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February 5, 2002

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 650 and Senate Bill 333: Business Mergers and Conversions

Assembly Bill 650 and Senate Bill 333 are identical bills that would allow corporations and other types of business organizations to merge with, or convert to, other types of business entities. The bills would also make a number of other modifications to the statutes regarding business associations and securities transactions.

AB 650 was introduced on November 27, 2001, and referred to the Assembly Committee on Financial Institutions. On January 22, 2002, the bill was recommended for passage by that committee by a 13 to 0 vote. Assembly Amendment 1 was offered on January 28, 2002. The bill was referred to the Joint Committee on Finance on January 29, 2002.

SB 333 was introduced on December 6, 2001, and referred to the Senate Committee on Universities, Housing and Government Operations. On December 9, 2001, that committee recommended passage of the bill by a vote of 6 to 0. On January 8, 2002, the bill was referred to the Joint Committee on Finance.

SUMMARY OF BILLS

Mergers of Business Entities

Under current law, corporations may merge with other corporations and limited liability companies (LLCs) may merge with other LLCs. Current law does not have a procedure regarding mergers of limited partnerships. The bills would allow corporations and LLCs to merge with other types of business entities (domestic or foreign business corporations, LLCs, limited partnerships or nonstock corporations) and would establish procedures allowing limited partnerships to merge with any of these types of business entities.

Mergers of Limited Partnerships

The bills would allow one or more domestic limited partnerships to merge with or into one or more other business entities if the merger is permitted under the applicable laws of the jurisdiction that governs each other business entity that is a party to the merger and each business entity approves the plan of merger in the manner required by the laws applicable to the business entity.

The plan of merger would have to set forth all of the following: (a) the name, form of business entity, and identity of the jurisdiction governing each business entity that is a party to the merger and the name, form of business entity, and identity of the jurisdiction of the surviving business entity with, or into, which each other business entity proposes to merge; and (b) the manner and basis of converting the interests in each merging business entity into shares, interests, obligations, or other securities of the surviving business entity or any other business entity or into cash or other property in whole or in part.

In addition to the requirements identified above, the plan of merger could set forth any of the following: (a) amendments to the certificate of limited partnership or other similar governing document of the surviving business entity; or (b) other provisions relating to the merger.

After a merger is authorized, and at any time before the articles of merger are filed with the Department of Financial Institutions (DFI), the planned merger could be abandoned, subject to any contractual rights, without further action on the part of the shareholders or other owners, in accordance with the procedure set forth in the plan of merger or, if none is set forth, in the manner determined by the governing body of any business entity that is a party to the merger.

After a plan of merger is approved by each participating business entity, the surviving business entity would have to deliver to DFI the fee specified below and articles of merger that include all of the following: (a) the plan of merger; (b) a statement that the plan was approved by each participating business entity in the manner required by the laws applicable to each business entity; (c) the effective date and time of the merger, if the merger is to take effect at a time other than the close of business on the date of filing the articles of merger; and (d) other provisions relating to the merger, as determined by the surviving business entity. The fee for filing articles of merger would be $150, except that DFI, by rule, could specify a larger fee for filing articles in paper format.

A merger would have the following effects, which are similar to provisions that would apply to mergers of other types of business entities under the bills:

a. Each business entity that is a party to the merger would merge into the surviving business entity, and the separate existence of every business entity, except the surviving business entity, would cease.

b. If the merger is with or into a business entity under the laws applicable to which one or more of the owners of the business entity is liable for the debts and obligations of the business entity, the owner or owners would be so liable only for the debts and obligations accrued during the period or periods in which such laws are applicable.

c. The title to all property owned by each participating business entity would be vested in the surviving business entity without reversion or impairment, provided that, if a merging business entity has an interest in real estate in Wisconsin on the date of the merger, the merging business entity transfers that interest to the business entity surviving the merger and executes any required real estate transfer fee return. The business entity surviving the merger would have to promptly record the instrument of conveyance in the office of the register of deeds for each county in which the real estate is located.

d. The surviving business entity would have all liabilities of each business entity that is party to the merger.

e. A civil, criminal, administrative, or investigatory proceeding pending by or against any business entity that is a party to the merger could be continued as if the merger did not occur, or the surviving business entity could be substituted in the proceeding for the business entity whose existence ceased.

f. The articles of incorporation, articles of organization, certificate of limited partnership, or other similar governing document, whichever is applicable, of the surviving business entity would have to be amended to the extent provided in the plan of merger.

g. The shares or other interests of each business entity that is party to the merger that are to be converted into shares, interests, obligations, or other securities of the surviving business entity or any other business entity or into cash or other property would be converted, and the former holders of the shares or interests would be entitled only to the rights provided in the articles of merger or to their rights under the laws applicable to each merging business entity.

h. If the surviving entity is a foreign business entity, DFI would be the agent of the surviving foreign business entity for service of process in a proceeding to enforce any obligation of any business entity that is a party to the merger or the rights of the dissenting members or other owners of each business entity that is a party to the merger.

i. When a merger takes effect, any surviving foreign business entity would have to promptly pay to the dissenting shareholders of each domestic corporation or dissenting owners of each other domestic business entity that is a party to the merger the amount, if any, to which they are entitled under current provisions regarding corporate dissenters' rights or under any law applicable to the other domestic business entity.

Under item "b", if a business entity in which the owners have limited liability (such as an LLC) merges into an entity in which the owners have some pass-through liability (such as a limited partnership), the owners of the new entity would potentially assume the liabilities and debts of the previous pass-through entity. Similar provisions would apply for mergers of other types of business organizations.

Mergers and Share Exchanges of Business Corporations

Under current law, one or more business corporations may merge into another business corporation if the board of directors of each corporation approves a plan of merger and, if required, its shareholders also approve the plan of merger. The bills would modify this provision to allow corporations to merge with or into one or more other business entities, not just with or into another corporation. In addition, the bills would specify that the merger would have to be permitted under the applicable law of the jurisdiction that governs each other merging business entity and that each such business entity approves the plan of merger in the manner required by the laws applicable to the business entity.

Currently, a business corporation may acquire all of the outstanding shares of one or more classes or series of another corporation if the board of directors of each corporation approves a plan of share exchange and, if required, its shareholders also approve the plan of share exchange. The bills would modify this provision to allow a corporation to acquire the shares of another business entity, not just of another corporation. In addition, the bills would specify that the share exchange must be permitted under the applicable law of the jurisdiction that governs the other business entity and the other business entity must approve the plan of share exchange in the manner required by the laws of the jurisdiction that governs the other business entity.

Under current law, a parent corporation owning at least 90% of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary. The bills would modify this provision to allow a parent corporation owning at least 90% of the outstanding shares of each class of a subsidiary corporation or at least 90% of the outstanding interests of each class of any other subsidiary business entity to merge the subsidiary into the parent or the parent into the subsidiary.

Currently, the parent corporation may not deliver articles of merger to DFI for filing until at least 30 days after the date on which it mailed a copy of the plan of merger to each shareholder of the subsidiary who did not waive the mailing requirement. The bills would reduce the 30-day period to 10 days.

Under current law, after a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation generally must deliver to DFI for filing articles of merger or share exchange setting forth the plan of merger or share exchange and a statement that the plan was approved in accordance with state law. The bills would also require the articles of merger or share exchange to set forth: (a) the effective date and time of the merger or share exchange, if the merger or share exchange is to take effect at a time other than the close of business on the date of filing the articles of merger; and (b) other provisions relating to the merger, as determined by the surviving business entity.

The bills would create a new provision specifying that when a corporate merger takes effect, if the merger is with or into a business entity under the laws applicable to which one or more of the owners of the business entity is liable for the debts and obligations of the business entity, the owner or owners are so liable only for the debts and obligations accrued during the period or periods in which such laws are applicable. This provision would not affect liability under any taxation laws.

The bills would also provide that when a corporate merger or share exchange takes effect, DFI would be the agent of any surviving foreign business entity of a merger or any acquiring foreign business entity in a share exchange, for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders or other owners of each participating domestic business entity.

In addition, when a corporate merger or share exchange takes effect, any surviving foreign business entity of a merger or any acquiring foreign business entity in a share exchange would have to promptly pay to the dissenting shareholders of each domestic corporation or dissenting owners of each other domestic business entity that is a party to the merger or share exchange the amount, if any, to which they are entitled under the statutes relating to the rights of dissenting corporate shareholders or under any law applicable to such other domestic business entity.

Mergers of Nonstock Corporations

Currently, one or more nonstock corporations may merge into a nonstock corporation or a stock corporation, if the plan of merger is approved by the members or board of directors of the nonstock corporation. Under the bills, one or more nonstock corporations could merge with or into one or more other business entities if the plan of merger is approved and if the merger is permitted under the applicable law of the jurisdiction that governs each other participating business entity and each business entity approves the plan of merger in the manner required by the laws applicable to the business entity.

Under current law, a parent corporation that is a member with at least 90% of the voting rights in a subsidiary corporation may merge the subsidiary into itself without approval of the members of the parent or subsidiary. The parent may not deliver articles of merger to DFI for filing until at least 30 days after the date on which it mailed a copy of the plan of merger to each member of the subsidiary who did not waive the mailing requirement. The bills would modify this provision to permit a parent corporation that is a member with at least 90% of the voting rights in a subsidiary corporation to merge the subsidiary into the parent or the parent into the subsidiary without approval of the members of the parent or the members or other owners of the subsidiary. In addition, the 30-day period for delivery of articles of merger would be reduced to 10 days.

Under current law, after a plan of merger is approved by the board of a nonstock corporation, and, if required, by the members and any other persons, the surviving or acquiring corporation must deliver to DFI for filing articles of merger that include all of the following information: (a) the plan of merger; (b) if approval of members was not required, a statement to that effect and a statement that the plan was approved by a sufficient vote of the board; (c) if approval by members is required, information about the number of votes required to approve the merger and a statement that the number cast for the plan by each class was sufficient for approval by that class; and (d) if approval of the plan by a person other than the members or the board is required, a statement that the approval was obtained.

If approval by members is required to authorize the merger, the bills would also require the articles of merger to include a statement that the plan was approved by each other merging business entity in the manner required by the laws applicable to the business entity. In addition, in all cases, the articles of merger would have to include the effective date and time of the merger, if the merger is to take effect at a time other than the close of business on the date of filing the articles of merger and any other provisions relating to the merger, as determined by the surviving entity.

The bills would create a new provision under the section regarding the effect of mergers of nonstock corporations specifying that, if the merger is with or into a business entity under the laws applicable to which one or more of the owners of the business entity is liable for the debts and obligations of the business entity, the owner or owners would be so liable only for the debts and obligations accrued during the period or periods in which such laws are applicable. This provision would not affect liability under any taxation laws.

Currently, when a merger of a nonstock corporation takes effect, the surviving corporation has all of the rights, privileges, immunities and powers and is subject to all of the duties and liabilities of a nonstock corporation organized under state law. The bills would delete this provision and, instead, provide that the surviving business entity would have all liabilities of each business entity that is a party to the merger.

Under current law, a civil, criminal, administrative or investigatory proceeding pending *against* any nonstock corporation that is a party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased. The bills would modify this to make it applicable to proceedings pending *by or against* any business entity that is a party to the merger.

The bills would create a new provision under the section regarding the effect of mergers of nonstock corporations specifying that the shares or other interests of each merging business entity that are to be converted into shares, interests, obligations, or other securities of the surviving business entity or any other business entity or into cash or other property would be converted, and the former holders of the shares or interests would be entitled only to the rights provided in the articles of merger or under laws applicable to each business entity that is party to the merger.

Mergers of LLCs

Under current law, unless otherwise provided in an operating agreement, one or more domestic or foreign LLCs may merge with or into one or more other domestic or foreign LLCs, with the surviving company being the LLC provided in the plan of merger. The bills would modify these provisions to allow one or more LLCs to merge with one or more other business entities if the merger is permitted under the applicable laws of the jurisdiction that governs each such other business entity and each business entity approves the plan of merger in the manner required by the laws applicable to the business entity.

The bills would create a new provision specifying that after a merger is authorized under these provisions, and at any time before the articles of merger are filed with DFI, the planned merger could be abandoned, subject to any contractual rights, without further action on the part of the shareholders or other owners, in accordance with the procedure set forth in the plan of merger or, if none is set forth, in the manner determined by the governing body of any business entity that is a party to the merger.

Currently, following a merger, the surviving LLC must deliver to DFI articles of merger, executed by each party to the plan of merger, that include all of the following: (a) the name and state or jurisdiction of organization of each LLC that is to merge; (b) the plan of merger; (c) the name of the surviving or resulting LLC; (d) a statement as to whether the management of the surviving company will be reserved to its members or vested in one or more managers; (e) the delayed effective date of the merger, if applicable; and (f) a statement that the plan of merger was approved by the member of the merging LLCs as required by state law. A merger takes effect upon the effective date of the articles of merger.

These provisions would be repealed. Instead, the articles of merger provided to DFI would have to include: (a) the plan of merger; (b) the effective date and time of the merger, if the merger is to take effect at a time other than the close of business on the date of filing the articles of merger; (c) a statement that the plan was approved by the members of each domestic LLC that is a party to the merger in accordance with state law, and by each other business entity that is a party to the merger in the manner required by the laws applicable to the business entity; and (d) other provisions relating to the merger, as determined by the surviving business entity.

Under present law, a merger of LLCs has the following effects:

a. The LLCs that are parties to the plan of merger become a single entity, which is the entity designated in the plan of merger as the surviving LLC.

b. Each party to the plan of merger, except the surviving LLC, ceases to exist.

c. The surviving LLC possesses all of the rights, privileges, immunities and powers of each merged company and is subject to all of the restrictions, disabilities and duties of each merged company.

d. All property and all debts, including contributions, and each interest belonging to or owed to each of the parties to the merger is vested in the surviving LLC without further act.

e. Title to all real estate and any interest in real estate, vested in any party to the merger, does not revert and is not in any way impaired because of the merger.

f. The surviving LLC has all of the liabilities and obligations of each of the parties to the plan of merger and any claim existing or action or proceeding pending by or against any merged LLC may be prosecuted as if the merger had not taken place, or the surviving LLC may be substituted in the action.

g. The rights of creditors and any liens on the property of any party to the plan of merger survive the merger.

h. The interests in an LLC that are to be converted or exchanged into interests, cash, obligations or other property under the terms of the plan of merger are converted and the former interest holders are entitled only to the rights provided in the plan of merger or the rights otherwise provided by law.

i. The articles of organization of the surviving LLC are amended to the extent provided in the articles of merger.

The bills would repeal these provisions and, instead, specify that a merger would have the following effects. [These provisions are the same as those for limited partnerships outlined above.]

a. Every other business entity that is a party to the merger would merge into the surviving business entity, and the separate existence of every business entity, except the surviving business entity, would cease.

b. If the merger is with or into a business entity under the laws applicable to which one or more of the owners of the business entity is liable for the debts and obligations of the business entity, the owner or owners would be so liable only for the debts and obligations accrued during the period or periods in which such laws are applicable.

c. The title to all property owned by each merging business entity would be vested in the surviving entity without reversion or impairment, provided that, if a merging business entity has an interest in real estate in Wisconsin on the date of the merger, the merging business entity transfers that interest to the surviving entity and executes any required real estate transfer return. The surviving entity would have to promptly record the instrument of conveyance in the office of the register of deeds for each county in which the real estate is located.

d. The surviving business entity would have all liabilities of each business entity that is party to the merger.

e. A civil, criminal, administrative, or investigatory proceeding pending by or against any business entity that is a party to the merger could be continued as if the merger did not occur, or the surviving business entity could be substituted in the proceeding for the entity whose existence ceased.

f. The articles of organization, certificate of limited partnership, or other similar governing document, whichever is applicable, of the surviving business entity would be amended to the extent provided in the plan of merger.

g. The shares or other interests of each merging business entity that are to be converted into shares, interests, obligations, or other securities of the surviving entity or any other business entity or into cash or other property would be converted, and the former holders of the shares or interests would be entitled only to the rights provided in the articles of merger or to their rights under the laws applicable to each business entity that is a party to the merger.

h. If the surviving business entity is a foreign business, DFI would be the agent of the surviving entity for service of process in a proceeding to enforce any obligation of any business entity that is a party to the merger or the rights of the dissenting members or other owners of each business entity that is a party to the merger.

i. When a merger takes effect, any surviving foreign business entity would have to promptly pay to the dissenting shareholders of each domestic corporation or dissenting owners of each other domestic business entity that is a party to the merger the amount, if any, to which they are entitled under state law regarding the rights of dissenting shareholders or under any law applicable to the other domestic business entity.

Under current law, unless otherwise provided in an operating agreement, upon receipt of the notice of approval of a merger of LLCs, a member who did not vote in favor of the merger may, within 20 days after the date of the notice, voluntarily dissociate from the LLC and receive fair value for the member's interest in the LLC. The bills would modify this provision by also specifying that the rights afforded to shareholders, partners, or other owners of other business entities would be as required or provided by the laws applicable to the other business entities.

Conversions of Business Entities

Under current law, with the exception of certain corporations formed before July 1, 1953, business organizations are not permitted to convert to a different form of entity. Instead, businesses must undertake a series of steps that may include dissolution and subsequent re-creation.

Under the bills, a domestic limited partnership, business corporation, nonstock corporation or LLC could convert to another form of business entity if it satisfies the requirements outlined below and if the conversion is permitted under the applicable law of the jurisdiction that governs the organization of the business entity into which the domestic entity is converting. "Business entity" would mean a domestic or foreign business corporation, LLC, limited partnership or nonstock corporation.

Similarly, other types of business entities would be allowed to convert to a domestic limited partnership, business corporation, nonstock corporation or LLC if they satisfy the requirements outlined below and if the conversion is permitted under the applicable law of the jurisdiction that governs the business entity. A business entity converting into another type of entity would have to comply with the procedures that govern the submission and approval of a plan of conversion of the jurisdiction that governs the business entity.

The plan of conversion would have to set forth all of the following: (a) the name, form of business entity, and the identity of the jurisdiction governing the business entity that is to be converted; (b) the name, form of business entity, and the identity of the jurisdiction that will govern the business entity after conversion; (c) the terms and conditions of the conversion; (d) the manner and basis of converting the shares or other ownership interests of the business entity that is to be converted into the shares or other ownership interests of the new form of business entity; (e) the effective date and time of the conversion, if the conversion is to be effective other than at the time of filing the certificate of conversion or otherwise; (f) a copy of the articles of incorporation, articles of organization, certificate of limited partnership, or other similar governing document of the business entity after conversion; and (g) other provisions relating to the conversion, as determined by the business entity.

Except with respect to taxation laws of each jurisdiction that are applicable upon the conversion of the business entity, when a conversion is effective, the business entity that is converted would no longer be subject to the applicable law of the jurisdiction that governed the organization of the prior form of business entity and would be subject to the applicable law of the jurisdiction that governs the new form of business entity.

If the conversion is from or to a business entity under the laws applicable to which one or more of the owners thereof is liable for the debts and obligations of such business entity, such owner or owners would be so liable only for debts and obligations accrued during the period or periods in which such laws are applicable. This provision would not affect liability under any taxation laws.

The following additional provisions would also apply when a conversion is effective:

a. The new business entity would continue to have all liabilities of the business entity that was converted.

b. The business entity would continue to be vested with title to all property owned by the business entity that was converted without reversion or impairment, provided that, if the converting business entity has an interest in real estate in Wisconsin on the date of the conversion, the converting business entity transfers that interest to the business entity surviving the conversion and executes any required real estate transfer fee return. The business entity surviving the conversion would be required to promptly record the instrument of conveyance in the office of the register of deeds for each county in which the real estate is located.

c. The articles of incorporation, articles of organization, certificate of limited partnership, or other similar governing document, whichever is applicable, of the business entity would be as provided in the plan of conversion.

d. All other provisions of the plan of conversion would apply.

After a plan of conversion is submitted and approved, the business entity that is to be converted would have to deliver to DFI for filing a certificate of conversion that includes all of the following together with a fee of $150: (a) the plan of conversion; (b) a statement that the plan of conversion was approved in accordance with the applicable law of the jurisdiction that governs the organization of the business entity; and (c) the registered agent and registered office, record agent and record office, or other similar agent and office of the business entity before and after conversion. DFI, by rule, could specify a larger fee for filing a certificate of conversion in paper format.

Any civil, criminal, administrative, or investigatory proceeding that is pending by or against a business entity that is converted could be continued by or against the business entity after the effective date of conversion.

DFI would be required to prescribe and furnish forms for an application for a certificate of conversion under the new provisions.

For business corporations, the bills would also modify existing statutes regarding rights of shareholders to dissent to allow a shareholder or beneficial shareholder to dissent from, and obtain payment of the fair value of his or her shares in the event of consummation of a plan of conversion. In addition, the bills would repeal a current statute allowing certain business corporations formed before July 1, 1953, to reorganize as nonstock corporations. The new general provisions regarding corporate conversions would instead apply.

For LLCs, the bills would specify that an affirmative vote, approval or consent of all members would not be required to convert an LLC to a new form of business entity under the new provisions.

Other Provisions Relating to LLCs

Under current law, an LLC is formed when the articles of organization become effective and DFI's filing of the articles of organization is conclusive proof that the LLC is organized and formed. The bills would also provide that the status of an LLC as a domestic LLC or as a foreign LLC registered to transact business in this state and the liability of any member of any such LLC would not be adversely affected by errors or subsequent changes in any information stated in any filing made under the LLC statutes. In addition, DFI's filing of the articles of organization of a foreign LLC would be considered the certificate of authority for that LLC to transact business in this state and would be considered notice of all other facts set forth in the registration statement.

The bills would also specify that, if an LLC dissolves, but its business continues without winding up and without liquidating the company, the status of the LLC before dissolution would continue to be applicable to the company as it continues its business, and the company would not be required to make any new filings. Any filings made by such an LLC before dissolution would be considered to have been filed by the company while it continues its business. If an LLC dissolves, any filings made by the company before dissolution would remain in effect as to the company and its members during the period of winding up and to the members during the period after the company's liquidation or termination with respect to the liabilities of the company.

The bills would create a new provision specifying that an LLC operating agreement may establish, or provide for the establishment of, designated series or classes of members, managers, or LLC interests that have separate or different preferences, limitations, rights, or duties, with respect to profits, losses, distributions, voting, property, or other incidents associated with the LLC.

Under current law, two provisions govern the powers of LLC members to withdraw from the company. First, unless an LLC operating agreement provides that a member does not have the power to withdraw by voluntary act from the LLC, the member generally may do so at any time by giving written notice to the other members, or on any other terms as are provided in the agreement. If the member has the power to withdraw but the withdrawal is a breach of an operating agreement or the withdrawal occurs as a result of otherwise wrongful conduct of the member, the LLC may recover damages for breach of the agreement or as a result of the wrongful conduct and may offset the damages against the amount otherwise distributable to the member, in addition to pursuing any remedies provided for in the operating agreement or otherwise available under applicable law. Unless otherwise provided in an operating agreement, in the case of a LLC for a definite term or particular undertaking, a withdrawal by a member before the expiration of that term or completion of that undertaking is a breach of the operating agreement.

Under the second provision, which applies if a member acquired an interest in an LLC for no or nominal consideration, the member may withdraw from the LLC only in accordance with the operating agreement and only at the time or upon the occurrence of an event specified in the agreement. If the operating agreement does not specify the time or the event upon the occurrence of which the member may withdraw, such a member may not withdraw prior to the time for the dissolution and commencement of winding up of the LLC without the written consent of all members of the company.

The bills would modify these provisions by specifying that the second provision described above would apply to a member who owns an interest in an LLC as to which the power to withdraw is prohibited or otherwise restricted in the operating agreement. The bills would also specify that, unless otherwise provided in an operating agreement, in the case of an LLC that is organized for a definite term or particular undertaking, the operating agreement would be considered to provide that a member may not withdraw before the expiration of that term or completion of that undertaking.

Currently, an LLC is dissolved and its affairs must be wound up upon an event of dissociation of a member, unless any of the following applies: (a) the business of the LLC is continued by the consent of all of the remaining members within 90 days after the date on which the event occurs at which time the remaining members may agree to the admission of one or more additional members or to the appointment of one or more additional managers, or both; or (b) otherwise provided in an operating agreement. The bills would specify that this provision would only apply to LLCs organized before the bills' effective date.

Under current law, the laws of the state or other jurisdiction under which a foreign LLC is organized govern its organization and internal affairs and the liability and authority of its managers and members, regardless of whether the LLC obtained or should have obtained a certificate of registration under Wisconsin law. The bills would create an exception to this provision for foreign LLCs that have filed a certificate of conversion to become a domestic LLC. Such companies would be subject to the requirements of Wisconsin law governing domestic LLCs on the effective date of the conversion and would no longer be subject to the requirements of Wisconsin law governing foreign LLCs.

Tax Provisions

Income Tax

The bills would create new sections under the individual and corporate income tax administrative statutes specifying that, notwithstanding other provisions of state law regarding business mergers and conversions, the conversion of a business entity to anther form of business entity, or the merger of business entities, under the new provisions must be treated for state tax purposes in the same manner as the conversion or merger is treated for federal tax purposes. Similar provisions would be created in the statutes relating to the duties and powers of the Department of Revenue (DOR).

Real Estate Transfer Fee

Under current law, transfers of real property pursuant to mergers of corporations are exempt from the real estate transfer fee. "Mergers of corporations" means the merger or combination of two or more corporations or the combination of two or more LLCs. The bills would amend this definition to mean the merger or combination of one or more corporations, nonstock corporations, LLCs, or limited partnerships, or any combination thereof, under a plan of merger or a plan of consolidation permitted by the laws that govern the entities. Therefore, transfers of real property pursuant to these additional types of mergers would be exempt from the fee.

Similarly, the bills would create a new transfer fee exemption for conveyances of real property pursuant to the conversion of a business entity to another form of business entity under the new provisions, if, after the conversion, the ownership interests in the new entity are identical with the ownership interests in the original entity immediately preceding the conversion.

The bills would also create a new exemption for conveyances of real property pursuant to partnerships registering as limited liability partnerships.

Sales Tax

The bills would create a new section in the sales tax administrative statutes specifying that, notwithstanding the new provisions regarding conversions of business entities, a business entity that converts to another business entity would be subject to the sales and use tax provisions applicable to liquidations, reorganizations and business entity formations.

Service of Process on Foreign Limited Partnerships

Currently, service of process on DFI under the statutes relating to foreign limited partnerships must be made by serving of duplicate copies of the process on the Department, together with a fee established by DFI. The Department must mail notice of the service and a copy of the process within 10 days addressed to the foreign limited partnership at its office in the state of its organization.

The bills would allow DFI to mail the notice to either the partnership's office in the state of its organization or its principal office, as appearing on the records of the Department from information supplied when the partnership registered to conduct business in this state.

Notice of Dissolution or Revocation of Certain Business Entities

Under current law, if DFI determines that one or more grounds exist for dissolving a domestic corporation, the Department must serve the corporation with written notice of the determination. Within 60 days after service of the notice is perfected, the corporation must correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Department that each ground does not exist. If the corporation fails to do so, DFI must administratively dissolve the corporation by issuing a certificate of dissolution that recites each ground for dissolution and its effective date. The Department must file the original of the certificate and serve a copy on the corporation.

The bills would modify the notice procedure by requiring DFI to "give" rather than "serve" written notice of the dissolution. The notice would have to be addressed to the registered office of the corporation. In addition, instead of filing the original of the certificate of dissolution and serving a copy of the certificate on a corporation that fails to address grounds for dissolution, DFI would be required to enter a notation in its records to reflect each ground for dissolution and the effective date of dissolution and to give the corporation written notice of those facts, addressed to the registered office of the corporation.

The bills would also specify that if a notice of dissolution is returned to DFI as undeliverable, the Department would have to again give notice to the corporation in the same manner. If the second notice is returned as undeliverable or if the corporation's principal office cannot be determined from DFI's records, the Department would have to give the notice by publishing a class two notice in the official state newspaper. Current law does not establish a procedure regarding undeliverable notices for most types of business entities.

The bills include similar modifications regarding foreign business corporations, nonstock corporations and LLCs.

A notice under these provisions would take effect at the earliest of the following: (a) when received; (b) five days after its deposit in the U.S. mail, if mailed postpaid and correctly addressed; or (c) on the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

Dissolution of Domestic Nonstock Corporations

Under current law, if DFI determines that one or more grounds exist for dissolving a nonstock corporation, the Department must give the corporation written notice of the determination by certified mail, return receipt requested, addressed to the corporation's registered agent and to the corporation's principal office. The bills would modify this provision by requiring the notice to be by first class mail rather than by certified mail and by only requiring the notice to be sent to the corporation's registered agent.

Currently, if the notices of administrative dissolution are both returned to DFI as undeliverable or if the corporation's principal office cannot be determined from the records of the Department, DFI must provide the notice by publishing a class two notice. Under the bills, if the initial notices are returned as undeliverable, DFI would be required to again give the corporation notice by first-class mail, addressed to the principal office of the corporation, as most recently designated in the records of the Department. If the second notice is returned as undeliverable or if the corporation's principal office cannot be determined from DFI's records, the Department would have to give the notice by publishing a class two notice in the official state newspaper.

Under current law, upon receiving a notice of dissolution, a nonstock corporation is given 60 days to correct the grounds for dissolution. If satisfactory resolution of the grounds does not occur, DFI must administratively dissolve the corporation by issuing a certificate of dissolution that recites each ground for dissolution and its effective date. The Department must file the original of the certificate and provide notice to the corporation of the certificate in the same manner as a notice of determination. Under the bills, DFI would still be required to dissolve the corporation, but would no longer be required to issue a certificate of dissolution. Instead, the Department would have to enter a notation in its records to reflect each ground for dissolution and the effective date of dissolution and give the corporation notice of those facts.

Under current law, the articles of dissolution of a nonstock corporation for which approval by members is required must include all of the following: (a) the designation, number of memberships outstanding, number of votes entitled to be cast by each class entitled to vote separately on dissolution, and number of votes of each class indisputably voting on dissolution; and (b) either the total number of votes cast for and against dissolution by each class entitled to vote separately on dissolution or the total number of undisputed votes cast for dissolution by each class and a statement that dissolution was approved by a sufficient vote of the members of each class entitled to vote on dissolution. The bills would repeal this provision and, instead, require a statement that dissolution was approved by a sufficient vote of the members of each class entitled to vote on dissolution.

Amended Certificates of Authority

Currently, a foreign corporation authorized to transact business in Wisconsin must obtain an amended certificate of authority from DFI if it changes any of the following: (a) its corporate name or the fictitious name under which it has been issued a certificate of authority; (b) the period of its duration; or (c) the state or country of its incorporation. The bills would modify this provision to also require an amended certificate if the foreign corporation changes its date of incorporation.

Under present law, a foreign LLC authorized to transact business in this state must obtain an amended certificate of registration from DFI if the company changes any of the following: (a) its name; (b) the state or jurisdiction under whose laws it is organized; or (c) whether management of the company is vested in one or more managers. The bills would also require an amended certificate if the LLC changes the fictitious name under which it has been issued a certificate of registration or changes its date of organization.

Registered Agents

Under current law, every limited liability partnership, limited partnership, partnership, business corporation, nonstock corporation and LLC must continuously maintain in this state a registered office and registered agent. The registered agent receives certain communications on behalf of the business and receives service of process, and may be a natural person who resides in this state or a business entity. The types of business entities that may serve as a registered agent are not uniform in the statutes. In addition, limited partnerships and limited liability partnerships generally may not be appointed as a registered agent.

The bills would modify these provisions by allowing the following types of businesses to serve as a registered agent: business corporations, nonstock corporations, LLCs, limited partnerships and limited liability partnerships.

The bills would also specify that the registered agent of a limited liability partnership could resign by executing and filing with DFI a written statement that includes all of the following information, as applicable: (a) the name of the partnership; (b) the name of the agent; (c) if the agent is acting for a registered limited liability partnership, the street address of the partnership; (d) if the agent is acting for a foreign limited liability partnership, the partnership's current registered office and the mailing address of the partnership's current principal office; (e) a statement that the agent resigns; and (f) if the registered office is also discontinued, a statement to that effect. After the filing of such a statement, DFI would be required to mail a copy of the statement to the partnership at the address provided in the statement.

In addition, the bills would also create a new provision specifying that an agent for service of process for a limited partnership could resign by executing and filing with DFI a statement, in duplicate, containing all of the following information, as applicable: (a) the name of the partnership; (b) the name and current street address of the agent; (c) if the agent is acting for a domestic limited partnership, the address of the partnership's record office; (d) if the agent is acting for a foreign limited partnership, the address of the partnership's office in its state of organization; and (e) a statement that the agent resigns. DFI would be required to note on one of the duplicates filed the date of filing and to mail that duplicate to the limited partnership at the address provided above. A resignation under this provision would be effective 30 days after the date on which the statement is filed or the date on which the appointment of a successor agent is effective, whichever is earlier.

These provisions are similar to the current procedure for the resignation of agents for other types of business organizations.

Electronic Filing

Under current law, corporations may file documents with DFI by any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery or electronic transmission. The bills would also permit electronic delivery of documents by limited liability partnerships, limited partnerships, nonstock corporations and LLCs.

Document Filing Fees

Under current law, the statutes specify numerous fees that must be paid by business organizations when they file documents with DFI. In some cases, a higher fee is specified for documents that are filed in paper format. The bills would allow DFI to specify a higher fee, by rule, if any of these documents are filed in paper format.

Currently, fees are charged when business organizations notify DFI of a change in their registered agent. The fees are generally $10 ($25 for limited partnerships). The bills would eliminate these fees.

Under present law, the fee for filing documents of merger varies depending upon the type of organization executing the merger. The fee is generally charged for each entity involved in the merger, and is $50 for business corporations and LLCs and $30 for nonstock corporations. The current merger fee for cooperatives is $10. The bills would uniformly set these fees at a flat $150 per merger, except the fee for mergers of cooperatives would be set at $30.

The bills would also create a $150 fee for filing a certificate of conversion under the new provisions.

Exclusive Use of Business Names

Under current law, a limited partnership, business corporation or nonstock corporation may reserve the exclusive right to use a name by filing an application with DFI or by making a telephone application and paying a fee ($10 for limited partnerships, $30 for business corporations and $20 for nonstock corporations). DFI must cancel a telephone application if the fee is not received within 15 business days after the application (10 days for foreign nonstock corporations). The bills would delete the requirement that DFI cancel a telephone reservation if the fee is not paid. DFI indicates this provision is no longer needed because the Department typically requires payment by credit card at the time a phone application is made.

Current law relating to limited partnerships also specifies that, once having reserved a name, the same applicant may not again reserve the same name until more than 60 days after the expiration of the last 60-day period for which that applicant reserved that name. This provision would also be deleted. This change would make the statute for limited partnerships consistent with the statute for corporations.

Endorsement of Time of Receipt on Certain Documents Filed with DFI

Currently, upon receipt of a document for filing by DFI from a partnership, business corporation or LLC, the Department must stamp or otherwise endorse the date and time of receipt on the original document copy. The bills would eliminate the requirement that the time of receipt be endorsed on the document. The date of receipt would still have to be endorsed.

Exemptions from Securities Registration and Licensing Requirements

Under current law, a person may not offer or sell any security in this state unless a registration statement relating to the security is filed with the Division of Securities (DOS) within DFI. However, certain types of securities transactions are exempt from the registration requirement.

One of the exemptions under current law is for any offer or sale of securities to an individual accredited investor if the issuer reasonably believes immediately before the sale that the investor, either alone or with his or her representative, has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of the prospective investment. "Accredited investor" is defined by DOS by rule. The bills would modify these provisions by defining "accredited investor" as under federal law [17 CFR 230.501 (a)] and specifying that any sale to an accredited investor would be exempt from registration.

Current law also provides an exemption from the registration requirement for any offer or sale of its securities by an issuer having its principal office in this state, if the aggregate number of persons holding all of the issuer's securities, after the securities to be issued are sold, does not exceed 15 (excluding accredited investors), if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state, except to broker-dealers and agents licensed in this state, and if no advertising is published unless it has been permitted by DOS. The bills would increase from 15 to 25 the number of investors that could hold such securities without requiring registration.

An exemption is also currently provided for any transaction pursuant to an offer directed by the offeror to not more than 10 persons in this state (excluding accredited investors but including persons exempt under the previous provision) during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this state, if the offeror reasonably believes that all the persons in this state are purchasing for investment, and no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state other than accredited investors. The bills would increase from 10 to 25 the number of investors that could be offered such securities without requiring registration.

The bills would create an exemption from the state licensing requirements that apply to securities broker-dealers and agents for an agent who is acting exclusively as an agent representing an issuer of securities and who makes offers and sales of the issuer's securities in transactions to accredited investors or in transactions that are otherwise exempt from registration under a rule of DOS that specifically exempts transactions involving accredited investors and that is based on a model accredited investor exemption adopted by the North American Securities Administrators Association.

Administrative Funding for DFI

The bills would increase DFI's expenditure authority in its general program operations appropriation by $821,600 PR in 2002-03.

Effective Date

The bills would take effect on the first day of the 6th month beginning after publication.

SUMMARY OF ASSEMBLY AMENDMENT 1

Assembly Amendment 1 to AB 650 would modify the bill as follows:

a. A technical correction would be made in the definition of "mergers of corporations" under the real estate transfer fee statutes to specify that a merger would be the combination of two or more business entities. As drafted, the bill uses the phrase "one or more." Another technical correction would be made to add a cross reference regarding the fee for a corporate conversion.

b. Under the bill, the filing fee for a domestic corporate annual report would be $25, and DFI would be permitted to charge a higher fee, by rule, for reports filed in paper format. The amendment would specify a filing fee of $30 for reports filed electronically and $40 for reports filed in paper format. Under current law, the fee is $25 for reports filed electronically and $40 for paper reports.

c. The bill would set the filing fee for an annual report of a foreign corporation or LLC at $65, and authorize DFI to charge a higher fee, by rule, for reports filed in paper format. The amendment would specify a filing fee of $85 for reports filed electronically and $100 for reports filed in paper format. Under current law, the fee is $65 for reports filed electronically and $80 for paper reports.

FISCAL EFFECT

Because the bills' provisions would not take effect until six months after publication, no fiscal effect would occur in 2001-02. The estimates presented below assume publication in March, 2002, and an effective date of September 1, 2002.

Department of Financial Institutions

The Department of Financial Institutions indicates that the availability of on-line applications and the electronic imaging of documents is a prerequisite to implementation of AB 650/SB 333 without extensive reliance on overtime and additional staffing. To that end, the bills would appropriate one-time funding of $821,600 PR in 2002-03 for development and implementation of these capabilities as they relate to corporate mergers and conversions. Funding would be provided as shown below:

Application Development (Capability for expanded on-line filings; increased on-line access by customers to services; capability for web-based searches with images, etc.)	$534,000
Imaging & Document Conversion (Convert data from paper, microfiche, microfilm formats; convert three years' worth of records; image viewing licenses for corporations staff)	192,900
Hardware and Software (Acquire three servers & SQL software; miscellaneous electrical equipment)	94,700
Total	$821,600

DFI estimates that implementation of AB 650/SB 333 would result in increased fee revenues of approximately $1,250,000 in 2002-03, primarily from "built-up" demand for conversions or mergers that would be accommodated by the new provisions and on-line enhancements. In fiscal year 2003-04, these revenues are anticipated to drop to approximately $375,000, as fee revenue from the accumulated demand for transactions begins to abate. Additional fee revenues are estimated to level off at approximately $75,000 annually thereafter.

Under current law, all balances remaining in DFI's general program operations appropriation lapse to the general fund as GPR-earned at the close of each fiscal year. Given anticipated additional fee revenues of $1,250,000 in 2002-03 and the additional appropriation of $821,600 in the same year under AB 650/SB 333, the net impact on the general fund would be an increase in GPR-earned of $428,400. In the out years, the anticipated fee revenue enhancements would result in additional GPR-earned amounts.

Tax Effects

The bills would create exemptions from the real estate transfer fee for conveyances of real property pursuant to certain mergers or conversions. The Department of Revenue has estimated that the exemptions would result in revenue losses to the general fund of approximately $400,000 annually. Adjusting for the assumed September 1, 2002, effective date, the state revenue loss is estimated at $330,000 in fiscal year 2002-03 and at $400,000 annually thereafter. Because 20% of the transfer fee is retained by the county in which the property is located, county revenues from the fee would decrease by an estimated $83,000 in 2002-03 and $100,000 annually thereafter.

The Department of Revenue indicates that, under current law and the bills, the Wisconsin franchise and income tax treatment of mergers and conversions would follow the federal income tax treatment and estimates that income tax revenues would not be affected. With regard to sales and use taxes, the sales and use tax treatment of transfers of assets in mergers and conversions would follow the provisions applicable to liquidations, reorganizations and business-entity formations. As under current law for similar transactions, the transfers would largely fall outside state sales tax statutes.

Fiscal Effect of Assembly Amendment 1

Assembly Amendment 1 would increase the filing fees for annual reports of corporations and LLCs. DFI estimates these changes would increase fee revenues by $330,000 in 2002-03 and $400,000 annually thereafter. These additional revenues would lapse to the general fund as GPR-earned at the close of each fiscal year.

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