions and similar partnership tax related provisions.

members, instruct them to do so. In *McLeod v. Jackson*, 829 So. 2d 722 (Miss. Ct. App. 2002), the attorney who formed an LLC was sued for malpractice for failing to include the members' capital contributions because there was a subsequent disagreement over the amount of each party's capital contribution. The attorney ultimately prevailed, but the case should serve as a warning to practitioners.

An Operating Agreement should also address under what circumstances an additional capital contribution *must* be made (i.e., at a certain stage of product development) or *can* be made (i.e., by positive vote of all of the members, a certain percentage of membership interests, or a majority in interest of the LLC). An Operating Agreement can also provide what occurs when a member is not able/willing to make an additional capital contribution. *See* Ala. Code §10A-5-5.02. For instance, it may be provided that non-contributing members have their membership interests reduced pro-rata, that the non-contributing members will be treated as taking out a loan from the LLC or the other members in the amount of the required contribution (to be set off by future distributions) or that contributing members now have an option to purchase the non-contributing members' interest. *See* Ala. Code §10A-5-5.02.

(2) **Allocations and Distributions:**

LLCs are pass-through entities for tax purposes. Accordingly, when an LLC has taxable income, it is taxable to the members regardless of whether they were actually distributed any cash or property by the LLC. An Operating Agreement should set out what special allocations will be made to members, if any, and how and when distributions will be made to members. The default rule under Alabama law is that distributions are made on a pro-rata basis to members based upon their capital contributions and, therefore, allocations for tax purposes will follow suit.

See Ala. Code §10A-5-5.03. A common provision in many Operating Agreements is for the LLC to distribute cash in an amount sufficient to pay the tax liabilities of its members.

(3) **Method of Amending the Operating Agreement:**

An Operating Agreement should state how the document can be amended. Commonly, an action such as this requires a super-majority or unanimous vote.

C. Rights and Duties of Members:

Alabama law imposes fiduciary duties upon members of an LLC. *See* Ala. Code §10A-5-3.03. These duties may be limited to some degree by provisions in the Operating Agreement or by agreement of the members. *Id*. Without such a limitation, members may be precluded from pursuing similar business opportunities without the LLC. In *Banks v. Bryant*, 497 So.2d 460 (Ala. 1986), minority shareholders of a corporation brought suit against the majority shareholders for usurping a corporate opportunity. The facts of *Bryant* involved a corporation formed to own and operate greyhound race tracks in Alabama. The majority shareholders became involved in another Alabama race track individually rather than through the corporation. The court found that because the majority shareholders owed a duty to the corporation not to compete and because they had taken advantage of a corporate opportunity as a result of their involvement in the other race track, the benefit they obtained was held to be in constructive trust for the corporation. One method of limiting member duties to an LLC is narrowing the purpose of an LLC to a more specific enterprise. For example, in the Bryant case, had the purpose of the corporation been to own and operate a race track in a certain area or county of Alabama, the majority shareholders would not have breached any duty to the corporation by investing in a race track elsewhere. Delaware law is clear on the limitations of fiduciary duties

for LLC members and the ability of the members to waive essentially all fudiciary duties. For this reason, many choose to organize in Delaware as opposed to Alabama when this is an important issue to the members.

D. Management Structure:

An Operating Agreement should provide how management decisions will be made. As discussed above, an LLC may be manager-managed or member-managed. A manager-managed LLC should provide how a manager will be elected and exactly what powers are available to the manager and what decisions require the approval of the members. A member-managed LLC should provide how votes will be taken and on what type of decisions a vote is required. If no member has a majority in interest, practitioners may want to provide in the Operating Agreement how a dead-lock will be resolved. Without such a provision, certain members may have a de facto veto right over LLC decisions. In rare instances, members may wish to submit disputes among the members to arbitration.

E. Assignment of Membership Interests:

An Operating Agreement will often provide the circumstances under which membership interests can be transferred (including pledges of an interest) and how such a transfer may be accomplished. For instance, a transferring member may be required to supply certain information to the LLC about a person or entity purchasing his membership interest and ensure compliance with any applicable securities laws. In many cases, an Operating Agreement will provide that any unauthorized transfer is null and void. A common technique to ensure that membership interests are not transferred to an undesirable purchaser is to provide all other members with the right of first refusal to purchase a selling member's interest. Operating Agreements may provide for certain allowable transfers, such as (i) to family members upon death, (ii) to affiliated entities, or (iii) to other

members. Even upon the proper purchase of a membership interest in an LLC, the purchaser may only have economic rights and have no governance rights under Alabama law. *See* Ala. Code §10A-5-6.02. In other words, a selling member may retain governance rights although the member has sold all economic interests. In addition, the member could continue to have obligations as a member notwithstanding the fact that he/she no longer owns any financial interest (e.g. fiduciary duties, mandatory capital contributions, etc.) An Operating Agreement should provide for the method by which a purchaser is admitted as a member so that he has all of the rights of a member. Under the LLC Law, if the Operating Agreement of an LLC is silent, the consent of all members is required for the admission of a new member. *See* Ala. Code §10A-5-6.01.

F. Buy-Sell Provisions

(1) Right of First Refusal.

Many Operating Agreements provide for a right of first refusal in the event a member proposes to transfer its interest (voluntarily or by operation of law) to a third party. This allows the existing members to ensure that the current ownership structure is maintained. The right of first refusal will cover situations such as the following: one member receives an attractive offer from a third party; a divorce settlement in which a member's ex-spouse would otherwise receive an ownership interest; the foreclosure of a debt secured by a member's interest; and the personal bankruptcy of a member. In some instances, the buy-sell provision will also be drafted to cover the death, disability or incapacity of a member.

(2) Russian Roulette

In this type of provision, all members are given the right to present to the other members a notice of intent to sell/purchase a membership interest.

The member delivering the notice must include a purchase price and the terms pursuant to which the membership interest is to be sold. The other members then have the right to either sell their interest at the specified price and on the specified terms or purchase the noticing member's interest on the same price and terms. This type of provision has the advantage of simplicity and a base fairness because, in most instances, the provision forces the price and payment terms to be fair since the one putting the proposal to the other members does not know if they will be buying or selling his/her interest. However, this type of provision may not be a desired alternative in the following instances:

1. One member has substantially deeper pockets than the other member allowing him to set a price that is lower than fair market value but greater than the other member's ability to pay; or

2. If some of the members work in the business and the others do not, this type of provision may not be fair to the insiders who rely on the business for their livelihood which may force them to purchase to protect their compensation.

(3) **Texas Showdown/Shoot-Out**

This provision is most commonly used as a way to resolve a deadlock between members. Once a deadlock occurs, either member is given the right to initiate the process under the Texas Showdown provision which requires each member to send a sealed, typically all cash bid to a neutral third party stating the price at which they are willing to purchase the other member's interest. The sealed bids are opened and the member submitting the highest bid is then required to buy the other member's interest.

G. Security Issues

The Securities Act of 1933 and The Securities Exchange Act of 1934 are federal laws that generally apply to transactions involving "securities." These federal laws do not provide a detailed definition of what constitutes a security and instead they provide lists of certain instruments that fall within the meaning of a "security" including stocks, bonds, notes, investment contracts and "any interest or interests commonly known as a security." The import of these laws is that if an LLC interest is deemed to be security, an obligation arises on the part of the LLC to register interests in the company unless registration falls within certain specified exemptions. The registration process frequently results in significant compliance costs.

The most common method used by the courts to determine whether the sale of an LLC interest involves the sale of a security relies on the tests established in *SEC v. W.J. Howey Company*, 328 U.S. 293 (1946). In the *Howey* case, the Supreme Court held that an investment contract for purposes of the federal securities laws means "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." This decision has created a four part test to determine if an instrument is a security:

1. investment of money;
2. in a common enterprise;
3. with an expectation of profits; and
4. solely from the efforts of others.

Within many LLCs, the first three components of the *Howey* test are satisfied in most instances. Accordingly, the fourth element is frequently the decisive factor. The answer to this question will often depend on how the company is established

and operated. If all the members are actively engaged and materially participate in the operation of the company, it is unlikely that the *Howey* test will be satisfied. However, if the LLC is manager-managed, the interests of non-manager members may very well constitute a security.

H. Cessation of Membership

(a) Events of Cessation. Cessation of membership occurs upon (i) a member's voluntary cessation from the organization, (ii) a member's assignment of his/her or its entire interest in the LLC and the admission of the assignee as a member, (iii) a member's expulsion from the LLC as a member of the organization, (iv) a member's bankruptcy, (v) a member's death or adjudication of incompetency or (vi) termination or dissolution of the business entity. Other events may be provided for in the Operating Agreement to cause a cessation of a person's membership in an LLC. Ala. Code §10A-5-6.06.

(b) Voluntary Cessation. A member may voluntarily cease being a member of an LLC at any time unless prevented by the Operating Agreement. Notice must be given as required by the Operating Agreement, or if there is no such provision for notice, then 30 days written notice is required to the other members. If the cessation of membership is a breach of the Operating Agreement, or if the cessation occurs as a result of an otherwise wrongful act by the member, then the LLC may recover damages for breach of the Operating Agreement, including the reasonable costs of obtaining a replacement for the services the member who has ceased membership was obligated to perform, but did not perform. Except to the extent the Operating Agreement provides otherwise, a cessation of membership by a member of an LLC created to last for a definite term, or until a particular undertaking is completed, will constitute a breach of the Operating Agreement. Ala. Code §10A-5-6.06(d).

(c) Consequences of Cessation. Upon a member's cessation of membership, (i) such member's governance rights terminate; (ii) such member's duties of loyalty and care terminate except with regard to matters arising and events occurring prior to the member's cessation of membership (unless the member participates in the winding up of the LLC); and (iii) such member's duty of loyalty with respect to information shall be the same as that of a member who is not a manager under Section 10A-5-3.03(k)(l) (unless the member participates in the winding up of the LLC).

I. Dissolution and Liquidation

LLC Operating Agreements should provide the circumstances under which a dissolution will occur. Events may include insolvency, a vote of the members or judicial dissolution. A method of reconstituting the LLC under certain circumstances and the winding up process (including final distributions, if available) is often advisable.

(a) Events of Dissolution. Section 10A-5-7.01 provides that an LLC will be dissolved upon the occurrence of the first of the following events: (a) any event stated in the Governing Documents to cause a dissolution; (b) the unanimous written consent of all members to dissolve; (c) when there is no remaining member unless (i) the holders of all the financial rights in the LLC agree in writing, within ninety (90) days after the cessation of membership of the last member, to continue the legal existence and business of the LLC and to appoint one or more new members, or (ii) the legal existence and business of the LLC is continued and one or more new members are appointed in the manner stated in the Governing Documents; or (d) a merger or consolidation with one or more LLCs, or other entities, and the LLC is not the successor LLC in the transaction.

(b) Judicial Dissolution. A member may seek a decree in the circuit court of the county in which the Certificate of Formation is filed for a dissolution of the LLC. Judicial dissolution is appropriate if it is not reasonably practicable for the LLC's business to be carried on in accordance with the Governing Documents. Ala. Code §10A-5-7.02.

(c) Winding Up. Members who have not wrongly dissolved an LLC may wind up the business and affairs of the organization. The person winding up the LLC is vested with certain powers, including the right (i) to preserve the business or property as a going concern for a reasonable time, (ii) to prosecute and defend actions and proceedings (civil, criminal, administrative), (iii) to settle and close the LLC's business, (iv) to dispose of and transfer property, (v) to discharge the LLC's liabilities, (vi) to distribute the assets in accordance with law, and (vii) to perform any other necessary and appropriate acts. Ala. Code §10A-5-7.03.

(d) Survival of Remedies After Dissolution. The existence of an LLC continues after it is dissolved. No business is to be carried on by the LLC except to the extent necessary or appropriate to wind up and liquidate its business and affairs. No transfer of title to the assets of the LLC is deemed to occur as a result of the dissolution. Nor does a dissolution (i) terminate or suspend any proceeding by or against the LLC or (ii) terminate the authority of the LLC's registered agent. Ala. Code §10A-5-7.04.

(e) Distribution of Assets. A priority system is established for distribution of assets of an LLC upon dissolution. The first priority of distributions is to creditors (including members who are creditors as allowed by Ala. Code §10A-5-7.05 or as otherwise

permitted by law) in order of priority among the creditors. Excluded are those liabilities to members for interim distributions or associated with contributions made to the LLC. The second priority is to the members, and former members, for interim distributions and contributions (unless provided otherwise in the Governing Documents). The third priority is to members (i) first for the return of their contributions and (ii) second with respect to their interest in the LLC, in the proportions in which the members share in distributions, except as provided otherwise in the Governing Documents. Ala. Code §10A-5-7.05.

(f) Articles of Dissolution. Once a dissolution event has occurred, the LLC is to file Articles of Dissolution in the office of the Judge of Probate of the county in which the Certificate of Formation was filed. The Articles are to include (i) the name of the LLC, (ii) the date of filing the Certificate of Formation, (iii) the reason for filing the Articles of Dissolution, (iv) the effective date of the Articles of Dissolution (which is to be a specific date if not to be effective immediately), and (v) any other information the members or managers filing the Articles deem appropriate. An original and two copies of the Articles are to be delivered to the Judge of Probate. The Judge of Probate will mark the Articles "filed" with the hour, day, month and year of filing and issue a certificate of dissolution (to which the Articles of Dissolution will be attached). Ala. Code §10A-5-7.06.

(g) Known/Unknown Claims. An LLC is to give written notice to all known claimants of the dissolution in order to dispose of its known claims. A notice may be published by a dissolved LLC requesting

that persons having claims against the LLC present them in accordance with the notice. Ala. Code §10A-1-9.21 and 9.22.