# Statutory Conversions of State Law Business Corporations to Limited Liability Companies–Law, Tax and Practice in Light of LTRs 200528021 and 200548021

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John Cunningham summarizes the corporate and LLC business organization law relevant to the statutory conversion of corporations to LLCs, as well as the background and content of LTRs 200528021 and 200548021, which facilitate these conversions.



## Introduction

### Statutory Conversions of Corporations to Limited Liability Companies–Introduction

There are presently about 5.2 million privately held state-law business corporations that file federal income tax returns, of which about 3 million are taxable as S corporations and the remaining 2 million as C corporations.[2] For a significant number of these corporations—probably totaling many tens of thousands of companies, and perhaps hundreds of thousands—the limited liability company business organization form offers statutory legal advantages, including business asset protection advantages, that can be of great practical value and that the corporate form cannot offer. In addition, in a few states, the LLC form is preferable to the corporate form for state tax reasons.[3]

Assuming that their conversion is cost-effective in terms of professional and other fees and that it can have no adverse tax consequences, all privately held corporations that can benefit significantly from the above LLC statutory legal advantages or state tax advantages should seriously consider converting to LLCs.

There are three main alternatives for effecting the conversion of a corporation into an LLC—namely, through a nonstatutory conversion, through a statutory interspecies merger, or through a statutory conversion.[4] However, for most corporations, the best way to convert to an LLC is through a statutory conversion. In a statutory conversion, in contrast to other types of conversions, the converting corporation is, by law, the same legal entity after the conversion as before, and thus avoids transfer taxes and other potentially negative legal and state tax consequences that afflict

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multi-entity conversions. The laws of approximately 26 states presently permit statutory conversions of corporations to LLCs—namely, in alphabetical order, Alabama, Alaska, California, Colorado, Delaware, Florida, Georgia, Hawaii, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

On April 4, 2005, the Internal Revenue Service issued a private letter ruling, designated LTR 200528021, to a corporation that I will refer to here as "XYZ." XYZ is a state-law business corporation formed under the laws of State M, and it is an S corporation for federal tax purposes. In LTR 200528021, the IRS ruled, in essence, that if XYZ effects the statutory conversion to an LLC, described in XYZ's submission to the IRS, and elects to be classified as an association taxable as a corporation, the conversion will qualify as a reorganization under Code Sec. 368(a)(1)(F) and will not affect XYZ's S election.[6] On August 23, 2005, the IRS issued to XYZ a second letter ruling, designated LTR 200548021, in which it ruled, in essence, that the draft of XYZ's LLC operating agreement that XYZ had submitted to the IRS would determine whether XYZ had a second class of stock within the meaning of Code Sec. 1361(b)(1)(D) after the conversion; and that the operating agreement would not create a second class of stock.[7]

> [T]here is no reason for a Delaware corporation to convert to an LLC merely to improve its status as an entity.

Before the issuance of the above rulings (together, the "Rulings"), there was ample federal tax authority concerning the favorable federal income tax consequences of conversions to LLCs taxable as corporations by state-law corporations (whether they were C or S corporations for federal tax purposes) through nonstatutory conversions and statutory interspecies mergers.[8] However, there was no federal tax authority directly on point concerning statutory conversions as such. XYZ is a client of mine, and I was the principal author of the XYZ submissions that resulted in the Rulings. Only XYZ may cite the Rulings as precedent.[9] However, all other corporations, whether taxable as S corporations or as C corporations, that contemplate statutory conversions to LLCs, may derive substantial comfort from them.

In this article, I will summarize the corporate and LLC statutory law relevant to the conversion of corporations to LLCs, and I will summarize the background and content of the Rulings and discuss in some detail their practical implications for statutory conversions by corporations other than XYZ.

## The Background of the Rulings

XYZ is a privately held state-law business corporation company with a small number of stockholders, all of whom are individuals. Its managers are highly competent in supervising and managing its day-to-day business, but they also are careful long-term planners, and they possess what, in my experience, is a rare openness to innovative legal and tax ideas. XYZ is a profitable company that has experienced substantial growth in recent years and is likely to continue this growth. It has one wholly owned operating subsidiary, whose business organization form is that of a single-member LLC, and which is classified for federal income taxation as a disregarded entity. However, XYZ itself directly conducts most of its operations, and it directly owns most of its business assets. These assets have an aggregate value of many millions of dollars.

In approximately July of 2004, I made the following recommendations to XYZ:

- I recommended that in order to obtain LLC business asset protection advantages and other LLC statutory advantages (discussed further in the next section of this article), XYZ should convert to an LLC under the statutory conversion law of State M.
- I recommended that in order to obtain additional business asset protection, XYZ should change its function to that of an essentially passive holding company and should transfer most of its management functions and all of its day-to-day operations to its existing subsidiary.[10]
- I recommended that XYZ create certain additional operating entities and that it establish governance procedures and a system of intercompany leasing, licensing and lending arrangements among itself and these subsidiaries that, on the basis of this fully articulated holding company/operating company structure, would minimize the risk of XYZ liability for third-party claims against its subsidiaries.

Finally, although I advised XYZ that under existing federal tax authorities, the above corporate procedures, taken together, would almost certainly qualify as an F reorganization, I recommended that XYZ seek a private letter ruling confirming this advice. However, I made clear to XYZ that because of an IRS no-ruling policy on F reorganizations, it might be difficult to obtain such a ruling.

XYZ accepted all of the above recommendations, and, to my surprise, the IRS was willing to consider a request by XYZ for a private letter ruling on all of the federal tax issues relevant to its restructuring. On December 1, 2004, XYZ made an initial submission to the IRS (the "December 1, 2004, submission"), in which it requested rulings to the effect that the above corporate procedures would qualify as a reorganization under Code Sec. 368(a)(1)(F) and that XYZ's S election would be unaffected by them. At the suggestion of the IRS, XYZ on January 18, 2005, made an additional submission (the "January 18, 2005, submission"), in which it requested certain supplemental rulings, including a ruling that under a draft LLC operating agreement that it included with its submission, it would, after its statutory conversion, have only a single class of stock under Code Sec. 1361(b)(1)(D).

As indicated above, XYZ has received favorable rulings on all of the above issues. At the time this article was being prepared for publication, XYZ was in the process of implementing its statutory conversion and all of the other revisions of its structure summarized above.



## LLC and Corporate Statutory Law as Relevant To Statutory Conversions–Key Points of Comparison

### Introduction

In order to understand why it can benefit particular corporations or their stockholders if these corporations convert to LLCs for state law purposes, it is necessary to have a relatively detailed comparative knowledge of LLC and corporate statutory business organization law on all key business organization law issues likely to be of practical relevance to privately held companies. In my view, there are nine such issues.

1) The "entity status" issue. Does the statute in question confer entity status on the business organizations formed under it?
2) The "number of owners" issue. What minimum and maximum number of entity owners is permitted or required by the statute?
3) The "liability shield" issue. Does the statute confer a liability shield on the owners of entities formed under it?
4) The "contractual freedom and enforceability" issue. To what extent does the statute confer contractual freedom on the owners of entities formed under it to tailor their organizations to meet owner needs, and are the tailoring arrangements on which the owners agree judicially enforceable?
5) The "continuity of life" issue. Is the duration of entities formed under the statute subject to limitations or, instead, may these entities have an indefinite duration?
6) The "free transferability" issue. May the owners of these entities freely transfer their ownership interests?
7) The "management structure" issue. What management structures are available to the owners of these entities?
8) The "statutory formality" issue. To what extent does the proper implementation of these management structures require owners to comply with complex statutory formalities?
9) The "charging order protections" issue. To what extent are the management rights of these owners and the assets of their organizations statutorily protected from creditors with claims against the owners in their individual capacities?

For brevity, in the paragraphs that follow, I will address the relevant points of statutory comparison only on the basis of the General Corporation Law of the State of Delaware (the "DGCL") and the Delaware Limited Liability Company Act (the "DLLCA"). However, as readers will know, each of these statutes is widely regarded as the preeminent U.S. statute in its field, and the DLLCA is a model for numerous statutes in other states. Furthermore, all of the statutory rules under the DGCL and the DLLCA discussed below apply equally under the business corporation acts and LLC acts of many other U.S. states. Finally, about one-tenth of all U.S. LLCs have been formed under the DLLCA.[11]

As the following discussion will show, the characteristics of LLC statutory law that are by far the most likely to be relevant to a corporation in determining whether to convert to an LLC are the business asset protection and the other protections provided under the charging order provisions of these acts. However, depending on the specific facts, other unique LLC statutory characteristics, such as statutory informality and contractual freedom and enforceability, may also be significant factors in making these determinations.

## Discussion

### *Entity status*

An entity is a business organization that, by statute, is a legal person, separate and independent from its owners. Statutory business organizations formed under both the DGCL and the DLLCA are entities, and the meaning of the term "entity" in these two acts is essentially identical.[12] Thus, there is no reason for a Delaware corporation to convert to an LLC merely to improve its status as an entity.

### *Number of owners*

The DLLCA permits LLCs to have multiple members with no maximum number, but requires that they have at least one member.[13] The DGCL imposes no maximum number of stockholders, but it also permits the formation of corporations with no stockholders at all.[14] However, this technical difference between Delaware corporate and LLC statutory law is unlikely ever to constitute a reason for a Delaware corporation to convert to an LLC.

### *Liability shield*

Both the DGCL and the DLLCA provide the owners of entities formed under them with a statutory liability shield. Except in certain narrowly defined circumstances, this shield protects these owners, in their capacity as owners, from claims against their entities. The owners of entities formed under both the DGCL and the Delaware Act have statutory liability shields, and, in general, the protection afforded by these shields under the two acts is identical.[15] Thus, liability shield considerations will rarely, if ever, induce a Delaware corporation to convert to an LLC.

### *Contractual freedom and enforceability*

The DLLCA provides LLC organizers with very broad freedom to structure their LLCs to meet member needs and interests, and it ensures maximum enforceability of any such structure against owner or judicial challenge.[16] While the DGCL also provides corporate stockholders with significant contractual freedom, there is a serious question whether it provides the same level of contractual enforceability as the DLLCA.[17] However, in practice, the fact that the DLLCA provides greater contractual enforceability than corporate statutory law will rarely constitute a sufficient reason for converting a corporation to an LLC.[18]

However, as discussed below, Delaware corporations are subject to much more extensive statutory formalities in connection with their formation and operation than LLCs; and a corporation's failure to comply with these formalities may assist third parties in seeking to pierce its veil. This veil-piercing factor may be important for at least a small number of Delaware corporations in deciding whether to convert to LLCs.

### *Continuity of life*

The default provisions of both the DGCL and the DLLCA provide entities formed under them with indefinite duration; in general, this duration will not terminate under either statute unless the owners so vote or the entity in question fails to pay annual taxes or to meet other state administrative requirements.[19] Thus, few Delaware corporations are likely to convert from a corporation to an LLC merely because of continuity-of-life concerns.

### *Free transferability of interests*

The DGCL imposes no restriction on the transfer of any type of stockholder right, whether the rights in question are voting rights and other management rights or purely economic rights. By contrast, the relevant default rules of the Delaware LLC Act provide (i) that members may freely transfer their "limited liability company interests"—defined to mean the right of a member to share in allocations of LLC profits and losses and in distributions of LLC profits and other assets[20]—but (ii) that, without the consent of all of the other members, they may not transfer their "right to participate in the management of the business and [internal] affairs of [the LLC]."[21]

However, with some limitations, the DGCL expressly permits corporate stockholders to agree validly to impose restrictions on transfers of corporate stock.[22] Furthermore, as indicated, the above DLLCA rules governing transfers of management rights and LLC interests are merely default rules that the members may validly alter. Thus, as a practical matter, there is no significant difference between the DGCL and the DLLCA on the issue of free transferability of interests, and no Delaware corporation will be likely to convert to an LLC merely because of transferability-of-interest concerns.

### *Management structure*

The default rules of the DGCL impose on corporations and their stockholders a relatively complex tripartite management structure under which (1) the stockholders have only very limited voting rights and no agency rights; (2) all other corporate matters are reserved for decision by the directors; and (3) only individuals appointed by the directors as officers may act as corporate agents and may conduct a corporation's day-to-day business.[23]

By contrast, the default rules of the DLLCA provide (1) that unless the members decide otherwise, the LLC will have a "member-managed" management structure, under which each member, like a partner of a general partnership, is an agent of the LLC;[24] but (2) that, if they wish, the members may instead adopt a "manager-managed" structure under which, as in a limited partnership, only those members (or third parties) that are specifically appointed as managers may act as LLC agents.[25]

> The owners of entities formed under both the DGCL and the Delaware Act have statutory liability shields, and, in general, the protection afforded by these shields under the two acts is identical.



However, although the member-management and manager-management structures available under the DLLCA are generally far more user-friendly for privately held companies than the complex tripartite DGCL structure, it is doubtful that any Delaware corporation will want to convert to an LLC merely to avail itself of these structures. Among other considerations, the DGCL provides significant flexibility to stockholders to tailor their management structures in certificates of incorporation, bylaws and stockholder agreements; and even greater flexibility is available under Delaware's close corporation statute.[26]

### *Statutory formalities*

The DGCL contains complex rules governing stockholder and director meetings and decision-making.[27] Failure to comply with these formalities may raise significant issues concerning the legal validity of corporate actions by Delaware corporations and, as indicated above, may facilitate veil piercing.

By contrast, under the default rules of the DLLCA, the members and managers of LLCs are not required to hold annual or other meetings and the rules governing member and manager voting are extremely flexible.[28]

However, because Delaware corporations can generally avoid the costs and complexities of DGCL corporate governance rules by such simple means as annual stockholder and director consents, the greater simplicity of the DLLCA management procedures will rarely, if ever, constitute a compelling reason for a Delaware corporation to convert to an LLC.

### *Charging order protections*

If Delaware corporate stockholders incur unsatisfied debts in their individual capacities, no provision of the DGCL or other applicable Delaware law bars creditors from executing on their shares and effectively substituting these creditors as stockholders.

By contrast, Section 18-703 of the DLLCA provides, in effect, (1) that creditors of LLC member-debtors in default that are members of multi-member LLCs may obtain "charging orders" against these members—effectively, liens on the members' LLC interests; but (2) that they may not acquire ownership or control of the members' other rights as members, including voting rights, agency rights, information rights, fiduciary rights and dispute resolution rights (often referred to collectively by LLC practitioners as "management rights").[29] All other U.S. LLC acts except the Nebraska and Pennsylvania acts provide charging order protections generally similar to those of the DLLCA.[30]

Section 18-703 provides three specific types of protection, each of which may be of great practical value to particular business entities and their owners; and for many companies, all three of these protections will have substantial value. The three types of protections are these:

- *Protection of debtor-members' management rights.* As indicated above, the section protects LLC members who incur unsatisfied judgments from the possibility of losing their management rights.
- *Protection of nondebtor members from unwanted new co-members.* The section protects nondebtor members of LLCs from having to accept unwanted third-party creditors of debtor-members as new co-members.

- *Protection of all members from possible forced sale of LLC assets*. In cases in which the LLC member-debtor in default holds voting control of the LLC, the section protects both the member-debtor and the nondebtor members from the possibility that, by exercising the member-debtor's voting rights, a creditor may be able to force the sale of LLC assets in satisfaction of the debt in question.

The fact that these charging order protections are available under the DLLCA, but not under the DGCL, is by far the strongest business organization law reason why the stockholders of a particular Delaware corporation may find it advisable to convert to an LLC; and the fact that the LLC act of State M provides charging order protections similar to those of DLLCA §18-703 is the principal reason why XYZ decided to convert to an LLC. Furthermore, charging order protections are unavailable under any U.S. corporate statute; whereas, as noted above, these protections are available under all U.S. LLC acts except those of Nebraska and Pennsylvania.

State-law business corporations that should seriously consider converting to LLCs include the following:

- *Corporations with stockholders that want to avoid losing their management rights*. They include all corporations that have one or more stockholders who want to ensure that if they incur unsatisfied debts in their individual capacities, they can protect their entity management rights from their creditors.
- *Corporations and corporate stockholders that want to avoid forced sales of corporate assets*. They include any corporation that has a controlling stockholder and wants to ensure that the corporation's business assets will not be at risk of forced sale if that stockholder incurs an unsatisfied debt in his or her individual capacity.
- *Corporations whose stockholders want to avoid the risk of unwanted new co-owners*. They include all corporations whose stockholders want to prevent the possibility of having to accept an unwanted new stockholder if any existing stockholder incurs an unsatisfied debt in his or her individual capacity.

As indicated at the beginning of this article, it is safe to assume that of the total of approximately 5.2 million active U.S. privately held business corporations, many tens of thousands and perhaps even some hundreds of thousands may find it cost-effective to convert to LLCs in order to obtain the above protections.

# Statutory Conversion Law–Overview

## Definition of Conversion; Methods of Effecting Conversions

As noted above and in Exhibit A, a conversion may be defined for purposes of this article as a change of the business organization form of an entity. There are four main methods by which a corporation may be converted to an LLC—namely, through a nonstatutory conversion, a statutory interspecies merger, a statutory conversion or a statutory interspecies merger with a corporation in another state whose laws permit statutory conversions followed by a statutory conversion under the laws of that state.[31]

### *Nonstatutory conversion*

In a nonstatutory conversion, the owners generally must follow the two steps described immediately below. In this description, and in the rest of this article, "Oldco" will refer to the corporation whose owners want to convert its business organization form into that of an LLC, while "Newco" will refer to the LLC into which they want to convert Oldco.

- First, Oldco's stockholders must cause the formation of Newco as an LLC under the relevant state LLC act.
- Secondly, Oldco's stockholders must engage in either an "assets-up" transaction, an "assets-over" transaction, or an "interests-over" transaction.
  - In an assets-up transaction, the stockholders must cause Oldco to distribute all of its assets to them as Oldco's stockholders; they must contribute these assets to Newco for Newco membership rights; and, finally, they must dissolve and liquidate Oldco.
  - In an assets-over transaction, Oldco's stockholders must cause Oldco to transfer its assets to Newco in exchange for Newco membership rights; they must cause Newco to distribute these membership rights to the stockholders in exchange for Oldco stock; and, they must cause Newco to effectuate the dissolution and liquidation of Oldco.
  - In an interests-over transaction, they must contribute their Oldco stock to Newco in

exchange for Newco membership rights and they must then cause Newco to effectuate the dissolution of Oldco and its liquidation into Newco.

### *Statutory interspecies merger*

In a statutory interspecies merger under Delaware law:

- Oldco's stockholders must form Newco as an LLC under the relevant state LLC act in a transaction in which, while remaining Oldco stockholders, they are also the members of Newco.[32]
- Oldco's stockholders must approve the merger of Oldco into Newco in their capacity both as Oldco stockholders and as Newco members.[33]
- Oldco's stockholders must formally exchange their Oldco shares for Newco membership rights.[34]
- Oldco's stockholders must cause all documents to be filed and all other things to be done that are necessary for compliance with the statutory interspecies merger requirements imposed by the relevant corporate and LLC merger provisions.[35]

The principal results of the above interspecies merger procedures will be (1) that all of the assets of Oldco will automatically be transferred to Newco by operation of law (and thus, will be transferred without any need to revise or refile Oldco title documents or, normally, to obtain third-party consents); and (2) that Oldco will cease to exist as an entity and will be succeeded for all legal purposes by Newco.[36]

### *Statutory conversion*

As indicated earlier in this article and in Exhibit A, a statutory conversion is a legal procedure in which an entity changes its business organization form while remaining the same entity. Under the laws of Delaware, the following steps will be necessary in order for an entity to convert its business organization form from that of a corporation to that of an LLC:

1) The directors of the converting entity must approve the conversion and must prepare a plan of conversion.[37]
2) The directors must recommend to the stockholders that they approve the conversion and the plan of conversion.[38]
3) The stockholders must give these approvals (which, under the default rules of most or all statutory conversion laws, including those of Delaware, will require the affirmative vote of stockholders holding a majority of stockholder votes).[39]
4) The corporation must cause the filing of a certificate of conversion and an LLC certificate of formation with the Secretary of State.[40]

### *Merger with foreign corporation followed by statutory conversion*

If (1) a corporate entity wants to convert to an LLC but (2) the laws of the state under which the entity has been formed do not provide for either statutory conversions or statutory interspecies mergers, the entity can merge into a corporation in a state whose laws do provide for these statutory procedures and, as a corporation of that state, the entity may then take advantage of these procedures.

## Effects of Statutory Conversion; Terminological Issues

*Effects of statutory conversion.* As a result of the above statutory conversion procedures:

1) The converting corporation will continue to exist and will be deemed to be the same entity after the conversion as before.[41] However, it and its owners will no longer be subject to the DGCL, but rather, to the DLLCA.[42]
2) The entity will continue to have all of the rights and privileges that it possessed as a corporation, including all contract rights.[43]
3) The entity will continue to be subject to all of the obligations to which it was subject as a corporation.[44]

*Statutory conversion terminological issues.* While the concept of statutory conversion has existed in some form for at least 15 years, it is a concept that departs sharply from traditional business organization law theory.[45] Thus, special care must be taken in describing statutory conversion procedures and in distinguishing them from other business organization law statutory and nonstatutory procedures. To illustrate:

- When the stockholders of an entity that is a corporation merge it into an LLC in an interspecies statutory merger, the corporate entity disappears and only the LLC survives. In a statutory conversion, the entity that, before the conversion, has the business organization form of a corporation has, after the conversion, the business organization form of an LLC, but it is, as indicated above, the same entity after as before. Thus, it is not quite accurate to say that in a statutory conversion, the "original corporation" disappears or ceases to exist; it is far more accurate to say that the entity has changed its business organization form from that of a corporation to that of an LLC.

- When the stockholders of a corporation merge it into an LLC in an interspecies statutory merger, they exchange their shares of the disappearing corporation for membership rights in the surviving LLC. In a statutory conversion, there is no exchange of shares; rather, persons that are stockholders of the converting entity before the conversion *convert* these shares into membership rights of the converted entity.
- When an entity effects a statutory conversion from a corporation to an LLC, there can be no transfer of entity property, because there is no transferor and no transferee. Rather, as a result of the conversion, the business organization form of the entity that owns the property is changed, but the ownership of the entity's property does not change.

### Choosing the Best Method for Converting a Corporation to an LLC

Choosing which of the above methods of effecting conversions of corporate entities to LLCs requires a careful consideration of the facts of each case. However, in the great majority of cases, in the approximately 25 states under whose laws it is available the statutory conversion method, because it involves only a single entity, will be the simplest method from an administrative and operational viewpoint; it will be the least expensive in terms of professional and other fees; and it will be the best from a purely legal viewpoint. In particular, the fact that it will involve only a single entity will generally mean that there will be no need to amend or refile title documents and other documents evidencing asset ownership; and, as indicated above, in a statutory conversion, there will be no real property transfer taxes, assessments of vehicle registration fees or other similar charges that would result from changes of legal ownership.

## LTR 200528021—Summary of the Ruling; Practical Implications

### LTR 200528021—Summary of Contents

Like many private letter rulings, LTR 200528021 consists of a brief procedural history, brief statements of issues, facts and representations, and a series of formal rulings. The Ruling recites 16 specific representations made by XYZ in the December 1, 2004, submission; these representations are identified in the Ruling by letters (a) through (p). As discussed further below, because of the issuance on February 25, 2005, of final regulations on certain issues relevant to reorganizations under Code Secs. 368(a)(1)(E) and (F), a few of these representations are no longer necessary in order to qualify a transaction as an F reorganization.

LTR 200528021 contains eight specific rulings. Briefly, these rulings provide that, if XYZ effects its statutory conversion in accordance with its representations:

1) Under Code Sec. 368(a)(1)(F), its statutory conversion to an LLC will qualify as an F reorganization.
2) Under Code Secs. 361(a) and 357(a), it will recognize no gain or loss on what the Ruling describes as the "deemed exchange" of its assets in connection with its conversion.
3) Under Code Sec. 362(b), the basis of its assets in its hands after its conversion will be the same as the basis of these assets in its hands before the conversion.
4) Under Code Sec. 1223(2), the holding periods of its assets will be the same after the conversion as before.
5) Under Code Sec. 358(a)(1), the basis that its owners will have in their XYZ LLC membership interests after the conversion will be the same as the basis they had in their XYZ stock before the conversion.
6) Under Code Sec. 1223(1), the holding periods that its owners will have in their XYZ membership rights after the conversion will be the same as they had in their XYZ stock before the conversion.
7) Under Rev. Rul. 64-250,[46] XYZ's S election will not terminate as a result of its F reorganization.
8) Under Rev. Rul. 73-526,[47] after its conversion, XYZ will retain the employer identification number that it had before the conversion.

### Why Was the IRS Willing to Consider XYZ's Ruling Request?

As many readers will know, the IRS has long had a policy of not granting private letter rulings on whether a particular proposed transaction will qualify as an F reorganization unless the transaction raises "significant issues."[48] In telephone conferences with the IRS before December 1, 2004, and in XYZ's December 1, 2004, submission, I urged the IRS to treat the issues raised by XYZ in that submission as "significant issues" on the following grounds:

1) As noted at the beginning of this article, there are roughly 3 million privately held state-law

business corporations that are taxable as S corporations and roughly 2 million taxable as C corporations.

2) A substantial number of these corporations can derive important legal benefits under statutory LLC statutes if they convert to LLCs.
3) As LLC statutory law becomes better understood by legal and tax professionals and their clients, increasing numbers of these corporations will want to effect these conversions.
4) Under the laws of 26 states, the best way to effect the conversion of a corporation to an LLC is through a statutory conversion.
5) However, if, after any of these corporations has made such a conversion, the IRS, upon audit, takes the position that the conversion is not an F reorganization, but rather, a deemed corporate liquidation or if it takes the position that, even assuming it is an F reorganization, its S election has terminated, the federal income tax consequences for the corporation and its stockholders may be catastrophic.
6) It is true that there are numerous federal tax authorities that strongly support the qualification of a statutory conversion of a corporation to an LLC as an F reorganization and as having no effect on a corporation's S election. However, there is no authority directly on point on these issues. This absence of direct authority is likely to deter not only XYZ but also many other corporations from making a statutory conversion to an LLC.[49]

My impression, based on my discussions with IRS personnel, is that in deciding to consider XYZ's ruling requests, the IRS attached significant weight to all the above considerations. However, another consideration that I believe was significant to the IRS in making this decision was that, at the time that XYZ was discussing with the IRS the possibility of its granting rulings to XYZ concerning its statutory conversion, the IRS was about to issue a ruling—namely, LTR 200450012 (issued to the requesting taxpayer on August 26, 2004, but not published for several weeks thereafter)—which holds that a statutory interspecies merger of a state-law business corporation taxable as an S corporation into a general partnership would qualify as an F reorganization and that the corporation's S election would be unaffected by the merger. The IRS may well have felt that it would be unfair to grant LTR 200450012 to the taxpayer requesting it yet not to consider XYZ's ruling request.

> Choosing which of the … methods of effecting conversions of corporate entities to LLCs requires a careful consideration of the facts of each case.

## Terminological Issues in LTR 200528021

No ruling concerning the qualification of a statutory conversion of a corporation to an LLC as a reorganization under Code Sec. 368(a)(1)(F) can be useful to the taxpayer requesting the ruling or, indeed, to any other taxpayer except to the extent that the terms of the ruling accurately reflect the unique nature of the law governing the statutory conversion of corporations to LLCs. In LTR 200528021, the IRS, in referring to the transaction covered by the Ruling, makes three express uses of the term "statutory conversion;" and in the section of the Ruling setting forth XYZ's representations, the IRS specifically notes that XYZ has represented that under the applicable state law, "New A [the LLC that XYZ will become after the conversion] will be considered the same entity after the conversion as before."

Thus, although a few brief references in the Ruling are arguably inconsistent with statutory conversion law, the Ruling is, on balance, highly consistent with this law.

## F Reorganization Issues Relating to XYZ's Holding Company/Operating Company Structure

As noted at the beginning of this article, in connection with its plan to convert to an LLC, XYZ also wanted to expand and restructure substantially the somewhat rudimentary holding company/operating company structure that it had in place at the time of its ruling request. As also noted, the purpose of this structure was to protect valuable XYZ business assets by holding them in XYZ itself, rather than in any operating subsidiary. Further, under the restructuring that XYZ decided to adopt, it planned (1) to form a number of additional operating subsidiaries, all of which would be single-member LLCs classified as disregarded entities under the Entity Classification Regulations; and (2) to establish various arm's-length intercompany agreements and tailored governance arrangements among itself and these subsidiaries. As a measure of caution, I included in XYZ's December 1, 2004, submission a series of representations about this restructuring and requested a ruling that the restructuring would not adversely affect the qualification of XYZ's statutory conversion as an F reorganization.

However, my discussions with the IRS in the course of its review of the December 1, 2004, submission made clear to me that because all of XYZ's subsidiaries after its restructuring would be disregarded for federal tax purposes, including for Code Sec. 368(a)(1)(F) purposes, the IRS did not view the restructuring as raising any Code Sec. 368(a)(1)(F) issues. Thus, in order to simplify XYZ's ruling process, I decided that in the January 18, 2005, submission, I should request the IRS to ignore XYZ's request in its December 1, 2004, submission that its elaboration of its holding company/operating company structure would have no impact under Code Sec. 368(a)(1)(F), and the IRS was willing to ignore it.

On the basis of my discussions with the IRS, as summarized above, I would suggest that other corporate entities that, in connection with a statutory conversion to an LLC, decide to adopt or develop a holding company/operating company structure in which all subsidiaries will be single-member LLCs classified as disregarded entities may, like XYZ, be confident that this structure will have no adverse effect on the qualification of their conversion as an F reorganization.

## The Nine Tests for Qualification of Statutory Conversions under Code Sec. 368(a)(1)(F)—Introduction

In XYZ's December 1, 2004, request, I included as the basis for XYZ's requests under Code Sec. 368(a)(1)(F) an interpretation and synthesis of Code Sec. 368(a)(1)(F) judicial and administrative precedents in which I took the position that corporate entities that want their statutory conversions to LLCs to qualify as F reorganizations generally must meet each of nine separate tests; I cited specific authority for each of these tests; and I showed that XYZ's statutory conversion would meet each test.

In private letter rulings, the IRS, unlike the courts in issuing judicial rulings on federal tax matters, normally does not comprehensively discuss, nor even comprehensively identify, the federal tax authorities that support the conclusions in these rulings, much less the legal and tax theory that underlies them. LTR 200528021 is no exception to this general IRS practice. However, in considering whether statutory conversions by their corporate clients to LLCs will qualify as F reorganizations, practitioners may find it useful to have at least a general awareness of the above nine tests. Thus, in the paragraphs that follow, I will briefly discuss each of these tests. However, in doing so, I will also address the impact on these tests of new proposed regulations governing E and F reorganizations issued by Treasury on August 12, 2004 (the "August 12, 2004, Proposed Regulations") and final regulations governing these reorganizations issued by Treasury on February 25, 2005 (the "February 25, 2005, Final Regulations"). (For brevity, I will refer collectively to the August 12, 2004, Proposed Regulations and the February 25, 2005, Final Regulations as the "New Regulations.") The August 12, 2004, Proposed Regulations were originally published in 69 Federal Register 49836 on August 12, 2004. The February 25, 2005, Final Regulations were published in TD 9182 (February 25, 2005). For purposes of this article, the most important proposals in the August 12, 2004, Proposed Regulations relating to F reorganizations are those that propose (subject to certain qualifications) that a transaction that is intended to qualify for treatment as an F reorganization will not be disqualified from that treatment merely because:

1) The corporation involved in the transaction fails to maintain continuity of business enterprise (COBE) in connection with the transaction;
2) The corporation involved in the transaction fails to maintain continuity of interest (COI) in connection with the transaction;
3) Shares of the corporation involved in the transaction are redeemed in connection with the transaction; or
4) A corporation disappearing in a merger intended to qualify as a reorganization under Code Sec. 368(a)(1)(F) is not dissolved in the reorganization transaction.

In the February 25, 2005, Final Regulations, as in effect on and after that date, the above COBE and COI proposals became final.[50] All of the other proposals in the August 12, 2004, Proposed Regulations remain in place as proposals.

## The Nine Tests—Discussion

**1. *The "change-in-form" test.*** Under the terms of

Code Sec. 368(a)(1)(F), a statutory conversion of a corporation to an LLC must, in order to qualify as an F reorganization, involve a "change in form" of the entity in question. The December 1, 2004, submission cited numerous IRS administrative authorities that effectively define the term "change of form" to mean a change of *business organization* form.[51] The change-in-form test under Code Sec. 368(a)(1)(F), listed in the December 1, 2004, submission as the first of the above nine tests, has not been affected by the New Regulations.

**2. *The "mere change in form" test.*** Code Sec. 368(a)(1)(F) requires that in order for a statutory conversion of a corporation to an LLC to qualify as an F reorganization, the change effected by the conversion must be a "mere" change of the entity's form within the meaning of that section. In general, this means that all interests in the resulting LLC must be issued in respect of stock of the converting corporation.[52]

The above test, which was listed in the December 1, 2004, submission as the second of the above nine tests, generally continues to apply under the New Regulations. However, as noted above, under the August 12, 2004, Proposed Regulations, redemptions of fewer than all stockholders in connection with such a conversion will not disqualify the conversion as an F reorganization.

**3. *The "one corporation" test.*** Under the terms of Code Sec. 368(a)(1)(F), in order for a statutory conversion of a corporation to an LLC to qualify as an F reorganization, the conversion must involve only "one corporation" within the meaning of Code Sec. 368(a)(1)(F). In general, the phrase "one corporation" in the section means a single *tax* corporation.[53] The December 1, 2004, submission listed this "one corporation" test as the third of the above nine tests. The New Regulations have not affected this test.

**4. *The "business purpose" test;* XYZ's business purpose as stated in the December 1, 2004, submission**. Reg. §1.368-1(b) provides, in effect, that in order for the conversion of a corporation to an LLC to qualify as an F reorganization, the entity making the conversion must have a business purpose for the conversion. This test, listed in the December 1, 2004, submission as the fourth of the above nine tests, has not been affected by the New Regulations.

In its December 1, 2004, and January 18, 2005, submissions, XYZ stated that the principal purpose for its statutory conversion would be to obtain LLC statutory charging order protections, and in my discussions with the IRS during XYZ's ruling process and in LTR 200528021 itself, the IRS never raised a question about the validity of this purpose as a business purpose under Code Sec. 368(a)(1)(F). Accordingly, other corporations that can represent in good faith that the purpose of their statutory conversion is to obtain these protections should pass the Code Sec. 368(a)(1)(F) business purpose test with flying colors.

**5. *The "continuity of proprietary interest" test.*** Reg. §1.368-1(e), as in effect on December 1, 2004, provided that in order for a statutory conversion to qualify as an F reorganization, there must be continuity of ownership of proprietary interests in the converting entity before and after the conversion transaction. In general, this means that the owners of the converting corporation must be the same after the conversion as before. This test, which was listed in the December 1, 2004, submission as the fifth of the above nine tests, has been repealed by the February 25, 2005, Final Regulations.

**6. *The "continuity of business enterprise" test.*** Reg. §1.368-3(d), as in effect on December 1, 2004, provided that in order for a statutory conversion to qualify as an F reorganization, there must be continuity in the business enterprise of the entity in question before and after the transaction; *i.e.*, the converted entity must continue the historical business of the converting entity. This test, which was listed in the December 1, 2004, submission as the sixth of the above nine tests, has been repealed by the New Regulations.

**7. *The "plan of reorganization" test.*** Reg. §§1.368-1(a) and (c) provide, in effect, that in order for a conversion of a corporation to an LLC to qualify as an F reorganization, the converting entity must carry out the conversion pursuant to a plan of reorganization within the meaning of these sections. These plans generally must state the reasons for the conversion, describe the steps of the conversion, make clear that the conversion has been duly authorized by the entity's owners, and make clear that the conversion is a *bona fide* transaction not intended to avoid otherwise payable federal taxes. This test, listed in the December 1, 2004, submission as the seventh of the above nine tests, has not been affected by the New Regulations.

As noted later in this article, the DGCL and the DLLCA impose as a procedural requirement for a statutory conversion the approval of a plan of conversion by the stockholders of the converting corporation. The statutory conversion laws of many other states contain similar requirements. Because much of the content of this plan of conversion will be the same as the content of a plan of reorganization under the above Treasury regulations, XYZ's plan of conversion and plan of reorganization are included in the same document, entitled "Plan of Conversion and Reorganization." I submitted this document to the IRS with the December 1, 2004, submission, and the document seemed to raise no issues with the IRS. For the sake of simplicity and efficiency, other corporations making statutory conversions to LLCs may want to take the same approach in drafting their plans of conversion and reorganization.

**8.** ***The "IRS filing" test.*** Under LTR 200248023, in order for a transaction to qualify as an F reorganization, the converted entity—namely, the LLC resulting from the conversion—must file with the IRS a timely election under Reg. §301.7701-3(c) to be classified as an association taxable as a corporation.[54] This requirement, listed in the December 1, 2004, submission as the eighth of the above nine tests, has not been affected by the New Regulations.

**9.** ***The "Code Sec. 368(a)(1)(F) purpose" test.*** In order for a transaction to qualify as a reorganization under Code Sec. 368(a)(1)(F), it obviously must be consistent with the intent of that section. In general, the intent of Code Sec. 368(a)(1)(F) is to preserve the federal income tax situation and tax attributes of a corporation and its stockholders and to protect these taxpayers from adverse federal income tax consequences in situations in which the corporation engages in a specified type of transaction—namely, a mere change in identity, form or place of incorporation—that does not involve a sale or other transfer or disposition of stock or corporate assets or any other change that could reduce the taxpayers' federal income tax liability.[55] Compliance with the above requirement of consistency with the intent of Code Sec. 368(a)(1)(F), listed in the December 1, 2004, as the ninth of the above nine tests, has not been affected by the New Regulations.

## The Relevance of Example 8 in the August 12, 2004, Proposed Regulations to the Qualification of Statutory Conversions of Corporations to LLCs as F Reorganizations

Example 8 in the August 12, 2004, Proposed Regulations provides, in effect, that a transaction in which a state-law business corporation makes a statutory conversion to a limited partnership that meets generally applicable F reorganization requirements will qualify as an F reorganization. Although the August 12, 2004, Proposed Regulations are merely *proposed* regulations, and thus, do not bind the IRS, XYZ's December 1, 2004, submission nevertheless cited Example 8 as providing significant support for XYZ's contention that its statutory conversion to an LLC would qualify as an F reorganization.

I feel certain that the inclusion of Example 8 in the August 12, 2004, Proposed Regulations significantly strengthened XYZ's case under Code Sec. 368(a)(1)(F), and I strongly suspect that Example 8 will appear unchanged in final regulations concerning its subject matter. Regretfully, I also suspect that these final regulations will contain no examples concerning the qualification of statutory conversions of corporations to LLCs as F reorganizations. However, even in the August 12, 2004, Proposed Regulations, Example 8 should provide significant comfort to corporations considering statutory conversions to LLCs, and this support will be all the more powerful if the example appears in a final regulation.

## LTR 200548021—Summary of the Ruling; Practical Implications

### Background of the Ruling; Summary of Its Contents

As readers will know, Code Sec. 1361(b)(1)(D) provides, in effect, that an entity cannot be an S corporation if it has more than one class of stock. Reg. §1.1361-1(l)(1) provides that a corporation is treated as having only one class of stock if all outstanding shares of its stock confer on its stockholders identical rights to distribution and liquidation proceeds. Reg. §1.1361-1(l)(2) provides that the determination whether all outstanding shares of stock of a corporation confer identical rights to distribution and liquidation proceeds is made on the basis of the corporation's charter, articles of incorporation, bylaws, applicable state law and binding agreements relating to distribution and liquidation proceeds (collectively, the corporation's "governing provisions").

LTR 200548021 deals with two issues under Code Sec. 1361(b)(1)(D) and the above regulations that are of substantial importance to XYZ's statutory conversion to an LLC and that LTR 200528021 does not address. The first of these issues is whether the draft LLC agreement that XYZ submitted to the IRS with its January 18, 2005, submission will be, when signed by XYZ's members after XYZ becomes an LLC, a "governing provision" within the meaning of Reg. §1.1361-1(a)(2)(i). In its January 18, 2005, submission, XYZ contended that this agreement, when signed by XYZ's members after XYZ becomes an LLC, will be a "governing provision" under the plain meaning of the terms of that regulation.

The second issue addressed by LTR 200548021 is whether the terms of the XYZ LLC agreement, as drafted, provide for only a single class of stock. Needless to say, this issue can be resolved only by a comprehensive review of the above agreement.

LTR 200548021, like LTR 200528021, consists of a brief procedural history: a statement of the above issues; a brief statement of facts; a brief section, entitled "Law and Analysis," that summarizes the contents of the relevant Code sections and regulations, and a section, entitled "Conclusion," in which the IRS grants favorable rulings on both of the above issues.

Given the relative clarity and comprehensiveness of Reg. §1.1361-1(a)(2)(i), I had no doubt at the time of the January 18, 2005, submission that XYZ would obtain the first of the above rulings; and I suspect that the IRS viewed the ruling in the same way. The issue whether any LLC operating agreement, viewed in its entirety, complies with the single-class-of-stock rule is inherently complex. XYZ's approach in addressing this issue in its operating agreement is summarized in the paragraphs that follow.

> [N]o LLC act provides owners of LLCs with units of ownership called "shares," and the concept of shares has no clear meaning in LLC law.



## Compliance of XYZ's LLC Agreement with the Single-Class-of-Stock Rule; Relevant Provisions in XYZ's Agreement

Under classic statutory corporation law, a "share" is a unit of ownership in a corporation. Under corporate statutory law default provisions, holders of shares have the right to allocations of corporate profits (and, in the case of corporations taxable as S corporations, losses) and they have the right to vote to elect directors, to vote on proposed amendments of the corporate charter, and to vote on corporate mergers, sales of all or substantially all assets, and dissolutions. However, they have no right to direct or to participate in corporate management.

The Entity Classification Regulations permit entities whose business organization form is that of LLCs to be S corporations for federal tax purposes.[56] However, no LLC act provides owners of LLCs with units of ownership called "shares," and the concept of shares has no clear meaning in LLC law. Rather, the default provisions of most LLC acts provide owners with two distinct kinds of ownership rights:

- The first, defined in many LLC acts as a "limited liability company interest," consists of the right to share in allocations of LLC profits and losses and to receive interim and liquidating distributions of LLC profits and other assets.
- The second is described in many LLC acts as "the right to participate in the management and affairs of the limited liability company." This latter right principally includes: (1) the right to vote on LLC matters; (2) agency rights, (3) the right to LLC information; (4) fiduciary rights; and (5) dispute resolution rights.

However, the contractual freedom that is the hallmark of all LLC acts unquestionably permits the organizers of LLCs that are to be taxable as S corporations to provide members in their operating agreements with LLC ownership interests that are described as shares that fit the traditional corporate definition of shares and that comply with the S corporation single-class-of-stock requirements under Code Sec. 1361(b)(1)(D) and Reg. §1.1361-1(l)(1). In drafting XYZ's operating agreement, XYZ's legal and tax professionals took great pains to ensure this compliance, and, as indicated, LTR 200548021 expressly ruled that the draft of the agreement submitted to the IRS by XYZ provided for only a single class of stock.

There are many ways to draft LLC operating agreements so as to ensure compliance with the S corporation single-class-of-stock rule. The principal arrangements in XYZ's operating agreement that were intended to achieve this compliance are summarized below. For practitioners handling statutory conversions generally similar to those of XYZ, these arrangements may provide, at the very least, a useful starting point.

- *Section 1.1—binding effect of agreement.* Section 1.1 of XYZ's operating agreement provides that the agreement will bind the parties (consisting of XYZ itself and all of its members) and will be effective on the later of the date on which its statutory conversion becomes effective and the date on which the last of its parties signs it.

- *Section 1.7—consistency of agreement with Subchapter S.* Section 1.7 of the agreement provides as follows:

***Subchapter S and F Reorganization Provisions.*** All economic rights, including ownership interests and distribution rights, under this Agreement shall be *pro rata* to share holdings and shall in no way confer rights that would be in violation of Subchapter S or the F Reorganization provisions [of the Internal Revenue Code]. If any such rights would be in violation of Subchapter S or the F Reorganization provisions, then these rights shall be changed to meet the Subchapter S and/or F Reorganization provisions.

- ***Section 3.2—allocations of LLC tax items.*** Section 3.2 provides that "[t]he Company [*i.e.*, XYZ] shall allocate its income, losses and other tax items among its Members in accordance with Subchapter S."
- ***Section 2.2—one class of stock.*** Insofar as relevant here, Section 2.2 of the Agreement provides as follows: "At all times after [its] statutory conversion, the Company shall have only one class of Shares. All economic rights, including ownership interests and distribution rights, shall be identical before and after the statutory conversion. The right of Members to allocations of the Company's tax items and to distributions of its profits and all other assets and the other rights represented by each Share shall be identical to those represented by each other Share."
- ***Section 2.10—allocations of amounts distributed as interim distributions.*** The final sentence of Section 2.10 of the Agreement provides as follows: "Each [interim] distribution shall be allocated among the Members on the basis of their respective holdings of Shares."
- ***Section 6.3(b)—liquidating distributions.*** Section 6.3(b) provides that "the Company shall then [*i.e.*, in connection with its liquidation] distribute its assets to the Members in accordance with Subchapter S."
- ***Section 9.2 (second sentence)—primacy of XYZ's LLC agreement over the Stockholder Agreements.*** The second sentence of Section 9.2 is intended to provide, in effect, that if, with respect to Subchapter S single-class-of-stock issues or any other issues, there is any conflict between XYZ's LLC agreement and any of the stockholder agreements to which XYZ's stockholders are parties, XYZ's LLC agreement shall prevail. The sentence provides in its entirety as follows: "In the event there is any conflict between this Agreement and the Stockholder Agreements, this Agreement shall prevail."

## Single-Class-of-Stock Issues That LTR 200548021 Does Not Address

As noted above, XYZ will convert from a state-law corporation to an LLC that will be governed by the LLC Act of State M. As also noted, LTR 200548021 expressly provides that XYZ's operating agreement, as included in the January 18, 2005, submission, does not create a second class of stock under Subchapter S. The Ruling does not address the question whether any mandatory or default provision of that act or of other State M law including the tax law of State M, may be inconsistent with the Subchapter S single-class-of-stock rule. In my view, it is very clear that no mandatory or default provision of State M's LLC act, or of other relevant State M law, conflicts with that rule. I strongly suspect that the LLC acts and other relevant laws of other states, like those of State M, will create no such conflicts. However, practitioners advising corporate clients about statutory conversions in these other states will obviously have to review these laws to ensure this conclusion.

## To What Extent Can Corporations Other Than XYZ Rely on LTR 200528021 and LTR 200548021?

The text of Code Sec. 6110(k)(3) provides in relevant part as follows: "Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent." "Written determination" for purposes of Code Sec. 6110(k)(3), includes private letter rulings.[57]

Code Sec. 6110(k)(3) is sometimes interpreted by tax professionals as having one or both of the following meanings:

- By reason of Code Sec. 6110(k)(3), the taxpayer to which a private letter ruling is granted may rely on it only with respect to the federal tax consequences of the specific transaction covered by the ruling.

- By reason of Code Sec. 6110(k)(3), a private letter ruling may not be relied upon by any other taxpayer, by the IRS itself or by the courts as authority in determining the tax consequences of any other transaction.

Both of the above interpretations are open to serious challenge. Among other considerations:

1. There are two fundamental ambiguities in the terms themselves of Code Sec. 6110(k)(3). The first concerns the meaning of the term "precedent." This term, as used both in federal tax law and in other areas of law, has many possible meanings, some of which conflict directly with others. The second is whether the "use-or-citation" prohibition in the section is intended to apply: (1) only to taxpayers receiving private letter rulings; (2) to other taxpayers; (3) to the IRS; (4) to the courts; or (5) to one or more of the preceding four classes of persons but not to others. These ambiguities substantially undermine the above common interpretations of the section by tax professionals.
2. Neither the legislative history of the section nor any other authority is useful in clarifying the above ambiguities.
3. A few courts have construed Code Sec. 6110(k)(3) as prohibiting any use whatsoever of private letter rulings by any person, including even the courts themselves, in determining the federal tax consequences of particular transactions. However, other courts have placed substantial reliance on them, and there are significant issues of Constitutional and administrative law as to whether Congress, by statute, can validly bar taxpayers or the courts from relying on private letter rulings.

The issues surrounding the meaning and practical impact of Code Sec. 6110(k)(3) are discussed in substantial depth in *Private Letter and Revenue Rulings: Remedy or Ruse?*[58] and in *Note: The Perils of Bright Lines: Section 6110(k)(3) and the Ambiguous Precedential Status of Written Determinations.*[59] I will not attempt to review these discussions here; rather, I will focus only on the practical value of the Rulings for corporations other than XYZ as authority on the tax consequences of statutory conversions to LLCs. In my view, for corporations other than XYZ that are considering the possibility of such a conversion, the principal practical considerations in deciding whether to rely on the Rulings in determining the federal income tax consequences of these conversions are the following:

> For many privately held state-law business corporations, the [advantages] available under LLC statutory law but not under corporate law strongly support a conversion to the LLC business organization form.

Code Sec. 368(a)(1)(F) is not one of the more complex or treacherous provisions of the Internal Revenue Code. If the statutory conversions contemplated by the above corporations comply with the literal terms of that section, these corporations can be reasonably certain that their conversions will qualify as F reorganizations, and, if they are S corporations, that their S elections will be unaffected by the conversion. If a corporation contemplates a statutory conversion that involves unusual facts or legal issues (and particularly if these facts are likely to arise for a significant number of other corporations), the corporation will have at least a decent chance of obtaining a private letter ruling about the conversion, and it is now possible to obtain such a ruling on an expedited basis.[60]

- As noted above, even apart from the Rulings, there is substantial federal tax authority, albeit indirect, that strongly supports the qualification of any statutory conversion of a corporation to an LLC as an F reorganization if the relevant facts are generally similar to those of XYZ.
- For corporations that are contemplating statutory conversions and can make all of the factual representations made by XYZ in the Rulings and meet all of the nine Code Sec. 368(a)(1)(F) legal tests discussed above, the Rulings, in my view, provide virtually bullet-proof authority that their conversions are F reorganizations; and I have no question that the IRS and most courts would agree.
- Furthermore, as discussed above, because of the issuance of the February 25, 2005, Final Regulations, the Rulings should effectively provide the above corporations with strong authority on the federal tax consequences of their statutory

conversions even if they fail the COI and COBE tests outlined above and cannot make the representations cited in the Rulings as representations by XYZ insofar as these representations relate to COI and COBE issues.

- Finally, although the IRS, in any audit or appeal, is likely to take the position that no corporation other than XYZ may cite the Rulings as precedent, there are, as indicated above, compelling arguments that the courts should give significant weight to the Rulings in the case of statutory conversions to LLCs of corporations other than XYZ in which the relevant facts are similar to those of XYZ.

## Conclusion

For many privately held state-law business corporations, the asset protection advantages and the other legal advantages that are available under LLC statutory law but not under corporate law strongly support a conversion to the LLC business organization form. In some states, these conversions will also result in significant state tax savings.

There are several methods for effecting such a conversion; but for most corporations, the best method is through a statutory conversion. In a statutory conversion, in contrast to other types of conversions, the converting company is the same entity after the conversion transaction as before. Twenty-six states, including, as noted, Delaware, permit statutory conversions. All but eight states permit a somewhat similar conversion procedure called a "statutory interspecies merger."

There is already ample federal tax authority for the proposition that nonstatutory conversions and conversions through statutory interspecies mergers of corporations to LLCs are F reorganizations and that these conversions do not affect the S election of converting corporations that are S corporations. In LTR 200528021 (issued on April 4, 2005) and LTR 200548021 (issued on August 23, 2005), the IRS has ruled that these same federal tax results apply in the case of the statutory conversion to an LLC contemplated by the corporation to whom those rulings were issued. These two LTRs significantly enhance the attractiveness of the statutory conversion method as the



### Exhibit A

***Business Organization Law Definitions Useful In Understanding And Planning Statutory Conversions***

For purposes of the above article:

1) ***Business organization law.*** Business organization law means the field of state statutory and case law that is concerned with the creation of business organizations and with the legal rules that govern these organizations and their owners, including rules governing the liability of owners for debts of their business organizations and the internal governance and economic arrangements within the organizations. Business organization law includes, among other areas of law, sole proprietorship law, general and limited partnership law, corporate law, LLC law and the law of statutory business trusts.
2) ***Business entities.*** Business entities (often referred to by practitioners simply as "entities") mean individual business organizations deemed under state business organization law to exist as legal persons separate from and independent of their owners. By state statute, entities are, in general, endowed with the same business powers as natural persons – *e.g.*, the power to enter into agreements, to hire and dismiss employees, and to borrow and lend money.

3) ***Business organization form.*** A business organization form means a business organization structure that results from the application of a unified set of state statutory or common law rules that governs a particular type of entity. The principal business organization forms are the sole proprietorship form, the general and limited partnership forms, the corporate form, the LLC form and the statutory business trust form.
4) ***Conversion [of an entity]***. The conversion of an entity generally means a change of the entity's business organization form. Conversions can be either non-statutory or statutory.
5) ***Non-statutory conversion.*** The non-statutory conversion of an entity normally involves:
   a) The creation of a new entity by the owners of an existing entity;
   b) The transfer of the existing entity's assets to the new entity;
   c) The issuance of ownership interests by the new entity to the owners of the existing entity; and
   d) The dissolution and liquidation of the existing entity.

The following is an example of a non-statutory conversion:

*XY is a general partnership under the laws of State Z. XY's partners decide to convert its business organization form to that of a business corporation. They effect this change by creating a new business corporation under Z law, distributing XY's assets to themselves, dissolving XY, and contributing its assets to XY, Inc. in exchange for XY stock*

6) ***Merger.*** A merger means a statutory or common law procedure whereby the assets of one entity become those of another. In a merger, the former entity usually disappears as a consequence of the merger transaction.
7) ***Non-statutory merger.*** A non-statutory merger means a legal procedure in which one entity merges into another by any means except by compliance with statutory merger provisions.
8) ***Statutory intraspecies merger.*** A statutory intraspecies merger means a procedure under which, through compliance with specific state statutory rules, one entity (the "disappearing entity") having a particular statutory business organization form (a) is merged into another having the same statutory business organization form; and, (b) in general, ceases to exist as an entity. In a statutory intraspecies merger;
   a) The assets of the disappearing entity are transferred to the surviving entity "by operation of law" (*i.e.*, without any need to document their transfer); and
   b) The rights and duties of the disappearing entity become those of the surviving entity.
9) ***Statutory interspecies merger.*** A statutory interspecies merger means a state statutory procedure in which an entity having one statutory business organization form—e.g., the corporate form—merges into an entity having another statutory business organization form—*e.g.*, the LLC form.
10) ***Statutory conversion.*** A statutory conversion means a statutory procedure in which a single entity changes its business organization form—*e.g.*, from the corporate form to the LLC form. In a statutory conversion:
   a) There are no transfers of assets.
   b) There are no exchanges of ownership interests (but rather, these interests are converted—*e.g.*, from corporate shares to LLC membership rights); and
   c) The rights and duties of the entity are the same after the conversion as before.

## Exhibit B

### *Statutory Conversions Of Corporations To LLCs—Governing Law in the 50 States and the District of Columbia*

| State | Does The Corporate Statute Permit Conversion? | Corporate Statute | Does The LLC Statute Permit Conversion? | LLC Statute |
|---|---|---|---|---|
| Alabama | Yes | Code of Ala. § 10-15-3 | Yes | Code of Ala. § 10-15-3 |
| Alaska | Yes | Alaska Stat. § 10.06.590 | Yes | Alaska Stat. § 10.50.570 |
| Arizona | No | | No | |
| Arkansas | No | | No | |
| California | Yes | Cal Corp Code § 1151 | Yes | Cal Corp Code § 17540.2 |
| Colorado | Yes | C.R.S. 7-90-201 | Yes | C.R.S. 7-90-201 |
| Connecticut | No | | No | Conn. Gen. Stat. § 34-199 |
| Delaware | Yes | 8 Del. C. § 266 | Yes | 18 Del. C. § 18-214 |
| District of Columbia | No | | No | |
| Florida | Yes (effective 1-1-2006) | | Yes (effective 1-1-2006) | Fla. Stat. § 608.439 |
| Georgia | Yes | O.C.G.A. § 14-2-1109.1 | Yes | O.C.G.A. § 14-11-212 |
| Hawaii | Yes | HRS § 414-271 | Yes | HRS § 428-902.5 |
| Idaho | No | | No | |
| Illinois | No | | No | 805 ILCS 180/37-10 |
| Indiana | Yes | Burns Ind. Code Ann. § 23-1-38.5-10 | No | |
| Iowa | No | | Yes | I.C.A. § 490A.304 |
| Kansas | No | | No | K.S.A. § 17-7684 |
| Kentucky | No | | No | KRS § 275.370 |
| Louisiana | No | | No | |
| Maine | Yes | 13-C M.R.S. § 952 | Yes | 31 M.R.S. § 746 |
| Maryland | No | | No | |
| Massachusetts | Yes | ALM GL ch. 156D, § 9.50 | Yes | ALM GL ch. 156C, § 69 |
| Michigan | No | | No | MCLS § 450.4707 |
| Minnesota | Yes | Minn. Stat. § 302A.681 | Yes | Minn. Stat. § 322B.78 |
| Mississippi | No | | No | |
| Missouri | No | | No | |
| Montana | No | | No | MCA § 35-8-1210 |
| Nebraska | No | | No | |
| Nevada | Yes | NRS 92A.105 | Yes | NRS 92A.105 |
| New Hampshire | Yes | RSA 293-A:11.09 | Yes | RSA 304-C:17-a |
| New Jersey | No | | No | |
| New Mexico | Yes | | Yes | N.M. Stat. Ann. § 53-19-60 |
| New York | No | | No | NY CLS LLC § 1006 |
| North Carolina | Yes | N.C. Gen. Stat. § 55-11A-10 | Yes | N.C. Gen. Stat. § 57C-9A-01 |
| North Dakota | Yes | N.D. Cent. Code, § 10-19.1-104.1 | Yes | N.D. Cent. Code, § 10-32-108.1 |
| Ohio | No | | No | |
| Oklahoma | Yes | 18 Okl. St. § 1090.5 | Yes | 18 Okl. St. § 2054.1 |
| Oregon | Yes | ORS § 60.472 | Yes | ORS § 63.470 |
| Pennsylvania | No | | No | |
| Rhode Island | No | | No | R.I. Gen. Laws § 7-16-5.1 |
| South Carolina | Yes | S.C. Code Ann. § 33-11-111 | Yes | |
| South Dakota | Yes | S.D. Codified Laws § 47-1A-950 | Yes | |
| Tennessee | Yes | Tenn. Code Ann. § 48-21-111 | Yes | |
| Texas | Yes | Tex. Business Organizations Code § 10.101 | Yes | Tex. Business Organizations Code § 10.101 |
| Utah | Yes | | Yes | Utah Code Ann. § 48-2c-1401 |
| Vermont | No | | No | 11 V.S.A. § 3122 |
| Virginia | Yes | Va. Code Ann. § 13.1-722.9 | Yes | Va. Code Ann. § 13.1-1010.4 |
| Washington | No | | No | |
| West Virginia | No | | No | W. Va. Code § 31B-9-902 |
| Wisconsin | No | | No | |
| Wyoming | Yes | Wyo. Stat. § 17-26-101 | Yes | Wyo. Stat. § 17-26-101 |

## Exhibit C

***Statutory Interspecies Mergers Of Corporations Into LLCs—Governing Law in the 50 States and the District of Columbia***

| State | Corporate Statute Provides For Mergers Of Corporations Into LLCs | Corporate Statute | LLC Statute Provides For Mergers Of Corporations Into LLCs | LLC Statute |
|---|---|---|---|---|
| Alabama | Yes | Code of Ala. § 10-15-4 | Yes | Code of Ala. § 10-15-4 |
| Alaska | No | | No | |
| Arizona | Yes | A.R.S. § 10-1108 | Yes | A.R.S. § 29-752 |
| Arkansas | Yes | A.C.A. § 4-32-1201 | Yes | A.C.A. § 4-32-1201 |
| California | Yes | Cal. Corp. Code § 1113 | Yes | Cal. Corp. Code § 17550 |
| Colorado | Yes | C.R.S. § 7-90-203 | Yes | C.R.S. § 7-90-203 |
| Connecticut | Yes | Conn. Gen. Stat. § 33-815 | Yes | Conn. Gen. Stat. § 34-193 |
| Delaware | Yes | 8 Del. C. § 264 | Yes | 6 Del. C. § 18-209 |
| District of Columbia | Yes | D.C. Code § 29-101,72b. | No | D.C. Code § 29-1040 |
| Florida | Yes | Fla. Stat. § 607.1108 | Yes | Fla. Stat. § 608.438 |
| Georgia | Yes | O.C.G.A. § 14-2-1109 | Yes | O.C.G.A. § 14-11-901 |
| Hawaii | Yes | HRS § 414-311 | Yes | HRS § 428-904 |
| Idaho | Yes | Idaho Code § 30-1-1102 | Yes | Idaho Code § 53-661 |
| Illinois | Yes | 805 ILCS 5/11.39 | Yes | 805 ILCS 180/37-20 |
| Indiana | Yes | Burns Ind. Code Ann. § 23-1-40-8 | Yes | Burns Ind. Code Ann. § 23-18-7-9 |
| Iowa | Yes | Iowa Code § 490.1102 | Yes | Iowa Code § 490A-1201 |
| Kansas | Yes | K.S.A. § 17-7701 | Yes | K.S.A. § 17-7701 |
| Kentucky | Yes | KRS § 271B.11-080 | Yes | KRS § 275.345 |
| Louisiana | Yes | La. R.S. 12:117 | Yes | La. R.S. 12:1357 |
| Maine | Yes | 13-C M.R.S. § 1102 | Yes | 31 M.R.S. § 741-A |
| Maryland | Yes | Md. Corporations and Associations Code Ann. § 3-102 | Yes | Md. Corporations and Associations Code Ann. § 4a-701 |
| Massachusetts | Yes | ALM GL ch. 156D, § 11.02 | Yes | ALM GL ch. 156C § 59 |
| Michigan | Yes | MCLS § 450.1736 | Yes | MCLS § 450.4705 |
| Minnesota | Yes | Minn. Stat. § 302A.651 | Yes | Minn. Stat. § 322B.70(2) |
| Mississippi | Yes | Miss. Code Ann. § 79-4-11.02 | Yes | Miss. Code Ann. § 79-29-209 |
| Missouri | Yes | § 347.710 R.S.Mo. | Yes | § 347.710 R.S.Mo. |
| Montana | No | | Yes | MCA § 35-8-1201 |
| Nebraska | No | | Yes | R.R.S. Neb. § 21-2647 |
| Nevada | Yes | NRS § 92A.100 | Yes | NRS § 92A.100 |
| New Hampshire | Yes | RSA § 293-A:11.08 | Yes | RSA § 304-C:18 |
| New Jersey | Yes | N.J. Stat. § 14A:10-14 | Yes | N.J. Stat. § 42:2B-20 |
| New Mexico | No | | Yes | N.M. Stat. Ann. § 53-19-62 |
| New York | Yes | NY CLS Bus Corp § 904-a | Yes | NY CLS LLC § 1001 |
| North Carolina | Yes | N.C. Gen. Stat. § 55-11-10 | Yes | N.C. Gen. Stat. § 57C-9A-20 |
| North Dakota | Yes | N.D. Cent. Code, § 10-19.1-96 | Yes | N.D. Cent. Code, § 10-32-100 |
| Ohio | Yes | ORC Ann. § 1701.791 | Yes | ORC Ann. § 1705.36 |
| Oklahoma | Yes | 18 Okl. St. § 1090.2 | Yes | 18 Okl. St. § 2054 |
| Oregon | Yes | ORS § 60.481 | Yes | ORS § 63.481 |
| Pennsylvania | Yes | 15 Pa.C.S. § 1921 | Yes | 15 Pa.C.S. § 8956 |
| Rhode Island | No | | Yes | R.I. Gen. Laws § 7-16-59 |
| South Carolina | Yes | S.C. Code Ann. § 33-11-101 | Yes | S.C. Code Ann. § 33-44-904 |
| South Dakota | Yes | S.D. Codified Laws § 47-1A-1102 | Yes | S.D. Codified Laws § 47-34A-904 |
| Tennessee | Yes | Tenn. Code Ann. § 48-21-110 | Yes | Tenn. Code Ann. § 48-244-101 |
| Texas | Yes | Tex. Business Organizations Code § 10.001 | Yes | Tex. Business Organizations Code § 10.001 |
| Utah | No | | Yes | Utah Code Ann. §§ 48-2(c)-1407 |
| Vermont | No | | Yes | 11 V.S.A. § 3124 |
| Virginia | Yes | Va. Code Ann. § 13.1-716 | Yes | Va. Code Ann. § 13.1-1070 |
| Washington | Yes | Rev. Code Wash. (ARCW) § 23B.11.080 | Yes | Rev. Code Wash. (ARCW) § 25.15.395 |
| West Virginia | Yes | W. Va. Code §31D-1-1102 | Yes | W. Va. Code §31B-9-904 |
| Wisconsin | Yes | Wis. Stat. § 180.1101 | Yes | Wis. Stat. § 183.1201 |
| Wyoming | No | | Yes | Wyo. Stat. § 17-15-139 |

## ENDNOTES

method of choice in converting state-law corporations, whether they are C or S corporations for federal tax purposes, to LLCs.

1 The author wishes to acknowledge his indebtedness to Susan D. Bielski and Christina Rezk for their expert assistance in researching and drafting this article.

2 The latest Internal Revenue Service statistics are for calendar year 2002. In that year, 3,154,377 companies filed IRS Forms 1120S and 2,100,074 filed Forms 1120. The Internal Revenue Service website that contains these and a vast array of other statistical information is *www.irs.gov/taxstats*. Although, under the U.S. Treasury Department's Entity Classification Regulations, LLCs may of course elect treatment as C or S corporations, it is safe to assume that the vast majority of the above companies were state-law business corporations. My informal inquiries with the Securities and Exchange Commission indicate that of the roughly 5 million active U.S. state-law business corporations, only about 15,000 are public companies; the rest are privately held.

3 The New Hampshire Interest and Dividends Tax applies to New Hampshire residents who receive distributions from corporations but not to New Hampshire residents who receive distributions from limited liability companies with "nontransferable shares." RSA 77:4,III. My preliminary research suggests that other states that have franchise taxes or other taxes that apply to state-law business corporations or their shareholders but not at all (or at least more favorably) to limited liability companies or their members include Alabama, Arkansas, Delaware, Illinois, Louisiana, New Jersey and South Carolina.

4 A glossary of business organization law technical terms relevant to conversion practice is set forth in the attached Exhibit A.

5 *See* statutory table in the attached Exhibit B. The table reflects the author's best effort to parse the statutory business organization law of the 50 states and the District of Columbia on the relevant issues, but practitioners assisting clients in possible conversions from corporations to LLCs should review this table with a critical eye.

6 Code Sec. 368(a)(1)(F) provides in its entirety as follows:

> Section 368 *Definitions relating to corporate reorganizations*
> (a) *Reorganizations*
> (1) *In general*. For purposes of parts I and II and this part, the term "reorganization" means:
> (F) A mere change in identity, form, or place of organization of one corporation, however effected. . . .

7 Both rulings may be accessed online at, among other sources, *www.llcformations.com* (under the "LLC Library" button).

8 Briefly, compelling, although indirect support for the qualification of nonstatutory conversions of corporations to LLCs as F reorganizations may be found in, among other authorities, Rev. Rul. 67-376, 1967-1 CB 42; Rev. Rul. 70-241, 1970-1 CB 84; LTR 8517053 (Jan. 29, 1985); and LTR 8711091 (Dec. 17, 1986); and compelling, although indirect authority for the qualification of conversions of corporations to LLCs through interspecies mergers may be found in FSA 200237017 (June 7, 2002), LTR 200510012. Support for the proposition that the S election of entities participating in the above types of conversions will be unaffected by the conversions may be found in, among other authorities, LTR 200510012 and Rev. Rul. 64-250, 1964-1 CB 333.

9 Code Sec. 6110(k)(3).

10 A leading case on the efficacy of the holding company/operating company structure is the decision of the U.S. Supreme Court in *U.S. v. Bestfoods*, SCt, 524 US 51, 118 SCt 1876 (1998).

11 My sampling of Secretary of State statistics suggests that there are presently about 3 million U.S. LLCs nationwide. According to the Delaware Secretary of State, as of October 29, 2005, there were 319,445 LLCs formed and existing under the DLLCA and 280,567 corporations formed and existing under the DGCL.

12 Del. Code Ann. tit. 8, §106; Del. Code Ann. tit. 6, §18-201(b).

13 Del. Code Ann. tit. 6, §18-101(6).

14 Del. Code Ann. tit. 8, §102(a)(4)(4th sentence).

15 Del. Code Ann. tit. 8, §102(b)(6); Del. Code Ann. tit. 6, §18-303.

16 Del. Code Ann. tit. 6, §18-1101(b); *Elf Atochem North America v. Jaffari*, 1999 Lexis 111 (Del. S. Ct. 1999). Section 18-1101(b) of the DLLCA provides in its entirety as follows:

> (b) It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.

17 *See generally*, Jack B. Jacobs, *Entity Rationalization: A Judge's Perspective,* 58 BUS. LAW. 1043 (May 2003). Jack B. Jacobs, the author of the above article, is a Vice Chancellor of the Delaware Court of Chancery.

18 One situation, however, in which the greater contractual freedom and enforceability available under the DLLCA may be important to the organizers of an entity may be the situation in which these organizers wish the flexibility to reduce or eliminate manager fiduciary duties and liabilities. Del. Code Ann. tit. 6, §§18-1101(c) and (e).

19 Del. Code Ann. tit. 8, §102(b)(5); 8 Del. C. §§510 & 511; Del. Code Ann. tit. 6, §§18-201(b); 18-801; & 18-1108(a).

20 Del. Code Ann. tit. 6, §18-101(8).

21 Del. Code Ann. tit. 6, §18-702(a)(1).

22 Del. Code Ann. tit. 8, §202.

23 *See, e.g.*, Del. Code Ann. tit. 8, §102(b)(1); §141; §142; §212.

24 Del. Code Ann. tit. 6, §18-402.

25 Del. Code Ann. tit. 6, §18-402.

26 *See, e.g.*, Del. Code Ann. tit. 8, §351 ("Management by Stockholders").

27 *See, e.g.*, Del. Code Ann. tit. 8, §141, §211; & §222.

28 *See* Del. Code Ann. tit. 6, §18-404(c).

29 Del. Code Ann. tit. 8, §18-703 provides in its entirety as follows:

> **§18-703. Member's limited liability company interest subject to charging order**
> (a) On application by a judgment creditor of a member or of a member's assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment. To the extent so charged, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled in respect of such limited liability company interest.
> (b) A charging order constitutes a lien on the judgment debtor's limited liability company interest. The purchaser at the foreclosure sale has only the rights of an assignee.
> (c) This chapter does not deprive a member or member's assignee of a right under exemption laws with respect to the judgment debtor's limited liability company interest.
> (d) The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interest.
> (e) No creditor of a member or of a member's assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.
> (f) The Court of Chancery shall have jurisdiction to hear and determine any matter relating to any such charging order.

While the charging order protections afforded by Section 18-703 are not expressly limited to multi-member LLCs and their members, most LLC practitioners believe that the section is thus limited. *See In re Albright,* DC Colo., 291 BR 538, Case No.01-11367 ABC (April 4, 2003).

30 Useful discussions of charging order protections in general and of specific issues relating to charging order provisions in LLC statutes may be found in Allan G. Donn, *State Law & State Taxation Corner, Charging Orders—Creditors of Partners and LLC Members,* J. Passthrough Entities, Jul.-Aug. 2003, at 15; Daniel S. Kleinberger, Carter G. Bishop and Thomas Earl Geu, *Charging Orders and the New Uniform Limited Partnership Act: Dispelling Rumors of Disaster,* 18 Probate & Property 30 (2004); Thomas Earl Geu and Thomas E. Rutledge, *The* Albright *Decision—Why a SMLLC is Not an Appropriate Asset Protection Vehicle,* Bus. Entities, Sep.-Oct. 2003, at 16; Thomas Earl Geu and Thomas E. Rutledge, *Guess Who's Coming to Dinner?: The Bankruptcy Trustee's Ability to Become a Member of an LLC and the Ehmann Case,* Bus. Entities, Mar.-Apr. 2005, at 32; Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Associations,* 30 Del. J. Corp. L. 199 (2005).

31 An excellent although somewhat dated overview of the legal structuring and the federal income tax consequences of conversions is Sheldon I. Banoff, *Conversions of Legal Entities: Should Form or Substance Control?* Tax Planning for Domestic and Foreign Partnerships, LLCs, Joint Ventures and Other Strategic Alliances 2000 (Practising Law Institute J0-002W), at 175-310.

32 *See generally* Del. Code Ann. tit. 8, §264; Del. Code Ann. tit. 6, §§18-201(b); 18-209.

33 Del. Code Ann. tit. 8, §251(c); Del. Code Ann. tit. 6, §§18-209(b) (second sentence).

34 Del. Code Ann. tit. 8, §251(b)(5); Del. Code Ann. tit. 6, §18-209(b)(third sentence).

35 Del. Code Ann. tit. 8, §251; Del. Code Ann. tit. 6, §209 generally.

36 *See generally* Del. Code Ann. tit. 8, §264.

37 Del. Code Ann. tit. 8, §251(b); Del. Code Ann. tit. 8, §266(b).

38 Del. Code Ann. tit. 8, §251(c); Del. Code Ann. tit. 8, §266(b).

39 Del. Code Ann. tit. 8, §266(b).

40 Del. Code Ann. tit. 6, §18-214(b); Del. Code Ann. tit. 8, §266(c).

41 Del. Code Ann. tit. 6, §18-214(g).

42 Del. Code Ann. tit. 6, §18-214(d).

43 Del. Code Ann. tit. 6, §18-214(f); Del. Code Ann. tit. 8, §266(h).

44 Del. Code Ann. tit. 6, §18-214(e); Del. Code Ann. tit. 8, §266(h).

45 The history of the concept of statutory conversion is unclear. However, the concept seems to have originated in roughly the late 1980s in one or more states that amended their partnership laws to permit general partnerships to convert into limited partnerships and vice versa. The concept was then extended to conversions of general and limited partnerships to LLCs and finally to conversions of entities having any business organization form to any other business organization form.

46 Rev. Rul. 64-250, 1964-1 CB 333.

47 Rev. Rul. 73-526, 1973-2 CB 404.

48 *See, e.g.,* Rev. Proc. 2004-3, IRB 2004-1, 114, Section 3.01(30); Rev. Proc. 2005-3 , IRB 2005-1, 118, Section 3.01(31).

49 As noted above, the authority for these statistics is the IRS's Statistics of Income reports for its fiscal year 2002 (the most recent year for which IRS data are available).

50 T.D. 9182, IRB 2005-11, 713; amended Reg. §1.368-1(b).

51 *See, e.g.,* Rev. Rul. 67-376, 1967-1 CB 142; Rev. Rul. 70-241, 1970-1 CB 84; LTR 200335019 (May 27, 2003).

52 *See generally* Prop. Reg. §1.368-2(m)(1)(i).

53 *See generally* H.R. Conf. Rep. No. 97-760, 540-541, Tax Equity and Fiscal Responsibility Act of 1982.

54 *See also* FSA 200237017; LTR 200007011; Reg. §§301.7701-2 and 3.

55 *See* August 12, 2004, Proposed Regulations, Preamble, Page 1; *H.H. Berghash,* 43 TC 743, Dec. 27,277, *aff'd,* CA-2, 66-1 ustc ¶9446, 361 F2d 257.

56 Reg. §301.7701-3(c).

57 Code Sec. 6110(b)(1)(A).

58 Dale F. Rubin, *Private Letter and Revenue Rulings: Remedy or Ruse?* 28 N. Ky. L. Rev. 50 (2001).

59 Judy S. Kwok, *Note: The Perils of Bright Lines: Section 6110(k)(3) and the Ambiguous Precedential Status of Written Determinations,* 24 Va. Tax Rev. 863 (Spring 2005).

60 Rev. Proc. 2005-68, IRB 2005-41 (Oct. 11, 2005).