

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Thomas C. (Tim) Owens at 9:36 a.m. on February 3, 2009, in Room 545-N of the Capitol.

All members were present.

Committee staff present:

Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the committee:

Stephanie Mickelsen, Deputy Assistant Secretary of State
Edwin W. Hecker, Jr., Professor of Law
Dianne Minear, Secretary of State's Office

Others attending:

See attached list.

The Chairman opened the hearing on **SB 85 - Secretary of state; return of filings.**

Stephanie Mickelsen testified in support indicating the bill will allow the Office of the Secretary of State to return a certified copy rather than original documents. Enactment will accommodate the anticipated move to electronic filing as well as reduce confusion among customers. (Attachment 1)

There being no further conferees, the hearing on **SB 85** was closed.

The Chairman opened the hearing on **SB 86 - Secretary of state; letters of good standing.**

Stephanie Mickelsen testified in support stating enactment of **SB 86** will reduce redundancies and streamline services by incorporating information for corporations currently provided in the Letter of Good Standing into the Certificate of Good Standing. (Attachment 2)

There being no further conferees, the hearing on **SB 86** was closed.

The Chairman opened the hearing on **SB 132 - Enacting business entity transaction act.**

Dianne Minear, proponent, reviewed the bill which would enact the Business Entity Transactions Act (BETA). The bill provides comprehensive statutory authority for business entities (corporations, partnerships, limited partnerships, and limited liability companies) to perform mergers, conversions, interest exchanges, and domestications with similar or dissimilar business entities. Ms. Minear also provided a amendment addressing a technical correction. (Attachments 3 & 4)

Edwin Hecker appeared in support providing detailed information of the history and development of business entities. There are four major business entities, corporations, limited liability companies, partnerships and limited partnerships which are each governed by their own set of statutes. Currently there is no statute to allow partnerships or limited liability companies to convert into a corporation, a statute permitting corporations to convert into any other type of entity, or statutory authorization for mandatory interest exchanges or domestications. **SB 132** seeks to fill these voids, it is good public policy and good for business. Mr. Hecker indicated the American Bar Association and the Uniform Commissioners on State laws have endorsed the Business Entity Transactions Act. (Attachment 5)

There being no further conferees, the hearing on **SB 132** was closed.

CONTINUATION SHEET

Minutes of the Senate Judiciary Committee at 9:36 a.m. on February 3, 2009, in Room 545-N of the Capitol.

Approval of Minutes

Senator Haley moved, Senator Pilcher-Cook seconded, to approve the minutes of January 20 and January 21. Motion carried.

The Chairman notified the Committee of his intention to refer **SB 27 - Presumption of paternity; genetic testing** to the Judicial Council for further review.

Senator Schmidt indicated following the Committees action passing **SB 28** a question was raised regarding complications arising from merger of misdemeanor and felony.

Senator Schmidt moved, Senator Vratil seconded, to reconsider **SB 28 – Driver’s license penalties for unlawful possession of a controlled substance or analog which occurs while transporting the substance or analog in a vehicle.** Motion carried.

The next meeting is scheduled for February 4, 2009.

The meeting was adjourned at 10:15 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-3-09

NAME	REPRESENTING
SEAN MILLER	CAPITOL STRATEGIES
Scott Heidner	Graces Braden
Lynn Wells	Judicial Branch
Joseph Molina	KS BAR ASSOC.
Diane Miniar	Sec. of State
Stephanie Mickelsen	Sec of State
Edwin W. Heckler, Jr.	Edwin W. Heckler, Jr.

TESTIMONY OF THE SECRETARY OF STATE TO THE SENATE JUDICIARY
COMMITTEE ON SB 85

February 3, 2009

Mr. Chairman and Members of the Committee:

The Secretary of State appreciates the opportunity to appear today to brief the committee and answer questions relating to SB 85, a bill requested by the Secretary of State.

This bill seeks to change language in four business entity statutes (K.S.A. 17-6003, 17-7301, 17-7678, 56-1a156) regarding the filed document our office returns to the customer. These statutes use varying language referring to original documents, including

- “the original instrument as a certified copy of the original recorded instrument”
- “the original, certified”
- “the original document, certified as a true copy of the recorded document”

We are requesting a change in the language in each statute to “a certified copy of the recorded document.”

One reason for this request is to accommodate a change in our filing process that we expect to implement in 2010. At that time we plan to return copies of documents to customers, not the original documents. The copies will be imaged and file stamped and will represent exactly what is stored in our filing system.

With the new process we will not physically move the original paper document through the filing steps (data entry, accounting, scanning, customer correspondence) as we currently do; it will instead be routed electronically. If we return a copy of the filed document, the customer can verify that we filed the document as they intended.

The second reason for this request is to make the language consistent and reduce confusion among our customers about what we return to them upon filing their document.

We request that the effective date in the bill be amended to January 1, 2010.

There will be no fiscal impact on the Secretary of State or the State General Fund.

I appreciate the opportunity to appear today and would be happy to answer questions.

Stephanie Mickelsen
Deputy Assistant Secretary of State

Senate Judiciary

2-3-09

Attachment 1

TESTIMONY OF THE SECRETARY OF STATE TO THE SENATE JUDICIARY
COMMITTEE ON SB 86

February 3, 2009

Mr. Chairman and Members of the Committee:

The Secretary of State appreciates the opportunity to appear today to brief the committee and answer questions relating to SB 86, a bill requested by the Secretary of State.

This bill seeks to amend K.S.A. 17-7506 by striking in paragraph (d), the words, "letters of good standing".

This change will reduce redundancies and streamline services. Currently, our office provides customers the option to order from us a Letter of Good Standing (LGS) and/or a Certificate of Good Standing (CGS). The data provided in the LGS is very similar to that in the CGS. Essentially, we provide duplicate services and there is little value to the customer in providing both documents; often it creates unnecessary confusion for the customer.

Our office will incorporate the information currently provided in the Letter of Good Standing into the Certificate of Good Standing so that our customers suffer no loss in data that they may have found valuable.

We request that the effective date be amended to January 1, 2010 so that we may complete an upgrade to our filing process and develop this new improved document.

There will be no fiscal impact to the State General Fund. We anticipate a reduction in our fee funds of \$68,000. We plan to manage this reduction in revenue by streamlining services and reassigning staff.

I appreciate the opportunity to appear today and would be happy to answer questions.

Stephanie Mickelsen
Deputy Assistant Secretary of State

Senate Judiciary

2-3-09

Attachment 2

SENATE JUDICIARY COMMITTEE
EXECUTIVE SUMMARY
SB 132: BUSINESS ENTITY TRANSACTIONS ACT

Mr. Chairman and members of the Committee:

The Secretary of State thanks the Committee for the opportunity to present this Executive Summary for SB 132.

This Act began as a national, Model Entity Transactions Act, drafted by the American Bar Association and the National Conference on Commissioners on Uniform State Laws. These groups spent more than four years developing the Act. The Kansas Bar Association then took on the task of drafting the Kansas version of this model act, which we now call the Business Entity Transactions Act.

The Model Act came about as a response to the proliferation of different entity types, each type with its own laws governing how it can change, merge, convert, etc. For example, current Kansas law allows LLCs to convert into LPs, but it excludes corporations from this transaction. If corporations need to convert, they must undertake a multi step process to dissolve and start over, or find other less direct, more time consuming and more expensive avenues to become another kind of entity. This act seeks to apply consistent, universal rules across all of the entity types. This act seeks to make the transformations of business entities more straightforward and fluid.

The Business Entity Transactions Act provides procedures for business entities such as corporations, limited liability companies, partnerships, limited partnerships and limited liability partnerships to perform four kinds of transactions. Some of these transactions are already allowed on a limited basis under Kansas law. This Act serves to make these transactions more universally possible.

This Act provides procedures for business entities to perform:

Mergers—two or more entities are combined into a surviving entity (ABC Inc. and DEF Inc. become DEF Inc. or XYZ Inc.)

Conversions—a single entity transforms itself into a different type of entity (a corporation becomes a LLC)

Interest Exchanges—one entity acquires the stock of another entity

Domestications—a domestic entity becomes a foreign entity of the same type, and vice versa (a Kansas LP becomes a Missouri LP)

We request that the effective date of this bill be July 1, 2010 so that we may complete improvements to our filing process and program our system to manage the filings provided for in this Act.

We discovered after this bill was drafted that additional merger statutes would need to be repealed and that we would need to add a definition to the bill. Therefore we present today a balloon amendment with these changes.

Senate Judiciary

2-3-09
Attachment 3

SENATE BILL No. 132

By Committee on Judiciary

1-28

9 AN ACT enacting the business entity transaction act; amending K.S.A.
 10 17-7675, 17-7681, 56a-401, 56a-502, 56a-905, 56a-906, 56a-907 and
 11 56a-908 and repealing the existing sections; also repealing K.S.A. 17-
 12 7684, 17-7685, 56a-901, 56a-902, 56a-903 and 56a-904.

17-7701 through 17-7709,

13
 14 *Be it enacted by the Legislature of the State of Kansas:*

15 New Section 1. This act may be cited as the business entity trans-
 16 actions act.

17 New Sec. 2. As used in this act:

18 (a) "Acquired entity" means the entity, all of one or more classes or
 19 series of interests in which are acquired in an interest exchange.

20 (b) "Acquiring entity" means the entity that acquires all of one or
 21 more classes or series of interests of the acquired entity in an interest
 22 exchange.

23 (c) "Agreement" means a plan or agreement of merger, interest
 24 exchange, conversion or domestication.

25 (d) "Approve" means, in the case of an entity, for its governors and
 26 interest holders to take whatever steps are necessary under its organic
 27 rules, organic law, and other law to:

28 (1) Propose a transaction subject to this act;

29 (2) adopt and approve the terms and conditions of the transaction;
 30 and

31 (3) conduct any required proceedings or otherwise obtain any re-
 32 quired votes or consents of the governors or interest holders.

33 (e) "Conversion" means a transaction authorized by article 4.

34 (f) "Converted entity" means the converting entity as it continues in
 35 existence after a conversion.

36 (g) "Converting entity" means the domestic entity that approves an
 37 agreement of conversion pursuant to section 25, and amendments
 38 thereto, or the foreign entity that approves a conversion pursuant to the
 39 law of its jurisdiction of organization.

40 (h) "Domestic entity" means an entity whose internal affairs are gov-
 41 erned by the law of this state.

42 (i) "Domesticated entity" means the domesticating entity as it con-
 43 tinues in existence after a domestication.

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1 (j) "Domesticating entity" means the domestic entity that approves
2 an agreement of domestication pursuant to section 31, and amendments
3 thereto, or the foreign entity that approves a domestication pursuant to
4 the law of its jurisdiction of organization.

5 (k) "Domestication" means a transaction authorized by article 5.

6 (l) "Filing entity" means an entity that is created by the filing of a
7 public organic document.

8 (m) "Foreign entity" means an entity whose internal affairs are gov-
9 erned by the laws of a jurisdiction other than this state.

10 (n) "Governance interest" means the right under the organic law or
11 organic rules of an entity, other than as a governor, agent, assignee or
12 proxy, to:

13 (1) Receive or demand access to information concerning, or the
14 books and records of, the entity;

15 (2) vote for the election of the governors of the entity; or

16 (3) receive notice of or vote on any or all issues involving the internal
17 affairs of the entity.

18 (o) "Governor" means a person by or under whose authority the pow-
19 ers of an entity are exercised and under whose direction the business and
20 affairs of the entity are managed pursuant to the organic law and organic
21 rules of the entity.

22 (p) "Interest" means:

23 (1) A governance interest in an unincorporated entity;

24 (2) a transferable interest in an unincorporated entity; or

25 (3) a share or membership in a corporation.

26 (q) "Interest exchange" means a transaction authorized by article 3.

27 (r) "Interest holder" means a direct holder of an interest.

28 (s) "Interest holder liability" means:

29 (1) Personal liability for a liability of an entity that is imposed on a
30 person:

31 (A) Solely by reason of the status of the person as an interest holder;
32 or

33 (B) by the organic rules of the entity pursuant to a provision of the
34 organic law authorizing the organic rules to make one or more specified
35 interest holders or categories of interest holders liable in their capacity
36 as interest holders for all or specified liabilities of the entity; or

37 (2) an obligation of an interest holder under the organic rules of an
38 entity to contribute to the entity.

39 (t) "Jurisdiction of organization" of an entity means the jurisdiction
40 whose law includes the organic law of the entity.

41 (u) "Liability" means a debt, obligation or any other liability arising
42 in any manner, regardless of whether it is secured or whether it is
43 contingent.

(1) "Entity" means:
(1) A corporation;
(2) a general partnership, including a limited liability partnership;
(3) a limited partnership, including a limited liability limited partnership;
(4) a limited liability company;
(5) a business trust or statutory trust entity;
(6) a cooperative; or
(7) any other person that has a separate legal existence or has the power to acquire an interest in real property in its own name other than:
(A) An individual;
(B) a testamentary, inter vivos, or charitable trust, with the exception of a business trust, statutory trust entity or similar trust;
(C) an association or relationship that is not a partnership solely by reason of subsection (c) of K.S.A. 56a-202, and amendments thereto, or a similar provision of the law of any other jurisdiction;
(D) a decedent's estate; or
(E) a government, a governmental subdivision, agency, or instrumentality or a quasi-governmental instrumentality.

and by relettering the remaining subsections accordingly

4-3

1 cuted and declared to be accurate pursuant to subsection (c) of K.S.A.
 2 56a-105, *and amendments thereto*, stating the name of a partnership ~~or~~
 3 ~~limited partnership~~ that is a party to the merger in whose name property
 4 was held before the merger and the name of the surviving ~~entity part-~~
 5 ~~nership~~, but not containing all of the other information required by sub-
 6 section (b), operates with respect to the partnerships ~~or limited partner-~~
 7 ~~ships~~ named to the extent provided in subsections (c) and (d).

8 Sec. 50. K.S.A. 56a-908 is hereby amended to read as follows: 56a-
 9 908. This article is not exclusive. Partnerships ~~or limited partnerships~~ may
 10 be ~~converted or~~ merged in any other manner provided by law.

11 Sec. 51. K.S.A. 17-7675, 17-7681, 17-7684, 17-7685, ~~56a-401, 56a-~~
 12 ~~502, 56a-901, 56a-902, 56a-903, 56a-904, 56a-905, 56a-906, 56a-907 and~~
 13 ~~56a-908~~ are hereby repealed.

17-7701 through 17-7709,

14 Sec. 52. This act shall take effect and be in force from and after July
 15 1, 2010, and its publication in the statute book.

TESTIMONY OF EDWIN W. HECKER, JR.
TO THE SENATE JUDICIARY COMMITTEE
ON SB 132

FEBRUARY 3, 2009

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear today to brief the Committee and answer questions relating to SB 132, a bill requested by the Secretary of State and the Kansas Bar Association.

SB 132 is entitled the Business Entity Transactions Act (BETA). It is a close copy of the Model Entity Transactions Act (META) with minor changes necessary to integrate it and make it consistent with existing Kansas law. META is the culmination of a joint project of the National Conference of Commissioners on Uniform State Laws and the American Bar Association. Its drafters describe it as follows:

The Model Entity Transactions Act provides procedures for mergers, conversions, interest exchanges, and domestications of business and nonprofit entities, including partnerships, limited partnerships, limited liability companies and corporations. Cross entity transactions of these kinds are made more universally possible. The objective is to accomplish such a transaction with appropriate approvals without having to dissolve an entity and without extinguishing any obligations owed by preceding entities in the process.

Melissa A. Wangemann, then Kansas Deputy Assistant Secretary of State and Legal Counsel, became interested in the META project and was one of three official observers of the national drafting process. At the state level, she organized a committee to study META with a view toward its possible adoption in Kansas. The study committee consisted of W. Robert Alderson, Jr. of Alderson, Alderson, Weiler, Conklin, Burghart & Crow, L.L.C.; Charles D. Lee of Martindell, Swearer & Shaffer; Kathleen A. Olsen of the Kansas Bankers Association; William R. Wood II of Foulston Siefkin LLP; and myself. SB 132 is the product of the work of that committee.

Since the early 1990s, there has been a proliferation of different types of business entities, in Kansas and elsewhere. Presently, the four major types are corporations, limited liability companies, partnerships (including limited liability partnerships), and limited partnerships (including limited liability limited partnerships). In Kansas, each has its own governing statute that authorizes mergers with like entities. The statutes that govern partnerships and limited liability companies also authorize them to convert into some other type of unincorporated entity without the necessity of dissolving and reorganizing. But they cannot convert into a corporation. Nor is there a statute that permits a corporation to convert into any other type of entity. Kansas also has a so-called mixed entity merger statute that broadly authorizes and regulates mergers between dissimilar

entities of all types. It does not, however, authorize transactions other than mergers. Finally, there is no statutory authorization in Kansas for mandatory interest exchanges or domestications with respect to any type of entity.

SB 132, BETA, seeks both to fill these voids and rationalize existing law with a comprehensive statute that substantively authorizes four types of mixed entity (and in some cases similar entity) transactions, coupled with parallel procedures for the authorization of those transactions. It consists of six articles that address: (1) definitions and generally applicable provisions; (2) mergers; (3) interest exchanges; (4) conversions; (5) domestications; and (6) execution and filing requirements, amendment and repeal of other statutes, effective date, etc. Although I do not wish to prolong these remarks unduly, with your indulgence I would like to highlight just a few points in each of the six articles.

Article 1 (sections 1-10), in its definition of "entity," lists all of the various generic types of entities to which the bill applies. Article 1 also excludes coverage of insurance companies, banks, trust companies, credit unions, and professional corporations and limited liability companies. It includes public utilities, however, subject to any inconsistent provisions in Chapter 66 of K.S.A.

Article 2 (sections 11-16) governs mergers. It begins by excluding mergers of two or more corporations, two or more limited partnerships, two or more partnerships, and two or more limited liability companies. The reason is that the separate statutes governing these four types of entities already provide for mergers between like kind entities, so there is no need for redundant coverage under BETA. Article 2 then goes on to provide a procedure to accomplish primarily mixed entity mergers that also serves as a template for the other three substantive articles as well. First, an agreement of merger is negotiated by the two or more entities that wish to merge. Second, the merger agreement must be approved by each entity in the same manner as that required by its governing statute and internal governing documents for a merger with a similar entity. If an entity's governing statute and internal rules do not provide for approval of a like-kind merger, the agreement must receive the unanimous approval of all interest holders who have voting rights. The surviving entity then must file a certificate of merger with the Secretary of State, after which the merger will become effective.

Article 3 (sections 17-22) authorizes interest exchanges, which are new to Kansas law, and therefore applies to both similar entity and mixed entity transactions. In an acquisition cast in the form of a simple merger, the acquiring entity survives with the combined assets, liabilities, rights, powers, privileges, restrictions, etc. of both entities, and the acquired entity disappears. Under current law, if the acquiring entity wishes to keep the acquired entity in existence and operate it as a wholly-owned subsidiary, it has only two alternatives, both of which are unnecessarily complicated. It can engage in a reverse triangular merger, in which it creates a paper shell subsidiary which is then merged into the acquired entity with the acquired entity surviving; the interest holders of the acquired entity receive interests in the acquiring entity and/or cash; and the acquiring entity's interests in the disappearing shell subsidiary are converted into interests in the

acquired entity. Alternatively, the acquiring entity can make a direct offer to purchase the interests of the individual interest holders of the acquired entity. This will rarely result in acquiring all of the outstanding interests in the acquired entity, and so a follow up reverse triangular merger will be necessary if complete ownership is desired. BETA allows acquisition of a previously unrelated entity as a subsidiary simply and directly with an “interest exchange,” in which all of at least one class of interests in the acquired entity are exchanged for interests in the acquiring entity and/or cash, pursuant to an agreement of interest exchange negotiated between the two entities. From the acquired entity’s point of view, the transaction is accomplished like a merger, including appraisal rights for dissenters if they would have had them in a merger. Unlike a merger, approval by the interest holders of the acquiring entity generally is not required. This is consistent with current law governing triangular mergers and outright interest purchases and reflects the policy that such a transaction is not necessarily a fundamental organic change as to that entity. That is, the entity simply is purchasing some new assets—interests in another entity. Of course, it is entirely permissible to include an approval requirement in the governing documents of the acquiring entity, if desired. Like a merger, an interest exchange becomes effective upon filing a certificate of interest exchange with the Secretary of State.

Article 4 (sections 23-28) expands existing law to permit any entity to convert itself into a different form without the necessity of dissolving and reorganizing. It follows the same pattern of approval of an agreement and filing a certificate as that governing mergers, but the process is simpler because only a single entity is involved. Importantly, the rights of creditors of the original entity are preserved unimpaired just as if the conversion had not occurred. Because Article 4 is intended to be comprehensive, the overlapping provisions of current partnership and limited liability company law that permit only certain kinds of conversions are repealed by Article 6 (sections 35-52).

Domestication statutes permit an entity to change its jurisdiction (state) of organization without having to dissolve in the original jurisdiction and reorganize in the new one. Because Kansas presently has no domestication laws, Article 5 (sections 29-34), like Article 3 (sections 17-22), represents a major advance. If SB ___ becomes law, a Kansas entity could domesticate in a foreign (different) jurisdiction, or a foreign entity could domesticate in Kansas, assuming a reciprocal law in the foreign jurisdiction. Article 5 follows the familiar pattern of approval of an agreement of domestication, filing a certificate of domestication, and effectiveness. It is even simpler than Article 4 (sections 23-28), however, because all transactions are not only single entity but also same entity.

Finally, Article 6 (sections 35-52) makes certain additional conforming changes in the statutes governing partnerships and limited liability companies and repeals the existing mixed entity merger statute.

It is apparent to me that SB 132 would constitute a significant advance in Kansas statutory business law. It would simplify mixed entity mergers; extend and rationalize conversions; and introduce two entirely new and cost-effective kinds of transactions:

interest exchanges and domestications. If enacted, it would solidify the state's reputation as being business-friendly and in the forefront of 21st century business law innovation.

The opinions I have expressed are my own and do not necessarily represent the views of the University of Kansas. Thank you for your patience and the opportunity to appear today. I would be happy to try to answer any questions you may have.

Edwin W. Hecker, Jr.
Professor of Law