RON TUSLER

STATE REPRESENTATIVE • 3rd ASSEMBLY DISTRICT

Testimony on
Assembly/Senate Bill 566
Joint Hearing
Assembly Committee on Financial Institutions
Senate Committee on Veteran and Military Affairs and Constitution and Federalism
October 21, 2021

Chairman Duchow, Chairman Wimberger, and fellow members of both the Assembly Committee and Senate Committee: thank you for hearing this bill in a joint hearing forum today. The bill before you is Assembly Bill/Senate Bill 566 (AB/SB 566), relating to adopting revisions to the uniform limited partnership law and limited liability company law and making modifications to the state's uniform partnership law.

This bill, 2021 AB/SB 566, is a comprehensive update which combines the Revised Limited Partnership Act and Revised Limited Liability Company Act, which were promulgated by the Uniform Law Commission in 2001 and 2006, respectively, and have been adopted in twenty-four and twenty-two other states, respectively. Our border sates of Minnesota, Iowa, and Illinois have adopted both revised acts.

The product before the Committee today represents years of work by the State Bar's Business Law Section, representatives of which are here today to provide more details, to ensure that adoption of these acts do not unnecessarily disrupt current Wisconsin law or practices in these areas of law.

Enactment of this bill will create a more conducive environment for limited partnerships and limited liability companies to form and operate in Wisconsin. Establishing uniformity in this area of law, similar to the Uniform Commercial Code, is good for the Wisconsin economy and businesses, promotes stability, and stimulates the free flow of commerce and business between states.

Thank you for your consideration and attention to this important and impactful legislation. I strongly urge your support.

P.O. Box 8953 • Madison, Wisconsin 53708 • (608) 266-5831 • Toll Free: (888) 534-0003
Rep.Tusler@legis.wisconsin.gov

STATE SENATOR
Eric Wimberger
DISTRICT 30

Testimony on Senate Bill 566 and Assembly Bill 566

Senate Committee on Veterans and Military Affairs and Constitution and Federalism
Assembly Committee on Financial Institutions
Thursday, October 21, 2021

Committee Members,

Thank you for taking the time to hear testimony on Senate Bill 566 and Assembly Bill 566 which would modernize several of our state's business law chapters and make Wisconsin a more attractive place to start or locate a business.

This bill harmonizes five state chapters uniformly: Chapter 178, which relates to partnerships; Chapter 179 which relates to limited partnerships; Chapter 180, which relates to stock corporations; Chapter 181, which relates to non-stock corporations; and Chapter 183, which relates to limited liability companies.

The legislative language is built upon work done by the Uniform Law Commission. The Uniform Law commission is an organization made up of lawyers, lawmakers, and legal experts from across the country. It is a nonpartisan organization that meticulously drafts model language and best practices on a wide variety of issues. Generally, before language is even presented it has gone through a five year long process. This bill is no different.

Over 20 other states have already passed this uniform law and it is time for Wisconsin to join the ranks. It is very important we make our state as attractive as possible for people looking to locate their business. A savvy business person will be highly attune to the legal frameworks that states may or may not have.

We have several legal experts and CPAs in attendance today that have spent several years working on this legislation. They will be available to answer technical questions you may have.

Thank you so much for your time.

State Capitol • PO Box 7882
Madison, WI 53707-7882
(608) 266-5670 • (800) 385-3385
Sen.Wimberger@legis.wi.gov

Business Law Section

Date: **October 21, 2021**

To: **Members of the Senate Committee on Veterans and Military Affairs and Constitution and Federalism**
Members of the Assembly Committee on Financial Institutions

Re: **SB 566/AB566 – Business Entities**

The Wisconsin Institute of Certified Public Accountants and the Business Law Section Board of the State Bar of Wisconsin strongly support SB 566 and AB 566 relating to: updates to uniform laws for Wisconsin's Business Entity Statutes (Chapter 178, 179, 180, 181 and 183). We want to thank Senator Wimberger and Representative Tusler for their sponsorship and work on this very important issue.

The size of this bill can been intimidating, yet we want to assure you that the primary purpose of updating five separate business entity chapters is to make it easier for all businesses to understand Wisconsin's rules on how to incorporate and establish Wisconsin as a business friendly state. Years have passed since Wisconsin has revised or reviewed our business entity chapters and the current system has resulted in a patchwork of business laws that can be confusing for a general lay person to understand and that don't work well together. These outdated laws create an environment where Wisconsin businesses new and old might find it easier to incorporate in other states rather than grow and prosper in our state. Our laws need to be streamlined and easier to understand, which is what SB 566 and AB 566 accomplish.

For example, Wisconsin's current LLC statute is a "home brewed" first-generation LLC law created in 1993, and is now behind other states including Delaware – which is constantly updating its business organization statutes, and even has an entire court of chancery dedicated to business organization disputes. Wisconsin has not kept up with improvements due to case law, federal law treatment, liability changes and technology changes, just to name a few. As a result, Wisconsin is not only behind Delaware, but multiple other states that have adopted new uniform laws. It makes no sense for our state's small businesses who operate entirely in Wisconsin to organize in Delaware or any other state because their laws are updated to current practices.

At a time when Wisconsin faces a population and business base that is shrinking, this bill would make Wisconsin based businesses more interested in incorporating here and then staying here as they grew, expand or merge with other businesses. This bill makes all the rules uniform, more understandable and easier to create a business entity in Wisconsin. For Wisconsin businesses that become multi-state or national, it would allow them Wisconsin-based business with a corporate structures that is easily adapted to work in other states.

This bill is lengthy only because all five chapters need to be rewritten in order for all the chapters to work together in a congruent fashion. The goal of this legislation is to streamline all five chapters. These updated Chapters would make it easier for businesses, DFI and practitioners to fill out less paper and comply with an updated law. Wisconsin companies would have better access and more efficiency from DFI using updated business entity forms and transactions.

P.O. Box 7158 | Madison, WI 53707-7158 5302 Eastpark Blvd. | Madison, WI 53718-2101
(800) 728-7788 (608) 257-3838 Fax (608) 257-5502 www.wisbar.org service@wisbar.org

Twenty-three other states have already adopted these Uniform Laws, which leaves Wisconsin behind in modernizing our business entity statutes. As professionals who work with businesses on a daily basis, it makes no sense to us that Wisconsin retains policies that drive our home town businesses to incorporate in other states.

SB 466/AB 466 has been thoroughly vetted by business practitioners and leaders and again is supported by the Wisconsin Institute of Certified Public Accountants, Wisconsin Bankers Association and the State Bar's Business Law Section. We urge your support for passage of SB566/AB566. Thank you in advance for your consideration.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

111 N. Wabash Ave.
Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

Statement of Libby Snyder, Legislative Counsel at the Uniform Law Commission, to the Assembly Committee on Financial Institutions and Senate Committee on Veterans and Military Affairs and Constitution and Federalism in Support of Assembly Bill 566 – Enacting the Revised Uniform Limited Liability Company Act and the Revised Uniform Limited Partnership Act in Wisconsin

Public Hearing of October 21, 2021

Chair Wimberger, Chair Duchow, Vice Chair Jacque, Vice Chair Katsma, and Members of the Committees:

Thank you for considering Assembly Bill 566, enacting the Revised Uniform Limited Liability Company Act and the Revised Uniform Limited Partnership Act, promulgated by the Uniform Law Commission (ULC). The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of state law for which uniformity among the states is advisable.

The state of Wisconsin has a long and successful history of enacting uniform acts, including the Uniform Commercial Code, Uniform Partnership Act, Uniform Anatomical Gifts Act, and Uniform Transfers to Minors Act, among others.

I am writing to support the Assembly Bill 566, which would enact the Revised Uniform Limited Partnership Act (RULPA) and the Revised Uniform Limited Liability Company Act (RULLCA) in the State of Wisconsin. This bill would also make corresponding and related changes to the Wisconsin Uniform Partnership Law, which was updated in 2015 Wisconsin Act 295 to reflect the Revised Uniform Partnership Act (RUPA). This bill is a comprehensive update to the State's existing limited partnership and limited liability company laws.

The Uniform Limited Partnership Act was approved by the ULC in 1916. The act has been significantly updated twice since 1916 – first in 1976 and again in 2001. The act was further refined in 2011 and 2013. The purpose of the most recent revision was to harmonize the act's language with other uniform unincorporated business entity acts. To date, 21 states and the District of Columbia have adopted the Revised Uniform Limited Partnership Act or RULPA.

The Uniform Limited Liability Company Act was first approved by the ULC in 1994 and was significantly updated in 2006. The RULLCA was refined in 2011 and 2013 as part of the ULC's harmonization of uniform unincorporated business entity acts. To date, 19 states and the District of Columbia have adopted the Revised Uniform Limited Liability Company Act or RULLCA.

Assembly Bill 566 is the product of a multi-year revision and drafting effort by a Wisconsin State Bar Association committee comprised of business lawyers. This group scrutinized RULPA and RULLCA as drafted by the ULC and made adjustments to ensure that the bill's content and structure are appropriate for Wisconsin. The committee has worked with the ULC during the

entire drafting process to confirm that the bill meets the goals and purposes of the uniform acts. RULPA and RULLCA would bring clarity, cohesiveness, and continuity to limited partnerships and limited liability companies in Wisconsin, if enacted.

Assembly Bill 566 is a carefully crafted and complete update to Wisconsin's Uniform Limited Partnership Act and Uniform Limited Liability Company Act, with corresponding and related changes to the Wisconsin Uniform Partnership Law.

If passed, Assembly Bill 566, implementing the Revised Uniform Limited Partnership Act and the Revised Uniform Limited Liability Company Act, would provide necessary clarity and change to this complex area of the law. Thank you for your time and consideration.

Libby Snyder
Legislative Counsel
Uniform Law Commission

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

111 N. Wabash Ave.
Suite 1010
Chicago, IL 60602
(312) 450-6600 tel
(312) 450-6601 fax
www.uniformlaws.org

A Few Facts about

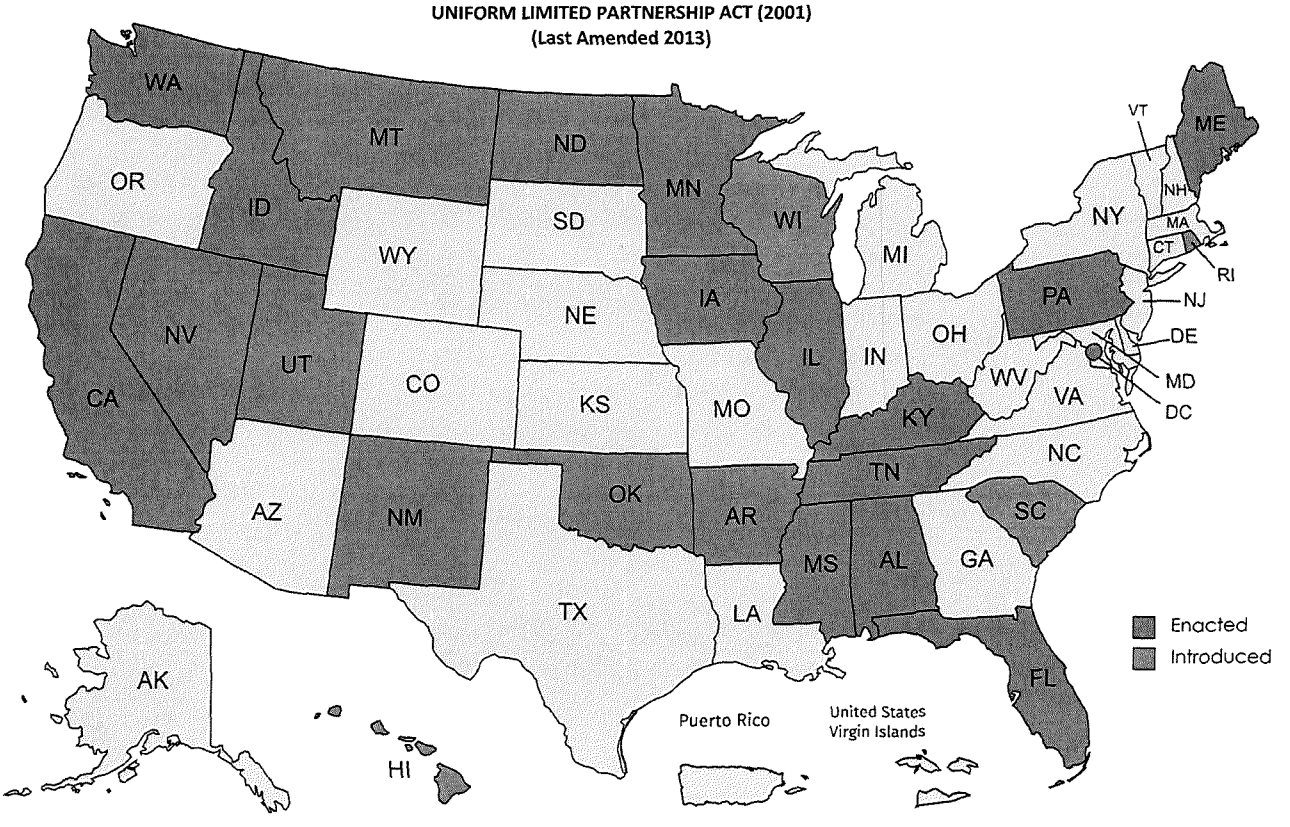
THE UNIFORM LIMITED PARTNERSHIP ACT (2013 AMENDMENTS)

PURPOSE: The Uniform Limited Partnership Act (ULPA) provides a more flexible and stable basis for the organization of limited partnerships, helping states stimulate new partnership business ventures. In 2011 and 2013, amendments to ULPA (2001) were enacted as part of the Harmonization of Business Entity Acts project. These amendments harmonize the language in this Act with similar provisions in the other uniform and model unincorporated entity acts.

ORIGIN: Completed by the Uniform Law Commission in 2001, amended in 2011 and 2013.

APPROVED BY: American Bar Association

ENACTED BY:



For further information about ULPA, please contact ULC Legislative Counsel Libby Snyder at lsnyder@uniformlaws.org or (312) 450-6619.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

111 N. Wabash Ave.
Suite 1010
Chicago, IL 60602
(312) 450-6600 tel
(312) 450-6601 fax
www.uniformlaws.org

A Few Facts about

THE UNIFORM LIMITED LIABILITY COMPANY ACT (2013 AMENDMENTS)

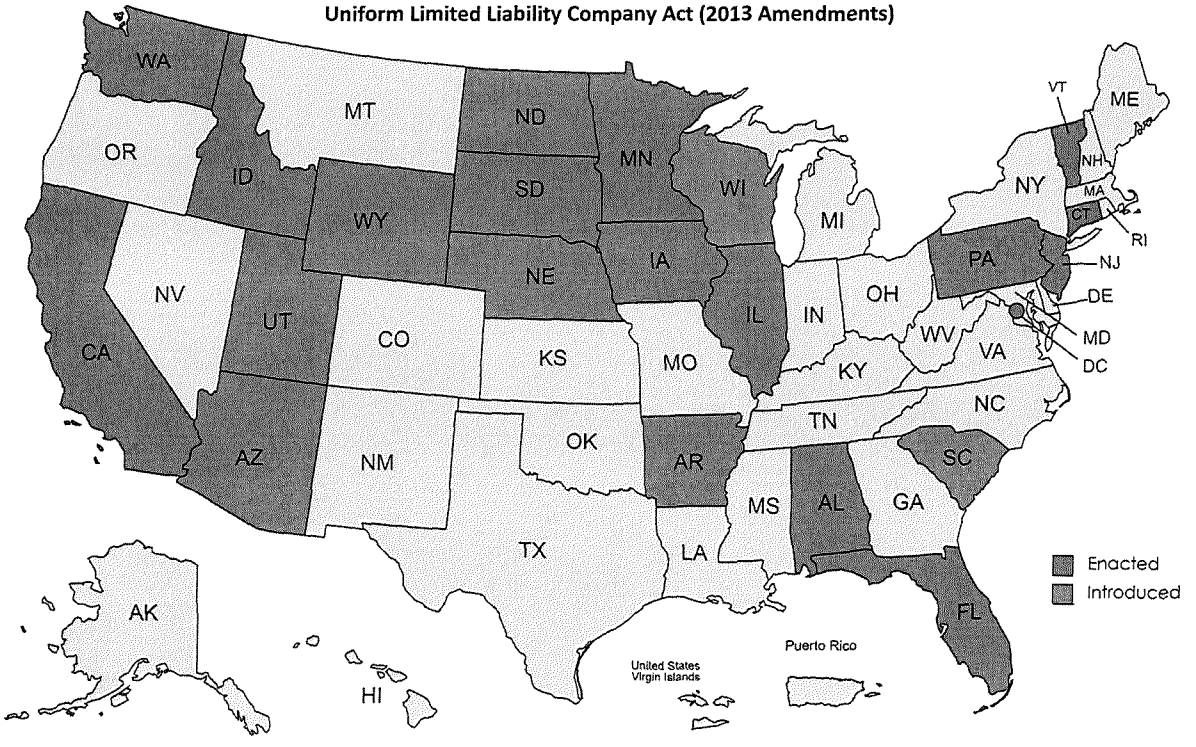
PURPOSE: The Uniform Limited Liability Company Act (ULLCA) permits the formation of limited liability companies (LLCs), which provide owners with the advantages of both corporate-type limited liability and partnership tax treatment. The 2011 and 2013 amendments, enacted as part of the Harmonization of Business Entity Acts project, updated and harmonized the language in this Act with similar provisions in other uniform and model unincorporated entity acts.

ORIGIN: Completed by the Uniform Law Commission in 2006, amended in 2011 and 2013.

ENDORSED BY: Real Property, Probate, and Real Estate Sections of the American Bar Association

APPROVED BY: American Bar Association

ENACTED BY:



Last Updated October 21, 2021

For further information about ULLCA, please contact ULC staff liaison Libby Snyder at lsnyder@uniformlaws.org or (312) 450-6619.

THE MILWAUKEE CENTER
111 EAST KILBOURN AVENUE, 19TH FLOOR
MILWAUKEE, WI 53202-6622

MTFN.COM
MAIN 414.273.1300
FAX 414.273.5840

MEISSNER TIERNEY FISHER & NICHOLS S.C.

ADAM J. TUTAJ
ATTORNEY AT LAW
AJT@MTFN.COM

October 21, 2021

Members of the Senate Committee on Committee on Veterans and Military Affairs and Constitution and Federalism
Chair
Senator Eric Wimberger, Chair
Senator André Jacque, Vice Chair
Ranking
Senator Tim Carpenter, Ranking Member

Members of the Assembly Financial Institutions
Representative Cindi Duchow,
Representative Terry Katsma, Vice Chair
Representative Steve Doyle,
Member

Re: SB566/AB566 – Business Entities

Dear Chairs, Vice Chairs, Ranking Members and Committee Members:

I am the Co-Chair of the Limited Liability Company Committee of the Business Law Section ("BLS") of the State Bar of Wisconsin ("SBW"). I thank you for the opportunity to testify in favor of SB566/AB566 (collectively, the "proposed bill"). The proposed bill would, among other things, update Wisconsin's Limited Liability Company Statutes (Chapter 183) to reflect the Revised Uniform Limited Liability Company Act ("RULLCA") approved and recommended for enactment in all the states by the Uniform Law Commission ("ULC"). The proposed bill would also update Wisconsin's Limited Partnership Statutes (Chapter 179) to reflect the Revised Uniform Limited Partnership Act ("RULPA") approved and recommended for enactment in all the states by the ULC, and make corresponding changes to Wisconsin's Partnership Statutes (Chapter 178), Business Corporation Statutes (Chapter 180) and Nonstock Corporation Statutes (Chapter 181) in order to harmonize and coordinate provisions involving all of those types of entities—such as those relating to cross-species transactions, as well as procedures for the Wisconsin Department of Financial Institutions (the "DFI").

As the Co-Chair of the SBW BLS Limited Liability Committee, I will be addressing my comments to the proposed bill's updates to Chapter 183.

Chapter 183 was partially modeled after the November 19, 1992 draft of the "Prototype Limited Liability Company Act" drafted by the Working Group on the Prototype Limited Liability Act, Subcommittee on Limited Liability Companies, Committee on Partnerships and Unincorporated Business Organizations, Section on Business Law of the American Bar Association. That said, it was—and is—a relatively "home-brewed" construct. While there have been some modifications and periodic updates since its original enactment, to reflect some of the

policies and principles adopted by Wisconsin in Chapters 178 and 180, Chapter 183 essentially remains a "first-generation" limited liability company statute.

The proposed bill would adopt the most recent version of RULLCA (including the 2013 amendments), and with it join the twenty-three (23) other States that have already adopted this "second-generation" limited liability company statute. In the view of the SBW BLS Limited Liability Committee, such adoption would have a number of notable benefits.

First, under current law, the only "operating agreements" that are legally recognized are "written" agreements. This means that small business owners who want an operating agreement now either need to get an attorney involved or fashion a document themselves—often based on materials they find online, which may have all sort of unsuitable "extra" provisions that are not intended or understood. By contrast, RULLCA will recognize oral and implied (i.e., "course of dealing") operating agreements—which will afford legal recognition to the arrangements that many small businesses already have in place. While there are certain matters that would still require some sort of written agreement to be effective under the new law, these are fairly sophisticated points that intentionally vary from the statutory default rules—and, thus, are best required to be evidenced in writing. However, for the typical small business owner, RULLCA will be an improvement.

Second, there is little case guidance generally regarding the application of current Chapter 183, and few comparisons can easily be made to the law of other States. If members of an LLC (and their lawyers) have a question over a particular point of law and perceive themselves as being in completely "uncharted territory," this is more likely to grow into a contested dispute and possible litigation. By adopting RULLCA in Wisconsin, business owners and their lawyers could reasonably seek guidance regarding the interpretation and resolution of such matters by looking to the case law of the nearly two dozen or so other states that have enacted RULLCA (with more likely to follow). Such legal clarity could head off disputes in the first place and work a substantial savings to all concerned.

Third, because Wisconsin's current LLC statute is a "home-brewed," first-generation LLC law, it is often perceived as parochial compared to Delaware. As a result, many businesses who operate entirely in the State of Wisconsin are induced to organize as Delaware LLCs simply because they think it's the "right thing to do"—particularly if they work without a lawyer and look at online resources for guidance. This is a huge trap for the unwary, as it will cause them to have to make annual report filings in two states (rather than one), and pay fees/franchise taxes in two states (rather than one). Moreover, by organizing in Delaware, such businesses can be sued in Delaware (even if they do not actually operate outside of Wisconsin) and may not be able to avoid litigating certain "internal affairs" between the members in the Delaware courts. Adopting a modern, uniform limited liability company statute increases the likelihood that Wisconsin businesses will organize under Wisconsin law and save themselves substantial cost (and headache) in the future.

The SBW BLS Limited Liability Company Committee produced a Report explaining the rationale for non-editorial variations from the original RULLCA text, and some substantive comments regarding both RULLCA and the proposed bill. However, these comments are intended only to supplement, and not to repeat or displace, the ULC's official comments to RULLCA itself. Here with me are Thomas J. Nichols, Chair of the SBW BLS Partnership Committee, and Randal J. Brotherhood, Chair of the SBW BLS Corporation Committee, which committees produced similar Reports with respect to Wisconsin's Partnership and Limited Partnership Statutes and Business Corporation and Nonstock Corporation Statutes, respectively. I understand that this Report and the corresponding Reports from the other SBW BLS Committees have all been made available to you, and we are hopeful that they will be included in the legislative history. We think that these resources will be helpful to you as legislators, as well as to judges and practitioners in understanding and applying these updated laws.

As explained in the Reports, each of the SBW BLS Committees generally followed the lead of the ULC in substantive matters, unless there were significant reasons relating to Wisconsin law and practice, or otherwise, to vary from the Uniform Law. Not surprisingly, then, the proposed bill includes the uniform law language in the large majority of circumstances, other than editorial changes made by the Legislative Reference Bureau in conforming the uniform law to Wisconsin's drafting style.

All three of us are available to respond to whatever specific questions you may have with respect to the changes in any of the five Business Entity Chapters covered by the proposed bill.

In closing, I would like to extend my enormous thanks to the other members of the SBW BLS Limited Liability Committee. Additionally, I join with the Chairs of the SBW BLS Corporation and Partnership Committees in my sincere appreciation for the work done by Sen. Wimberger and Rep. Tusler and their respective staff, as well as the LRB and DFI, and in particular Aaron Gary at the LRB and Matthew R. Lynch at the DFI.

Kind regards,

MEISSNER TIERNEY FISHER & NICHOLS S.C.

By: Adam J. Tutaj

THE MILWAUKEE CENTER
111 EAST KILBOURN AVENUE, 19TH FLOOR
MILWAUKEE, WI 53202-6622

Randal J. Brotherhood
ATTORNEY AT LAW
RJB@MTFN.COM

THE MILWAUKEE CENTER
111 EAST KILBOURN AVENUE, 19TH FLOOR
MILWAUKEE, WI 53202-6622

MEISSNER TIERNEY FISHER & NICHOLS S.C.

October 21, 2021

Members of the Senate Committee on Veterans and Military Affairs and Constitution and Federalism
Senator Eric Wimberger, Chair
Senator André Jacque, Vice Chair
Senator Tim Carpenter, Ranking Member

Members of the Assembly Committee on Financial Institutions
Representative Cindi Duchow, Chair
Representative Terry Katsma, Vice Chair
Representative Steve Doyle, Ranking Member

Re: SB566/AB566 – Business Entities

Dear Chairs, Vice Chairs, Ranking Members and Committee Members:

It is my privilege to be able to appear today, in my capacity as chairman of the Corporations Committee of the State Bar of Wisconsin's Business Law Section (the "SBW BLS"), and as a past Chair of the Business Law Section of the SBW BLS. Thank you for holding this hearing on SB566/AB566, the Business Entity Update Legislation.

As you are aware from the other testimony and materials presented for this Legislation, it updates Chapter 179 (limited partnerships) and Chapter 183 (limited liability companies) of the Wisconsin business entity statutes to reflect the most current versions of the Revised Uniform Limited Partnership Act ("RULPA") and the Revised Uniform Limited Liability Company Act ("RULLCA") promulgated by the Uniform Law Commission (the "ULC"). It also makes a number of changes to bring about uniformity in those Chapters and the three other major business entity Chapters, Chapter 178 (general partnerships), Chapter 180 (business corporations) and Chapter 181 (nonstock corporations).

As stated above, the primary thrust of these changes to the Business Corporation Statutes and the Nonstock Corporation Statutes is to harmonize certain provisions in those Chapters with changes made to Chapters 178, 179 and 183, pertaining to general partnerships, limited partnerships and limited liability companies, respectively, so that those provisions are consistent throughout the Chapters for all five types of business entities. These common provisions pertain to, for instance, the procedures of the Wisconsin Department of Financial Institutions ("DFI") for all five types of entities allowed to merge and otherwise engage in so-called "cross-species" transactions under Wisconsin law.

The approach taken in drafting the harmonizing updates to Chapters 180 and 181 and the other Chapters was to utilize the most workable language in these common provisions from the ULC and elsewhere in the various chapters and make it uniform throughout all five Chapters. I should note that we worked closely with the DFI to update and harmonize the provisions relating to its procedures.

Although Tom Nichols and Adam Tutaj, my two SBW BLS colleagues who were instrumental in the updates to Chapters 178, 179 and 183, have addressed the cross-species transaction provisions generally, I would like to provide a few examples of improvements included within the harmonization provisions of the business entity update legislation:

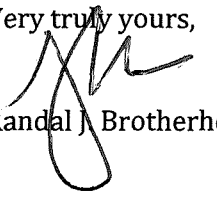
1. The Legislation would make clear that surviving entities in cross-species transactions must timely honor, not only dissenters rights as to business corporations under Chapter 180, but also all comparable protective provisions with respect to other domestic business entities; and, in the case of nonstock corporations under Chapter 181, provisions which would provide protections for nonconsenting members.

2. The Legislation would add to both Chapters 180 and 181 provisions for domestications, i.e., transactions whereby a foreign entity can adopt Wisconsin law as its "governing law." Such provisions have been included in Delaware law and the other Wisconsin business entity Chapters for some time.

3. The Legislation would establish uniformity with respect to certain DFI and procedural matters. For example, the rules with respect to the procedure and impact of the resignation of registered agent are harmonized for Chapters 178, 179, 180, 181 and 183.

I would like to join my colleagues in expressing thanks to Senator Wimberger and Representative Tusler for sponsoring this significant Legislation. And once again, thank you to the Committees for your attention and support in this hearing and their respective staff, as well as to Aaron Gary at the LRB and Matthew R. Lynch at the DFI.

Very truly yours,



Randal J. Brotherhood

The Milwaukee Center
111 East Kilbourn Avenue, 19th Floor
Milwaukee, WI 53202-6622

The Milwaukee Center
111 East Kilbourn Avenue, 19th Floor
Milwaukee, WI 53202-6622

MEISSNER TIERNEY FISHER & NICHOLS S.C.

Thomas J. Nichols
Attorney At Law
tjn@mtfn.com

October 21, 2021

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Representative Steve Doyle, Ranking Member

Re: SB566/AB566 – Business Entities

Dear Chairs, Vice Chairs, Ranking Members and Committee Members:

I am Chair of the Partnership Committee of the Business Law Section ("BLS") of the State Bar of Wisconsin ("SBW"), and also an active member of the Wisconsin Institute of Certified Public Accountants. Thanks to all of you for holding this hearing on SB566/AB566, the Business Entity Update Legislation. As you know from the other testimony and materials presented for this Legislation, it updates Chapter 179 (limited partnerships) and Chapter 183 (limited liability companies) of the Wisconsin business entity statutes to reflect the most current versions of the Revised Uniform Limited Partnership Act ("RULPA") and the Revised Uniform Limited Liability Company Act ("RULLCA") promulgated by the Uniform Law Commission (the "ULC"). It also makes a number of changes to bring about uniformity in those Chapters and the three other major business entity Chapters, Chapter 178 (general partnerships), Chapter 180 (business corporations) and Chapter 181 (nonstock corporations).

I realize that this is a big Bill. Well over half the Bill is simply updating the limited partnership and LLC Chapters 179 and 183 to adopt RULPA and RULLCA. In and of itself, this is a big step forward. It enables Wisconsin courts, practitioners and businesses to rely upon the ULC's updated Uniform Laws that now reflect decades of court decisions and other legal developments since Wisconsin's adoption of its limited partnership and limited liability company laws decades ago, and to benefit from case law developments under these Uniform Laws in the upcoming years. This helps to answer questions and reduce legal uncertainty which should reduce litigation and provide a more favorable environment for Wisconsin businesses.

Because the RULPA/RULLCA update portions of this Legislation include more modern provisions relating to cross species mergers, conversions and other transactions between entities formed under different Chapters (e.g., merging a limited partnership under Chapter 179 into a limited liability company under Chapter 183), the Legislation was expanded to update the cross-species transaction provisions for all five major business entity Chapters. For example, it doesn't make sense for the

provisions in Chapter 183 describing the results of a merger of a limited liability company into a corporation to be any different than the corresponding provisions of Chapter 180 describing the results of that same merger. For similar reasons, we worked with the Department of Financial Institutions (the "DFI") to bring about uniformity for corresponding DFI procedures in all five business entity Chapters. You obviously can't accomplish this efficiently and effectively in a multitude of smaller bills. That's why this Legislation is so large.

Given my position as Chair of the Partnership Committee, I will focus the remainder of my comments on the two Partnership Chapters, 178 (general partnerships) and 179 (limited partnerships). Adam Tutaj, Chair of the SBW BLS Limited Liability Company Committee, will speak to the update of Chapter 183 (limited liability companies) and Randy Brotherhood, chair of the SBW BLS Corporation Committee, will address the cross-species transaction and DFI provisions that are common to all five Chapters.

The current Limited Partnership Chapter 179 was based on the Uniform Law promulgated by the ULC (f/k/a National Conference of Commissioners on Uniform State Laws) in 1976 (before the 1985 amendments to that Uniform Law). This Business Entity Update Legislation would adopt the most recent version of the Uniform Limited Partnership Law (including the 2013 amendments). As indicated earlier, the thrust of all of these changes is to reflect case law and developments during the intervening approximately 40 years. For example, the RULPA Uniform Act includes the following improvements:

- Eliminates troublesome language implying that management participation could trigger personal liability for limited partners that courts have struggled with ever since the initial Uniform Limited Partnership Act was promulgated. As we all know, when courts struggle, businessmen and women pay through the nose in legal fees and uncertainty.
- Adopts case law that imposes an obligation of good faith and fair dealing on limited partners, something that makes common sense, but it helps to be explicit.
- Explicitly allows limited partnerships to elect to be "limited liability limited partnerships" so that the general partners do not have unlimited liability. This allows entrepreneurs to avoid having to incorporate a separate corporation (usually an S corporation) to act as the general partner of their limited partnerships, which saves both legal and accounting fees on an ongoing basis.
- Conforms the partner distribution liability and dissolution claims bar procedures to those in the revised Model Business Corporation Act. This prevents defaulting entities from taking advantage of the cross-species merger and conversion provisions in order to disadvantage creditors.

These and other considerations and improvements are discussed in detail in the Report issued by the ULC in connection with RULPA, which can be accessed on the ULC website.

Our Partnership Committee looked closely at all the RULPA provisions and recommended changes from where adoption of the RULPA provisions could be disruptive to Wisconsin businesses and practice. For example, Wisconsin has its own nonwaivable "willful misconduct" breach of duty provisions, and the Bill reflects those provisions instead of the generalized ULC language. We also

compared all the new RULPA provisions for limited partnerships with the corresponding Revised Uniform Partnership Act provisions previously adopted in Chapter 178 for general partnerships, and recommended adoption of the most modern and consistent language for both Chapters. Our Committee has issued a detailed SBW BLS Partnership Committee Report, both explaining these changes, as well as other instances where, in the interests of uniformity among the states, we declined to vary from the ULC Uniform Law language. We also offer that Report for the record.

In closing, a sincere thanks to Senator Wimberger and Representative Tusler for their sponsorship of this important Legislation. Also, I would like to express my appreciation to the other members of the SBW BLS Partnership Committee, Joseph Masterson, James Phillips and Christopher Little, as well as Aaron Gary at the Legislative Reference Bureau and Matthew Lynch at the DFI. Once again, a sincere thank you to the members of your Committees for your attention and support for this initiative.

Sincerely,

Thomas J. Nichols

PUBLIC HEARING ON SENATE BILL 566

Committee on Veterans and Military Affairs and Constitution and Federalism

Thursday, October, 21, 2021 at 10:00 AM

(Room 412 E of the State Capital)

Attorney Joseph W. Boucher Written Report

In May of 1970 I became acutely aware of the risks and shortcomings of being a sole proprietor. At age 59, my father died of a heart attack, which resulted legally in the termination of his sole proprietorship, *Bouchers' Bakery* in Marinette, Wis. My mother, who had five children, and who had been a businessperson before she and my father got married, now had to figure out how to continue a business that had been legally terminated. She thankfully had relationships with local lawyers due to family connections and worked her way through this difficult situation. After my father passed away, my mother had to raise five children as a single parent, while managing a business, while also trying to deal with the legal effects of the business being terminated.

Several years later I met my future wife. Her father owned a construction company in Green Bay, Wisconsin with the same issue: my father-in-law was the sole proprietor. Both my father-in-law's business and my mother's business ultimately became corporations in the 1970s because after becoming lawyers my wife and I advised our parents to do so and assisted them with the transition. Relying on having a lawyer in the family, however, isn't a good recipe for helping the people of a state build successful and legally sound businesses.

If sole proprietorships have so many issues, then it raises the question of why my father and my father-in-law were both sole proprietorships back in the 1960s and 70s. The answer is simple: They were intimidated by the paperwork and the requirements necessary to form a corporation. People were aware of the advantages of having a corporation; forming a corporation was at that time the only option to have limited liability for the business owner and perpetual life for the entity. However, this was before the internet, and business owners who wanted to create a corporation had to work through lawyers and accountants, and that could be expensive and complicated. As a result, many business owners simply didn't do it. Because of this, both my father and father-in-law had businesses that were sole proprietorships, exposing them to personal liability, and due to the fact that the business had no separate life or corporate identity, creating problems like the ones faced by my family when my father died and his business terminated.

These personal experiences were what helped drive me to get involved when Wisconsin began considering creating a limited liability company law.

In the late-1980s, I chaired a State Bar led committee that was formed to draft the first limited liability company law in Wisconsin. When we drafted this law, there was no template or uniform law in place. Every state was simply cobbling together various pieces of other areas of law; partnership law, corporate law, whatever they thought fit to create their LLC statute. Because there was no standard at the time, we did the same. Wisconsin's first LLC law was passed in 1993 and became effective in 1994, and that law is still substantially the same LLC law in Wisconsin, Wisconsin Chapter 183.

The issue with the Wisconsin LLC law is simple: the law is now almost 30 years old and, as a result, is badly out of date. There have been updates, and new model templates that have been well crafted to deal with over 30 years of lessons from around the country. Other states, including several mid-western states, have updated their statutes to better reflect the Revised Uniform Limited Liability Company Act or RULLCA, which is what we are proposing Wisconsin do as well. There is no reason for Wisconsin to be a state using old, outdated statues.

It is clear from the data submitted with my testimony, that the number of LLCs in Wisconsin has grown dramatically from the early 1990s, to now where around 40,000 limited liability companies are formed every year, with LLCs constituting over 90% of the new entities formed in our state. LLCs are the predominant form of new business in Wisconsin, and so quite simply, passing this law is necessary for Wisconsin to keep up with its neighbors. It's necessary to make sure that lawyers and CPAs are operating under the most up to date statues, to ensure consistent practice and encourage people to practice here. It is necessary so that our clients and current or future business owners don't ask us "why aren't we forming in Delaware?", or "why aren't we using Iowa law or Minnesota law or Illinois law since it's more up to date?". We as service providers, as people who help businesses, want to have the most current law on the books.

There are many positives to updating Wisconsin's LLC law. But competition is a significant reason we should pass an updated LLC law: because we want to be able to compete with other states in the 2020s and beyond.

Neider & Boucher, s.c.
Attorneys and Counselors

University Research Park • 401 Charmany Dr • Ste 310 • PO Box 5510 • Madison, WI 53705-0510 • 608.661.4500 • FAX 608.661.4500 • neiderboucher.com

WISCONSIN ENTITY HISTORICAL TREND DATA

Developments in Wisconsin Legal Entities

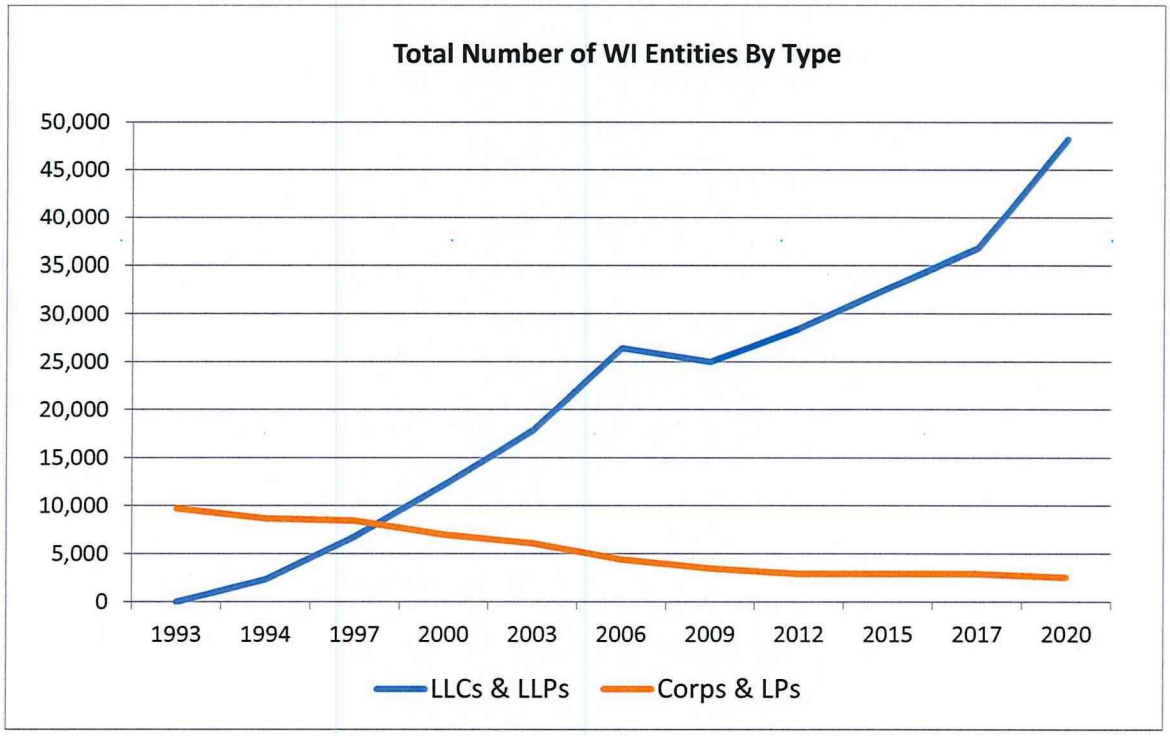
Attorney Joseph W. Boucher

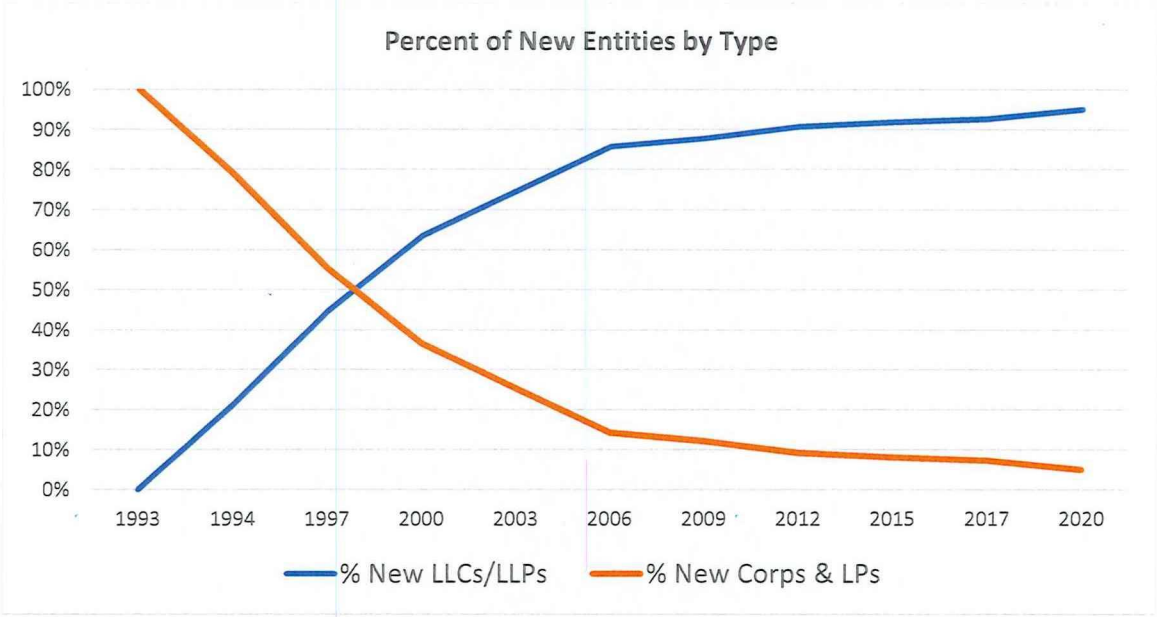
Total New Wisconsin Entities by Year

Year	New LLCs	New LLPs	TOTAL LLCS & LLPS	New Corps. and LPs	Total Entities
1993	0	0	0	9,700	9,700
1994	2,317	0	2,317	8,646	10,963
1997	5,830	962	6,792	8,428	15,220
2000	11,674	489	12,163	6,992	19,155
2003	17,463	367	17,830	6,067	23,897
2006	26,292	184	26,476	4,398	30,874
2009	24,880	132	25,012	3,449	28,461
2012	28,402	94	28,496	2,883	31,379
2015	32,612	101	32,713	2,868	35,581
2017	36,646	71	36,717	2,891	39,608
2020	48,160	58	48,218	2,525	50,743

Percentage of New Wisconsin Entities by Year:

Year	% New LLCs/LLPs	% New Corps & LPs
1993	0%	100%
1994	21%	79%
1997	45%	55%
2000	63%	37%
2003	75%	25%
2006	86%	14%
2009	88%	12%
2012	91%	9%
2015	92%	8%
2017	93%	7%
2020	95%	5%


Total Number of WI Entities By Type
50,000
45,000
40,000
35,000
30,000
25,000
20,000
15,000
10,000
5,000
0
1993
1994
1997
2000
2003
2006
2009
2012
2015
2017
2020
LLCs & LLPs
Corps & LPs


Percent of New Entities by Type
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
1993
1994
1997
2000
2003
2006
2009
2012
2015
2017
2020
% New LLCs/LLPs
% New Corps & LPs

WISCONSIN UNIFORM LIMITED LIABILTY COMPANY LAW

Report of the Limited Liability Company Committee
Business Law Section
State Bar of Wisconsin

PREFATORY NOTE

This is the Report of the Limited Liability Company Committee (the "Committee") of the Business Law Section of the State Bar of Wisconsin (the "SBW Business Law Section") regarding legislation prepared by the Wisconsin legislative Reference Bureau as draft 2021 Senate Bill 566 and 2021 Assembly Bill 566 (collectively, the "proposed bill"). It is intended to facilitate adoption and application of the proposed bill.

The proposed bill would restate Chapter 183 of the Wisconsin Statutes, Wisconsin's current Limited Liability Company Act ("WLLCA"), and make other related changes to the Wisconsin Statutes. WLLCA is a "first-generation" limited liability company statute modeled after the November 19, 1992 draft of the "Prototype Limited Liability Company Act" drafted by the Working Group on the Prototype Limited Liability Act, Subcommittee on Limited Liability Companies, committee on Partnerships and Unincorporated Business Organizations, Section on Business Law of the American Bar Association, but with modifications and periodic updates reflecting the policies and principles adopted by Wisconsin in Chapters 179 and 180. The primary purpose of the proposed bill is to update Chapter 183, in order to reflect the Revised Uniform Limited Liability Company Act (2006) approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") at its Annual Conference Meeting on July 7 to 14, 2006 ("RULLCA").

For the most part, the proposed bill follows the substantive lead of RULLCA. However, there were some areas, such as the default rules regarding voting and distributions, and many procedural aspects for filings with the Department of Financial Institutions ("DFI"), where provisions in the proposed bill vary somewhat from RULLCA in order to avoid unnecessary disruption to Wisconsin law and practice. In addition, there are a limited number of other instances where the specific provisions of RULLCA were modified in the proposed bill to accommodate specific statutory and policy concerns noted in this Report.

In order to facilitate practice under the proposed bill, attached to this Report is an Appendix, which contains a cross-reference chart listing and correlating common procedural and cross-species provisions of all five Chapters.

In addition to explaining the rationale for non-editorial variations between Chapter 183 and the proposed bill, this Report also contain some substantive comments regarding RULLCA

and the proposed bill. However, these Comments are intended only to supplement, and not to repeat or displace, the official Comments to RULLCA itself.

CHAPTER 183 RESTATEMENT: LIMITED LIABILITY COMPANIES

Subchapter I
General Provisions

Proposed section 183.0102(4) containing the definition of the term "distribution" reflects a variation from RULLCA. The RULLCA definition specifically excludes "compensation for present or past service," as well as "payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program." The proposed bill specifies that "other payments made to members for good and valuable consideration other than in their capacity as members" are also excluded from the definition of the term "distribution." This change was intended to make it clear that non-service payments unrelated to membership contributions and distributions, such as rents, guarantee fees and the like, should also not be treated as membership distributions.

Proposed Section 183.0102(13) defines an "operating agreement" to include any agreement "whether oral, in a record, implied, or in any combination thereof" of all of the members of a limited liability company (including a sole member) concerning the matters described in proposed Section 183.0105(1). While a limited liability company is not strictly required to have an operating agreement, RULLCA's broad definition makes it functionally inevitable. This is a significant departure from WLLCA, which defines the term operating agreement to include only "an agreement in writing, if any, among all of the members as to the conduct of the business of a limited liability company and its relationships with its members." See WLLCA section 183.0102(16).

The Committee generally approves of the broad conception of "operating agreement" contained in RULLCA. However, the Committee believes that certain provisions otherwise permitted to be made in an operating agreement are of such a character that, for a number of reasons – both philosophical and prudential – they should be required to be set forth in a writing approved by all of the members. Thus, the Committee has added proposed Section 183.0102(26) to create the defined term "written operating agreement," meaning an operating agreement (as defined in proposed section 183.0102(13)), or any part thereof, that is "set forth in writing." This new term "written operating agreement" permits of easier distinction between those matters that may be contained in any operating agreement and those that are required to be set forth in writing.

Importantly, RULLCA itself seems to contemplate these very same concerns by requiring that certain provisions be "expressly provided" or "identified" in an operating agreement. However, the commentary to RULLCA does not clarify how specific terms are to be "expressly provided" or "identified" in the context of purely oral or implied operating agreements. The Committee believes that significant uncertainty can be avoided by the simple expedient of

requiring that such extraordinary matters actually be "set forth in writing" (the single distinguishing feature of a "written operating agreement" under Proposed Section 183.0102(26)).

In this regard, however, it should be noted that the Committee does not believe that a "written operating agreement" necessarily needs to be a single, integrated instrument – indeed, the definition of "written operating agreement," itself, clearly contemplates that an operating agreement might only be partially set forth in writing. Likewise, it should be stressed that the "written operating agreement" does not necessarily need to be "signed" or "subscribed" by a member in order to be considered agreed by and effective against such member. The Committee is comfortable that the common law of contracts and the laws of evidence are well-suited to the task of determining if a particular document or written communication (or series of documents or written communications) – including, without limitation, an "e-mail chain" by and among the member of a limited liability company – are sufficient to constitute an agreement of the members that is "set forth in writing."

Additionally, the Committee found it instructive that even Delaware – generally regarded as having the most flexible limited liability company act – makes a distinction between a "limited liability company agreement," on the one hand, and a "written limited liability company agreement," on the other. See 6 Del. C. § 18-101(7). Under Delaware law, a "limited liability company agreement" (the equivalent of an "operating agreement" under RULLCA and WLLCA) may be written, oral or implied. However, a "written limited liability company agreement" is a distinct term under Delaware law, and is used in relation to certain member agreements that must be set forth in writing in order to be effective.

The definition of "transfer" contained in proposed section 183.0102(23) provides that the term "includes" "[a]n assignment" and various other types of conveyance. The use of the term "includes" in this definition differs from the terminology used in most of the other definitions contained in section 102 of RULLCA. For example, the definition of "property" contained in section 102(17) of RULLCA (and proposed section 183.0102(17)) provides that the term "means" "all property, whether real, personal, or mixed or tangible or intangible, or any right or interest therein." This suggests that the term "transfer" may actually be broader than the specific items listed in proposed section 183.0102(23). The only other definition that contains comparable language is the one for the term "business" contained in proposed section 183.0102(1m), which "includes every trade, occupation, and profession." The Committee chose not to vary from the RULLCA language in either case because the implication of broader coverage appears to have been intended.

Proposed section 183.0103(3) provides that "[s]ubject to s. 183.0210(6)," a person can notify another person "by taking steps reasonably required to inform the other person in ordinary course." This is based on the corresponding language of RULLCA without modification. The provision referred to, proposed section 183.0210(6), which provides that the DFI "may" deliver a record in certain specified ways, is also based on the corresponding RULLCA language without substantive modification. Technically, the two provisions do not appear to be in conflict so that one would be "subject" to the other. However, it was not thought necessary to vary from the RULLCA language in this instance.

Proposed section 183.0103(4) specifies when "a person not a member" is deemed to have knowledge or notice of certain items. Presumably, a member would be deemed to have such knowledge or notice in the same circumstances, though the opposite could be argued. In most situations, this issue should be irrelevant because the members themselves are the first to know of the items in question. However, this could be less true for larger limited liability companies. Nonetheless, in the interests of uniformity, the Committee decided not to make any change from the RULLCA language for this provision.

Proposed section 183.0104(1)(2m), which is not contained in RULLCA, clarifies that the election of a limited liability company to be taxed under the Internal Revenue Code as a partnership or corporation, and in such latter event as either an S corporation or C corporation, is not intended to have any impact on the governing law applicable to the internal affairs of the limited liability company and the interest-holder liability of its members. That said, such election may still be a fact that is relevant in the application of those rules. For example, whether a limited liability company is a partnership for tax purposes is a fact that would be relevant to how the default distribution and voting provisions of proposed sections 183.0404(1), 183.0407(2)(b), and 183.0707(2)(b) are applied, per the express terms of those sections. Likewise, the fact that members may subject to passthrough taxation and, as such, accustomed to so-called "tax distributions" from a company to enable them to pay their individual taxes attributable to passthrough income, may be "fact" that is relevant in the adjudication of a claim of "minority oppression" if managers and/or majority members were to reduce or eliminate such prior distributions for the purpose of harming a minority member and without a valid business purpose. However, the company's tax status would not alter the governing legal principles applied in adjudicating these claims. It would simply be a fact that would be taken into account, just like all other relevant facts, in applying those principles.

Proposed section 183.0104(3m) explicitly states that an operating agreement may require that, consistent with applicable jurisdictional requirements, all claims involving the internal affairs and interest-holder liability matters of a limited liability company governed by Wisconsin law must be brought in Wisconsin courts. As explained in more detail in the SBW Corporation Report, this provision is based upon section 115 of the General Corporation Law of the State of Delaware (entitled "Forum selection provisions"). However, unlike Delaware section 115, proposed section 183.0104(3m) allows an operating agreement to specify another jurisdiction as the exclusive forum for the resolution of some or all such disputes. Such operating agreement provisions could also deal with venue within this or another state, to the same extent as they could under current law. All such provisions are also subject to whatever restrictions apply under federal law. See the comments relating to proposed new sections 180.0145and 181.0163 of the SBW Corporation Report for more information.

Proposed section 183.0105(3) specifies the limits to the members' contractual freedom to modify the provisions of Chapter 183 via an operating agreement. In general, the proposed bill follows RULLCA in this regard. However, there are some variations.

Proposed section 183.0105(3)(c), which was not contained in the original version of RULLCA but is based upon subsequent refinements proposed by the NCCUSL, confirms that members shall not have the power to alter various administrative requirements and procedures

applicable to all LLCs organized or operating in Wisconsin. While this could reasonably have been inferred, it is a useful clarification given the structure of proposed Section 183.0110, which largely defines the scope, function and limitations of the operating agreement in the negative – that is to say, primarily by reference to provisions which are ***not*** permitted to be included therein.

Proposed sections 183.0105(3)(e) and (f), which limit the ability of the members to alter or eliminate the duties of loyalty and care and the contractual obligation of good faith and fair dealing, respectively, have been modified to make it clear that the operating agreement also could not "restrict remedies for the breach of" such obligations. It was thought that otherwise such restrictions could be used to undermine the purpose of such contractual freedom limitations.

Proposed section 183.0105(3)(e) provides that the operating agreement cannot "[a]lter or eliminate" the duties of loyalty and care, whereas corresponding language of proposed section 183.0105(3)(f), dealing with the contractual obligation of good faith and fair dealing, varies from this language slightly, providing that the operating agreement cannot "[e]liminate" that obligation, but a written operating agreement "may prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured." With the exception of the change noted above, both of these provisions are substantively identical to the corresponding RULLCA provisions. One could argue that the absence of the term "alter" in subsection (f) suggests that members are free to "alter" the contractual obligation of good faith and fair dealing in the operating agreement, as long as they do not "eliminate" it. However, this language difference seems only intended to accommodate the possibility of prescribing standards that are "not manifestly unreasonable" pursuant to the remainder of that provision. In any event, it was not thought necessary to modify the RULLCA language in this regard.

Proposed section 183.0105(3)(g), which sets forth the type of behavior for which there can be no exoneration under the operating agreement, deviates from the corresponding RULLCA provision in order to accommodate current Wisconsin practice. Section 105(c)(7) of RULLCA describes such behavior as "conduct involving bad faith, willful or intentional misconduct, or knowing violation of law." Instead, proposed section 183.0105(3)(g) covers the following categories of activities, which have come to characterize the so-called "bad boy" activities proscribed under Wisconsin business entity law:

1. A willful failure to deal fairly with the company or its members in connection with a matter in which the person has a material conflict of interest.

2. A violation of the criminal law, unless the person had reasonable cause to believe that the person's conduct was lawful or no reasonable cause to believe that the person's conduct was unlawful.

3. A transaction from which the person derived an improper personal profit.

4. Willful misconduct.

Proposed section 183.0105(3)(h), which limits the ability of the members to unreasonably restrict the duties and rights of the members with respect to certain information of the company,

deviates from the corresponding RULLCA provision in order to further restrict the ability of the members to vary the information required to be kept under proposed section 183.01075, discussed below.

Proposed section 183.0105(3)(k), which limits the ability of the members to unreasonably restrict the right of a member to maintain an action under proposed Subchapter VIII, is consistent with the corresponding RULLCA provision. However, the Committee decided not to include any counterpart to section 105(c)(12) of RULLCA, which would have limited the ability of the members to vary the default provisions related to the appointment and conduct of a special litigation committee (section 805 of RULLCA, which is reflected in proposed section 183.0805), but would have allowed the members to opt not to have any special litigation committee at all. The Committee believed that this limitation on any flexibility by the members to compose and conduct a litigation committee was needlessly restrictive in light of the fact that proposed section 183.0805(5) already confers onto the courts the authority and obligation to determine whether "the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care," with the committee having the burden of proof.

Proposed section 183.01075, which is not contained in RULLCA, provides that a limited liability company shall maintain at its principal office certain information related to the ownership and organization of the company, in order to accommodate current Wisconsin practices that continue to be reflected the proposed bill.

Proposed section 183.0110 contains the transitional rules for applicability of the proposed bill, and is only loosely based on the corresponding provision of RULLCA. These transitional rules are designed to apply to all genuinely new Wisconsin limited liability companies formed after the enactment of the proposed bill, as well as to transition existing limited liability companies to these new uniform provisions—subject to exceptions so as not to disrupt the reasonable expectations of existing limited liability companies, members and third parties. Limited liability companies that are successors to existing prior law limited liability companies are treated as pre-existing limited liability companies for this purpose. For example, a limited liability company that is technically dissolved but continues under section 183.0903 of WLLCA is not treated as a new limited liability company. This is consistent with the corresponding transitional provisions in RULLCA.

In general, the proposed bill will apply to all Wisconsin limited liability companies as of January 1, 2021. With respect to limited liability companies formed on or after such date, there are no exceptions unless they are successors to prior law limited liability companies (for example, as the result of a technical dissolution under prior law). With respect to prior law limited liability companies, there are the following exceptions:

1. A prior law limited liability company can elect "in a manner allowed by law for amending the operating agreement" to continue to have prior law apply as long as it files a statement of applicability to that effect with the DFI prior to January 1, 2021.

2. Even after a prior law limited liability company becomes subject to the proposed bill, obligations incurred by the limited liability company prior to such applicability shall continue to be governed by prior law instead of the proposed bill.

3. Finally, any provisions in the operating agreement of a limited liability company that were valid and in effect immediately prior to it becoming subject to the proposed bill shall continue to be valid and applicable to the same extent as under prior law.

Under the proposed bill, limited liability companies that are not yet subject to it can also elect to become so immediately by filing a statement of applicability to that effect with the DFI. Also, current limited liability companies that elected to continue to be subject to prior law could subsequently elect to become subject to the proposed bill. Once made, such "opt in" elections would be irrevocable.

The proposed bill does not contain any provision corresponding to section 121 of RULLCA, which specifically confirms that the legislature continues to have the power to amend or repeal all or any part of the limited liability company statutes. It was thought that many specific and wholesale revisions to Wisconsin's business entity statutes have been and will be enacted without comparable language, and it seems clear that the legislature does reserve the right to make such changes in the future. Obviously, no suggestion otherwise is intended by the failure to include such a provision in the proposed bill.

Subchapter II
Formation; Articles of Organization and Other Filings

RULLCA refers to the principal organizational document of a limited liability company as the "Certificate of Organization." The committee believes that this should be revised in order to retain WLLCA's existing use of the term "Articles of Organization." It conveys a sense of formality more akin to "Articles of Incorporation" in the corporation context, yet is sufficiently distinguishable at the same time.

WLLCA limits the terms that may be set forth in the Articles of Organization—rather than letting the organizer/members script their own. In order to accommodate current Wisconsin practice, the Committee has proposed to retain the minimum Articles of Organization terms of WLLCA, with one significant exception. The Committee believes that removing WLLCA's current requirement that the form of management (i.e. member managed or manager-managed) be specified in the Articles of Organization would be a significant improvement, and consistent with RULLCA provisions allowing for separate notices regarding managerial authority. Among other things, removing this requirement would obviate the need for a limited liability company to amend its Articles of Organization whenever the members decide amongst themselves to change the form of management though their operating agreement. That said, the form of management could still be made public on the limited liability company's annual report and/or "statement of authority."

Proposed section 183.0201(3) represents a significant difference from WLLCA which would permit members to include additional terms and information in their articles of

organization. This is consistent with the corresponding provisions in RULLCA regarding the content of a Certificate of Organization.

One of the more controversial provisions of RULLCA, which was intensely debated during the drafting process, was whether to permit the flexibility to file the Certificate of Organization of a limited liability company without members (a so-called "shelf LLC"). Section 201(e) of RULLCA—which requires a subsequent filing—represents a compromise between those participants who recognized the practical need for flexibility to form entities on short notice, versus those who insisted that a limited liability company can "exist" only as a partnership of its members (and thus cannot "exist" without members). Daniel S. Kleinberger and Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 Bus. Law. 515 at 528(2006); Comment to RULLCA §2.01.

WLLCA already effectively permits of an approximate one (1) year "shelf" registration, inasmuch as (i) the presence of members is not required as a condition of formation, and (ii) the name and address of each manager (or each member, if the limited liability company is member-managed), is not required to be disclosed until the filing of the company's first annual report (about one year after formation). The Committee believes that the flexibility of WLLCA's current approach is superior to the 90-day shelf filing under RULLCA, which would require an additional, affirmative follow-up filing within 90 days to preserve entity status. Moreover, this one-year "shelf" registration is a custom well-known to Wisconsin's business bar, and retaining it would not upset existing arrangements or contemplated transactions.

Apart from the benefits of flexibility and familiarity following-on from retaining the current WLLCA approach to "shelf" registration, the Committee believes that the affirmative \ filing required by Section 201(e) of RULLCA could create a "trap for the unwary." Moreover, it could complicate opinion practice if the articles of organization of a limited liability company without members upon filing could lapse due to a failure to file a notice of a member within the requisite time period. Accordingly, the Committee has opted to maintain the functional one (1) year "shelf" registration of WLLCA, as reflected in the interplay between proposed section 183.0201(4), which does not require the appointment of members in order for a limited liability company to be formed, and proposed section 183.0708, which subjects a limited liability company for failure to timely file a valid annual report (which could only be done if the limited liability company had at least one member).

The language of proposed sections 183.0203(2) and (3) has been modified slightly in order to conform to long-standing terminology and practice of the DFI to allow non-officials of entities to sign as "an attorney-in-fact." Based on the language and comments for the corresponding sections of RULLCA, this should not create any substantive differences.

Proposed section 183.0204, regarding petitioning the court to order persons to sign and deliver documents, only applies to filings with the DFI. For example, it would not apply to a refusal to record a grant or limitation of authority to transfer real property under proposed sections 183.0302(6) and (7), respectively. Presumably, persons aggrieved by refusals to perform those and other ministerial acts not involving the DFI would still have a remedy under other applicable law. Accordingly, and in the interests of uniformity, no change was

recommended from the corresponding language of section 204 of RULLCA on which this provision was based.

Proposed section 183.0206, which is based on the corresponding RULLCA provision, requires that all words in a record to be filed with the DFI must be in English, though the name of an entity need not be in English as long as it is written in English letters or Arabic or Roman numerals. This would presumably mean that relevant information relating to a foreign entity, such as one being domesticated under proposed section 183.0151 et seq., would have to be translated.

Subchapter III
Relations of Members and Managers to Persons Dealing with Limited Liability Company

WLLCA follows the same basic rule governing agency powers of members and managers as the original version of the Uniform Limited Liability Company Act ("ULLCA"). See ULLCA §301, §301 cmt. sub. A. RULLCA rejects this "statutory apparent authority" model, borrowed from the partnership context, in favor of a model that makes no distinction between member-managed and manager-managed LLCs. *Progress Report on the Revised Uniform Liability Company Act*, ABA Committee on Partnership and Unincorporated Business Organizations Newsletter (March, 2006).

Proposed section 183.0304(1) varies the corresponding provision of RULLCA slightly in order to retain the provision of current WLLCA section 183.0304(1), which incorporates three specific exceptions to the general limitation of liability of members and managers. The three exceptions are current section 73.0306 (regarding certain tax obligations of the members of limited liability companies that are disregarded entities under section 7701 of the Internal Revenue Code), proposed section 183.0403 (regarding a member's liability to make a contribution) and proposed section 183.0406 (regarding a member's liability for improper distributions) .

Subchapter IV
Relations of Members to Each Other and to Limited Liability Company

Both RULLCA section 401 and WLLCA section 183.0801 deal separately with the admission of members prior to and after formation. Prior to formation, RULLCA focuses on what the members (and for single member LLCs, the member and organizer) agree upon with respect to admission. This seems less certain than current law, which admits members either upon formation, as specified in the operating agreement, or as specified in the company's records under WLLCA section 183.0405. Application of the RULLCA provision would appear to leave room for greater risk of dispute with respect to what the "agreement" was regarding who would become a member and when. To the extent it may be unclear, comments under RULLCA section 111 make clear that the earliest a person may become a member is upon limited liability company formation. Proposed section 183.0401(3), which does not have an equivalent under RULLCA, further clarifies that a person becomes an initial member with the consent of a majority of the organizers.

RULLCA section 401(e), which has no equivalent under current law, permits admission of "non-economic" members (i.e. persons who may become members without acquiring a transferable interest and without making or being obligated to make a contribution). This provision is intended to accommodate business practices and to reflect the fact that a limited liability company need not have a business purpose. Among other things, this would also appear to facilitate the use of LLCs as 501(c)(3) organizations (much like nonstock corporations under Chapter 181).

Section 402 of RULLCA and Section 183.0501 of WLLCA are virtually identical, except that RULLCA adds the broad term "other benefit" as a permitted form of contribution. This is consistent with Section 6.21 of the Model Business Corporation Act ("MBCA"), which is embodied in Wisconsin's business corporation law at section 180.0621(2) and uses the broad general term "benefit" as consideration for shares. The commentary to the MBCA notes that this term should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation by contribution of its shares to a charitable organization or as a prize in a promotion. The Committee believes that a similarly broad construction should be afforded to the term "other benefit" in the context of proposed section 183.0402.

In order to facilitate the retention of WILCCA's current default approach to distributions and member voting, which is based on relative contributions (and discussed in more detail below), proposed section 183.0402(2) adds valuation and record keeping requirements similar to those under current WLLCA sections 183.0501(2) and 183.0405(1)(e)1, respectively.

Under current law, a member's obligation to make a contribution must be specified in a writing signed by the member. RULLCA does not have an analogous requirement. The Committee believes that eliminating this requirement, thereby making a member's liability for the contribution effectively an evidentiary matter, is consistent with the laws of other jurisdictions (including Delaware), and is further consistent with the actual practice of many LLCs. Moreover, the contribution valuation and record-keeping requirements to be added to proposed section 183.0402 provide some discipline.

Proposed section 183.0403(3) deviates from RULLCA section 403(c) by requiring that a member's contribution obligation may be compromised only by the written consent of all of the members, unless otherwise provided in a written operating agreement.

RULLCA purposefully omits a default allocation of profits and losses, explaining that nearly all LLCs will base allocations on applicable tax, accounting and other regulatory requirements, and therefore RULLCA is not the proper source to make these determinations. Thus, RULLCA does not contain a provision equivalent to current WLLCA section 183.0503. The Committee was comfortable with this approach but, as discussed further below, proposed to retain certain aspects of current Wisconsin law that related to distributions and management that, like WLLCA section 183.0503, turn on the relative contributions of the members.

RULLCA section 404(b) contains the essential aspects of WLLCA section 183.0601, and provides that members are entitled to interim distributions only if the company decides to make

such a distribution. However, RULLCA section 404(a) requires all interim distributions to be in "equal shares among members and dissociated members." Failing an adjustment by written operating agreement, such a default approach could require distributions that do not reflect the economic realities of the members' relationship. (Variations to the extent necessary to comply with the transfer of a transferable interest under RULLCA section 502 or a charging order in favor of a judgment creditor under RULLCA section 503 are permitted, but these are fairly limited exceptions to the RULLCA default.)

The Committee proposes to retain the provisions of current Wisconsin law that, absent a written operating agreement to the contrary, distributions shall be made proportionally on the basis of the value of the contributions made by each such member. It is the view of the Committee that such a default rule is more consistent with economic realities in the event that the members do not formalize a written operating agreement. Indeed, even Delaware, which is widely regarded as the most flexible of jurisdictions when it comes to the internal affairs of LLCs, provides that distributions will be allocated based on contribution value (unless otherwise provided in an operating agreement). See 6 Del. C. § 18-504.

The Committee further proposes to modify the current Wisconsin default rule, with respect to companies treated as partnerships for tax purposes, to use the partnership capital account as the measure—rather than the initial contribution reflected in the company's records—because the capital account (as maintained for tax purposes, not book or other accounting purposes) will be the most recent and accurate measure of the members' relative contribution values.

Proposed section 183.0407(1) departs slightly from RULLCA section 407(a) by requiring that, if manager-management is intended, provision must be made in a *written* operating agreement, which is not inconsistent with RULLCA's requirement that such designation be "expressly" provided.

Additionally, the Committee took note of the current widespread use of the term "managing member" in practice—a term not formally recognized by WLLCA, and which appears to be used where the members of a "member-managed" limited liability company desire to vest management in one or more (but less than all) of the limited liability company's members, without strictly becoming a "manager-managed" limited liability company under WLLCA. The Committee believes that in some, but not necessarily all, circumstances, a "manager-managed" limited liability company is the appropriate result. Thus, the Committee believes that the designation of one or more (but less than all members) as "managing members" is likely to constitute the limited liability company as "manager-managed" unless the context requires otherwise.

As with the revisions to proposed Section 183.0404 (regarding distributions), proposed section 183.0407(2)(b) deviates from RULLCA section 407(b)(2), in order to retain the current Wisconsin default of WLLCA section 183.0404(1)(a)), by providing that the voting power of membership interests be allocated proportionally on the basis of the value of the contributions made by each such member—rather than default to equal management rights—as the Committee believes this is more consistent with economic realities in the event that the members do not

formalize a written operating agreement. Here again, even Delaware—which is widely regarded as the most flexible of jurisdictions when it comes to the internal affairs of LLCs—provides that member voting power will be allocated based on contribution value (unless otherwise provided in an operating agreement). See 6 Del. C. §§ 18-402 & 18-503.

Again, the Committee proposes to further modify this current Wisconsin default rule, with respect to companies treated as a partnership for tax purposes, to use the partnership capital account as the measure—rather than the initial contribution reflected in the company's records—because the capital account (as maintained for tax purposes, not book or other accounting purposes) will be the most recent and accurate measure of the members' relative contribution values.

Proposed section 183.0407(2)(c) departs from RULLCA 407(b)(3) by providing that, with the exception of those matters requiring unanimous consent under 183.0407(2)(d), the majority of the members' *transferable interests* shall be controlling—rather than default to a *per capita* majority of the members themselves. This is consistent with the current Wisconsin law and practice and reflects the Committee's recommendation to depart from RULLCA's default of equal shares among members.

Proposed section 183.0407(2)(d) departs from RULLCA 407(b)(4) to more clearly define those extraordinary acts that would require the affirmative vote or consent of all of the members, and does not have a counterpart in RULLCA. In the Committee's view, RULLCA section's use of the term "act outside the ordinary course of the activities and affairs of the company," is needlessly broad and could give rise to disputes as to whether member approval is required. Moreover, the list of extraordinary acts giving rise to a member vote under proposed section 183.0407(2)(d) is consistent with current Wisconsin law and practice, as reflected in WLLCA section 183.0404(2).

Proposed section 183.0407(e), requiring unanimous consent of the members to amend the operating agreement, is not substantively different from RULLCA section 407(b)(4)(B), but is stated separately to distinguish it from matters that are solely company acts. It is also consistent with current Wisconsin law and practice, as reflected in WLLCA section 183.0404(2)(c).

Proposed section 183.0407(3)(c) includes additional language, not contained in RULLCA, which, consistent with proposed section 183.0407(2)(d), more clearly defines those extraordinary acts that would require the affirmative vote or consent of all of the members, consistent with current Wisconsin law and practice.

Proposed section 183.0407(3)(d) departs from RULLCA 407(b)(3) by providing that, with the exception of those matters requiring unanimous consent under 183.0407(2)(d), the majority of the members' *transferable interests* shall be controlling—rather than default to a *per capita* majority of the members themselves. This is consistent with the current Wisconsin law and practice and reflects the Committee's recommendation to depart from RULLCA's default of equal shares among members.

Proposed section 183.0407(4) includes additional language, not contained in RULLCA, which would provide that the consent of a member in connection with an action taken by members may, in giving such consent, provide that such consent will be effective at a future time or upon the happening of a future event. A person executing a consent may instead provide for future effectiveness through instructions to an agent, but evidence of that instruction must be provided to the limited liability company so that it will know when the consent is effective. It also provides that any such consent providing for future effectiveness is revocable prior to effectiveness.

Inasmuch as the proposed section 183.0407(4) provides that a member consent includes the date of signature in signing the consent, the subsection further provides that, when such consent is to be effective at a future time or upon the happening of a future event, such effective time shall serve as the date of signature.

Generally, RULLCA sets out what is affirmatively expected of managers and the members in a member-managed limited liability company in terms of the duty of care and the duty of loyalty. Proposed section 183.0409(3) deviates slightly from RULLCA section 409(c) by defining the duty of care in the conduct or winding-up of the company's activities with reference to the conduct listed in proposed section 183.0105(3)(g), which defines the liabilities from which a person may not be relieved or exonerated under an operating agreement. Additionally, proposed section 183.0409(6) expands upon the language of RULLCA section 409(f) to confirm that an authorization and ratification with respect to a specific act or transaction, after full disclosure of all material facts, precludes a claim for breach of the duty of loyalty.

Proposed section 183.0410(2)(b) varies from RULLCA section 410(b)(2) in that it permits the member to "obtain" from the company information, as well as "inspect and copy" same, to allow for the possibility that company information may reside in a format that is not capable of "inspection" or "copying," as distinct from some other form of access.

Subchapter V
Transferable Interests and Rights of Transferees and Creditors

One of the most significant developments since the creation of WLLCA was the enactment of the "check-the-box" entity classification regulations, effective January 1, 1997. These regulations, which supplanted the *Kintner* regulations under Section 7701 of the Internal Revenue Code—so-called because they were designed to overturn the result of *U.S. v. Kintner*, 216 F.2d 418 (9th Cir. 1954)—defined which unincorporated associations might be recognized as a corporation. These, in turn, gave rise to the use of "single member LLCs," which are generally treated as "disregarded entities" for tax purposes.

The RULLCA provisions related to foreclosure of charging order liens now make a distinction between multi-member LLCs and single member LLCs. RULLCA section 503(6) provides for the transfer of the entire membership interest of a sole member upon the foreclosure of a charging order lien, not just a "transferrable interest," as well as the dissociation of the person whose interest was the subject of the foreclosure.

This is consistent with tax authority, which treats the purchase by a buyer of all of the interests in a disregarded entity as a purchaser of its assets. See Rev. Rul. 99-5, 1999-1 C.B. 434 (situation 1). See *also*, Judge Halpern's dissent in *Suzanne J. Pierre*, 133 T.C. 24, 44 (2009) (describing the evolution of this conclusion).

Subchapter VI
Dissociation

Proposed Section 183.0601 introduces the concept of a "wrongful" dissociation, which does not exist under WLLCA. While the Committee generally approved of this new concept, it believed that certain changes were warranted in order to avoid creating default statutory rules that would run contrary to the expectations of members in existing limited liability companies and would otherwise be better left to the parties involved to address. Accordingly, Proposed Section 183.0601(2)(a) varies from RULLCA Section 601(b)(1) to make a person's dissociation from a limited liability company wrongful only when such dissociation "is in breach of a written operating agreement." This change is consistent with the Committee's reasoning in creating the concept of a "written operating agreement" under Proposed Section 183.0102(26). As noted in the comments to Subchapter I, the Committee believed that use of a written operating agreement avoids the difficulty of having to establish the "express" provision of an operating agreement (as required by RULLCA Section 601(b)(1)), which might otherwise be oral or implied. In addition, the Committee believed that imposing potential liability on a member for a wrongful dissociation would be inappropriate absent the breach of an agreement by all of the members contained in a written operating agreement.

Proposed Section 183.0601(2)(b) makes two changes to RULLCA Section 601(b)(2). First, RULLCA Section 601(b)(2)(A), making dissociation by express will wrongful, is deleted. As noted above, WLLCA does not distinguish between "rightful" and "wrongful" dissociations, and therefore, a member is not subject to potential liability if that member voluntarily withdraws under current law. The Committee believed that changing present law in this regard would come as a surprise to many members of existing limited liability companies, and accordingly thought a deviation from RULLCA was warranted. The Committee also thought that the decision to make a voluntary dissociation wrongful would be better addressed by the members in a written operating agreement, rather than imposing such a default rule by statute. Second, proposed Section 183.0601(2)(b) also excludes RULLCA Section 601(b)(2)(D), relating to wrongful dissociations in the case of an entity-member being expelled or otherwise dissociated as a result of willful dissolution or termination, for the same reason.

Proposed section 183.0602(6), addressing instances when the limited liability company may seek a judicial order for a member's expulsion (thus resulting in dissociation), largely tracks the RULLCA language, but specifically excludes RULLCA Section 602(6)(C). RULLCA Section 602(6)(C) would permit the limited liability company to seek a judicial expulsion when the person "has engaged in, or is engaging in, conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member." The Committee reasoned that, in order to avoid rendering RULLCA Section 602(6)(C) mere surplusage, Section 602(6)(C) must contemplate conduct that is not "wrongful conduct that has

adversely and materially affected . . . the company's activities" (which is covered by Section 602(6)(A)) and does not involve "willfully or persistently . . . committing a material breach of the operating agreement or the person's other duties or obligations" (which is covered by Section 602(6)(B)). The Committee considered the situation in which a member with a minority interest exercised its rights under an operating agreement to preclude action by the limited liability company that would require a supermajority vote. Though this conduct is not precluded by Section 602(6)(A) or (B), arguably, the majority member(s) could seek a judicial expulsion of the minority member under the standard set forth in RULLCA Section 602(6)(C). The Committee believed the availability of such an action would be inconsistent with the parties' expectations.

In this situation, the Committee believed it was appropriate for the parties to resolve this type of dispute between themselves by including relevant provisions in a written operating agreement or some other type of negotiated settlement. In all events, to the extent that member disagreement or intransigence renders it impracticable to continue operations, judicial dissolution of the firm as a whole remains an option. The mechanics of such a forced dissolution and liquidation, while drastic, are presumed known to members going into the relationship and, as such, may induce a mutually agreeable voluntary settlement or other agreement among the members. The Committee believed that this would be preferable to having a court to fashion the expulsion mechanics by judicial *fiat* where no such terms had been previously negotiated by the members themselves. This would be particularly true in the case of a service enterprise or operation in which each of the members is privy to valuable trade secrets, as no provision or RULLCA or other law would seem to permit the imposition of any post-dissociation restrictive covenants on the member to be expelled where none had been previously agreed upon by such member.

Proposed section 183.0602 further deviates from RULLCA by not including RULLCA sections 602(12) through (15), which purport to work a "dissociation" whenever the limited liability company in question participates in certain transaction under Subchapter X (i.e., mergers, interest exchanges, conversions and domestications). The Committee believes that subchapter X, as well as the plan documents of the transaction in question, already address the rights, obligations and status of the members of a limited liability company participating in such a transaction, and the treatment of such transactions as a *per se* dissociation from the participating limited liability company creates needless uncertainty.

Subchapter VII
Dissolution and Winding Up

Proposed section 183.0701(1)(e) varies slightly from RULLCA section 701(a)(5) to include reference to the reinstatement provisions of proposed Section 183.0709 and the judicial review provisions of sections 227.52 to 227.58.

Proposed section 183.0704(4) is largely based on RULLCA section 704(d), but has been modified to reflect the Committee's proposal to retain the provision of WLLCA section 183.0907 which would further exclude liabilities for additional assessment under section 71.74

or for sales and use taxes determined as owing under section 77.59 from the known claims that may be barred by dissolution.

Proposed section 183.0705(3) deviates from RULLCA section 705(c) in order to retain the two-(2) year window that currently applies under current WLLCA section 183.0908(3) with respect to other claims, provided that notice of dissolution is published in accordance with proposed section 183.0705(2).

Consistent with its revisions to Proposed Sections 183.0404 (regarding distributions) and 183.0406 (regarding voting power), the Committee proposes to retain Wisconsin's current default provisions regarding distribution upon dissolution provision (WLLCA section 183.0905). Accordingly, proposed section 183.0707(2)(a), which has no equivalent in RULLCA, provides that after the payment of creditors, distributions are next to be made in satisfaction of previously approved distributions under proposed section 183.0404 (including previously approved distributions made in partial redemption of a member's transferrable interest). Proposed sections 183.0702(b) and (c) provide that the surplus proceeds of the limited liability company would next be made for the return of the contributions of members and dissociated members, and finally to the members and dissociated members in proportion to their respective rights to share in distributions before dissolution.

With respect to proposed section 183.0707(b), the Committee again proposes to retain the provisions of current Wisconsin law that, absent a written operating agreement to the contrary, distributions shall be made proportionally on the basis of the value of the contributions made by each such member. Again, the Committee believes that this approach works less of a "trap for the unwary" than RULLCA's default "equal shares" approach, in the event that the members do not formalize a written operating agreement. The Committee further proposes to modify the current Wisconsin default, with respect to companies treated as a partnership for tax purposes, to use the partnership capital account as the measure, rather than the initial contribution reflected in the company's records, as the capital account (as maintained for tax purposes, not GAAP) will be the most recent (and accurate) measure of the members' relative contribution values.

Proposed section 183.0707(c) further clarifies that distributions otherwise payable to members or dissociated members may be subject to the rights of transferees under proposed section 183.0502.

Subchapter VIII
Actions by Members

Proposed Subchapter VIII does not deviate from the substantive provisions in RULLCA with respect to Actions by Members. However, it is worth noting that Proposed Subchapter VIII represents a departure from current Subchapter XI of WLLCA in a number of significant respects.

Proposed Section 183.0801(1) provides that a member may maintain a direct action against another member, a manager or the limited liability company itself to enforce the member's own rights and to protect the member's own interests, including rights and interests

under the operating agreement, Chapter 183 or arising "*independently of the membership relationship*." (Emphasis added.) Of itself, this is not a significant variation from current Wisconsin law. However, proposed section 183.0801(2) provides further that a member maintaining a direct action under this proposed section must both "plead" and "prove" an actual or threatened injury that is "not solely the result of an injury suffered or threatened to be suffered by the limited liability company." (Emphasis added.) Any action to enforce a right of a limited liability company by a member would need to be pursued as a derivative action.

Under the existing WLLCA, there is not an equivalent to the special litigation committee in the corporation context. However, proposed section 183.0805 would import a process into the limited liability context that is similar to that in Section 180.0744 of Wisconsin's Business Corporations Act, which permits a court, upon a motion by the corporation, to appoint a panel of independent persons to determine whether a derivative action is in the best interest of the corporation.

Proposed section 183.0105(3)(k) would further prohibit an operating agreement from unreasonably restricting the right of a member to maintain an action under Subchapter VIII. In contrast, current section 183.1101(1) permits an operating agreement to alter the ability of a member to sue on behalf of the company. Thus, under the proposed bill, there is less flexibility in terms of limiting a member's right to bring a derivative action.

In short, the RULLCA-based derivative action provisions are much more akin to the more rigorous procedures applicable for regular business corporations, than the pre-existing WLLCA provisions in this area. Accordingly, case law under WLLCA, such as Marx v. Morris, 19 WI 34 (April 2, 2019), may not be fully applicable under these new provisions.

Subchapter IX
Foreign Limited Liability Companies

Proposed section 183.0901(1) specifies that "[t]he governing law of a foreign limited liability company governs . . . [t]he internal affairs of the company [and t]he liability of a member as [a] member and a manager as [a] manager for a debt, obligation, or other liability of the company." As noted in the comments under proposed section 183.0104(1), this governing law provision should mean that a limited liability company will be able to choose the state laws that will govern the limited liability company merely by organizing under the laws of that state.

Also in regard to proposed section 183.0901(1), it should be noted that the section designates the governing law for foreign limited liability companies only with respect to "[t]he internal affairs of the company" and "[t]he liability of a *member as member* and *manager as manager* and for a debt, obligation, or liability of the company" (emphasis added). Thus, by its terms, this provision does not refer to the liability of the limited liability company itself for obligations. This raises the question as to which state's law would apply in determining the apparent authority of a person allegedly acting on behalf of a foreign limited liability company doing business in Wisconsin. Because this would involve the liability of the limited liability company itself, rather than "[t]he liability of a member as member or manager as manager for . . . obligation[s] . . . of the foreign partnership," proposed section 183.0901(1) and the

corresponding provision of RULLCA might be inapplicable unless such apparent authority to bind the limited liability company against outside creditors were somehow found to constitute "[t]he internal affairs of the limited liability company." Given the fact that such issues unavoidably involve the law of both Wisconsin and at least one other state, the Committee thought it best to leave the relevant RULLCA language unchanged for uniformity reasons.

Proposed section 183.0902(2) provides that "[a] foreign limited liability company doing business in this state may not maintain an action or proceeding in this state unless it has registered to do business in this state," which corresponds to current section 183.1003(1) of the Wisconsin Statutes. However, proposed section 183.0902 does not contain any language corresponding to current sections 183.1001(2) and (3) of the Wisconsin Statutes, which essentially elaborate regarding this inability to maintain an action or proceeding in situations involving successors and assignees, as well as stays in proceedings while such issues are resolved. No change in Wisconsin law should result, except to the extent that such was intended under RULLCA.

Proposed section 183.0902(3) contains a slight variation from the corresponding section 902(c) of RULLCA in that proposed section 183.0902(3) provides that the failure of a foreign limited liability company to register to do business in this state does not impair "its title to property in this state," in addition to not impairing the validity of its contracts or acts and not precluding it from defending an action or proceeding in this state. This variation was made simply to conform this section to the corresponding provision relating to foreign corporations doing business in Wisconsin, namely section 180.1502(4).

Similarly, proposed section 183.0902(6) adds a provision, not found in the corresponding RULLCA section 902, imposing liability to the DFI upon any foreign limited liability company that does business in this state without registration. This section corresponds to section 180.1502(5) of the Wisconsin Statutes imposing comparable liability on foreign corporations doing business in this state without registration, and is another provision intended to harmonize the procedural requirements for business entities conducting activities in Wisconsin.

Proposed section 183.0904 contains several modifications that are intended to clarify and improve the DFI procedures for amending foreign limited liability company registration statements. First, language was added to allow both cancellation and amendment of such statements, whereas RULLCA section 1004 only includes language regarding amendments. This addition better parallels the corresponding procedures for amending or canceling statements of authority for domestic limited liability companies under proposed section 183.0302(2).

Second, in addition to requiring amendment filings for changes in a foreign limited liability company's name, governing law, addresses or registered office or agent, proposed section 183.0904(1m) also requires such a filing upon any change in "[t]he company's status as a foreign limited liability company." The Committee believed that such a change, which is not listed in the corresponding RULLCA section 904, was at least as important to disclose as the other listed items. Finally, proposed section 183.0904(4) makes clear that a foreign limited liability company is not required to file an amendment to its registration statement to reflect a change in its registered office or agent if it previously filed a statement of change to that effect

under proposed section 183.0116 or filed an annual report reflecting such change, which is treated as a statement of change under section 183.0212.

Proposed section 183.0906(1) (dealing with the adoption of a fictitious name by a foreign limited liability company to comply with the "distinguishable name" requirement) differs from the corresponding RULLCA section 906 to more clearly conform its language with the procedural practice of the DFI with respect to such names. First, proposed section 183.0906(1) does not contain a completely separate procedure for the adoption of an "alternate name" that is unique to limited liability companies. Rather, a foreign limited liability company may adopt a "fictitious name," the same as corporations do under current section 180.1506(1) of the Wisconsin Statutes. Second, proposed section 183.0906(1) does not include the language of section 906(a)(2) of RULLCA to specifically allow a foreign limited liability company to use its own name "with the addition of its jurisdiction of formation." Such a name is already allowed as an acceptable "fictitious name" under the DFI' current procedures. The language was not included in the proposed bill only to avoid any negative implication that such "jurisdiction of formation" names were not permissible as fictitious names under the Wisconsin Statutes relating to corporations and other types of business entities.

The language of proposed section 183.0907, dealing with deemed withdrawal of a foreign limited liability company's registration upon its conversion or merger to or into "a domestic limited liability company or . . . [other] entity whose formation requires the delivery of a record to the department," has been adjusted to make clear that such withdrawal shall not be deemed to have occurred when such registration is transferred to such company or entity as allowed under proposed section 183.0909.

Proposed sections 183.0907 and 183.0908 (dealing with withdrawal of a foreign limited liability company's registration upon certain entity structure transactions) provide that such withdrawal is appropriate, not only in conversion transactions, but also with respect to mergers. To the extent that such transactions are allowed under RULLCA, this adjustment should not cause any change in result. This change is also more important under the proposed bill, because, as explained in the comments to Subchapter X, Wisconsin allows a broader array of cross-species transactions.

Proposed section 183.0908 reflects some variations from the corresponding RULLCA section 908 that are intended to simplify the procedural administration of these provisions by the DFI. First, proposed section 183.0908(1)(a) requires the filing of a statement of withdrawal for all conversion and merger transactions unless formation of the converted or surviving entity "does not require the delivery of a record for filing by the department" in Wisconsin, whereas section 908(a) of RULLCA exempts all such transactions whenever such "formation does not require the public filing of a record" anywhere. For example, both RULLCA and the proposed bill would require the filing of a statement of withdrawal in the event of the conversion to an ordinary (i.e., non-limited liability) partnership, whose formation does not require filing with any state authorities, but the proposed bill would also require the filing of a statement of withdrawal in Wisconsin for a conversion to a foreign state corporation, whose formation would require a filing with such foreign state, but not with the DFI in Wisconsin. Second, rather than having a completely separate statement of withdrawal procedure for conversions and mergers, proposed

section 183.0908(1)(a) simply requires a regular statement of withdrawal under proposed section 183.0911. Third, proposed section 183.0908(2), regarding the service of process, as well as proposed section 183.0911(2) to which it refers, corrects and changes cross-references to proposed section 183.0119.

Proposed sections 183.09101, 183.09102 and 183.109103, dealing with revocation of a foreign limited liability company's registration and possible appeal, are based on current sections 180.1530, 180.1531 and 180.1532 of the Wisconsin Statutes to conform these procedures with the corresponding DFI procedures for corporations. Proposed sections 183.09101, 183.09102, and 183.09103 supplant section 910 of RULLCA.

Similarly, proposed section 183.0911 (dealing with the withdrawal of registration by a foreign limited liability company) is based primarily on corresponding current section 180.1520 of the Wisconsin Statutes relating to corporations. However, the RULLCA concept of requiring a foreign limited liability company to maintain an address to which service of process can be made, even if the foreign limited liability company no longer has a principal office, was preserved.

Subchapter X
Merger, Interest Exchange, Conversion, and Domestication

General Comments

The biggest difference substantive difference between RULLCA and WLLCA is the area of "cross-species" merger and conversion. The provisions of RULLCA would permit the merger or conversion of a limited liability company from or into a variety of trusts and unincorporated entities, including general partnerships. This additional flexibility is a useful innovation. However, inasmuch as it has the potential to move the members of a limited liability entity into an "un-limited" liability environment, additional revisions to the approval process are warranted. Therefore, Subchapter X of the proposed bill is designed to both update the limited liability company statutes to account for the potential migration of a limited liability company into a partnership form, as RULLC does, while at the same time integrating these new provisions with the corresponding provisions of the other four Chapters and minimizing any unnecessary disruptions in existing law or practice.

Like Article 10 of RULLCA, Subchapter X of the proposed bill applies to both same-type and cross-species mergers and interest exchanges and authorizes conversions and domestications in which at least one pre-transaction or post-transaction entity is a Wisconsin limited liability company. If an entity (any person except an individual) other than a Wisconsin limited liability company is also involved in the transaction, the governing law applicable to the other entity must not prohibit the transaction, though in some cases it need not explicitly authorize the transaction.

Existing Wisconsin statutes that authorize cross-species mergers, interest exchanges, and conversions for particular business entities limit the constituents to corporations, nonstock corporations, limited liability companies, and limited partnerships. Both RULLCA and proposed Subchapter X are broader, including partnerships, most business and statutory trusts and other legal persons. Section 183.0102(4p) of the proposed bill is broader than the RULCLA provision.

It defines an "entity" for this and other purposes under the proposed bill as any person other than an individual, and proposed section 183.0102(15) defines "person" quite broadly to include (among other things) any estate, trust, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity. The Committee believed it was appropriate for this enabling statute to be broadly permissive with respect to merger, interest exchange, conversion, and domestication transactions. Moreover, all transactions involving such changes in entity structure may have tax or other significant consequences, of which owners and practitioners need to be aware. However, it was thought best not to completely prohibit all such transactions with certain types of entities when they may be entirely appropriate in some situations.

As explained in more detail in the comments relating to proposed sections 183.1051 to 183.1055, the proposed bill defines "domestication" transactions much differently than in RULLCA. RULLCA uses the term to refer only to a change of domicile to or from Wisconsin by a limited liability company, a transaction that would be treated as a "conversion" under Wisconsin's current merger and conversion provisions. Instead, the proposed bill defines "domestication" as a transaction whereby an entity can be simultaneously governed both by Chapter 183 and by the law applicable to a non-United States entity. In this regard, the proposed bill is based upon (and generally similar to) the domestication provisions of the Delaware General Corporation Law.

Proposed section 183.1061 contains special protections for minority members in connection with a merger, interest exchange, conversion, and domestication transactions, which cannot be impaired in a operating agreement. This provision is in lieu of section 1006 of RULLCA, which expressly authorizes (but does not require) contractual appraisal rights in connection with partnership mergers, interest exchanges, conversions and domestications, and is intended for consideration where the operating agreement changes the default rule that would otherwise require the consent or affirmative vote of all of the members for these transactions. For more explanation, *see* the comments relating to proposed sections 183.0105(3)(n) and 183.1061.

General Provisions

Like its counterpart under RULLCA, proposed section 183.1001 contains additional definitions applicable specifically to Subchapter X. However, it also adds the following definitions:

1. Proposed section 183.1001(2m) defines a "constituent entity," a term which is not used in RULLCA.
2. Proposed sections 183.1001(8) and (9) define a "domesticated entity" and a "domesticating entity," respectively, which are in lieu of the terms "domesticated limited liability company" and "domesticating limited liability company" under RULLCA. As explained in the comments for proposed sections 183.1051 to 183.1055 with respect to "domestications," these definitional changes are intended to accommodate a broader scope for cross-species transactions under the proposed bill.
3. Similarly, proposed section 183.1001(22m) defines a "non-United States entity," a term which is also used for "domestication" transactions, as defined under the proposed bill.

4. Proposed section 183.1001(23m) defines "organizational documents," a term which is not used in RULLCA but replaces and corresponds generally to the terms "organic rules," "private organic rules," and "public organic record" used in RULLCA. Just as in the definitions for these corresponding RULLCA terms, the definition in the proposed bill confirms that an entity's "organizational documents" need not be in a record (i.e., in writing) if that is permitted under the entity's governing law.

The proposed bill also deletes or relocates certain other definitions that are used in RULLCA, including the following:

1. The term "distributional interest" is not used in proposed Subchapter X.
2. The definition of the term "domestic" is moved to proposed section 183.0102(4c).
3. The definition of the term "entity" is moved to proposed section 183.0102(4p) and, as noted above, is given a broader meaning than its RULLCA counterpart.
4. The term "filing entity" is not used in proposed Subchapter X.
5. The definition of the term "foreign" is moved to proposed section 183.0102(4t).
6. The terms "governance interest" and "governor" are not used in proposed Subchapter X.
7. The term "organic law" is generally replaced by the term "governing law" defined in proposed section 183.0102(5m).
8. The terms "organic rules," "private organic rules," "protected agreement," "public organic record," and "registered foreign entity," are not used in proposed Subchapter X, but, as noted above, proposed Subchapter X uses the term "organizational documents" in a way that corresponds generally to the terms "organic rules," "private organic rules," and "public organic record" used in RULLCA.

Finally, some of the terms that are used both in this Subchapter and in RULLCA are defined differently.

1. As noted above and as explained in the comments for proposed sections 183.1051 to 183.1055, a "domestication" under proposed Subchapter X is significantly different from a "domestication" as defined under RULLCA. Under RULLCA, a domestication refers to a transaction whereby a limited liability company changes its governing law to that of another state, a type of transaction which is already defined as a "conversion" under current Wisconsin law. However, as explained in the comments noted above, a domestication under proposed Subchapter X is a transaction causing an entity to be simultaneously governed both by Chapter 183 and by the law applicable to a non-United States entity (whether or not of the same type). The definitions of the terms "domesticated entity" and "domesticating entity" in proposed sections 183.1001(8) and (9) have been adjusted accordingly.
2. As noted above, the definition of "entity" in proposed section 183.0102(4p) is broader under the proposed bill (including proposed Subchapter X) than under RULLCA.
3. The definition of an "interest" under proposed section 183.1001(16) is similar to the definition of the corresponding term under the corresponding section of RULLCA. Although both sections contain a catchall provision for other types of interests in an "unincorporated entity," the scope of the term "interest" is unavoidably broader under

proposed Subchapter X, given the broader definition of the term "entity" in section 183.0102(4p) noted above.

Proposed section 183.1002 is based upon section 1002 of RULCCA. RULLCA section 1102(b) is intended to prevent any transaction under RULLCA from being subjected to or relieved from any "statutory law of this state relating to a change in control, takeover, business combination, control-share acquisition, or similar transaction involving a domestic merging, acquired, converting, or domesticating business corporation," but it includes express exceptions to allow such transactions to "create or impair a right, duty, or obligation" under such statutory law if "the transaction satisfies any requirements of the law" (when the corporation does not survive the transaction) or "the approval of the plan is by a vote of the shareholders or directors which would be sufficient to create or impair the right, duty, or obligation directly under the law" (when the corporation survives the transaction). The Wisconsin business corporation law does, for example, include takeover, business combination, and control share voting provisions (*see* sections 180.1130 to 180.1134, 180.1140 to 180.1144 and 180.1150 of the Wisconsin Statutes). Also, Wisconsin law, as noted above, already authorizes cross-species mergers, share exchanges and conversions of corporations with other business entities, but does not include any provision specifically preventing such cross-species provisions from somehow impairing the application of the takeover, business combination and control share voting provisions.

In light of the above, proposed section 183.1002(2) contains several variations from the corresponding RULLCA language in order to clarify its application under current Wisconsin law. First, instead of only referring to laws relating to change in control, takeover, business combination, control-share acquisition, or similar transactions involving a "business corporation," it specifically applies this general "no impact" rule to such laws relating to any "entity." Second, proposed section 183.1002(2) does not include the express exceptions noted above. The Committee thought that those exceptions were unnecessary and potentially confusing, and wanted to avoid any implication that they were somehow necessary in order to avoid unintentionally restricting the application of the corporate takeover provisions described above or any other comparable statutes under current Wisconsin law. Third, proposed section 183.1002(2) does not refer to a "domesticating business corporation," because such provisions should not apply to domestications, as defined in the proposed bill. See comments relating to proposed sections 183.1051 to 183.1055. In sum, proposed section 183.1002(2), the same as section 1102(b) of RULLCA, is intended merely to confirm that a transaction under proposed Subchapter X may not create or impair a right, duty or obligation under other Wisconsin laws relating to a change in control, takeover, business combination, control-share acquisition or similar transaction.

Proposed section 183.1003 does not include any provision corresponding to section 1103(a) of RULLCA. RULLCA section 1003(a) provides that any domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer in order to be a party to a merger must also give or obtain such notice or approval in order to be a party to an interest exchange, conversion or domestication. Proposed section 183.1003 intentionally omits that provision. Each of the four types of transactions authorized by proposed Subchapter X differs from the other three, and the Committee concluded it would be inappropriate to assume that such merger notice or approval requirements should automatically be the same for all four different types of transactions. The Committee also believed such an

expanded application of regulatory notification and approval requirements could easily be overlooked if it is located in these general transactional provisions. If a specially regulated limited liability company (or other entity) is to be required to give a particular notice or obtain a particular approval with respect to some or all interest exchanges, conversions, or domestications, an appropriate statute, regulation or order specifically applicable to a regulated entity should expressly delineate that requirement, just as may already be done for mergers.

RULLCA section 1003(b) appears to create a new statutory requirement with respect to transactions affecting property held for a charitable purpose. The Committee concluded that a new requirement was unnecessary. Proposed section 183.1003 merely notes that an entity that plans to be engaged in a transaction pursuant to proposed Subchapter X may apply to the circuit court for a determination of the transaction's compliance with *cy-près* or other law dealing with the non-diversion of charitable assets. However, there may be tax consequences. See the comments to proposed section 183.1045.

Proposed section 183.1005 explicitly provides that "[a] plan may refer to facts ascertainable outside the plan if the manner in which the facts will operate upon the plan is specified in the plan." This is based verbatim upon corresponding section 1005 of RULLCA. This should enable terms of a filed plan of merger, interest exchange, conversion, or domestication to simply refer to a corresponding agreement relating to the transaction which is not made a matter of public record.

As noted in the general comments above, proposed Subchapter X does not include any provision comparable to section 1006 of RULLCA (expressly authorizing contractual appraisal rights). Nothing in this Subchapter should be construed to prohibit contractual provisions granting appraisal rights to partners or other holders of interests in connection with transactions authorized by the Subchapter. However, since the proposed bill does not prohibit operating agreement provisions creating appraisal rights, it was thought that such an express authorization was unnecessary, and the Committee wanted to avoid any unintended implication that this express authorization might imply that other types of operating agreement provisions designed to protect members from oppression in other ways might somehow not be allowed because not similarly specifically authorized.

The proposed bill also does not contain any provision corresponding to section 1007 of RULLCA, which is a placeholder intended to itemize exceptions related to specially regulated entities (excluding specified entities from relying on the Subchapter or prohibiting transactions governed by more specific statutes). Just as with notice and approval requirements discussed above in connection with proposed section 183.1003, such restrictions may and should be included in appropriate statutes, regulations, or orders specifically applicable to regulated entities. No implication one way or the other is intended by the failure to also list any restrictions in the proposed bill.

Finally, it should be noted that there are many instances where proposed Subchapter X refers to a constituent entity's governing law. Such governing law presumably includes requirements under provisions of the entity's organizational documents which are valid under its governing law.

Merger

Although the provisions in proposed Subchapter X for mergers involving general partnerships are based on and intended to be broadly comparable to the corresponding RULLCA provisions, the proposed bill used the current Wisconsin Statutes for corporate mergers as a key reference for the authority, plan, approval, and effect provisions for mergers involving partnerships, as well as for the corresponding provisions for interest exchanges, conversions, and domestications authorized by the Subchapter. Although, as noted in the general comments above, proposed Subchapter X relating to entity structure transactions uses somewhat differing defined terms, and some of the specific verbiage relating to mergers vary from the corresponding provisions of RULLCA in order to maximize consistency with the corresponding provisions of Chapter 180 of the Wisconsin statutes relating to corporations and the current cross-species provisions in Wisconsin Chapters 178, 179, 180, and 181, the provisions of the proposed bill are generally still substantively consistent with those of RULLCA, though there are some exceptions as noted below.

Proposed section 183.1021, authorizing mergers involving domestic limited liability companies, is based on section 1021 of RULLCA. The proposed provision states that the transaction must comply with both the Chapter 183 statutory provisions regarding mergers by domestic limited liability companies and the plan of merger (required by proposed section 183.1022). A merger involving a domestic limited liability company can be accomplished if it is "permitted" under the governing law of each constituent entity and each constituent entity approves the plan of merger in the manner required by its governing law. The use of the term "permitted" seems somewhat more permissive than the corresponding term "authorized" used in section 1021(b) of RULLCA. However, "permitted" is the term used in corresponding section 180.1101 of the Wisconsin corporate statutes, and the Committee thought it more important to conform to that terminology, which has been in effect for corporations in Wisconsin and other states for some time. However, certain things should be clear, even under this more permissive standard.

Proposed section 183.1022 describes the requirements for a plan of merger and is based on RULLCA section 1022. Note that the plan of merger must be in a record and that the required contents of a plan of merger cannot be varied by the operating agreement (*see* proposed section 183.0105(3)(n)). Section 183.1023 addresses both the requirements to approve a merger that includes a domestic limited liability company as a constituent entity and also the provisions for amendment or abandonment of a merger after it has been approved but before it becomes effective, thus addressing the basic concepts of both sections 1023 and 1024 of RULLCA.

As with RULLCA, the default rule requires the unanimous vote or consent of all of the members for a merger of any domestic limited liability company. This requirement can be changed only by a provision contained in a written operating agreement that has been explicitly and unanimously agreed (*see* proposed section 183.1061(2)), but note that the plan of merger itself may specify the manner and the vote or consent required to amend or abandon the plan of merger. As with RULLCA, since the plan of merger can create or amend the organizational documents of the surviving entity (*see* proposed section 183.1022(1)(d) and (e)), if a plan of merger can be approved or amended with less-than-unanimous approval or consent, the

operating agreement of the surviving entity can also be amended by the same less-than-unanimous approval or consent.

Unlike under RULLCA, the approval itself is not required to be in a record even for a plan of merger in which the members of a constituent domestic limited liability company will have interest holder liability for debts, obligations, and other liabilities that arise after the merger, but note that (also unlike under RULLCA) proposed section 183.1061 prohibits any merger, interest exchange, conversion, or domestication that will materially increase the current or potential obligations of a member, unless the member consents.

Proposed section 183.1024 addresses the public filings required for a merger that includes a domestic limited liability company and is based on section 1025 of RULLCA. As is suggested in the comments to RULLCA, if a foreign constituent entity that is registered to do business in Wisconsin has adopted a fictitious name (under proposed section 183.0906 or similar statutes for other types of foreign entities registered to do business in Wisconsin), the name of the foreign entity set forth in the articles of merger should be the fictitious name under which it has registered to do business in Wisconsin so that the DFI can associate the articles of merger with the registration to do business. The Committee understands that Wisconsin corporations often list both names, and limited liability companies may wish to do that also.

Approval of a constituent entity in accordance with its governing law necessarily includes approval in accordance with any valid requirements of its organizational documents. As with mergers under Wisconsin's current corporation law (but unlike RULLCA section 1025), proposed section 183.1024 requires that the articles of merger state that the plan of merger is on file at the principal office of the surviving entity and that a copy of it will be provided upon request to any interest holder of a constituent entity. A merger takes effect at the effective date and time of the articles of merger (*see* proposed section 183.0207) without regard to the governing law of the surviving entity.

Proposed section 183.1025 addresses the effect of a merger that includes a domestic limited liability company. It is generally based on section 1026 of RULLCA. Proposed section 183.1025(1)(b) provides, for example, that, when a merger becomes effective, "[t]he title to all property owned by each constituent entity is vested in the surviving entity without transfer, reversion, or impairment." However, it still may be appropriate to update the public records for real estate, vehicles and other titled property.

The merger effects specified in proposed section 183.1025(am) are similar to RULLCA section 1126(c) and (d) with respect to interest holder liability and associated contribution or other rights before and after the merger. The Wisconsin statutory provisions differ from RULLCA in that a member in a merging limited liability company can be made subject to additional liabilities without a separate written consent of that member, but proposed section 183.1061 (which has no direct counterpart under RULLCA) prohibits any merger, interest exchange, conversion, or domestication that will materially increase the current or potential obligations of a member unless the member consents thereto.

Proposed section 183.1025(1)(am)4., similar to corresponding section 180.1106(am)3. of Wisconsin corporation law, provides that "[t]his paragraph does not affect liability under any

taxation laws." This seems implicit under RULLCA also. See *also* comments to proposed section 183.1045 relating to tax consequences of changes in type of entity.

Proposed section 183.1025(1)(e) provides that "organizational documents" of the surviving entity may be amended or created as part of the merger process. Under proposed section 183.1001(23m), the term "organizational documents" includes the articles and bylaws of a corporation, the partnership agreement of a partnership, and the operating agreement of a limited liability company. However, it would not include, for example, a shareholder agreement among the shareholders of a corporation.

Proposed section 183.1025(1)(f) provides that, just as with corporate mergers, "[t]he interests of each constituent entity that are to be converted into interests, securities, or obligations of the surviving entity, rights to acquire such interests or securities, money, other property, or any combination of the foregoing, *are converted* as provided in the plan of merger" (emphasis added). Thus, the conversion of ownership interests of a merged entity into ownership interests in the surviving entity would appear to be automatic upon the merger, i.e., even in the absence of an actual exchange of certificates, whereas other obligations, such as the payment of cash, may need to be affirmatively enforced. There are other issues that arise by virtue of the potential "cross-species" nature of mergers allowed under both RULLCA and the proposed bill. For example, how would a "transferee" of an interest in a limited liability company be treated if it is merged into a corporation? RULLCA and the proposed bill carefully distinguish the rights and obligations of "transferees" *vis-a-vis* "members" in a limited liability company, but there is no corresponding distinction for corporations. In the interests of uniformity, no attempt was made in the proposed bill to address all such "cross-species" transactions issues, it being thought that such issues were better addressed and resolved in the common law of the adopting states.

Proposed section 183.1025(1)(g) states the non-controversial proposition that "all of the rights, privileges, immunities, powers and purposes of each constituent entity vest in the surviving entity" upon the merger. However, it should be noted, that this means, for example, that the attorney-client privilege attaching to prior communications between the management and/or shareholders of any merged entities shall be able to be asserted, or waived, by the management of the surviving entity after the merger, in the absence of an agreement to the contrary.

Proposed section 183.1025(2) makes the DFI the agent of any foreign surviving entity with respect to enforcement of obligations to dissenting shareholders or other interest holders of domestic constituent entities under specified provisions of Wisconsin law applicable to domestic partnerships, limited partnerships, and corporations or corresponding provisions of the entity's other governing law.

Interest Exchange

Proposed section 183.1031, authorizing interest exchanges involving domestic limited liability companies, is based on RULLCA section 1031. It allows the parties to accomplish in a single step a structural outcome that could otherwise be accomplished by forming a new subsidiary and then engaging in a triangular merger.

Like section 1031(a) of RULLCA, proposed section 183.1031(1) provides that an interest exchange must include all of the outstanding interests of one or more classes or series of interests of the acquired entity, but there may be outstanding interests of another class or series that are not being acquired. This means that such "exchange" transactions can occur even when there is no complete "acquisition" of the "acquired entity," just as they may under corresponding section 180.1102 of the Wisconsin corporate statutes. Also, neither RULLCA nor the proposed statute includes any definition of the terms "class" and "series," but presumably those terms are used in the same sense as under statutory and case law applicable to corporations, but they may also include, for example, all of the outstanding interests of a "series LLC" under the limited liability company statutes of some states.

Proposed section 183.1031 does not include a provision corresponding to RULLCA section 1031(c) (a transition rule applicable if certain agreements refer to a merger but not to an interest exchange). Instead, as explained above, proposed section 183.0110(2)(d)1. contains a broader transitional rule intended to protect all creditors with respect to pre-existing obligations from adverse consequences brought about solely from enactment of the proposed bill. Entities that intend to condition or restrict interest exchanges should create or modify appropriate documents to do so expressly.

Proposed section 183.1032 describes the requirements for a plan of interest exchange and is based on RULLCA section 1032. The principal difference is that proposed section 183.1032 requires the plan of interest exchange to include specified information for the acquiring entity as well as for the acquired entity. The requirements of this section are mandatory (*see* proposed section 183.0105(3)(n)), although the plan may also include any other provisions relating to the interest exchange unless prohibited by law.

Proposed section 183.1033 addresses both the requirements to approve an interest exchange that includes a domestic limited liability company as a constituent entity and also the provisions for amendment or abandonment of an interest exchange after it has been approved, but before it becomes effective, thus addressing the basic concepts covered by RULLCA sections 1033 and 1034. As with RULLCA, the default rule requires unanimity of the members of any domestic limited liability company, except as that may be varied by a written provision in the operating agreement that does not impair the rights of a member under proposed section 183.1061 (*see* proposed section 183.0105(3)(o)). The RULLCA provisions apply only if a domestic limited liability company is the acquired entity while proposed section 183.1033 applies whether the domestic limited liability company is the acquired entity or the acquiring entity. In this respect, proposed section 183.1033 parallels the corresponding provisions for merger, conversion, and domestication transactions. See the comments to proposed section 183.1023 regarding approval requirements, revisions to organizational documents of the constituent entities, interest holder liability, and the effects of proposed section 183.1061, all of which should be generally applicable to interest exchanges also.

Proposed section 183.1034 describes the requirement to file articles of interest exchange for a plan of interest exchange that includes a domestic limited liability company. It is based on RULLCA section 1035 (which applies only when a domestic limited liability company is the acquired entity), but proposed section 183.1034 applies whether a domestic limited liability company is the acquired entity or the acquiring entity. Proposed section 183.1034 also parallels

similar provisions in Subchapter X relating to merger, conversion, and domestication entity structure transactions. See the comments to proposed section 183.1024 regarding references in the public filing to fictitious names, the requirement that the articles state that the plan is on file at the principal office of the surviving entity and that a copy of it will be provided upon request to an interest holder of a constituent entity, and the effective date and time of the transaction, all of which should also be generally applicable to interest exchanges.

Proposed section 183.1035 describes the effect of an interest exchange that includes a domestic limited liability company. It is based on RULLCA section 1036 (which applies only when a domestic limited liability company is the acquired entity), but proposed section 183.1035 applies whether a domestic limited liability company is the acquired entity or the acquiring entity. Proposed section 183.1035 also parallels the corresponding provisions in Subchapter X relating to merger, conversion, and domestication transactions. As the comments to RULLCA section 1036 emphasize, an interest exchange is unlike a merger in that it does not directly affect the separate existence of the parties, vest in the acquiring entity any assets of the acquired entity, or render the acquiring entity liable for any of the existing liabilities of the acquired entity. Interest holder liability with respect to debts, obligations, and other liabilities of either the acquiring or acquired entity is addressed in proposed section 183.1035(3), which is substantively similar to sections 1036(c) and (d) of RULLCA. As is the case with respect to share exchanges under the Wisconsin corporation law, proposed section 183.1035(4) makes the DFI the agent for service of process against any foreign acquiring entity in specified matters and requires any foreign acquiring entity to pay the former owners of any acquired domestic limited liability company any amounts required under specified statutory provisions or other governing law. There is no counterpart under RULLCA to proposed section 183.1035(4).

Conversion

Proposed section 183.1041, authorizing conversions involving domestic limited liability company, is based on RULLCA section 1041. This provision enables a domestic limited liability company to change into another type of domestic entity or into a foreign entity, as well as enabling another type of domestic entity or a foreign entity to change into a domestic limited liability company that will satisfy the definition of a limited liability company immediately after the conversion. This definition of "conversion" is based upon the current Wisconsin law cross-species transaction provisions, and differs from that contained in RULLCA in one respect. Transactions whereby a domestic limited liability company "converts" to a foreign limited liability company and vice versa are called "domestications" and treated separately as such under RULLCA. However, as explained in more detail below, the proposed bill defines "domestications" completely differently as a "dual domicile" status, based upon the corresponding provisions under Delaware law.

Under both RULLCA and the proposed bill, a conversion must be permitted under the governing law that applies to the converting entity, as well as the governing law that is to apply to the converted entity. Proposed section 183.1041 does not include a provision corresponding to RULLCA section 1141(c) (a transition rule applicable if certain agreements refer to a merger but not to a conversion). See the comments to proposed section 183.1031 regarding the non-adoption of a provision corresponding to section 1031(c) of RULLCA relating to interest exchanges, which are also relevant to non-adoption of the corresponding RULLCA section

1041(c) transition rule relating to conversions. In other respects also, proposed section 183.1041 parallels the corresponding provisions relating to mergers, interest exchange, and domestication in the proposed bill.

Proposed section 183.1042 describes the requirements for a plan of conversion and is based on RULLCA section 1042. The principal difference is, as explained above, that the RULLCA section 1042 conversion rules apply only when a domestic limited liability company is converting to a different type of entity or vice versa, and not when a limited liability company is merely changing its state of domicile (which is treated as a conversion under current Wisconsin law).

The plan of conversion must include the organizational documents of the converted entity that are to be in a record immediately after the conversion becomes effective. Note that if a plan of conversion can be approved or amended with less-than-unanimous approval or consent of the owners of the converting entity (proposed section 183.0105(3)(m) allows a written operating agreement to provide for less-than-unanimous approval as long as it does not impair the rights of a member under proposed section 183.1061), the organizational documents of the converted entity can be established by the same less-than-unanimous approval or consent. The requirements of this section are mandatory (*see* proposed section 183.0105(3)(n)), although the plan may also include any other provision relating to the conversion that is not prohibited by law.

Proposed section 183.1043 addresses both the requirements to approve a conversion in which a domestic limited liability company is the converting or converted entity and also the requirements for amendment or abandonment of a conversion after it has been approved but before it becomes effective. Thus, proposed section 183.1043 covers the same basic concepts addressed in RULLCA sections 1043 and 1044, although the RULLCA provisions apply only if a domestic limited liability company is the converting entity. As with RULLCA, the Wisconsin default rule requires unanimous approval of all of the members of any converting domestic limited liability company. However, as noted above, this unanimity requirement may be varied by a written provision in the operating agreement that does not impair the rights of a member under proposed section 183.1061 (*see* proposed section 183.0105(3)(m)). In other respects also, proposed section 183.1043 parallels the corresponding provisions in the proposed bill relating to mergers, interest exchanges and domestications. See the comments to proposed section 183.1023 regarding interest holder liability and the effects of section 183.1061, which are also relevant for conversions.

Proposed section 183.1044 describes the requirement to file articles of conversion for a plan of conversion in which a domestic limited liability company is the converting or converted entity. It is based on RULLCA section 1045. Proposed section 183.1044 also parallels similar provisions in the proposed bill relating to mergers, interest exchanges and domestications. See the comments to proposed section 183.1024, which is analogous, regarding the use of fictitious names in the public filing, the requirement that the articles state that the plan is on file at the principal office of the converted entity and that a copy of it will be provided upon request to any person that was an interest holder of the converting entity, and the effective date and time of the transaction.

Proposed section 183.1045 describes the effect of a conversion in which a domestic limited liability company is the converting or converted entity. It is based on RULLCA section 1046. Section 183.1045 also parallels the corresponding provisions in the proposed bill relating to mergers, interest exchanges, and domestications. See the comments related to proposed section 183.1025 (relating to mergers). Just as with mergers, conversions can have very significant tax consequences. For example, the conversion of a corporation into a limited liability company taxed as a partnership would normally be a fully taxable transaction at both the corporate and shareholder level. See I.R.C. §§ 311(b), 336(a). It may also trigger taxability to the members of any income earned by the surviving tax partnership entity. See I.R.C. § 721. Similarly, the conversion of a charitable chapter 181 nonstock corporation into a for-profit limited liability company can have different, but also very serious, tax consequences. See, *e.g., Caracci v. Comm'r of Internal Revenue*, 456 F.3d 444, No. 02-60912 (5th Cir. July 11, 2006). Again, just as with mergers, no attempt is made in chapter 183 to address the tax consequences of the entity structure transactions covered by Subchapter X. In fact, consistent with current Wisconsin law for other entities, proposed section 183.1045(1)(am)4. specifically provides that the paragraph defining the corporate law impact of a conversion "does not affect liability under any taxation laws." Business owners and practitioners are obviously well advised to engage competent professional tax assistance.

As the comments to RULLCA section 1046 emphasize, a conversion is not a conveyance, transfer or assignment, does not require the entity to wind up its affairs and does not constitute or cause dissolution of the entity. The converted entity is the same entity as the converting entity. Interest holder liability with respect to debts, obligations, and other liabilities of the entity under the governing law applicable to the converting or converted entity is addressed in proposed section 183.1045(1)(am), which is similar to RULLCA sections 1046(c) and (d). Proposed section 183.1045 (2)(a), which is based on section 1046(e) of RULLCA, makes the DFI the agent for service of process against any foreign converted entity in specified matters. Proposed section 183.1045(2)(b) provides that any foreign converted entity must pay any amount to which dissenting shareholders or other interest holders of a domestic converting entity are entitled.

Domestication

Proposed sections 183.1051 to 183.1055 authorize a "domestication" whereby a Wisconsin limited liability company can be simultaneously governed both by Chapter 183 and by the law applicable to a non-United States entity (whether or not it is the same type of entity under its non-United States governing law), provided the domesticated entity meets the definition of a "limited liability company" under this chapter and the transaction is not prohibited by the governing law applicable to the non-United States entity. As noted in the general comments to proposed Subchapter X, these provisions are based on (and generally similar to) the domestication provisions (sections 388 to 390) of the Delaware General Corporation Law and are an expansion of existing Wisconsin business entity law. As also noted in those comments, this "domestication" concept has no counterpart under RULLCA section 1051, which uses the term "domestication" to refer to a change of a domestic limited liability company into a foreign limited liability company or vice versa.

The actual language of proposed section 183.1051 itself parallels the corresponding provisions relating to mergers, interest exchanges, and conversions. Therefore, the comments

relative to those provisions are also relevant to domestications. In addition, it is important to note that, after domestication under these provisions, the "governing law" of the domesticated entity includes both Wisconsin law and the law of the jurisdiction from which or to which the entity is domesticated.

Proposed section 183.1052 describes the requirements for a plan of domestication. The plan must include "[t]he organizational documents of the domesticated entity that are to be in a record immediately after the domestication becomes effective." Note that if a plan of domestication can be approved or amended with less-than-unanimous approval or consent of the domesticating entity (proposed section 183.0105(3)(m) authorizes less-than-unanimous approval pursuant to the provision of a written operating agreement that does not impair the rights of a member under proposed section 183.1061), this means that the organizational documents of the domesticated entity can be established by the same less-than-unanimous approval or consent. The requirements of proposed section 183.1052 are mandatory (*see* proposed section 183.0105(3)(n)), although the "plan of domestication may contain any other provision relating to the domestication not prohibited by law."

Proposed section 183.1053 addresses the requirements to approve a domestication by a domesticating Wisconsin limited liability company (whereas a plan of domestication by a non-United States domesticating entity must be approved pursuant to its governing law). Proposed section 183.1053 also provides procedures for amending or abandoning a plan of domestication after it has been approved but before it becomes effective. The Wisconsin default rule under proposed section 183.1053(1) requires unanimous approval of the members of any domesticating domestic limited liability company, although, as noted above, this unanimity requirement may be varied by a written provision in an operating agreement that does not impair the rights of a member under proposed section 183.1061 (*see* proposed section 183.0105(3)(m)). Proposed section 183.1053 parallels the corresponding proposed provisions relating to mergers, interest exchanges, and conversions. See the comments to proposed sections 183.1023 and 183.1061, which are also relevant to domestications.

Proposed section 183.1054 describes the requirement to file articles of domestication for a plan of domestication subject to Chapter 183. Proposed section 183.1054 also parallels similar provisions in Subchapter X relating to mergers, interest exchanges, and conversions. See the comments to proposed section 183.1024, which is analogous to proposed section 183.1054, regarding the use of fictitious names in the public filing, the requirement that the articles state "that the plan . . . is on file at the principal office of the domesticated entity" and that a copy of the plan is available upon request "to any person that was an interest holder in the domesticating entity," and the "effective date and time of the articles of domestication."

Restrictions on Approval

Proposed section 183.1061 prohibits a merger, interest exchange, conversion, or domestication of a Wisconsin limited liability company that would cause specified material adverse effects or impose disparate treatment on a member unless either (1) "[t]he member consents to the merger, interest exchange, conversion or domestication" or (2) "[t]he member has consented to the provision of the written operating agreement that provides for approval of a merger, conversion, or domestication with the consent of fewer than all the members." Proposed

section 183.1061(3) further clarifies that a member shall not be deemed to have given the requisite consent merely by consenting to a provision of an operating agreement that generally permits the operating agreement to be amended with the consent of fewer than all the members. Because of the specific nature of the agreement required, and the difficulties inherent in making such a fine distinction where the operating agreement is oral or implied, the Committee believes that it is appropriate to require such an agreement to be made in a written agreement, consistent with the revisions to other RULLCA provisions requiring "express" provisions in an operating agreement.

The specified material adverse effects under proposed section 183.1061(1) include a material increase in the member's "current or potential obligations . . . whether as a result of becoming subject to interest holder liability . . . becoming subject to affirmative or negative obligations under the organizational documents of the entity, becoming subject to tax on the income of the entity, or otherwise." As a consequence, becoming subject to fiduciary obligations as a general partner of a surviving partnership, or as a member in a member-managed limited liability company, could be sufficient to trigger this provision.

Respectfully submitted this 17th day of September 2021.

Limited Liability Company Committee
Business Law Section
State Bar of Wisconsin

Adam J. Tutaj, Co-Chair
Richard A. Latta, Co-Chair
Joseph W. Boucher
Nadelle Grossman
Leslie N. Van Buskirk

APPENDIX

Cross-Species/DFI Provisions Crosswalk

Subject	Chapter 178	Chapter 179	Chapter 180	Chapter 181	Chapter 183
Definition of Department of Financial Institutions.	**178.0102(3m)**	**179.0102(3m)**	**180.0103(6m)**	**181.0103(8)**	**183.0102(3m)**
Definition of domestic.	**178.0102(4c)**	**179.0102(4c)**	**180.0103(7d)**	**181.0103(10g)**	**183.0102(4c)**
Definition of foreign.	**178.0102(4t)**	**179.0102(4t)**	**180.0103(8r)**	**181.0103(12g)**	**183.0102(4t)**
Knowledge; notice.	**178.0103**	**179.0103**	**180.0141**	**181.0105**	**183.0103**
Operating documents.	**178.0105 178.0106; 178.0107**	**179.0105; 179.0106; 179.0107**	**180.0206**	**181.0206**	**183.0105; 183.0106 183.0107**
Permitted names.	**178.0902**	**179.0114**	**180.0401**	**181.0401**	**183.0112**
Reservation of name.	**178.0906**	**179.0115**	**180.0402**	**181.0402**	**183.0113**
Registration of name.	**178.0907**	**179.0116**	**180.0403**	**181.0403**	**183.0114**
Registered agent and registered office.	**178.0908**	**179.0117**	**180.0501**	**181.0501**	**183.0115**
Change of registered agent or registered office.	**178.0909**	**179.0118**	**180.0502**	**181.0502**	**183.0116**
Resignation of registered agent.	**178.0910**	**179.0119**	**180.0503**	**181.0503**	**183.0117**
Change of registered agent's name or address.	**178.0911**	**179.0120**	**180.0502(3)**	**181.0505**	**183.0118**
Filing and service fees.	**178.0120(1)-(2)**	**179.0124(1)-(2)**	**180.0122**	**181.0507(1)-(2)**	**183.0122(1)-(2)**
Evidentiary effect of copy of filed document.	**178.0120(3)**	**179.0124(3)**	**180.0127**	**181.0127**	**183.0122(3)**
Penalty for false document.	**178.0120(4)**	**179.0124(4)**	**180.0129**	**181.0129**	**183.0122(4)**
Annual report.	**178.0913**	**179.0212**	**180.1622**	**181.0214**	**183.0212**

Formation documents.	**178.0901**	**179.0201**	**180.0202**	**181.0202**	**183.0201(1)-(3)**
Amendment or cancellation.	**178.0901(6)**	**179.0202**	**180.1001-1009**	**181.1001-1007**	**183.0202**
Filing requirements.	**178.0113**	**179.0206**	**180.0120**	**181.0208**	**183.0206**
Signing of records filed with the department.	**178.0108; 178.0112**	**179.0203; 179.0204**	**180.0120(3)-(4)**	**181.0208(1)(d)**	**183.0203; 183.0204**
Forms.	**178.0113(5)**	**179.0206(5)**	**180.0121**	**181.0121**	**183.0206(5)**
Effective date and time.	**178.0114**	**179.0207**	**180.0123**	**181.0209**	**183.0207**
Duty of department to file; review of refusal to file; delivery of record by department.	**178.0117**	**179.0210**	**180.0125**	**181.0212**	**183.0210**
Certificate of status.	**178.0121**	**179.0211**	**180.0128**	**181.0213**	**183.0211**
Statement of authority.	**178.0303**	**179.04023**	**180.0202(2)-(4)**	**181.0202(2)-(4)**	**183.0302**
Statement of denial.	**178.0304**	**179.04025**	**180.0202(2)-(4)**	**181.0202(2)-(4)**	**183.0303**
Claims against dissolved entity.	**178.0807; 178.0808**	**179.0806; 179.0807**	**180.1406; 180.1407**	**181.1406; 181.1407**	**183.0704; 183.0705**
Grounds for administrative revocation or dissolution.	**178.09031**	**179.0811(1)**	**180.1420**	**181.1420**	**183.0708(1)**
Procedure for administrative revocation or dissolution.	**178.09032**	**179.0811(2)-(5)**	**180.1421**	**181.1421**	**183.0708(2)-(5)**
Reinstatement after administrative revocation or dissolution.	**178.0904**	**179.0812**	**180.1422**	**181.1422**	**183.0709**
Appeal from denial of reinstatement.	**178.0905**	**179.0813**	**180.1423**	**181.1423**	**183.0710**
Foreign entity registration.	**178.1002**	**179.1002**	**180.1501(1); 180.1502**	**181.1501(1); 181.1502**	**183.0902**

Filing registration statement as a foreign entity.	**178.1003**	**179.1003**	**180.1503**	**181.1503**	**183.0903**
Amending foreign entity registration statement.	**178.1004**	**179.1004**	**180.1504**	**181.1504**	**183.0904**
Foreign entity name.	**178.1006**	**179.1006**	**180.1506**	**181.1506**	**183.0906**
Registered agent and registered office of foreign entity.	**178.0908**	**179.0117**	**180.1507**	**181.1507**	**183.0115**
Change of registered agent or registered office of foreign entity.	**178.0909**	**179.0118**	**180.1508**	**181.1508**	**183.0116**
Resignation of registered agent of foreign entity.	**178.0910**	**179.0119**	**180.1509**	**181.1509**	**183.0117**
Withdrawal or transfer of foreign entity's registration.	**178.1007; 178.1008; 178.1009; 178.1011**	**179.1007; 179.1008; 179.1009; 179.1011**	**180.1520**	**181.1520**	**183.0907; 183.0908; 183.0909; 183.0911**
Grounds for administrative revocation of foreign entity's registration.	**178.10101**	**179.10101**	**180.1530**	**181.1530**	**183.09101**
Procedure for administrative revocation of foreign entity's registration.	**178.10102**	**179.10102**	**180.1531**	**181.1531**	**183.09102**
Reinstatement after administrative revocation of foreign entity's registration.	**178.10103(2)**	**179.10103(2)**	**180.1531(2)**	**181.1531(2)**	**183.09102(2)**

Appeal from denial of reinstatement of foreign entity's registration.	**178.10103**	**179.10103**	**180.1532**	**181.1532**	**183.09103**
Merger authorized.	**178.1121**	**179.1121**	**180.1101(1)**	**181.1101(1)**	**183.1021(1)**
Plan of merger.	**178.1122**	**179.1122**	**180.11012**	**181.1102**	**183.1022**
Amendment or abandonment of merger.	**178.1123(2), (3)**	**179.1123(2), (3)**	**180.11031(2), (3)**	**181.1103(2m), (3m)**	**183.1023(2), (3)**
Filings required for merger.	**178.1124(1)-(3)**	**179.1124(1)-(3)**	**180.1105(1)**	**181.11045(1)-(3)**	**183.1024(1)-(3)**
Effective date of merger.	**178.1124(4)**	**1179.1124(4)**	**180.1105(2)**	**181.11045(4)**	**183.1023(4)**
Effect of merger: Agent for service of process for claims from dissenters.	**178.1125(2)(a)**	**179.1125(2)(a)**	**180.1106(3)(a)**	**181.11055(2)(a)**	**183.1025(2) (a)**
Interest exchange authorized.	**178.1131**	**179.1131**	**180.1102(1), (1m)**	**181.1131**	**183.1031**
Plan of interest exchange.	**178.1132**	**179.1132**	**180.11021**	**181.1132**	**183.1032**
Amendment or abandonment of plan of interest exchange.	**178.1133(2), (3)**	**179.1133(2), (3)**	**180.11031(2), (3)**	**181.1133(2), (3)**	**183.1033(2), (3)**
Filings required for interest exchange.	**178.1134(1)-(2)**	**179.1134(1)-(2)**	**180.1105(1)**	**181.1134(1)-(2)**	**183.1034(1)-(2)**
Effective date of interest exchange.	**178.1134(3)**	**179.1134(3)**	**180.1105(2)**	**181.1134(3)**	**183.1034(3)**
Interest Exchange: Agent for service of process for claims from dissenters.	**178.1135(5)(a)**	**179.1135(5)(a)**	**180.1106(3)(a)**	**181.1135(4)(a)**	**183.1035(4)(a)**
Conversion authorized.	**178.1141**	**179.1141**	**180.1161(1)-(2)**	**181.1161(1m)-(2m)**	**183.1041**

Plan of conversion.	**178.1142**	**179.1142**	**180.1161(3)-(3m)**	**181.1162**	**183.1042**
Amendment or abandonment of plan of conversion.	**178.1143(2), (3)**	**179.1143(2), (3)**	**180.11031(2), (3)**	**181.1163(2), (3)**	**183.1043(2), (3)**
Filings required for conversion.	**178.1144(1)-(3)**	**179.1144(1)-(3)**	**180.1161(5)**	**181.1164(1)-(3)**	**183.1044(1)-(3)**
Effective date of conversion.	**178.1144(4)**	**179.1144(4)**	**180.1161(3)(e), (5)(cm)**	**181.1164(4)**	**183.1044(4)**
Conversion: Agent for service of process for claims from dissenters.	**178.1145(2)(a)**	**179.1145(2)(a)**	**180.1161 (8)**	**181.1165(2)(a)**	**183.1045(2)(a)**
Domestication authorized.	**178.1151**	**179.1151**	**180.1171**	**181.1171**	**183.1051**
Plan of domestication.	**178.1152**	**179.1152**	**180.1172**	**181.1172**	**183.1052**
Amendment or abandonment of plan of domestication.	**178.1153(2), (3)**	**179.1153(2), (3)**	**180.1173(2), (3)**	**181.1173(2), (3)**	**183.1053(2), (3)**
Filings required for domestication.	**178.1154(1)-(2)**	**179.1154(1)-(2)**	**180.1174(1)-(2)**	**181.1174(1)-(2)**	**183.1054(1)-(2)**
Effective date of domestication.	**178.1154(3)**	**179.1154(3)**	**180.1174(3)**	**181.1174(3)**	**183.1054(3)**
Restrictions on certain transactions.	**178.1161**	**179.1161**	**180.1301-1331**	**181.1180**	**183.1061**

WISCONSIN BUSINESS CORPORATION LAW
WISCONSIN NONSTOCK CORPORATION LAW

Report of the Corporation Committee
Business Law Section
State Bar of Wisconsin

PREFATORY NOTE

This is the Report of the Corporation Committee (the "Committee") of the Business Law Section of the State Bar of Wisconsin (the "SBW Business Law Section") regarding legislation prepared by the Wisconsin Legislative Reference Bureau as draft 2021 Senate Bill 566 and 2021 Assembly Bill 566 (collectively, the "proposed bill"). It is intended to facilitate adoption and application of the proposed bill.

The primary thrust of the proposed bill is to update Chapters 178, 179 and 183 of the Wisconsin Statutes to reflect (as more fully described below) the most recent Uniform Law Commission ("ULC") uniform laws pertaining to partnerships, limited partnerships and limited liability companies; to this end, the proposed bill would also amend Chapter 180 (entitled "Business Corporations") and Chapter 181 (entitled "Nonstock Corporations"), as more fully described in this report in order to, among other things, harmonize provisions relating to the procedures of the Wisconsin Department of Financial Institutions ("DFI") for all five types of entities allowed to merge and otherwise engage in so-called "cross-species" transactions under Wisconsin law (general partnerships, limited partnerships, business corporations, nonstock corporations and limited liability companies).

More specifically, the proposed bill would, as to Chapters 178, 179 and 183:

1. Amend and restate Chapter 179 of the Wisconsin Statutes, the current Wisconsin Uniform Limited Partnership Act, which is based on the Uniform Limited Partnership Act (1914) ("ULPA"), and enact the new Wisconsin Uniform Limited Partnership Law ("WULPL") based on the Revised Uniform Limited Partnership Act ("RULPA") approved and recommended (2001, last amended 2013) for enactment in all the states by the ULC, formerly known as the National Conference of Commissioners on Uniform State Laws or NCCUSL.

2. Make corresponding and related changes to Chapter 178 of the Wisconsin Statutes, the Wisconsin Uniform Partnership Law ("WUPL"), which was updated in 2015 Wisconsin Act 295 (the "WUPL Act") to reflect the Revised Uniform Partnership Act ("RUPA") approved and recommended (1997, last amended 2013) for enactment in all states by the ULC. Prior to the WUPL Act, Chapter 178 of the Wisconsin Statutes relating to general (as distinguished from limited partnerships) was based upon the Uniform Partnership Act (1914) ("UPA").

3. Amend and restate Chapter 183 of the Wisconsin Statutes (entitled "Limited Liability Companies") to reflect the Revised Uniform Limited Liability Company Act approved and recommended (2006, last amended 2013) for enactment in all states by the ULCT

The amendments to Chapter 178 and the amendment and restatement of Chapter 179 in the proposed bill are the subject of a separate Report of the Partnership Committee of the SBW Business Law Section (the "SBW Partnership Report"), and the restatement of Chapter 183 under the proposed bill is the subject of a separate Report of the Limited Liability Company Committee of the SBW Business Law Section (the "SBW LLC Report"). The SBW Partnership Report is the primary authority with respect to the proposed bill's amendments of Chapter 178 (general partnerships) and the amendments and restatement of Chapter 179 (limited partnerships), and the SBW LLC Report is the primary authority with respect to the proposed bill's restatement of Chapter 183 (limited liability companies). Both Reports will be referred to from time to time in this Report.

This Report focuses primarily on the provisions of the proposed bill relating to business corporations and nonstock corporations in Chapters 180 and 181 of the Wisconsin Statutes. Many of the provisions of the proposed bill, including those relating to DFI procedures and cross-species transactions, build upon the current Chapter 178 WUPL provisions relating to general partnerships that were enacted in the WUPL Act, which were the subject of a Report of this Committee dated January 8, 2016 (the "WUPL Report"). Accordingly, this Report is intended to be read in conjunction with the WUPL Report, and the two Reports collectively are intended to be the primary authority with respect to the restatements of both Chapter 178 (general partnerships) and Chapter 179 (limited partnerships), as well as the above-described amendments relating to DFI procedures and cross-species transactions contained in the WUPL Act and the proposed bill.

CHAPTERS 180 AND 181 AMENDMENTS: BUSINESS AND NONSTOCK CORPORATIONS

The first general area where harmonizing modifications have been made to Chapters 180 and 181 is, as stated above, procedural, with the focus primarily being to establish modern, harmonized provisions relating to the procedures of DFI for all five types of entities allowed to merge and otherwise engage in so-called "cross-species" transactions under Wisconsin law (general partnerships, limited partnerships, business corporations, nonstock corporations and limited liability companies. See the Appendix attached to the SBW Partnership Report (the "Appendix"), which contains a cross-reference chart listing and correlating common procedural and cross-species provisions for all five Chapters after enactment of the proposed bill.

Consistent with the goal of modernizing DFI's procedures, it should be noted that procedures under Chapters 178, 179, 180, 181 and 183, as updated in the proposed bill, would require registered agents for both domestic and foreign business and nonstock corporations to maintain email addresses for the receipt of notices from DFI.

The second area where harmonizing modifications have been made to Chapters 180 and 181 is with respect to provisions pertaining procedures for cross-species transactions. See also the Appendix and the WUPL Report, especially the comments relating to Subchapter XI of Chapter 178 of the Wisconsin Statutes, the Wisconsin Uniform Partnership Law, to the extent of comments therein which are applicable to corresponding modifications to Chapters 180 and 181.

Forum Selection for Internal Corporate Claims

The bill proposes, as to Chapter 180, to add new Section 180.0145, which would provide that the articles of incorporation or the bylaws of a Wisconsin corporation may require that any "internal corporate claims," such as derivative lawsuits, actions asserting breaches of fiduciary duty, and actions arising pursuant to any provision of the state's corporation law, shall be brought solely and exclusively in Wisconsin courts. This proposed addition is based on its counterpart under Delaware law, specifically 8 Del. Code §115. A parallel provision applicable to Wisconsin nonstock corporations is contained in the proposed bill at Section 181.0163.

Effective Date of Shareholder, Member and Director Consents

The bill proposes, as to Chapter 180, to add new subsections 180.0704(7) and 180.0821(4), which would provide that the consent of a shareholder or a director, respectively, in connection with action taken by shareholders or directors, respectively, of a Wisconsin corporation may, in giving such consent, provide that such consent will be effective at a future time or upon the happening of a future event. A person executing a consent may instead provide for future effectiveness through instructions to an agent, but evidence of that instruction must be provided to the corporation so that it will know when the consent is effective. Both sections also provide that any such consent providing for future effectiveness is revocable prior to effectiveness.

Inasmuch as both proposed subsections provide that a shareholder or director consent, as the case may be, include the date of signature in signing the consent, both subsections further provide that, when such consent is to be effective at a future time or upon the happening of a future event, such effective time shall serve as the date of signature.

Parallel provisions applicable to Wisconsin nonstock corporations under Chapter 181 are contained in the proposed bill at subsections 181.0704(5) and 181.0821(4).

Merger, Interest Exchange, Conversion, and Domestication

As stated above, the proposed bill's proposed changes to the procedures and requirements applicable to cross-species transactions (i.e., a merger, interest exchange and conversion) and its provisions pertaining to domestication are discussed in greater detail in the WUPL Report, the SBW Partnership Committee Report and the SBW LLC Report and reference is hereby made to those Reports. However, certain of these changes as they pertain to corporations in particular are highlighted below.

The proposed bill, as to Chapter 181, contains new subsections 181.11055(2)(b), 181.1135(4)(b) and 181.1165(2)(b), which are intended to make clear, in connection with cross-species transactions involving a Wisconsin nonstock corporation, that surviving entities must timely honor provisions which would provide protections for nonconsenting members (see discussion regarding proposed new Section 181.1180, below). These provisions would also add a requirement that articles of merger, interest exchange, conversion, and domestication specify whether Section 181.1180 regarding nonconsenting interest holders is applicable to the transaction for which such articles are being filed.

The proposed bill also creates, as to Chapter 181, new section 181.1180 of Chapter 181, which requires a nonstock corporation that engages in a merger, interest exchange, conversion, or domestication transaction to offer to purchase a member's interest in the corporation if the transaction would have specified material adverse effects on the member and that member does not consent to the transaction. New section 181.1180 contains provisions which (a) specify the timing of a written demand, the treatment of indebtedness owing to or by the corporation, required indemnification, and the procedure for when no agreement is reached regarding the price and terms for the purchase; (b) deal with court proceedings, including court discretion regarding the award of attorney fees and other expenses under certain circumstances; and (c) clarify that a member cannot give a consent for this purpose merely by agreeing to a provision in the corporation's bylaws. Proposed new section 181.1180 confirms that both the offer and acceptance provided for thereunder may be conditioned upon consummation of the transaction itself. In addition, it confirms that the remedy with respect to the failure to comply with the provisions of the section is limited to enforcement of the rights thereunder, rather than any right to rescind or otherwise undo the transaction itself. In this respect, these rights are similar to dissenters' rights under Chapter 180.

Note also in particular the addition of the potential for domestication transactions in proposed s. 180.1171 and 181.1171 and their related proposed provisions. These provisions are based on (and generally similar to) the domestication provisions (sections 388 to 390) of the Delaware General Corporation Law and are an expansion of existing Wisconsin business entity law. As explained in more detail in the WUPL Report, the proposed bill defines "domestication" transactions much differently than in many of the ULC model acts, which generally use the term to refer only to a change of domicile to or from a particular state within the United States (such a transaction would be treated as a "conversion" under Wisconsin's current merger and conversion provisions). Instead, the proposed bill defines "domestication" as a transaction whereby an entity can be simultaneously governed both by Wisconsin law and by the law applicable to a non-United States entity. In this regard, the proposed bill is based upon (and generally similar to) the domestication provisions of the Delaware General Corporation Law.

As stated above, and as explained in more detail in the WUPL Report, the proposed bill proposes to establish uniform cross-species provisions with respect to all five of the above-listed entity Chapters. These provisions build upon the WUPL Act in that they would further harmonize the cross-species provisions for Chapters 178, 179, 180, 181 and 183. In order to facilitate practice under the WUPL Act and the proposed bill, the Appendix contains a cross-reference chart listing and correlating common cross-species provisions for all five Chapters after enactment of the proposed bill.

Department of Financial Institutions Procedures

As stated above, and as explained in more detail in the WUPL Report, the proposed bill proposes to establish uniform DFI procedures with respect to all five of the above-listed entity Chapters. These provisions build upon the WUPL Act in that they would further harmonize the cross-species provisions for Chapters 178, 179, 180, 181 and 183.

It should be noted that proposed sections 180.0128 and 181.0213 would no longer require DFI to include in a certificate of status a statement as to whether a foreign business corporation or nonstock corporation is the subject of a proceeding to revoke its certificate of authority. DFI has indicated that such a proceeding is unlikely to be pending if all relevant filings have been made, and specific inquiry can and should be made if specific confirmation of that item is important in a given case.

Additionally, while the proposed bill would allow existing Wisconsin partnerships, limited partnerships and limited liability companies to elect to continue to be governed by the predecessor statutes to the proposed restatements of Chapters 178, 179 and 183, no such election is available to business or nonstock corporations under Chapters 180 and 181, respectively, because of their substantially more statutory character. In any event, the new DFI procedures would apply even to such electing partnerships, limited partnerships and limited liability companies after the effective date of the proposed bill notwithstanding any election to continue to be subject to the prior substantive provisions of those Chapters.

Other changes

The proposed bill includes provisions specifying when a person is considered to have notice or knowledge of a fact. The bill also specifies when a person is considered to have given another person notice of a fact.

Applicability and Effective Date

The proposed amendments to Chapters 180 and 181 in this bill generally would take effect the day after the enacted bill is published by the Legislative Reference Bureau and would generally apply to Wisconsin corporations formed before, on or after such date.

Respectfully submitted this 17th day of September 2021.

Corporation Committee
Business Law Section
State Bar of Wisconsin

Randal J. Brotherhood, Chairman
Christopher R. "Chal" Little
Timothy J. Feldhausen

WISCONSIN UNIFORM LIMITED PARTNERSHIP LAW
WISCONSIN UNIFORM PARTNERSHIP LAW

Report of the Partnership Committee
Business Law Section
State Bar of Wisconsin

PREFATORY NOTE

This is the Report of the Partnership Committee (the "Committee") of the Business Law Section of the State Bar of Wisconsin (the "SBW Business Law Section") regarding legislation prepared by the Wisconsin Legislative Reference Bureau as draft **[LRB-2890/P1]** (the "proposed bill"). It is intended to facilitate adoption and application of the proposed bill.

The proposed bill would update Chapter 179 of the Wisconsin Statutes, the current Wisconsin Uniform Limited Partnership Act, which is based on the Uniform Limited Partnership Act (1914) ("ULPA"), and enact the new Wisconsin Uniform Limited Partnership Law ("WULPL") based on the Revised Uniform Limited Partnership Act ("RULPA") approved and recommended (2001, last amended 2013) for enactment in all the states by the Uniform Law Commission (the "ULC"), formerly known as the National Conference of Commissioners on Uniform State Laws or NCCUSL. The proposed bill would also make corresponding and related changes to Chapter 178 of the Wisconsin Statutes, the Wisconsin Uniform Partnership Law ("WUPL"), which was updated in 2015 Wisconsin Act 295 (the "WUPL Act") to reflect the Revised Uniform Partnership Act ("RUPA") approved and recommended (1997, last amended 2013) for enactment in all states by the ULC. Prior to the WUPL Act, Chapter 178 of the Wisconsin Statutes relating to general (as distinguished from limited partnerships) was based upon the Uniform Partnership Act (1914) ("UPA").

The proposed bill would also update Chapter 183 of the Wisconsin Statutes (entitled "Limited Liability Companies") to reflect the Revised Uniform Limited Liability Company Act approved and recommended (2006, last amended 2013) for enactment in all states by the ULC. In addition to updating Chapters 178, 179 and 183 to reflect the most recent ULC uniform laws, the proposed bill would also amend Chapter 180 (entitled "Business Corporations") and Chapter 181 (entitled "Nonstock Corporations"), in order to harmonize provisions relating to the procedures of the Wisconsin Department of Financial Institutions ("DFI") for all five types of entities allowed to merge and otherwise engage in so-called "cross-species" transactions under Wisconsin law (general partnerships, limited partnerships, business corporations, nonstock corporations and limited liability companies). The amendments to Chapters 180 and 181 in the proposed bill are the subject of a separate Report of the Corporation Committee of the SBW Business Law Section (the "SBW Corporation Report"), and the restatement of Chapter 183 under the proposed bill is the subject of a separate Report of the Limited Liability Company

Committee of the SBW Business Law Section (the "SBW LLC Report"). The SBW Corporation Report is the primary authority with respect to the proposed bill's amendments of Chapter 180 (business corporations) and Chapter 181 (nonstock corporations), and the SBW LLC Report is the primary authority with respect to the proposed bill's restatement of Chapter 183 (limited liability companies). Both Reports will be referred to from time to time in this Report.

This Report focuses primarily on the provisions of the proposed bill relating to general partnerships and limited partnerships in Chapters 178 and 179 of the Wisconsin Statutes (WUPL and WULPL, respectively). Many of the provisions of the proposed bill, including those relating to DFI procedures and cross-species transactions, build upon the current Chapter 178 WUPL provisions relating to general partnerships that were enacted in the WUPL Act, which were the subject of a Report of this Committee dated January 8, 2016 (the "WUPL Report"). Accordingly, this Report is intended to be read in conjunction with the WUPL Report, and the two Reports collectively are intended to be the primary authority with respect to the restatements of both Chapter 178 (general partnerships) and Chapter 179 (limited partnerships), as well as the above-described amendments relating to DFI procedures and cross-species transactions contained in the WUPL Act and the proposed bill.

PARTNERSHIP PROVISIONS OVERVIEW

The prior uniform partnership and limited partnership acts, UPA and ULPA, respectively, were integrated in that the provisions of UPA also applied for purposes of ULPA to the extent not inconsistent. Correspondingly, current Chapter 179 still incorporates the Wisconsin general partnership provisions of Chapter 178 to the extent not inconsistent. See Wis. Stat. §179.10(2). The ULC took a different approach for purposes of the revised partnership and limited partnership uniform laws and drafted both RUPA and RULPA to be freestanding chapters. However, even though the ULC split RUPA and RULPA into two freestanding uniform laws, covering general partnerships and limited partnerships, respectively, many of the operative provisions of both uniform laws continue to be quite similar, and in many cases identical. As a consequence, the discussion of many of the general partnership WUPL Act provisions in the WUPL Report is relevant to the corresponding Wisconsin limited partnership provisions of the proposed bill. Rather than reiterating points made in the WUPL Report, this Report will focus primarily on provisions and considerations that are unique to Wisconsin limited partnerships or otherwise not covered in the WUPL Report.

Just as with the WUPL Act, the proposed bill generally follows the substantive lead of the ULC with respect to the uniform law, in this case RULPA. However, as explained in more detail in the WUPL Report, there are two major areas where WUPL and the proposed bill vary from the ULC uniform law language in order to better harmonize Wisconsin law and practice with respect to the five entities eligible for cross-species transactions in Wisconsin. These include general partnerships under Chapter 178, the subject of the WUPL Report and to a lesser extent this Report; limited partnerships under Chapter 179, the primary subject of this Report; business corporations and nonstock corporations under Chapters 180 and 181, respectively, the

primary subject of the SBW Corporation Report; and limited liability companies under Chapter 183, the primary subject of the SBW LLC Report.

As noted above and explained in more detail in the WUPL Report, the first general area where modifications have been made to the uniform laws is procedural, focused primarily on establishing uniform DFI procedures with respect to all five of the above-listed entity Chapters. The second area, which is also explained in more detail in the WUPL Report, especially the comments relating to Subchapter XI of WUPL, is with respect to merger, interest exchange, conversion and domestication transactions, which often involve one or more entities whose governing law is one of the above-named Chapters of the Wisconsin Statutes, and one or more other entities whose governing law is a different Chapter or corresponding provisions of other jurisdictions' laws (so-called "cross-species" transactions). The current Chapters of the Wisconsin Statutes already contain flexible provisions relating to cross-species transactions. Therefore, the cross-species transaction provisions of the proposed bill were adjusted so as to continue to provide the same level of flexibility for Wisconsin limited partnerships and other entities. The proposed bill also builds upon the WUPL Act in that it would further harmonize the DFI procedural provisions for Chapters 178, 179, 180, 181 and 183. In order to facilitate practice under the WUPL Act and the proposed bill, attached to this Report is an Appendix, which contains a cross-reference chart listing and correlating common procedural and cross-species provisions for all five Chapters after enactment of the proposed bill.

In most other areas, the provisions of the proposed bill are based upon the current RULPA and RUPA language. However, as explained below, there are a limited number of instances where provisions in the proposed bill vary somewhat from the uniform law language in order to avoid unnecessary disruption to Wisconsin law and practice or to accommodate specific statutory or policy concerns. This Report is intended to explain the rationale for non-editorial variations between the RULPA/RUPA uniform laws and the proposed bill, as well as to highlight certain matters relating to the proposed bill that may be of relevance to legislators and practitioners. However, the comments are intended only to supplement, and not to repeat or displace, the official comments of the ULC with respect to the uniform laws.

This Report consists of two sections. The first section describes and explains changes and issues relating to the restatement of the Chapter 179 limited partnership statute. The second section lists and explains changes to the Chapter 178 general partnership statute in the proposed bill. These latter Chapter 178 changes mostly serve to update and conform parallel language contained in both Chapters.

CHAPTER 179 RESTATEMENT: LIMITED PARTNERSHIPS

Subchapter I
General Provisions

It is noteworthy that a profit motive would no longer be required in order to form a limited partnership under the proposed bill, just as in RULPA. RULPA section 102(12); proposed section 179.0102(12), 179.0110(2). This is in contrast to general partnerships formed

under WUPL and other statutes based upon RUPA, as well as even limited partnerships under current Chapter 179 of the Wisconsin Statutes. See Wis. Stat. §178.0102(11), RUPA §102(11); Wis. Stat. §179.06. Accordingly, in numerous places under the proposed bill, the new Chapter 179 WULPL provisions refer to the "activities and affairs" of a limited partnership, rather than merely to its "business," even though most limited partnerships (including most limited liability limited partnerships) are still likely to pursue a business purpose.

Caution is appropriate, however, if a limited partnership is intended to engage in nonbusiness activities, as the tax rules relating to charitable enterprises are not designed to deal with noncorporate entities. Moreover, many of the default provisions contained in RULPA and the proposed bill, such as those relating to distributions and dissolution, do not integrate well with nonprofit activities.

Proposed section 179.0102(14) defines the term "partnership agreement." The Committee did not recommend any change from the corresponding language in RULPA for this provision. However, note that, even though a "partnership agreement" would require the agreement of "all the partners" under this provision, individual partners could still be outvoted with respect to mergers and other transactions under Subchapter XI of Chapter 179 under the proposed bill, and even with respect to amendment of the agreement itself to the extent provided in the agreement.

As noted in the comments below relating to proposed sections 179.04023 and 179.04025, the proposed bill contains additional provisions found in RUPA, but not in RULPA, to enable limited partnerships, just like general partnerships, to file statements relating to the authority of their general partners. Notably in this regard, proposed section 179.0103(4)(cr), which parallels corresponding section 178.0103(4)(a) of WUPL, would confirm that a non-partner is deemed to know of a limitation on authority to transfer real property contained in such statements.

With respect to proposed section 179.0104(2m), see the comment below regarding proposed new section 178.0104(2m) of WUPL.

With respect to proposed section 179.0104(3m), see the comment below regarding proposed new section 178.0104(3m) of WUPL.

The language of proposed section 179.0105(3)(e) contains a slight variation from RULPA to make it clear that all general partners are required to vote in favor of or consent to "an amendment to the certificate of limited partnership which deletes a statement that the limited partnership is a limited liability limited partnership." Section 105(c)(5) of RULPA provides that a partnership agreement may not "vary the right of a general partner under Section 406(b)(2) to vote on or consent to" such an amendment. Although the provision seems intended to prevent a partnership agreement from modifying the requirement for "the affirmative vote or consent of all of the [general] partners" for such an amendment, the Committee felt that an argument could be made that the provision only required that each general partner be given the opportunity to vote with respect to such amendment, rather than necessarily having to vote in favor of it. In order to preclude such an argument, proposed section 179.0105(3)(e) was adjusted slightly to provide that

a partnership agreement could simply not "[v]ary the right of a general partner under s. 179.0406(b)(2)."

With respect to proposed section 179.0105(3)(g), see the comment below regarding the proposed amendment to section 178.0105(3)(f) of WUPL.

With respect to proposed section 179.0105(3)(i), see the comment below regarding the proposed amendment to section 178.0105(3)(d) of WUPL.

As noted in the WUPL Report, the provisions of Chapter 178 were adjusted to allow a partnership agreement to eliminate both the power and authority of a general partner to withdraw as long as the partnership was a limited liability partnership. Correspondingly, proposed section 179.0105(3)(k) would allow a partnership agreement to eliminate a general partner's right to do the same in a limited partnership, again as long as it is a limited liability limited partnership.

With respect to proposed section 179.0105(3)(pm), see the comment below regarding proposed new section 178.0105(3)(np) of WUPL.

With respect to proposed section 179.0105(4), see the comment below regarding proposed new section 178.0105(4)(c) of WUPL.

Proposed section 179.0108 relating to required records varies from the corresponding language in RULPA in three non-major substantive respects. First, the language at the beginning was modified to delete the requirement that a limited partnership must keep such records "at its principal office." Second, the phrase "the partnership's federal, state, and local income tax returns and reports, if any," in RULPA was adjusted to delete the reference to "reports" in proposed section 179.0108(4). It is unclear what this additional "and reports" language might cover, and whether it might be interpreted so broadly as to include, for example, 1099's and other tax filings that do not seem to properly be included in mandatory recordkeeping provisions. Third, the language in proposed section 179.0108(6) was changed from "*any* financial *statement* of the partnership for the three most recent years" in RULPA to "*the* financial statements of the partnership, *if any,* for the 3 most recent years" (emphasis added). This latter change is intended to eliminate any implication that interim, draft or any financial statements other than the actual annual financial statements for the years listed need to be prepared or kept. The addition of the "if any" phrase is intended to both better parallel the corresponding language with respect to income tax returns in this section, as well as to avoid imposing an obligation on all limited partnerships to prepare freestanding financial statements. Many small partnerships prepare only income tax returns. These clarifications with respect to the recordkeeping requirements were thought to be appropriate, especially in light of the fact that proposed section 179.0105(3)(i), which is based on RULPA, would preclude the partnership agreement from modifying these recordkeeping requirements.

In light of the non-amendability provision, it is worth noting that proposed section 179.0108(9)(a) requires a limited partnership to maintain a record, either in the partnership agreement or elsewhere, of "[a] description and statement of the agreed value of contributions other than money." Thus, limited partnership records would be required to include this valuation

information for all non-cash property and service contributions under this provision, even if such values have no impact on the sharing of profits, losses, distributions or other operations. Such required valuation information could be relevant for tax and other purposes. Although this provision could be unnecessary or even problematic in some instances, in the interests of uniformity, no change was recommended.

The proposed bill would allow existing Wisconsin limited partnerships to elect to continue to be subject to pre-ULPA law (including relevant provisions of UPA), namely the limited partnership provisions of Chapter 179 (2017 stats.) (including the incorporation of relevant general partnership provisions of Chapter 178 (2013 stats.) as under prior law), rather than become subject to restated Chapter 179 under the proposed bill. See Section 179.0112(2)(b) under the proposed bill. A similar election was afforded existing general partnerships when Chapter 178 was restated under the WUPL Act and is intended to avoid disrupting existing Wisconsin businesses. See Wis. Stat. §178.0110(2)(b). Note, however, that, notwithstanding any such election, under Section 179.0112(2)(b) of the proposed bill, the new DFI procedures (and not those under prior law) would apply even to such partnerships after the effective date of the proposed bill, electing to continue to be subject to the prior ULPA/UPA substantive provisions.

With respect to proposed sections 179.0114(2), (3) and (6), see the comments below regarding the proposed amendments of sections 178.0902(1), (2) and (5) of WUPL.

Consistent with the goal of modernizing DFI's procedures under Chapters 178, 179, 180, 181 and 183, the proposed bill would require registered agents for both domestic or foreign limited partnerships to maintain email addresses under proposed section 179.0117(2) for the receipt of notices from DFI under proposed section 179.0103(7m)(d). See also proposed sections 179.0120(1), 179.0120(1)(b) and (c), 179.0121(1), 179.0201(2)(c), 179.0212(1)(b), 179.04023(1)(b)2., 179.04023(2)(b), 179.04023(2m)(a)2., 179.1003(5) and 179.1009(1)(f) under the proposed bill.

With respect to proposed section 179.0124, see the comments below regarding the proposed amendments to section 178.0120 of WUPL.

Subchapter II
Formation; Certificate of Limited Partnership and Other Filings

Section 202(b)(2) of RULPA requires filings to amend a certificate of limited partnership to include "the date of filing of its initial certificate." This requirement was not carried over to proposed section 179.0202(2). DFI confirmed that it is able to identify the relevant limited partnership from its name alone, and should not need the date of filing of the initial certificate to do so. The Committee also thought that it might be difficult to ascertain precisely what date would appropriately be included in these filings in situations where the relevant limited partnership had been involved in mergers, conversions, changes in domicile or other prior transactions. Significantly, the corresponding provisions in sections 901(f) of RUPA and 178.0901(6) of WUPL do not require such information to be included in amendments to statements of qualification with respect to general partnerships.

Proposed section 179.0202(5) contains two variations from the corresponding RULPA provision. The first variation would require a general partner to amend the certificate of limited partnership or file a statement of change or correction not only when the partner "knows" that the certificate is inaccurate, but also when the partner "has notice" of such inaccuracy. Proposed section 179.0205(1)(b)2., which is based directly on section 205(a)(2)(B) of RULPA, imposes liability upon a general partner whenever the general partner "knew or had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon," and it was thought that the applicability of both of these provisions should be the same. The second variation simply confirms that the amendment or statement of change or correction must "correct the inaccuracy," something which is implicit, but not explicit, in corresponding section 202(e) of RULPA.

Unlike section 203(a)(2) of RULPA, proposed section 179.0203(1)(b) only requires the signatures of all general partners when a "limited liability limited partnership" provision is being deleted, not when such protection is being added. Terminating a limited partnership's status as a limited liability limited partnership is obviously of critical importance to all general partners. However, a limited partnership could be organized so as to allow a mere majority of the general partners to opt into limited liability limited partnership status, and the Committee felt that requiring dissenting general partners to nonetheless sign the filings to accomplish such a change did not seem necessary, and could create unnecessary procedural difficulties in some situations. Moreover, these provisions relating to the signing of records for filing with DFI would not be subject to amendment in the partnership agreement under proposed section 179.0105(3)(c)2.

Similar complications could arise when a general partner is involuntarily expelled. Section 203(a)(5)(C) of RULPA requires an amended certificate of limited partnership to be signed by, among other persons, "each person that the amendment indicates has dissociated as a general partner" unless that person is deceased, has had a guardian or general conservator appointed or has previously filed a statement of dissociation. However, section 605(a)(3) of RULPA specifically requires that a dissociated general partner "at the request of the limited partnership, shall sign an amendment to the certificate of limited partnership which states that the person has dissociated as a general partner." In light of that requirement, and in the interests of uniformity, the Committee did not make any changes to corresponding sections 179.0203(1)(e)(3) and 179.0605(1)(c) of the proposed bill.

Proposed section 179.0203(2) indicates that "[a]ny record delivered for filing under this chapter may be signed by an attorney-in-fact." This language is identical to the language contained in section 203(b) of RULPA, except that the uniform law refers to an "agent," rather than an "attorney-in-fact." As noted in the WUPL Report, the "attorney-in-fact" language is more consistent with long-standing Wisconsin terminology and DFI practice. Proposed section 179.0203(3), as well as the corresponding section of WUPL (section 178.0108(3)), specifically provides that a person signing a record as an attorney-in-fact "affirms as a fact that the person is authorized to sign the record," and proposed section 179.0205(1)(a), as well as the corresponding provision of WUPL (section 178.0109(1)(a)), also makes it clear that a person who "caused another to sign" a filing could be held liable for inaccuracy. All of these provisions are based upon the uniform law, and the Committee did not attempt to further define the parameters and

responsibilities with respect to "attorney-in-fact" execution of documents, which will continue to be a matter of Wisconsin and uniform law. We understand that DFI plans to continue to allow attorneys, for example, to sign these filings on behalf of partners.

It is worth noting that, under proposed section 179.0205(1)(b), each general partner of a limited partnership could potentially be liable if the general partner knew or had notice of any inaccuracy in the partnership filings. This is in contrast to section 178.0109(2) of WUPL, which allows a general partnership to allocate filing responsibilities, and corresponding potential liability, to less than all general partners.

With respect to proposed section 179.0211, see the comments below regarding the proposed amendments to section 178.0121(2)(b)3. and 4. of WUPL.

Subchapter III
Limited Partners

The first sentence of section 303(a) of RULPA simply provides that a debt, obligation or other liability of a limited partnership "is not the debt, obligation, or other liability of a limited partner," whereas the second sentence of section 303(a) of RULPA provides that "[a] limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the partnership *solely* by reason of being or acting as a limited partner, even if the limited partner participates in the management and control of the limited partnership" (emphasis added). The liability protection under the second sentence seems to be just a subset of the protection under the first sentence, presumably to emphasize the elimination of the imposition of liability on limited partners for participating in management that was a defining characteristic of the liability provisions under prior ULPA law.

The emphasized term "solely" in the second sentence of section 303(a) of RULPA, quoted above, also appears to merely confirm that a limited partner could still be liable for debts, obligations, or other liabilities of the limited partnership for other reasons, such as where there is an independent guaranty by the limited partner or the limited partner has committed an independent tort for which the limited partnership happens to be responsible. Presumably, the general rule contained in the first sentence would not preclude liability in these circumstances, even despite the absence of the word "solely." In light of the importance of these provisions, and the likelihood that courts will interpret them in a reasonable and consistent fashion, it was decided that uniformity would be better served by not making any modification to the RULPA language for these provisions in proposed section 179.0303(1).

Unlike its counterpart in section 304(e) of RULPA, proposed section 179.0304(5), dealing with the rights of former limited partners to information from a limited partnership, does not explicitly provide that it is "[s]ubject to" subsection (10). Subsection (10) is based directly on corresponding section 304(j) of RULPA and provides that, in addition to any restriction or condition stated in its partnership agreement, a limited partnership, "as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished *under this section*" (emphasis added). The emphasized language clearly indicates that subsection (10) should apply to all of the foregoing

provisions of proposed section 179.0304, not just subsection (5), dealing with former limited partners, but also to subsection (3), dealing with the information rights of current limited partners. This result should obtain despite the fact that subsection 304(c) of RUPA, corresponding to subsection (3), does not explicitly provide that it is "[s]ubject to subsection (j)." Rather than inserting that limiting language in some or all of the other subsections of proposed section 179.0304, the Committee decided not to include the "[s]ubject to" subsection (10) language in subsection (5), and instead to simply rely upon the "under this section" language in subsection (10) itself to make it clear that all of the subsections of proposed section 179.0304 were subject to subsection (10) (rather than just subsection (5)), and to avoid any implication that subsection (10) might somehow not be applicable to one or more of those other subsections. The same result is likely to obtain under the uniform RULPA language.

The language of proposed section 179.0304(5) also raises questions as to precisely what information a former limited partner would be entitled to receive. In particular, the language provides that a person dissociated as a limited partner may have access to "information to which the person was entitled while a limited partner." This implies that information becoming available after the person is no longer a limited partner would not be so accessible. Among the questions this language raises, for example, is whether a limited partner dissociating on January 2nd following the closing of the partnership's calendar fiscal year, but before the preparation of its financial statements for the year, would be entitled to receive a copy of those financial statements after they are prepared, because, technically, those financial statements would not be "information to which the person was entitled *while* a limited partner" (emphasis added). In the interests of uniformity, no change was made to the standard RULPA language in these regards. However, note that the corresponding language in proposed section 179.0407(5)(a) relating to information to be provided to a former *general* partner requires the information to be provided as long as it "pertains to the period during which the person was a general partner."

Proposed section 179.0305(3), dealing with non-partner transactions between a limited partner and a limited partnership, differs slightly from the corresponding language in section 305(c) of RULPA. The proposed bill language refers to a limited partner entering into a transaction with "the" limited partnership, rather than "a" limited partnership. This terminology makes it clear that the provision only applies to the limited partnership in which the limited partner has an interest as such; it also more closely matches similar references to "the [limited] partnership" contained in both sections 179.0305(1) and (2) under the proposed bill and sections 305(a) and (b) of RULPA.

As explained in more detail in the comments regarding proposed new section 180.0704(7) relating to prospective consents by shareholders in the SBW Corporation Report and the comments below relating to proposed new section 178.0401(11m) in this Report, proposed section 179.0305(4m) is intended to make it clear that limited partners may consent in advance to partnership actions. However, unlike general partners, limited partners are more akin to shareholders of a corporation in that they typically have limited management responsibilities. Therefore, this provision relating limited partners allows for such consents to be irrevocable, much the same as shareholders under the proposed bill.

Proposed section 179.0306 deals with the unusual situation where an investor "erroneously but in good faith" believes that the investor is a limited partner, in which case the investor can avoid liability if the investor "on ascertaining the mistake" either files a certificate of limited partnership or other appropriate paperwork or withdraws from participation as an owner by filing a statement of negation. This provision would presumably apply in situations where a general partnership was formed, because no certificate of limited partnership was filed, but the investor "in good faith" thought that one was. This language is substantively the same as the corresponding language in section 306 of RULPA, but there are a few points worth noting.

First, by its terms, such relief would be retroactive unless, as provided in proposed section 179.0306(2), a third-party entered into a transaction with the enterprise "believing in good faith that the person is a general partner" before such paperwork was filed with DFI. Second, it may be unclear as to whether, by its terms, this provision would apply in certain situations because the provision only applies to "[a] person that makes an investment under sub. (1)." For example, query whether a person who contributes services (a "sweat-equity" partner) would thereby be "mak[ing] an investment under sub. (1)." Similarly, query whether a transferee or donee of such a partnership interest would be considered to step into the shoes of the original investor. Third, although an investor might be required to withdraw from the enterprise in order to take advantage of this liability relief, RULPA and the proposed bill do not contain any "put" right whereby such an investor might recover something for the investor's investment. If the enterprise ultimately turned out to be a general partnership by default, the investor may have the right to have the interest purchased under section 178.0701 of the general partnership statutes, though that right may not be all that useful in the context of development stage enterprises. Finally, proposed section 179.0306(3) would provide that such an investor would have the "right to withdraw," even if such withdrawal "would otherwise breach an agreement with others that are or have agreed to become co-owners of the enterprise." That section does not specify whether the investor might still be liable for breach of contract damages, though it is worth noting that corresponding language in section 602(a) of RUPA and section 178.0602(1) of WUPL are couched in terms of a general partner having the "power" to dissociate, which could be interpreted as being different than the "right to withdraw" under this section.

Subchapter IV
General Partners

RUPA contains specific provisions allowing general partnerships to file statements relating to the scope of their partners' authority, whereas RULPA does not include such provisions. The Committee decided that such provisions could also be helpful in the context of limited partnerships, and so the proposed bill includes sections 179.04023 and 179.04025, which would allow limited partnerships to make such filings. In particular, they would allow limited partnerships and limited partnership partners to file statements of authority and statements of denial with DFI to limit or supplement a general partner's apparent authority in certain circumstances. This would also help to harmonize the procedural provisions relating to general and limited partnerships.

The default rules with respect to management voting requirements contained in proposed section 179.0406(2), which is based on the corresponding provision of RULPA, would require the affirmative vote or consent of all the partners, including the limited partners, for amendment of the partnership agreement, amendment of the certificate of limited partnership to add or delete a statement that the partnership is a limited liability limited partnership and the sale, lease, exchange or other disposition of all, or substantially all, of the limited partnership's property (other than in the usual and ordinary course of the limited partnership's activities and affairs). This is in contrast to section 401(k) of RUPA and section 178.0401(11) of WUPL, for which the default rule requires unanimity for all acts "outside the ordinary course of business" for a general partnership. However, the RULPA comments contain a significant discussion relating to a general partner's actual authority under agency law and specifically state that "[a]cting individually, a general partner . . . has no actual authority to take unusual or non-customary actions that will have a substantial effect on the limited partnership."

In general, all of these voting requirements may be modified in the partnership agreement. Therefore, in the interests of uniformity, the Committee did not recommend any changes to the above-described default vote/consent rules. However, as discussed above in the comments relating to proposed section 179.0203(1)(b), the proposed bill would require unanimity among the general partners in order to delete a statement that a partnership is a limited liability limited partnership, whereas the corresponding provision of RULPA requires such unanimity for both addition and deletion of such a statement. Also, as discussed in the comments below relating to Subchapters XI of Chapters 179 and 178 under the proposed bill, there are additional vote/consent requirements with respect to mergers and other major corporate-style transactions.

As explained in more detail in the comments relating to proposed new section 180.0821(4) relating to prospective consents by corporate directors in the SBW Corporation Report and the comments below relating to proposed new section 178.0401(11m) in this Report, proposed new section 179.0406(2m) is intended to make it clear that general partners may consent in advance to partnership actions. However, unlike consents by limited partners, under proposed section 179.0305(4m), prospective consents by general partners would have to be revocable.

As with the variation from RULPA proposed for section 179.0304(5), dealing with information to be provided to former limited partners, proposed section 179.0407(5), dealing with information to be provided to former general partners, does not include the phrase "Subject to sub. (10)" in order to make it clear that subsection (10) is applicable to all of the other subsections of that section. See also the comments above regarding proposed section 179.0304(5).

Section 407(i)(2) of RULPA provides that, with respect to an individual general partner for whom a guardian or conservator has been appointed or whom a court has ordered is otherwise incapable of performing the duties of a general partner, "the legal representative of the individual may exercise the rights under subsection (c) of a person *dissociated* as a general partner" (emphasis added). However, subsection (c) of section 407 of RULPA deals with the rights of a current general partner, and it is subsection (e) that deals with the information rights

of a person dissociated as a general partner. Therefore, the corresponding provision in the proposed bill, section 179.0407(9)(c), refers to subsection (5) dealing with the information rights of dissociated general partners, rather than subsection (3) dealing with the information rights of current general partners.

The provisions of the proposed bill dealing with the duties of general partners in a limited partnership differ somewhat from the corresponding provisions of WUPL dealing with the duties of partners in general partnerships. These differences parallel those contained in the corresponding provisions of the RULPA and RUPA uniform laws. First, the proposed bill does not contain any provision equivalent to section 178.0401(9) of WUPL, which provides that "[a] partner may use or possess partnership property only on behalf of the partnership." However, section (2)(a)2. of both 179.0409 of the proposed bill and 178.0409 of WUPL provide that the "fiduciary duty of loyalty of a [general] partner includes . . . [t]he duty to account to the [limited or general] partnership and hold as trustee for it any property, profit, or benefit derived by the [general] partner in or from . . . [a] use by the [general] partner of the partnership's property." In light of this latter provision, no adjustment was thought necessary. Second, the duty of a general partner to refrain from competing with a general partnership under section 178.0409(2)(c) of WUPL only applies "before the dissolution of the partnership," whereas the corresponding duty of a general partner to refrain from competing with a limited partnership under section 179.0409(2)(c) of the proposed bill would apply both in the "conduct" and in the "winding up" of the partnership's activities and affairs. Since this additional obligation seemed consistent with the more centralized management powers and responsibilities inherent in a limited partnership, the Committee did not recommend any change in this regard either.

With respect to proposed section 179.0409(3), see the comments below regarding the amendment of section 178.0409(3) of WUPL.

Subchapter V
Contributions and Distributions

Proposed section 179.0503(1), which is based directly on the corresponding provision of RULPA and deals with distributions prior to dissolution, gives rise to some questions. For example, it states a general rule that such distributions must be shared among the partners "on the basis of the value, as stated in the required information when the limited partnership decides to make the distribution, of the contributions the limited partnership *has received* from each partner" (emphasis added). The emphasized "has received" language suggests that property and services to be contributed in the future would not count. Also, there is the obvious question regarding what happens when the "required information" has not been kept up-to-date. However, these default rules may be modified in a partnership agreement, and, in the interests of uniformity, no changes were recommended.

A clarifying change was recommended for proposed section 179.0505(3), which deals with the contribution rights of a general partner sought to be held liable for an improper distribution. Section 505 of RULPA, on which this proposed section is based, seems designed to apply separately with respect to each partnership distribution. However, the RULPA provision first specifies, in subsections (a) and (b), respectively, that general partners consenting to

wrongful distributions and limited partners knowingly receiving them are personally liable for their recovery, but then goes on to say that a general partner sought to be held liable under subsection (a) may implead "*any* other person that is liable under subsection (a)," as well as "*any* person that received *a* distribution in violation of subsection (b)" (emphasis added), without making it clear that the distribution from which contribution is sought must be the same distribution for which the impleading general partner is being sued. Consequently, the language of proposed section 179.0505(3) has been adjusted to make it clear that these provisions are to be applied on a distribution-by-distribution basis.

Subchapter VI
Dissociation

Proposed section 179.0601(2)(d)3., dealing with the expulsion of an entity when its organization under state law is compromised, differs slightly from the corresponding provision in RULPA. The changes are intended to clarify, rather than change, results under the provision. First, the corresponding RULPA provision, section 601(b)(4)(C), lists the suspension of an entity's "right to conduct business" as one of the events triggering such a right of expulsion. However, as explained in the comments above regarding proposed section 179.0102(12), a limited partnership, as well as other types of entities under various state laws, are not always required to actually conduct a "business," and therefore the language of proposed section 179.0601(2)(d)3.a. refers to the suspension of an entity's "right to conduct activities and affairs," which more closely parallels comparable language throughout the rest of the proposed bill.

Second, proposed section 179.0601(2)(d)3.a. also refers to suspension "by the jurisdiction of the person's governing law," rather than "the person's jurisdiction of formation." As explained in the comments to sections 178.0102(6) and (11) of WUPL in the WUPL Report, this difference is intended to make it clear that the jurisdiction of an entity's original formation may be irrelevant after it changes its legal domiciliary to another state, and it is the jurisdiction whose law currently governs its operations that should be determinative.

Third, proposed section 179.0601(2)(d)3.b. has been modified to provide that expulsion may occur if the problem under the entity's governing law is not resolved "within 90 days" of its notification thereof by the partnership. This differs from the double negative contained in corresponding section 601(b)(4)(C)(ii) of RULPA, which provides that it applies when the problem "has not been" resolved "not later than 90 days after the notification." Although it would take a very strained reading of the RULPA language to reach different results under the two provisions, it was felt that the proposed language was more straightforward.

As noted in the comments above regarding proposed sections 179.04023 and 179.04025, the proposed bill adds provisions (based on RUPA, rather than RULPA) to allow limited partnerships to file statements of authority. Proposed section 179.0605(1)(c)2., which matches the corresponding language in RUPA and WUPL, simply confirms that statements of dissociation act as limitations on general partner authority under these filed statement rules, the same as they do for general partnerships.

There is no counterpart in RULPA to proposed section 179.0605(3m), which would provide that the continued use of the limited partnership name or the name of a person dissociated as a partner does not "of itself" make the dissociated partner liable for obligations of the partnership. However, section 178.0705 of WUPL, and the corresponding provision of RUPA, are explicit on this point, and thus corresponding language was added in the proposed bill in order to avoid any implication that a different rule might apply with respect to limited partnerships.

Section 607(b) of RULPA provides that a person whose dissociation as a general partner results in a dissolution and winding up of the limited partnership's activities and affairs is liable on an obligation incurred by the partnership "under Section 805 to the same extent as a general partner under Section 404." This language appears intended to cause the dissociating, dissolution-causing partner to be liable for the regular wind-up liabilities. However, section 805 of RULPA merely imposes liability on specific general partners and former general partners, rather than the partnership or general partners as a whole, in the former case for acts not appropriate for winding up the partnership's activities and affairs and in the latter case for a dissociated partner's presumably unauthorized acts in connection with the wind up. It is section 804 of RULPA that imposes liability on the limited partnership itself (for which general partners would normally be liable unless the partnership is a limited liability limited partnership) for the regular liabilities incurred in connection with wind up. Accordingly, proposed section 179.0607(2) refers to proposed section 179.0804, rather than to proposed section 179.0805.

Subchapter VII
Transferable Interests and Rights of Transferees and Creditors

The Committee had no comments that were specific to this Subchapter.

Subchapter VIII
Dissolution and Winding Up

Proposed section 179.0801(1)(b), which is based on section 801(a)(2) of RULPA, describes the required "vote or consent" necessary to approve dissolution of a limited partnership. Both sections require the affirmative vote or consent of all general partners. However, section 801(a)(2) of the uniform act also requires the affirmative vote or consent of "*limited partners* owning a majority of the rights to receive distributions as *limited partners* at the time the vote or consent is to be effective" (emphasis added). In contrast, section 801(a)(3)(A) of RULPA, dealing with dissolution upon dissociation of one, but not all, of the general partners, requires the affirmative vote or consent of "*partners* owning a majority of the rights to receive distributions as *partners*" to dissolve the partnership (emphasis added), i.e., all partners, not just limited partners. In many cases, the distinction between these two distribution-based tests will have little practical consequence, inasmuch as the limited partners will be entitled to the lion's share of all distributions. However, in a setting where the general partner is entitled to a substantial portion of the distributions, such as where, for example, a general partner offers small minority interests to individuals active in the business, it would seem inappropriate for those minority limited partners to effectively have veto power over the general partner's desire to dissolve the partnership. Accordingly, the Committee is proposing that both

corresponding sections of the proposed bill, sections 179.0801(1)(b) and (c)(1), require the vote or consent only of "partners owning a majority of the rights to receive distributions, whether as a general partner, a limited partner, or both."

Proposed section 179.0801(1)(b) also adds the words "to dissolve" to the RULPA language to make explicit what is implicit in the uniform law, namely, that the "vote or consent" must be to dissolve, rather than just any "vote or consent" by the requisite number of partners.

With respect to these majority distribution-based vote or consent requirements, at least two things are worth noting. First, as explained in more detail in the comments below regarding proposed section 179.0810(2), precisely who has "a majority of the rights to receive distributions" may be difficult to ascertain in some circumstances. Second, as noted in the comments above regarding proposed section 179.0102(12), limited partnerships are not required to engage in a business. Therefore, partners in a nonprofit limited partnership may not have any "rights to receive distributions," which could make application of these default distribution-based provisions problematic. In these and other situations, it will be important for limited partnerships to take advantage of the ability to modify these default provisions in their partnership agreements.

Sections 803(c) and 812(d) of RULPA deal with the legal effect of two very similar situations, rescission of filed dissolution paperwork and reinstatement after administrative dissolution, respectively. Although the language of the two provisions differs somewhat, significant principled distinctions do not appear to have been intended. Section 803(c)(1) provides that "the partnership resumes carrying on its activities and affairs as if dissolution had never occurred," and section 812(d)(2) contains virtually identical language with respect to reinstatement.

However, section 803(c)(2) of RULPA provides that "subject to paragraph (3), any liability incurred by the partnership after the dissolution and before the rescission has become effective is determined as if dissolution had never occurred," whereas section 812(d)(1) of RULPA instead provides that "[t]he reinstatement relates back to and takes effect as of the effective date of the administrative dissolution." Thus, notwithstanding the "resumes carrying on its activities and affairs as if dissolution had never occurred" language contained in section 803(c)(1), the language of (c)(2) implies that reinstatement only impacts partnership liabilities, whereas the language of section 812(d)(1) suggests that the impact is more universal. For example, since section 803(c)(2) only literally covers "liability incurred by the partnership," is there a question as to how liabilities and obligations of the partners among themselves should be handled?

Moreover, section 803(c)(3) provides that "the rights of a *third party* arising out of *conduct* in reliance on the dissolution before the *third party* knew or had notice of the rescission *may* not be *adversely* affected" (emphasis added), whereas section 812(d)(3) provides that "[t]he rights of a *person* arising out of *an act or omission* in reliance on the dissolution before the *person* knew or had notice of the reinstatement *are* not affected" (emphasis added). As a comparison of these respective provisions shows, the first provision appears to be more limited in technical ways in that it only applies to the rights of third parties (and presumably not partners,

and perhaps not related parties), it applies only to "conduct" and not any "act or omission," and it appears to only preclude adverse (and not beneficial) effects on such affected parties.

Finally, as can be seen from the quoted language above, section 803(c)(2) of RULPA specifically subjects the retroactive effect on liabilities incurred by the partnership after dissolution and before rescission to the third-party creditor protection of section 803(c)(3), but this is not made clear in any of the remaining subsections of either of the two sections of RULPA.

In light of all of the above, the proposed bill conforms the language of both section 179.0803(3) and section 179.0812(4) by adopting the broader retroactive relief provisions contained in section 812(d) of RULPA, but it includes language confirming that "par. (c)" supersedes the relief in both paragraphs (a) and (b) to make it clear that the protection under paragraph (c) afforded to persons acting in reliance supersedes the provisions of both of the prior two paragraphs.

For the most part, proposed section 179.0806, dealing with the creditor notification procedure for dissolving limited partnerships, conforms to corresponding section 806 of RULPA. However, as explained in more detail in the comments below with respect to the amendments to section 178.0807 of WUPL, the proposed bill would incorporate the more rigorous section 179.0103(7m) rules for determining when a notice is effective for purposes the creditor notification provisions of both WULPL and WUPL.

The language of proposed section 179.0806 (3)(b)1. was adjusted to provide that claims to which the notification procedure applies could be barred unless "the claimant commences an action against the partnership to enforce the claim within 90 days after the notice is effective under s. 179.0103(7m)." This change was editorial in order to avoid the double negative contained in section 806(c)(2)(B) of RULPA, which states that such a bar would occur if "the claimant does not commence the required action not later than 90 days" after the claimant receives the notice. See similar comment above relating to proposed section 179.0601(2)(d)3.b.

With respect to proposed section 179.0806(4), see the comments below regarding 178.0807(4) of WUPL.

Section 807 of RULPA deals with the barring and enforcement of claims against a dissolved limited partnership. Proposed section 179.0807 generally follows the uniform law. However, see the comments below regarding 178.0808 of WUPL for an explanation of certain technical differences. Moreover, just as with WUPL with respect to general partnerships, the claims period was reduced from three years to two years, which is also consistent with Wisconsin law and practice for the other "cross-species" eligible entities.

Proposed section 179.0807(4)(b) and the corresponding provision of RULPA on which it is based provide that assets distributed upon dissolution may be recovered from the distributee, but only "to the extent of that person's proportionate share of the claim or of the partnership's assets distributed to the partner or transferee after dissolution, whichever is less." The provision gives rise to some questions, but, as explained below, they do not seem to merit deviation from

the uniform law language. First, it appears that this distributee liability would be in addition to, rather than in lieu of, liability for improper distributions under proposed section 179.0505, which contains a slightly different test for recovery. Second, the term "proportionate" as applied to the person's "share of the claim" could be subject to some uncertainty. Presumably, it is intended to incorporate a test similar to that contained in proposed section 179.0810(3) and the corresponding provision of RULPA, which specify the test for the obligation of a general partner to contribute to make up for a shortfall upon dissolution. Those sections provide that such obligation should be "in proportion to the right to receive distributions in the capacity of a general partner in effect for each of those persons when the obligation was incurred." A similar test could be applied to both general and limited partners under this provision. See also the comments below to that section. Third, the words "proportionate share" seem redundant as applied to "the partnership's assets distributed to the partner or transferee after dissolution," because presumably the partner or transferee would not receive more than his, her or its "proportionate share" of the assets distributed in any event. Finally, this provision does not deal directly with the enforcement mechanism appropriate for wrongful distributions in the context of nonprofit limited partnerships (which, as noted above in the comments with respect to proposed section 179.0102(12), are allowed under proposed bill). In contrast, sections 181.0833 and 181.1302 of the Wisconsin nonstock corporation statutes deal specifically with distributions in this context. Presumably, the general law relating to the obligations of "partners" of such nonprofit limited partnerships would provide the needed parameters in what is likely to be a very limited number of such situations. In any event, in the interests of uniformity, no change to the uniform language contained in RULPA was recommended for proposed section 179.0807(4)(b).

The language of proposed section 179.0808(1), which provides for a court procedure to cut off legacy liability for unknown, contingent and post-dissolution liabilities of a dissolved limited partnership, varies slightly from corresponding section 808(a) of RULPA. All of these changes were proposed to better conform to the corresponding procedural provisions contained in proposed section 179.0807(2)(a) and sections 178.0808 and 178.0809 of WUPL, as well as section 180.1407 of the Wisconsin corporate statutes. See the comments relating to those sections in this Report, the WUPL Report and the SBW Corporation Report. With respect to proposed section 179.0808(2), see the comments below regarding 178.0809(3) of WUPL.

Proposed section 179.0809, which is based on the corresponding provision in RULPA, provides that, if a claim is barred under the notification, publication or court procedures described in the preceding three sections of the proposed bill, then "any corresponding claim under s. 179.0404 or 179.0607 is also barred." These latter two sections are the ones that provide for the general liability of current and former general partners, respectively, with respect to obligations of a limited partnership. Proposed section 179.0809 makes no reference to the barring of claims under sections 179.0505 and 179.0805 of the proposed bill, which provide for liability of current and former partners with respect to wrongful distributions and incurrence of inappropriate liabilities after dissolution, respectively. However, these latter provisions appear to create liability only to the partnership itself and/or other current or former general partners, not to creditors. In any event, there do not seem to be any compelling reasons to modify the uniform law language with regards to these issues.

Section 810(b) of RULPA and corresponding section 179.0810(2) of the proposed bill contain default rules for the distribution of the surplus available upon dissolution of a limited partnership after all creditor obligations have been satisfied. All "contributions made and not previously returned" are to be paid out first, and the remainder of the surplus is to be distributed among persons owning transferable interests "in proportion to their respective rights to share in distributions immediately before the dissolution." Issues could arise under both of these rules. The return of contributions under the first priority test could be problematic for partnerships where the contributions were made at different points in time. The second priority test, based upon "respective rights to share in distributions," also raises issues. For example, many partnerships allocate distributions differently based upon preferred units, ordinary cash flow versus refinancing/disposition proceeds versus dissolution, and many other factors. However, this certainly appears to be a reasonable set of default rules, and these provisions can be varied by agreement. As a consequence, no change was recommended.

Proposed section 179.0810(3), which is also based on the corresponding provision of RULPA, sets forth the rules for the sharing of general partner liability in the event of an insufficiency of assets. It provides that such liability will be shared "in proportion to the right to receive distributions in the capacity of a general partner in effect for each of those persons when the obligation was incurred." This raises a question as to what would happen in cases where some or all of the general partners were not then entitled to receive any distributions, or perhaps only to receive distributions in their capacities as limited partners. However, again, this appears to be a reasonable default rule, and general partners should be free to adjust these internal sharing obligations in the partnership agreement, if appropriate. As a consequence, no changes were recommended for this provision either.

RULPA does not contain a provision corresponding to proposed section 179.0810(4r), which provides a default rule for dissolving partnerships that have surplus after the payment of creditor obligations, but not enough to fully return all capital contributions. However, RUPA does provide such a default rule. Section 806(e) of RUPA, as well as 178.0806(5) of WUPL based on that provision, both require that the available surplus should still be distributed "in proportion to the value of the respective unreturned contributions." Proposed section 179.0810(4r) would apply this same rule to limited partnerships.

Finally, with respect to proposed section 179.0810, subsection (5) reflects a variation from corresponding section 806(e) of RULPA. Both sections provide that distributions must be paid in money, but proposed section 179.0810(5) only refers back to distributions under subsection (2), whereas RULPA section 806(e) refers back to both subsections (b) and (c). However, subsection 806(c) of RULPA deals with contributions, not distributions, and the back reference seems inappropriate.

As explained above in the comments regarding proposed section 179.0803(3), dealing with rescission of dissolution, that section and section 179.0812(4), dealing with reinstatement after administrative dissolution, would be conformed in the proposed bill. However, the latter section raises an issue that would not arise in the rescission context. In particular, what is the appropriate result when a creditor checks DFI's website, notices that a limited partnership has been administratively dissolved and then loans money to the partnership "in reliance on the

dissolution" without informing the partnership that it was doing so? It seems that such a person would be entitled to relief, because, even though the creditor knew of the dissolution, the loan could be said to be in reliance on the dissolution "before the person knew or had notice of *the reinstatement*" (emphasis added). In the interests of uniformity, the Committee did not propose any change in order to try to deal with this set of issues.

Subchapter IX
Actions by Partners

With respect to derivative actions, see the comments regarding proposed sections 183.0104(1) and (2m) in the SBW LLC Report.

Subchapter X
Foreign Limited Partnerships

With respect to proposed section 179.1004(1), see the comments below regarding the proposed amendment to section 178.1004(1) of WUPL.

Note that the fictitious name procedures referenced in both sections 179.1006(1) and 179.1009(1)(c) could be used to cure a defect in the nomenclature required for limited partnership and limited liability limited partnership names in Wisconsin, e.g., use of "LP" and "LLLP," as well as non-distinguishability with respect to other registered Wisconsin entities. However, the fictitious name must comply in full with all Wisconsin requirements.

Section 1011(a)(3) of RULPA provides that a statement of withdrawal of a registered foreign limited partnership must state "that the partnership revokes the authority of its registered agent to accept service on its behalf in this state." Nonetheless, RULPA section 1011(b) provides that after withdrawal service of process may still be made pursuant to section 121 of RULPA, subsection (a), which, in turn, provides that service of process may be made "*by serving its registered agent*" (emphasis added). In contrast, proposed section 179.10102(6) specifically provides that termination of a foreign limited partnership's registration does not terminate the authority of its registered agent, which is in line with both the latter RULPA provision, as well as the procedural provisions for other Wisconsin entities.

Subchapter XI
Merger, Interest Exchange,
Conversion, and Domestication

Subchapter XI of WULPL (Chapter 179) under the proposed bill parallels and is intended to be interpreted in conformity with corresponding Subchapter XI of WUPL (Chapter 178), the provisions of which are explained in more detail in the WUPL Report. The proposed bill further refines those provisions, which are further explained in this portion of the Report relating to Chapter 179 and the corresponding portion of this Report relating to Chapter 178 below.

In addition, as explained above, the proposed bill is intended to harmonize provisions relating to cross-species merger, interest exchange, conversion, and domestication transactions

throughout all five "cross-species" eligible entity Chapters, i.e., not only for general and limited partnerships, but also for regular business corporations under Chapter 180, nonstock corporations under Chapter 181 and limited liability companies under Chapter 183. See the SBW Corporation Report and the SBW LLC Report for comments specific to those Chapters.

As explained in more detail in the WUPL Report, the cross-species transaction provisions for all of these Chapters are broader and more flexible than the corresponding provisions in either RUPA or RULPA, and in general do not track the corresponding provisions of either of those uniform laws. As a consequence, no provision-by-provision comparison of Subchapter XI of Chapter 179 under the proposed bill and corresponding Subchapter XI of RULPA is attempted here. The remainder of the comments in this section of this Report deal with statutory language and issues that are primarily relevant to Chapter 179 limited partnerships under the proposed bill.

Sections 1123(a)(1), 1133(a)(1), 1143(a)(1) and 1153(a)(1) of RULPA require consent by "all the partners [of the relevant partnership] entitled to vote on or consent to *any* matter" (emphasis added) to approve a merger, interest exchange, conversion or domestication transaction. Thus, in most cases this would require unanimous consent by all partners, both general and limited, as long as each of them were entitled to vote on "any" matter. In contrast, current Wisconsin law, which already provides for cross-species mergers and conversions, requires only general partner approval (subject to fiduciary duty and other limitations). In order not to unduly disrupt current Wisconsin law and practice, proposed sections 179.1123(1), 179.1133(1), 179.1143(1) and 179.1153(1) require approval only of all general partners and "[p]artners owning a majority of the rights to receive distributions, whether as a general partner, limited partner, or both." The latter test is similar to the majority distribution-based vote/consent provisions relating to dissolution in proposed sections 179.0801(1)(b), 179.0801(1)(c)1., 179.0801(1)(c)2.a., 179.0802(3) and 179.0810(2), discussed above. The specifics of each of these provisions vary, however. For example, the above-cited Subchapter XI provisions focus on the distribution rights of both general and limited partners collectively, whereas many of the other provisions are based upon the rights of either general or limited partners, but not both. However, there are many respects in which the issues involved with all of these provisions are similar, and the comments above relating to the provisions contained in the other Subchapters are likely to be relevant here also.

Unlike corporations, there are no special exceptions for mergers with direct or indirect subsidiaries or for the acquiring entity in an interest exchange. See Wis. Stats. §§ 180.1104, 180.11045 and 180.1103(1). However, under section 179.0105(3)(p) of the proposed bill, the partnership agreement could modify such approval rights as long as it is done by a "written provision in the partnership agreement that does not impair the rights of the partner under s. 179.1161."

Just as in Chapter 178, in situations where a merger, interest exchange or conversion has taken effect and the surviving entity is a foreign entity, proposed sections 179.1125(2), 179.1135(5) and 179.1145(2) provide that DFI is an agent of the surviving foreign entity for service of process. This need may exist with respect to mergers, interest exchanges and conversions, but not domestications, because in the instance of mergers, interest exchanges and conversions, without such provisions the dissenting interest holders could have to serve process

in the foreign jurisdiction. However, proposed section 179.1155(3), as well as the corresponding provision in Chapter 178, is different because, after domestication, the partnership is an entity under the laws of both the foreign jurisdiction and Wisconsin, so the partnership should still be able to be served in Wisconsin.

With respect to proposed sections 179.1123, 179.1124, 179.1125, 179.1134, 179.1135, 179.1144, 179.1145, 179.1154 and 179.1155, see the comments below regarding the amendments to sections 178.1123(2), 178.1124(1)(d)2., (g); 178.1125(1)(f), (2)(a), (b); 178.1132(1)(f); 178.1134(1)(d); 178.1135(1)(a), (5)(a), (b); 178.1144(1)(d), (g); 178.1145(1)(f), (2)(a), (b); and 178.1154(1)(d), (g).

With respect to proposed section 179.1161, see the comments below regarding the amendments to section 178.1161.

CHAPTER 178 AMENDMENTS: GENERAL PARTNERSHIPS

The proposed bill would make a number of changes to the provisions of Chapter 178, relating to general partnerships, both to conform corresponding language appearing in both Chapters 178 and 179 in order to minimize potential interpretive difficulties and as otherwise explained below.

Subchapter I
General Provisions

Section 178.0102(11) of WUPL sets forth the definition of a partnership and domestic partnership for purposes of Chapter 178. The proposed bill would add language to confirm that these terms do not include a limited partnership, a limited liability limited partnership or any entity for which a filing is required under another chapter of the Wisconsin Statutes.

There are two proposed changes to section 178.0104 of WUPL. As explained in the comments relating to proposed new section 183.0104(2m) in the SBW LLC Report, choices and elections by limited liability companies to be taxed under the Internal Revenue Code as partnerships or corporations, and for companies treated as corporations under the Code to be treated as either S corporations or C corporations, are not intended to have any impact on the governing law applicable to the internal affairs of such companies or the interest holder liability of their members, even though the corresponding tax consequences of such choices and elections may be relevant in the application of such law. Proposed new section 178.0104(2m) is intended to confirm that this same principle is applicable with respect to partnerships.

Proposed new section 178.0104(3m) explicitly states that a partnership agreement may require that, consistent with applicable jurisdictional requirements, all claims involving the internal affairs and interest-holder liability of the partnership's partners must be brought in the Wisconsin courts. As explained in more detail in the comments relating to proposed new sections 180.0145 and 181.0163 of the SBW Corporation Report, this provision is based upon

section 115 of the General Corporation Law of the State of Delaware (entitled "Forum selection provisions"). However, unlike Delaware section 115, proposed section 178.0104(3m) allows a partnership agreement to specify another jurisdiction as the exclusive forum for the resolution of some or all of such disputes. Such partnership provisions could also deal with venue within this or another state, to the same extent as they could under current law. All such provisions are also subject to whatever restrictions apply under federal law.

Section 178.0105(3) of WUPL, which corresponds to proposed section 179.0105(3) of WULPL, lists items that the partnership agreement is not permitted to do. Current section 178.0105(3)(b) states that the partnership agreement cannot "[v]ary the provisions of this section." However, neither RUPA nor RULPA currently contains such a provision, and this concept is implicit in the section itself. Therefore, the proposed bill would delete this language from section 178.0105(3)(b). This change is also intended to eliminate any argument that the absence of a corresponding provision in Chapter 179 means that a limited partnership agreement could alter the provisions of section 179.0105. No substantive change is intended.

Under the proposed bill, section 178.0105(3)(d) of WUPL would be modified to make it explicit that a partnership agreement could require partners to post security with respect to the breach of reasonable restrictions on the use of information obtained from the partnership. It was determined that this provision should be included in proposed Chapter 183 for limited liability companies and the Committee felt it should also be included in Chapters 178 and 179 to avoid the implication that such a provision could only apply to limited liability companies.

The proposed amendment to section 178.0105(3)(f) of WUPL is intended to allow partnership agreements to modify remedies with respect to breach of the contractual obligation of good faith and fair dealing, but only "if not manifestly unreasonable." A partnership agreement could, for example, prohibit recovery of consequential damages in appropriate circumstances.

The proposed revision to section 178.0105(3)(h) would substitute the word "person" for "partner" in order to correspond with the references to "the partner" in rest of that subsection. Similarly, section 178.0105(3)(n) of WUPL would also be changed to clarify the back-reference to "partner."

A new section 178.0105(3)(np) would be added to allow a partnership agreement to require any notice of acceptance of a buyout of a dissenting partner under section 178.1161 to be in writing and given in less than 60 (but not less than 10) days after the offer is made.

The phrase "Except as provided in sub. (3)(h)" at the beginning of section 178.0105(4)(c) would be deleted as redundant, inasmuch as all of section 178.0105(4) begins with the words "Subject to sub. (3)(h)." No substantive change is intended.

The reference on page 9 of the WUPL Report comments regarding sections 178.0109(2) and (3) should have been to sections 178.0108(2) and (3).

The proposed bill would amend section 178.0120 so that most DFI fees related to partnerships are specified by statute, rather than created by rule. The amounts of such fees are derived from DFI's proposed rules, Clearinghouse Rule 19-106.

The proposed bill would modify sections 178.0121(2)(b)3. and 4. of WUPL to eliminate the requirement that DFI include in a certificate of status a statement as to whether a domestic limited partnership is the subject of a proceeding to administratively dissolve it. Although the corresponding RUPA provision would require a certificate of status to include a statement as to whether such was the case, DFI has indicated that such a proceeding is unlikely to be pending if all relevant filings have been made (breach of which obligation would be noted in the certificate of status), and inquiry can and should be made if specific confirmation of that item is important in a given case.

Subchapter II
Nature of Partnership

The Committee had no comments that were specific to this Subchapter of WUPL.

Subchapter III
Relations of Partners to Persons
Dealing with Partnership

The proposed change to section 178.0301(1) of WUPL refers to "a record" rather than "an instrument" to use the defined term in the statute. Additionally, two of the references to the partnership in that section were made possessive for clarity.

Subchapter IV
Relations of Partners to Each
Other and To Partnership

While section 178.0407 already suggests this, the proposed change to section 178.0401(3) of WUPL would add a reference to 178.0406 (which conforms the language to section 179.0408(2) under the proposed bill) to clarify that the obligation of a partnership to indemnify and hold harmless a person does not extend to breaches of section 178.0406.

As explained in more detail in the comments relating to proposed new sections 180.0704(7) and 180.0821(4) of the SBW Corporation Report, proposed new section 178.0401(11m) is intended to make it clear that partners may consent in advance to partnership actions. However, given the management responsibilities of general partners, some of which are nonwaivable, it was thought that all such advance consents should be revocable.

In section 178.0402(2)(a), the proposed change would modify the language of this section to refer to "a," rather than "the" partnership agreement to conform to RUPA and RULPA and clarify that this section does not refer to a specific antecedent partnership agreement.

With respect to section 178.0405(3) of WUPL, the proposed addition of a specific reference to subsection (7) of section 178.0806 merely clarifies the reference.

Section 178.0409(3) would be amended to proscribe "grossly negligent or reckless conduct" under the duty of care, in addition to the Wisconsin "bad boy" provisions already incorporated into these duty provisions. The inclusion of both types of behavior as part of the duty of care seems more consistent with the overall structure of the RUPA/RULPA uniform laws.

Subchapter V
Transferable Interests and Rights Of Transferees and Creditors

The Committee had no comments that were specific to this Subchapter of WUPL.

Subchapter VI
Dissociation

In section 178.0601(4)(c)2. of WUPL, the language "the person has not been reinstated" is proposed to be added following the word "revoked," for clarity and to parallel WULPL section 179.0601(2)(d)3.b. under the proposed bill.

Subchapter VII
Person's Dissociation as a Partner When Business Not Wound Up

Conforming changes are proposed to section 178.0701(5), (7)(d) and (9) to clarify the language with respect to accrued interest. This is a variation from the language used in section 701 of RUPA. While the Committee feels the proposed language is clearer, the substantive results under both WUPL and RUPA are likely to be the same in these respects.

Section 178.0703 of WUPL provides that a dissociated partner is not liable for obligations incurred after dissociation, but it does not specifically say that the former partner continues to be liable for prior obligations. RULPA and proposed sections 179.0605(2) and 179.0607(1) (first sentence) both specifically say that dissociation does not relieve a general partner of liability for prior obligations. However, this concept seems sufficiently clear under Chapter 178 and RUPA. Therefore, the Committee did not recommend any change in this regard.

Subchapter VIII
Dissolution and Winding Up

The proposed bill would substitute the term "party" for the term "person" in section 178.0804(1) (intro.) in order to conform the terminology in the introduction to the rest of subsection 178.0804(1) of WUPL.

The proposed bill would delete the reference to subsections "(3) or (4)" in section 178.0806(3)(a) since those subsections are not sufficiently inclusive, and the reference should be to all of section 178.0703. The proposed bill would also renumber subsection (7) of section 178.0806 as subsection (6).

Sections 807(b)(3) and (c)(2)(A) and (B) of RUPA set deadlines for the filing of claims and the commencement of action on rejected claims, respectively, against dissolved partnerships. Those time frames are based upon "the date the notice is received by the claimant" and when "the claimant receives the notice," respectively. This focus on the date of actual receipt appears to give rise to an unintended level of factual uncertainty in what should be a straightforward procedural exercise. Accordingly, the proposed bill would amend sections 178.0807(2)(c) and (3)(b)1. and 2., which are based on the above-listed sections of RUPA, to refer instead to the provisions for the effectiveness of notices under section 178.0103(6), which are already incorporated into the section 178.0807 dissolved partnership creditor notice provisions by subsection (4r). As noted in the Appendix to this Report, the incorporated provision, 178.0103(6), is a parallel provision to section 180.0141 of the current Wisconsin corporate statutes, which is among the procedural provisions sought to be harmonized for all of the cross-species eligible Wisconsin entities under the WUPL Act and the proposed bill.

Also with respect to the notice provisions under section 178.0807, section 807(c)(2)(A) of RUPA appears to impose strict liability on the limited partnership to make sure that a notice is actually received by a creditor subject to the creditor notice procedures because it provides that a rejected claim is only barred if "the partnership *causes the claimant to receive* a notice in a record stating that the claim is rejected and will be barred" (emphasis added). This is in contrast to the corresponding language for the initial notification to known claimants contained in section 807(b), which merely requires the partnership to "in a record notify its known claimants," as well as section 180.1406(3), the corresponding Wisconsin corporate law provision. It also is inconsistent with the goal of providing certainty to dissolving limited partnerships. As a consequence, the proposed bill would amend section 178.0807(3)(b)1. to provide that a claim may be barred as long as the partnership "notifies the claimant in a record stating that the claim is rejected and will be barred" and complies with the other applicable requirements.

Note that section 178.0807(4) of WUPL provides that this notification procedure does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent, and proposed section 179.0807(3)(c) provides that such claims are nonetheless subject to being barred after two years under the publication procedure contained in section 179.0807. This raises questions, for example, with respect to the enforceability of post-dissolution claims arising shortly before or after the expiration of the publication procedure claims bar deadline. However, there seemed no obvious reason or solution to deviate from the uniform law provisions with respect to such claims, and, in the interests of uniformity, no change was recommended.

Both section 808 of RUPA and corresponding current section 178.0808 of WUPL are entitled "OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY PARTNERSHIP," which suggests that they do not apply to claims covered by the respective preceding sections of RUPA and WUPL, i.e., section 807 of RUPA and section 178.0807 of WUPL, both of which are

entitled "KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY PARTNERSHIP." However, it seems clear that at least some of the provisions of section 807 of RUPA and section 178.0807 of WUPL are intended to apply to both known and unknown claims. For example, both section 808(c)(1) of RUPA and section 178.0808(3)(a) of WUPL generically cover any "claimant that did not receive notice in a record" and both section 808(d) of RUPA and 178.0808(4) of WUPL specify the procedure for enforcing any "claim not barred under this section or [the preceding section]." Therefore, the title for section 178.0808 of WUPL would be amended under the proposed bill to refer more generically to all "Claims against dissolved limited liability partnership *generally*" (emphasis added), and the phrase "whether known or unknown" would be added to section 178.0808(1) in order to make it clear that the section is equally applicable to all types of claims not excluded by its terms. Both of these changes parallel the language of section 180.1407, the corresponding provision in Wisconsin's business corporation statute.

Another change would be made to section 178.0808 in order to conform to the corresponding provisions in 180.1407 in light of the harmonization goal of both the proposed bill and the WUPL Act. First, the reference to "the office of the partnership's registered agent" in subsection (2)(a) would be changed to "the partnership's registered office." This adjustment also has the advantage of eliminating any unnecessary uncertainty where, for example, the partnership's registered agent has more than one office.

Section 178.0808(3)(a) of WUPL, which is based on the corresponding language of RUPA, lists as one of three categories of claimants that could be barred under the publication procedure "[a] claimant that did not receive notice in a record under s. 178.0807." This provision raises the same difficult factual issues noted above in the comment with respect to sections 178.0807(2)(c) and (3)(b), but, unlike the changes proposed with respect to those two sections, the corresponding corporate law provision, section 180.1407(2)(a) of the Wisconsin statutes, contains similar language. Therefore, in the interests of uniformity, no change was recommended.

As explained above with respect to the amendments to section 178.0808(3)(a) of WUPL, the proposed bill would also make conforming changes to section 178.0809(1) of WUPL in order to better harmonize the procedural provisions for all cross-species eligible entity Chapters.

Subsection (3) of section 178.0809 of WUPL provides for notice only to "each claimant holding a contingent claim whose contingent claim is known to the partnership," but does not specify any notice procedures for other types of claims that could be covered by the section. Moreover, the "each claimant" language gives rise to the question of what would be the impact if one out of a number of claimants was inadvertently or otherwise not notified. Since this is a court-supervised proceeding, and the language here corresponds to that contained in not only RUPA and RULPA, but also the Model Business Corporation Act, no change was recommended in these regards.

Subchapter IX
Limited Liability Partnership

Similar to the provisions relating to limited partnerships, the proposed bill would amend several provisions of WUPL to require a registered agent for a domestic or foreign limited liability partnership to have an email address under proposed section 178.0901(3)(c) and receive notices from DFI at that email address under proposed section 178.0103(6)(d). See also proposed sections 178.0303(1)(b)2. and 3., 178.0303(2)(b) and (c), 178.0303(2m)(a)2. and 3., 178.0901(3)(c), 178.0908(2), 178.0911(1), 178.0911(1)(b) and (c), 178.0912(1), 178.0913(1)(b), 178.1003(5) and 178.1009(1)(f) under the proposed bill. Note that, in many instances and because of the nature of a limited liability partnership (which in many respects is more akin to a limited partnership), an email address for the partnership's principal office is also required.

Sections 178.0902(1), (2) and (5) would be modified to make it clear that variations in capitalization or punctuation would not cause names to be in or out of compliance with the mandatory naming requirements. For example, the name "XYZ LIMITED PARTNERSHIP" would be an acceptable name, even though the statute only refers to the phrase "limited partnership." Similarly, "XYZ L.P." would not be distinguishable from "XYZ LP" and vice versa. Although both items seem implicit in the uniform law provisions, other provisions relating to nomenclature in the proposed bill make such technical items explicit. See, for example, sections 179.0102(10) and (12) under the proposed bill. These adjustments should merely confirm what is likely to be the result under other statutes based upon RULPA/RUPA. The language of section 178.0902(5) would also be adjusted to reflect "service corporation" nomenclature used in Wisconsin to refer to corporations through which physicians and other professionals conduct licensed businesses.

Two changes are proposed with respect to section 178.09032 of WUPL. The first adds a cross reference in subsection (5) for clarity. The second adds a new subsection (6), which states that, "[t]he administrative revocation of a statement of qualification of a limited liability partnership does not terminate the authority of its registered agent," which is substantively identical to the corresponding RUPA provision, Section 903(e).

Subchapter X
Foreign Limited
Liability Partnership

Currently, an amendment of the foreign registration statement for a registered foreign limited liability partnership using a fictitious name does not require disclosure of that fictitious name. Section 178.1004(1) of WUPL would be amended to require that any amendment filed with DFI by a partnership required to use a fictitious name reflect "a fictitious name adopted pursuant to s. 178.1006(1)." This language also better parallels the corresponding language in 178.1003(1).

The proposed addition to section 178.1004(4) of WUPL, which deals with the amendment or cancellation of a foreign limited liability partnership's foreign registration statement, is an additional cross-reference to section 178.0116, dealing with correcting a filed

record. The procedure for correcting a filed record is another method by which a foreign limited liability partnership may change the information contained in its registration statement.

The proposed change to section 178.1006 of WUPL, which deals with noncomplying names of foreign limited liability partnerships, deletes the reference to subsection (3) of 178.0902 since other provisions of section 178.0902, such as the exceptions to the rule contained in subsection (3) thereof, also apply to the name of a foreign limited liability partnership. The same change is proposed for section 178.1009(1)(c) of WUPL.

In section 178.10101(1)(d) of WUPL, the addition of another cross-reference to 178.1004 is proposed to make clear that revocation is not appropriate if a limited liability partnership provides notice of a change of registered agent under section 178.1004 as an alternative to notice under the already-cited sections 178.0909 and 178.0910.

The proposed change to 178.10102 (1) of WUPL adds the possessive phrase "foreign limited liability partnership's" to the phrase "statement of foreign registration" to conform and clarify the language of WUPL and WULPL under the proposed bill.

Subchapter XI
Merger, Interest Exchange,
Conversion, and Domestication

The proposed amendment to section 178.1102(2) of WUPL modifies the reference from "chapter" to "subchapter" to clarify and conform the language.

While it might be obvious that the governing law of each entity that is party to a merger or other Subchapter XI transaction also governs whether a plan for that transaction may be amended or abandoned after the date that the plan is approved but before it is effective, the proposed bill would amend sections 178.1123(2), 178.1133(2), 178.1143(2) and 178.1153(2) to explicitly state that any amendment or abandonment of the plan is also subject to such governing law, and may also not be amended or abandoned if that option is specifically precluded in the plan for the transaction.

Sections 178.1125(2)(b), 178.1135(5)(b), and 178.1145(2)(b) of WUPL are proposed to be conformed for clarity and to make it clear that surviving entities must timely honor not only dissenters rights under Chapter 180, but also all comparable protective provisions with respect to domestic business entities.

Proposed new sections 178.1124(1)(g), 178.1132(1)(f), 178.1144(1)(g), and 178.1154(1)(g) would add a requirement that articles of merger, interest exchange, conversion and domestication specify whether amended section 178.1161 of WUPL regarding nonconsenting interest holders is applicable to the transaction for which such articles are being filed. Section 178.1161 and the proposed amendments thereto are discussed in detail in the WUPL Report and the related comments below in this Report.

Additional proposed modifications to sections 178.1125(1)(f), 178.1135(1)(a), and 178.1145(1)(f) of WUPL would add references to proposed sections 181.1180 and 183.1061, which would provide certain protections for nonconsenting members in the case of mergers, interest exchanges, conversions and domestications involving nonstock corporations and limited liability companies covered by Chapter 181 and Chapter 183, respectively.

Under the proposed bill, sections 178.1125(2)(a), 178.1135(5)(a) and 178.1145(2)(a) of WUPL would be amended to clarify that DFI is only "an" agent for service of process for a foreign surviving entity in merger, interest exchange, conversion and domestication transactions, rather than "the" agent for such service. Such sections would also be clarified to make it clear that such appointment only applies to obligations of interest holders "in their capacity as such," rather than for any claim against such foreign surviving entity.

Certain other minor conforming changes are proposed to WUPL sections 178.1133(1), 178.1135(5)(a), 178.1135(5)(b), 178.1141(1), 178.1143(1), 178.1144(1)(a), 178.1154(1)(d), 178.1154(1)(f), 178.1155(1)(e) and 178.1155(1)(f), which clarify the language and harmonize the provisions of WUPL and WULPL under the proposed bill.

Proposed changes to section 178.1142(1)(f) of WUPL would expressly permit a resulting entity that is party to a conversion to include in its plan of conversion any other matters required by its governing law.

The proposed bill would revise and clarify section 178.1161 of WUPL, which requires a partnership that engages in a merger, interest exchange, conversion or domestication transaction to offer to purchase a partner's interest in the partnership if the transaction would have certain specified material adverse effects on the partner and that partner does not consent to the transaction. Current section 178.1161 incorporates section 178.0701, the default provision relating to the purchase of a partner's interests upon dissociation, as the mechanism for the purchase of a partner's interest in a situation to which section 178.1161 applies. However, some of the provisions of section 178.0701 do not neatly apply to the purchase of a partner's interest in connection with a merger, interest exchange, conversion or domestication transaction. Accordingly, new section 178.1161 creates freestanding provisions regarding this purchase right. These include a new subsection (3), which specifies the timing of a written demand, the treatment of indebtedness owing to or by the partnership, required indemnification and the procedure that would apply when no agreement is reached regarding the price and terms for the purchase; a new subsection (4), dealing with court proceedings, including court discretion regarding the award of attorney fees and other expenses under certain circumstances; and a new subsection (5) to clarify that a partner cannot give a consent for this purpose merely by agreeing to a provision in the partnership agreement. While this proposed language for section 178.1161 is new, the purpose and mechanism is parallel to section 178.0701. Proposed new section 178.1161 confirms that both the offer and acceptance provided for thereunder may be conditioned upon consummation of the transaction itself. In addition, it confirms that the remedy with respect to the failure to comply with this provision is limited to enforcement of a nonconsenting partner's rights under this section, rather than any right to rescind or otherwise

undo the transaction itself. In this respect, these rights are similar to dissenters' rights under Chapter 180.

Respectfully submitted this **[6th day of May, 2021]**.

Partnership Committee
Business Law Section
State Bar of Wisconsin

Thomas J. Nichols, Chairman
Joseph D. Masterson
James N. Phillips
Christopher R. "Chal" Little

APPENDIX

Cross-Species/DFI Provisions Crosswalk

Subject	Chapter 178	Chapter 179	Chapter 180	Chapter 181	Chapter 183
Definition of Department of Financial Institutions.	**178.0102(3m)**	**179.0102(3m)**	**180.0103(6m)**	**181.0103(8)**	**183.0102(3m)**
Definition of domestic.	**178.0102(4c)**	**179.0102(4c)**	**180.0103(7d)**	**181.0103(10g)**	**183.0102(4c)**
Definition of foreign.	**178.0102(4t)**	**179.0102(4t)**	**180.0103(8r)**	**181.0103(12g)**	**183.0102(4t)**
Knowledge; notice.	**178.0103**	**179.0103**	**180.0141**	**181.0105**	**183.0103**
Operating documents.	**178.0105 178.0106; 178.0107**	**179.0105; 179.0106; 179.0107**	**180.0206**	**181.0206**	**183.0105; 183.0106 183.0107**
Permitted names.	**178.0902**	**179.0114**	**180.0401**	**181.0401**	**183.0112**
Reservation of name.	**178.0906**	**179.0115**	**180.0402**	**181.0402**	**183.0113**
Registration of name.	**178.0907**	**179.0116**	**180.0403**	**181.0403**	**183.0114**
Registered agent and registered office.	**178.0908**	**179.0117**	**180.0501**	**181.0501**	**183.0115**
Change of registered agent or registered office.	**178.0909**	**179.0118**	**180.0502**	**181.0502**	**183.0116**
Resignation of registered agent.	**178.0910**	**179.0119**	**180.0503**	**181.0503**	**183.0117**
Change of registered agent's name or address.	**178.0911**	**179.0120**	**180.0502(3)**	**181.0505**	**183.0118**
Filing and service fees.	**178.0120(1)-(2)**	**179.0124(1)-(2)**	**180.0122**	**181.0507(1)-(2)**	**183.0122(1)-(2)**
Evidentiary effect of copy of filed document.	**178.0120(3)**	**179.0124(3)**	**180.0127**	**181.0127**	**183.0122(3)**
Penalty for false document.	**178.0120(4)**	**179.0124(4)**	**180.0129**	**181.0129**	**183.0122(4)**
Annual report.	**178.0913**	**179.0212**	**180.1622**	**181.0214**	**183.0212**

Formation documents.	**178.0901**	**179.0201**	**180.0202**	**181.0202**	**183.0201(1)-(3)**
Amendment or cancellation.	**178.0901(6)**	**179.0202**	**180.1001-1009**	**181.1001-1007**	**183.0202**
Filing requirements.	**178.0113**	**179.0206**	**180.0120**	**181.0208**	**183.0206**
Signing of records filed with the department.	**178.0108; 178.0112**	**179.0203; 179.0204**	**180.0120(3)-(4)**	**181.0208(1)(d)**	**183.0203; 183.0204**
Forms.	**178.0113(5)**	**179.0206(5)**	**180.0121**	**181.0121**	**183.0206(5)**
Effective date and time.	**178.0114**	**179.0207**	**180.0123**	**181.0209**	**183.0207**
Duty of department to file; review of refusal to file; delivery of record by department.	**178.0117**	**179.0210**	**180.0125**	**181.0212**	**183.0210**
Certificate of status.	**178.0121**	**179.0211**	**180.0128**	**181.0213**	**183.0211**
Statement of authority.	**178.0303**	**179.04023**	**180.0202(2)-(4)**	**181.0202(2)-(4)**	**183.0302**
Statement of denial.	**178.0304**	**179.04025**	**180.0202(2)-(4)**	**181.0202(2)-(4)**	**183.0303**
Claims against dissolved entity.	**178.0807; 178.0808**	**179.0806; 179.0807**	**180.1406; 180.1407**	**181.1406; 181.1407**	**183.0704; 183.0705**
Grounds for administrative revocation or dissolution.	**178.09031**	**179.0811(1)**	**180.1420**	**181.1420**	**183.0708(1)**
Procedure for administrative revocation or dissolution.	**178.09032**	**179.0811(2)-(5)**	**180.1421**	**181.1421**	**183.0708(2)-(5)**
Reinstatement after administrative revocation or dissolution.	**178.0904**	**179.0812**	**180.1422**	**181.1422**	**183.0709**
Appeal from denial of reinstatement.	**178.0905**	**179.0813**	**180.1423**	**181.1423**	**183.0710**
Foreign entity registration.	**178.1002**	**179.1002**	**180.1501(1); 180.1502**	**181.1501(1); 181.1502**	**183.0902**

Filing registration statement as a foreign entity.	**178.1003**	**179.1003**	**180.1503**	**181.1503**	**183.0903**
Amending foreign entity registration statement.	**178.1004**	**179.1004**	**180.1504**	**181.1504**	**183.0904**
Foreign entity name.	**178.1006**	**179.1006**	**180.1506**	**181.1506**	**183.0906**
Registered agent and registered office of foreign entity.	**178.0908**	**179.0117**	**180.1507**	**181.1507**	**183.0115**
Change of registered agent or registered office of foreign entity.	**178.0909**	**179.0118**	**180.1508**	**181.1508**	**183.0116**
Resignation of registered agent of foreign entity.	**178.0910**	**179.0119**	**180.1509**	**181.1509**	**183.0117**
Withdrawal or transfer of foreign entity's registration.	**178.1007; 178.1008; 178.1009; 178.1011**	**179.1007; 179.1008; 179.1009; 179.1011**	**180.1520**	**181.1520**	**183.0907; 183.0908; 183.0909; 183.0911**
Grounds for administrative revocation of foreign entity's registration.	**178.10101**	**179.10101**	**180.1530**	**181.1530**	**183.09101**
Procedure for administrative revocation of foreign entity's registration.	**178.10102**	**179.10102**	**180.1531**	**181.1531**	**183.09102**
Reinstatement after administrative revocation of foreign entity's registration.	**178.10103(2)**	**179.10103(2)**	**180.1531(2)**	**181.1531(2)**	**183.09102(2)**

Appeal from denial of reinstatement of foreign entity's registration.	**178.10103**	**179.10103**	**180.1532**	**181.1532**	**183.09103**
Merger authorized.	**178.1121**	**179.1121**	**180.1101(1)**	**181.1101(1)**	**183.1021(1)**
Plan of merger.	**178.1122**	**179.1122**	**180.11012**	**181.1102**	**183.1022**
Amendment or abandonment of merger.	**178.1123(2), (3)**	**179.1123(2), (3)**	**180.11031(2), (3)**	**181.1103(2m), (3m)**	**183.1023(2), (3)**
Filings required for merger.	**178.1124(1)-(3)**	**179.1124(1)-(3)**	**180.1105(1)**	**181.11045(1)-(3)**	**183.1024(1)-(3)**
Effective date of merger.	**178.1124(4)**	**1179.1124(4)**	**180.1105(2)**	**181.11045(4)**	**183.1023(4)**
Effect of merger: Agent for service of process for claims from dissenters.	**178.1125(2)(a)**	**179.1125(2)(a)**	**180.1106(3)(a)**	**181.11055(2)(a)**	**183.1025(2) (a)**
Interest exchange authorized.	**178.1131**	**179.1131**	**180.1102(1), (1m)**	**181.1131**	**183.1031**
Plan of interest exchange.	**178.1132**	**179.1132**	**180.11021**	**181.1132**	**183.1032**
Amendment or abandonment of plan of interest exchange.	**178.1133(2), (3)**	**179.1133(2), (3)**	**180.11031(2), (3)**	**181.1133(2), (3)**	**183.1033(2), (3)**
Filings required for interest exchange.	**178.1134(1)-(2)**	**179.1134(1)-(2)**	**180.1105(1)**	**181.1134(1)-(2)**	**183.1034(1)-(2)**
Effective date of interest exchange.	**178.1134(3)**	**179.1134(3)**	**180.1105(2)**	**181.1134(3)**	**183.1034(3)**
Interest Exchange: Agent for service of process for claims from dissenters.	**178.1135(5)(a)**	**179.1135(5)(a)**	**180.1106(3)(a)**	**181.1135(4)(a)**	**183.1035(4)(a)**
Conversion authorized.	**178.1141**	**179.1141**	**180.1161(1)-(2)**	**181.1161(1m)-(2m)**	**183.1041**

Plan of conversion.	**178.1142**	**179.1142**	**180.1161(3)-(3m)**	**181.1162**	**183.1042**
Amendment or abandonment of plan of conversion.	**178.1143(2), (3)**	**179.1143(2), (3)**	**180.11031(2), (3)**	**181.1163(2), (3)**	**183.1043(2), (3)**
Filings required for conversion.	**178.1144(1)-(3)**	**179.1144(1)-(3)**	**180.1161(5)**	**181.1164(1)-(3)**	**183.1044(1)-(3)**
Effective date of conversion.	**178.1144(4)**	**179.1144(4)**	**180.1161(3)(e), (5)(cm)**	**181.1164(4)**	**183.1044(4)**
Conversion: Agent for service of process for claims from dissenters.	**178.1145(2)(a)**	**179.1145(2)(a)**	**180.1161 (8)**	**181.1165(2)(a)**	**183.1045(2)(a)**
Domestication authorized.	**178.1151**	**179.1151**	**180.1171**	**181.1171**	**183.1051**
Plan of domestication.	**178.1152**	**179.1152**	**180.1172**	**181.1172**	**183.1052**
Amendment or abandonment of plan of domestication.	**178.1153(2), (3)**	**179.1153(2), (3)**	**180.1173(2), (3)**	**181.1173(2), (3)**	**183.1053(2), (3)**
Filings required for domestication.	**178.1154(1)-(2)**	**179.1154(1)-(2)**	**180.1174(1)-(2)**	**181.1174(1)-(2)**	**183.1054(1)-(2)**
Effective date of domestication.	**178.1154(3)**	**179.1154(3)**	**180.1174(3)**	**181.1174(3)**	**183.1054(3)**
Restrictions on certain transactions.	**178.1161**	**179.1161**	**180.1301-1331**	**181.1180**	**183.1061**

State of Wisconsin
Department of Financial Institutions

Tony Evers, **Governor** Kathy Blumenfeld, **Secretary**

October 21, 2021

Statement of the Department of Financial Institutions Division of Corporate and Consumer Services Regarding Assembly/Senate Bill 566

The Department of Financial Institutions serves as the statutory filing office for business formation records, annual reports, and other official business records filed with the state under chapters 178, 179, 180, 181, and 183 of the Wisconsin Statutes. No different than its counterparts in other states, the Department's duties under these chapters are ministerial in nature. It processes filings, makes them available to the public, and enforces statutory filing deadlines, but it does not have authority to enforce the substantive provisions of those chapters or to regulate corporate governance more broadly. For that reason, this comment is limited to those aspects of the bill that directly impact the Department's administration of its filing-office duties under the law.

We are grateful to the State Bar Business Law Section for the opportunity to meet during the drafting stages of this legislation, and for its painstaking efforts to ensure that this legislation, if enacted, would be administratively feasible for the Department. The final bill contains no provisions that would impede the Department's performance of those filing-office duties, and several that would better enable the Department to carry them out.

Most significantly from the Department's perspective, the bill would streamline several statutory duties by authorizing paperless administration. While businesses can (and generally do) communicate and file their records electronically with the Department, current law still requires the Department to send various notices to businesses by physical mail at a cost of more than $130,000 per year. By allowing the Department to send required notices electronically, the bill would substantially eliminate the need to incur those costs.

In addition, the bill modernizes the law by eliminating several unnecessary discrepancies among the operative statutory chapters for general partnerships, limited partnerships, business corporations, nonstock corporations, and limited liability companies. The Department expects that these changes, over time, will result in greater clarity for the public, fewer questions for departmental staff, and fewer filing errors by businesses.

We appreciate the Committee's attention to this bill and to issues affecting business registrations in the state.

Sincerely,

Patti Epstein

Patti Epstein
Administrator, Division of Corporate and Consumer Services
Wisconsin Department of Financial Institutions
Patti.Epstein@dfi.wisconsin.gov