



THE MISSISSIPPI BAR

Spring 2013

Volume 4, Issue 1

The Mississippi

# Business Law Reporter

A Publication of the Business Law Section of The Mississippi Bar

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## Section Chair's Corner

By **Kenneth D. Farmer, Esq.**

Welcome to the Spring 2013 issue of The Mississippi Business Law Reporter, a publication of the Business Law Section of the Mississippi Bar Association. It is my pleasure and a sincere honor to serve as chair of the Business Law Section for the 2013 fiscal year. I am pleased to serve alongside Section officers, Stanley Q. Smith of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., Vice Chair; James T. Milam of Milam Law PA, Secretary; and immediate past-chair, C. Joyce Hall of Watkins & Eager PLLC. The Executive Committee Members include Jason Bailey of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Olive Branch; Tammra Cascio of Gulf Guaranty Life Insurance Company, Jackson; and Ryan L. Pratt of Pratt Law Firm PLLC, Madison. Drew Snyder of the Mississippi Secretary of State's Office is currently serving as our newsletter editor.

As many of you know, the Business Law Section met on November 15, 2012, with the Mississippi Corporate Counsel Association for our annual meet and greet social. The social was held at Nick's Restaurant in Fondren. Unlike years past, however, we ventured into new territory by inviting a guest of honor to join the event. Our guest of honor, Brent Christensen of the Mississippi Development Authority, provided our attendees with some great insight into the business climate in Mississippi. There were also several student representatives from both the University of Mississippi School of Law and Mississippi College School of Law in attendance. While I can't speak for everyone, I certainly think it was a huge success. I encourage you to attend the next social event!

I would like to give a special thanks to Joyce Hall, our immediate past-chair, and the other Section Officers and Committee Members for their outstanding work last year.

During our last meeting, the Business Law Section Officers and the Executive Committee Members discussed several activities and goals for the Section's year, including the following events:

1. Continuing publication of the Business Section newsletters: Spring 2013 and Summer 2013. Drew Snyder welcomes any and all articles and topics of interest which may be informative and helpful to our members.
2. Continue the joint annual ethics hour CLE program with the Mississippi Corporate Counsel Association. This year's CLE will be held on June 11, 2013. Professor Donald Campbell of Mississippi College School of Law will moderate, and Adam Kilgore, General Counsel of the Mississippi Bar, and David Allen of Page, Mannino, Peresich & McDermott, PLLC will serve as panelists.
3. Award scholarships this fiscal year to deserving students at the Mississippi College School of Law and the University of Mississippi School of Law.
4. Offer a CLE program in May following the close of the Mississippi Legislative Session to provide an update to members on business law topics. This year's Legislative Update CLE will be held on May 14, 2013.

# Ushering in Entity Change: The Development and Advantages of Entity Domestication and Conversion Statutes

By Victoria L. Applewhite

To take advantage of favorable corporate law in another state or a more suitable form of business, an entity may desire to change either its state of incorporation or business entity form through the use of a single-step process. While the majority of states have statutory provisions authorizing domestication and/or conversion, Mississippi does not have a statute that explicitly permits these changes.

While the term “domestication” is sometimes used to describe the process of licensing a foreign corporation to do business in this state, for purposes of this article, the term refers to a corporation discontinuing its incorporation under the foreign state and reincorporating under the laws of this state or vice versa.<sup>1</sup> Whether a corporation is a foreign or domestic corporation generally depends upon its place of incorporation and organization, not upon its business activities or location of members and stockholders.<sup>2</sup>

Conversion of business entities permits the more efficient accomplishment of what would otherwise be a burdensome multi-step process. Without statutory authority to change its organizational form, an entity is not precluded from doing so.<sup>3</sup> Instead, the entity must engage in procedures that are more elaborate, more cumbersome, and more expensive but achieve the same result.<sup>4</sup> Because the end result of conversion can still be achieved through the use of alternative processes, a statutory provision authorizing domestication and/or conversion would merely create a more efficient system involving only one entity and one document.<sup>5</sup>

With the authorization of conversion, several problem areas could potentially arise. The rights of creditors, litigants, and owners must be protected.<sup>6</sup> The conversion documents must clearly indicate the transfer of business property, and administrative procedures must enable the state to easily record

and report on the current status of a business.<sup>7</sup> In the case of conversions involving two jurisdictions, additional issues of coordination, reciprocity, and multiple sets of law arise.<sup>8</sup>

This article will examine general domestication and conversion statutes, discuss the advantages of each, and analyze how other states have dealt with the issue.

## DOMESTICATION

Corporations often conduct a substantial amount of business outside their state of incorporation with the approval of other states.<sup>9</sup> Most commonly, corporations obtain this approval through a certificate of authority, permitting the corporation to do business in the state without altering its status as a foreign corporation.<sup>10</sup> Domestication is a procedure whereby a foreign corporation discontinues its incorporation under the laws of the foreign state and becomes incorporated under the laws of the subject state or vice versa.<sup>11</sup> A domesticated corporation typically has all of the powers, privileges, and rights granted to corporations originally incorporated in the subject state, as well as all duties, liabilities, and limitations imposed upon them.<sup>12</sup>

### *Domestication under the Model Business Corporation Act*

Section 9.20 of the Model Business Corporation Act provides for two types of domestication: a foreign business corporation becoming a domestic business corporation, and a domestic business corporation becoming a foreign business corporation.<sup>13</sup> In each case, domestication must be permitted by the laws of the foreign jurisdiction, which also determine the conditions upon which a foreign corporation is authorized to domesticate in this state.<sup>14</sup> A foreign corporation may become a domes-

tic corporation only if the laws of its jurisdiction of incorporation so authorize.<sup>15</sup> The domestication must be approved in the manner prescribed by domestication laws in the subject state.<sup>16</sup>

Domestication statutes typically include provisions for a plan of domestication, action on the plan, articles of domestication, surrender of charter upon domestication, effect of domestication, and abandonment of domestication.<sup>17</sup> The filing of the articles of charter surrender terminates the status of corporation as a corporation incorporated under the laws of this state, but the procedure whereby a foreign corporation terminates its incorporation in the foreign state is governed by statute in that jurisdiction.<sup>18</sup> When domestication becomes effective, the corporation is considered to be incorporated under and subject to the organic law of this state for all purposes.<sup>19</sup> The domesticated corporation retains both its original date of incorporation in the former state and an uninterrupted status as the same corporation both before and after domestication.<sup>20</sup> Though each state has the option to adopt all or part of the Model Business Corporation Act's provisions, the act provides an accurate estimate of general domestication statutes.

#### *Advantages of Domestication*

Changing the state of incorporation may be favorable for several reasons, all depending on the laws of the subject state. Most notably, a corporation may want to domesticate in a certain state to benefit from advantageous tax laws in that state.<sup>21</sup> For example, Nevada, Texas, and Wyoming impose no corporate income taxes, which may significantly reduce taxes overall, depending on the corporation's business operations.<sup>22</sup> The laws of the jurisdiction in which a corporation is domesticated provide guidance on such issues as voting rights, protection of officers and directors, and liability.<sup>23</sup> Delaware has notoriously favorable corporate governance regulations,<sup>24</sup> while Nevada laws offer greater privacy and corporate officer liability protection.<sup>25</sup>

#### *Statutory Provisions for Domestication*

Thirty jurisdictions in total provide for domestication of corporations.<sup>26</sup> Twenty jurisdictions have

authorized domestication specifically by statute,<sup>27</sup> while ten additional jurisdictions have provided for domestication as a type of conversion authorized in conversion statutes.<sup>28</sup> Of the thirty jurisdictions authorizing domestication, five jurisdictions only authorize the domestication of foreign corporations domesticating into the state.<sup>29</sup>

## **ENTITY CONVERSION**

### *Entity Conversion under the Model Business Corporation Act*

Section 9.50 of the Model Business Corporation Act provides for four types of entity conversions: (1) a domestic business corporation to a domestic other entity; (2) a domestic corporation to a foreign other entity; (3) a domestic other entity converting into a domestic business corporation; and (4) a foreign other entity converting to a domestic business corporation.<sup>30</sup> Chapter Nine of the Model Business Corporation Act concerns the conversion of entities, nonprofit corporations, and foreign nonprofit corporations.<sup>31</sup> Though this article focuses solely on entity conversion, the provisions for nonprofit conversion and foreign nonprofit conversion are quite similar.<sup>32</sup>

The concept of entity conversion as discussed in section 9.50 is scarcely found in statutes governing the incorporation and organization of business entities.<sup>33</sup> Thus, if the organic law of a domesticating unincorporated entity does not specifically provide for this type of conversion, section 9.50(c) is intended to authorize such a conversion: "A domestic unincorporated entity may become a domestic business corporation."<sup>34</sup> A foreign unincorporated entity may only convert under section 9.50 if the laws of the foreign jurisdiction allow the conversion.<sup>35</sup> This provision avoids problematic issues arising if a foreign unincorporated entity were authorized to participate in transactions in this state which would not be permitted under the laws of the foreign jurisdiction.<sup>36</sup>

Though many states have adopted parts, rather than the whole, of section 9.50, the Model Business Corporation Act's conversion statute includes provisions for a plan of entity conversion, action on a plan of entity conversion, articles of entity con-

version, surrender of charter upon conversion, effect of entity conversion, and abandonment of an entity conversion.<sup>37</sup> The plan of conversion must be adopted by the board of directors and include: (1) a statement of the type of entity the surviving entity will be; (2) the terms and conditions of the conversion; (3) the manner and basis of converting the corporation's shares into interests or other securities, obligations, etc.; and (4) the text of the organic documents of the surviving entity.<sup>38</sup>

The plan must be approved by the shareholders, voting individually as each class or series of shares of the corporation.<sup>39</sup> The meeting at which votes are cast must have a quorum of at least a majority of eligible voters in that voting group.<sup>40</sup> If the conversion would expose any shareholder to owner liability, each shareholder must consent in writing.<sup>41</sup> After approval of the plan, the articles of conversion are executed and delivered to the secretary of state for filing.<sup>42</sup> In the case of conversion from a domestic corporation to a foreign entity, articles of charter surrender are to be executed and filed.<sup>43</sup> The existence of the surviving entity is uninterrupted, and its date of incorporation or organization remains on its original date of incorporation or organization.<sup>44</sup> The surviving entity is subject to the rights and liabilities of the original entity, though a shareholder who becomes subject to owner liability is liable only for obligations arising post-conversion.<sup>45</sup>

Several types of conversions are outside the scope of this provision: a domestic other entity to another form of unincorporated entity or to a foreign business corporation, and a foreign entity or foreign corporation to a domestic unincorporated entity.<sup>46</sup> However, many states have chosen to generalize the terms of their conversion provisions to allow these types of conversions not covered by section 9.50.<sup>47</sup>

#### *Advantages of Conversion*

Without express statutory authority, an entity may still change its organizational form through the use of a multi-step process which is eliminated by the more efficient method prescribed by conversion statutes.<sup>48</sup> For example, without the use of a conver-

sion statute, a partnership may change to a corporation through several methods.<sup>49</sup> In each situation, however, multiple steps are involved: the partnership is dissolved, its assets are transferred or sold to a newly formed corporation, and the former partners become shareholders in the new corporation.<sup>50</sup> Though accomplishing the desired result, this multi-step process involves expenses that would not otherwise exist with a statutory provision authorizing conversion.<sup>51</sup> Distribution of assets is a taxable event, and the dissolution and sale of assets may trigger contractual terms already in existence, requiring accelerated debt payment.<sup>52</sup> Additionally, documentation is necessary for transfers of assets, transfers of real estate, and the sale or assignment of personal property, all of which may impose additional expenses.<sup>53</sup>

Conversion provisions offer a greatly simplified method of accomplishing a change in entity form with respect to property, transfer restrictions, and transaction costs.<sup>54</sup> Property of the converting entity becomes property of the surviving entity by operation of law, without the need for deeds, assignments, or other documents of conveyance.<sup>55</sup> Title insurance continues in favor of the surviving entity, and no sales or transfer taxes apply to a conversion.<sup>56</sup> Additionally, restrictions on transfer, such as non-assignment clauses in leases, are not triggered.<sup>57</sup>

#### *Statutory Provisions for Conversion*

Of the forty-two jurisdictions that have a statutory provision for business entity conversions, twenty-eight have either adopted provisions identical to section 9.50 or authorized the types of conversions enumerated in section 9.50.<sup>58</sup> Furthermore, eighteen of those jurisdictions have chosen to adopt provisions authorizing other types of conversions beyond the four provided in section 9.50.<sup>59</sup>

Ten jurisdictions have elected to not only expand the types of conversions authorized by statute but also to use such broad terms as to include domestication as a type of authorized conversion in lieu of providing a separate domestication statute.<sup>60</sup> The following states have included domestication in conversion statutes: Alabama, California, Colorado,

Georgia, Hawaii, Michigan, North Carolina, Oregon, Rhode Island, and Texas.<sup>61</sup> Wyoming has perhaps the most expansive conversion statute, broadly stating that “any entity, domestic or foreign, may convert to any other entity, domestic or foreign.”<sup>62</sup>

In addition to flexibility regarding the provision’s coverage, states have options concerning the drafting and placement of conversion provisions. In the “junction box” model, cross-entity provisions are contained in a single statute, while the “self-contained” model repeats cross-entity provisions in individual statutory chapters governing the specific entity forms.<sup>63</sup> The “junction box” model assures consistency and requires fewer provisions; however, these provisions note that any conversion is subject to organic statutes governing each entity type that may prohibit or restrict any aspect of the conversion process.<sup>64</sup> Thus, three statutory provisions would need to be consulted to determine if conversion from one entity to a different entity form is authorized.<sup>65</sup> Though repetitive and lengthy, the “self-contained” model places a conversion provision in its entirety in chapters governing each entity form, reducing the number of provisions that must be consulted.<sup>66</sup>

## CONCLUSION

At a minimum, Mississippi would create a more efficient system by following the forty-one states that have enacted a statute authorizing conversion. Twenty-eight jurisdictions provide for both domestication and conversion.<sup>67</sup> Thirteen jurisdictions provide only for conversion,<sup>68</sup> while a mere two states provide only for domestication.<sup>69</sup> Thus, if a state authorizes conversion, it likely authorizes domestication as well. Furthermore, if Mississippi also elects to authorize domestication, the most efficient method would be to follow the ten states that authorize it as a type of conversion instead of creating a separate provision.

<sup>1</sup> See William Meade Fletcher, *Fletcher Cyclopaedia of the Law of Corporations* § 8302 (2012) (Westlaw, through February 2012).

<sup>2</sup> 36 Am. Jur. 2d *Determination as to domestic or foreign nature, generally* § 2 (2012).

<sup>3</sup> See Robert C. Art, *Conversion and Merger of Disparate Business Entities*, 76 Wash. L. Rev. 349, 368-369 (2001), WL 76 WALR 349.

<sup>4</sup> *Id.*

<sup>5</sup> See *id.* at 352.

<sup>6</sup> *Id.* at 353.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Fletcher, *supra* note 1, § 8302.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Model Bus. Corp. Act Ann. § 9.24 cmt. (2008) (revised 2009).

<sup>13</sup> *Id.* § 9.20(a)-(b).

<sup>14</sup> *Id.* § 9.20 cmt. 1.

<sup>15</sup> Fletcher, *supra* note 1, § 8304.

<sup>16</sup> *Id.*

<sup>17</sup> See Model Bus. Corp. Act Ann., *supra* note 12, §§ 9.20-9.25.

<sup>18</sup> *Id.* § 9.23 cmt.

<sup>19</sup> *Id.* § 9.24(a)(6)(i).

<sup>20</sup> *Id.* § 9.24(a)(6)(ii)-(iii).

<sup>21</sup> See generally Mark Robyn, *2012 State Business Tax Climate Index* (January 25, 2012), at [taxfoundation.org/article/2012-state-business-tax-climate-index](http://taxfoundation.org/article/2012-state-business-tax-climate-index).

<sup>22</sup> See *id.*

<sup>23</sup> See generally David Mace Roberts and Rob Pivnick, *Tale of the Corporate Tape: Delaware, Nevada and Texas* 52 *Baylor L. Rev.* 45 (2000), WL 52 BLRLR 45.

<sup>24</sup> See *id.* at 81.

<sup>25</sup> See *id.* at 51.

<sup>26</sup> See, e.g., D.C. Code § 29-205.01 (West, through May 10, 2012); Va. Code Ann. § 13.1-722.2 (West, through End of 2012 Reg. Sess. and End of 2012 Sp. Sess. I.); Wis. Stat. Ann. § 181.1533 (West, through 2011 Act 286, published April 26, 2012).

<sup>27</sup> See, e.g., Idaho Code § 30-18-501 (West, through End of 2012 2nd Regular Session of the 61st Legislature); La. Rev. Stat. Ann. § 12:164 (West, through 2011 First Extraordinary and Reg. Sess.).

<sup>28</sup> See, e.g., Col. Rev. Stat. Ann. § 7-90-201 (West, through laws effective July 1, 2012); Haw. Rev. Stat. Ann. § 414-271 (West, through Act 129 of 2012 Reg. Sess.); Or. Rev. Stat. Ann. § 60.472 (West, through 7/1/12).

<sup>29</sup> See, e.g., Fla. Stat. Ann. § 607.1801 (West, through Chapter 229 (End) of 2012 Second Reg. Sess. and 2012 Extraordinary Apportionment Sess. of Twenty-Second Leg.); Neb. Rev. St. § 21-20, 181.01 (West, through 102nd Legislature 1st Special Session (2011)).

<sup>30</sup> See Model Bus. Corp. Act Ann., *supra* note 12, § 9.50(a)-(d).

<sup>31</sup> *Id.* §§ 9.30-9.56.

<sup>32</sup> See Fletcher, *supra* note 1, § 3993.50.

<sup>33</sup> See Model Bus. Corp. Act Ann., *supra* note 12, § 9.50 cmt. 2.

<sup>34</sup> *Id.*

- <sup>35</sup> *Id.*
- <sup>36</sup> *See id.*
- <sup>37</sup> *See* Model Bus. Corp. Act Ann., *supra* note 12, §§ 9.50-9.56.
- <sup>38</sup> *See id.* § 9.51(a).
- <sup>39</sup> *Id.* § 9.52(2)-(5).
- <sup>40</sup> *See id.* § 9.52(5).
- <sup>41</sup> Fletcher, *supra* note 1, § 3993.50.
- <sup>42</sup> *See* Model Bus. Corp. Act Ann., *supra* note 12, § 9.53(d).
- <sup>43</sup> *Id.* § 9.54.
- <sup>44</sup> *See id.* § 9.55(a)(7).
- <sup>45</sup> Fletcher, *supra* note 1, § 3993.50.
- <sup>46</sup> *See* Model Bus. Corp. Act Ann., *supra* note 12, § 9.50 cmt. 1.
- <sup>47</sup> *See, e.g.*, Col. Rev. Stat. Ann. § 7-90-201 (West, through laws effective July 1, 2012).
- <sup>48</sup> *See* Art, *supra* note 3, at 369.
- <sup>49</sup> *Id.*
- <sup>50</sup> *See id.*
- <sup>51</sup> *See id.*
- <sup>52</sup> *Id.* at 370.
- <sup>53</sup> *See id.* at 371.
- <sup>54</sup> *See id.* at 372-373.
- <sup>55</sup> *Id.* at 373.
- <sup>56</sup> *Id.*
- <sup>57</sup> *Id.*
- <sup>58</sup> *See, e.g.*, Idaho Code § 30-18-401 (West, through End of 2012 2nd Regular Session of the 61st Legislature); Col. Rev. Stat. Ann. § 7-90-201 (West, through laws effective July 1, 2012).
- <sup>59</sup> *See, e.g.*, D.C. Code § 29-204.01 (West, through May 10, 2012); Wis. Stat. Ann. § 180.1161 (West, through 2011 Act 286, published April 26, 2012).
- <sup>60</sup> *See, e.g.*, Col. Rev. Stat. Ann. § 7-90-201 (West, through laws effective July 1, 2012); R.I. Gen. Laws § 7-1.2-1007 (West, through chapter 109 of 2012 Regular Session).
- <sup>61</sup> *See, e.g.*, Haw. Rev. Stat. Ann. § 414-271 (West, through Act 129 of 2012 Reg. Sess.); Or. Rev. Stat. Ann. § 60.472 (West, through 7/1/12).
- <sup>62</sup> Wyo. Stat. Ann. § 17-26-101 (West, through the 2012 Budget Session).
- <sup>63</sup> *See* Robert C. Art, *Conversion and Merger of Disparate Business Entities*, 76 Wash. L. Rev. 349, 381 (2001), WL 76 WALR 349.
- <sup>64</sup> *See id.* at 381-382.
- <sup>65</sup> *See id.* at 382.
- <sup>66</sup> *See id.* at 383.
- <sup>67</sup> *See, e.g.*, Va. Code Ann. §§ 13.1-722.2, 13.1-722.9 (West, through End of 2012 Reg. Sess. and End of 2012 Sp. Sess. I.).
- <sup>68</sup> *See, e.g.*, Ark. Code Ann. § 4-26-1002 (West, Westlaw through end of 2012 Fiscal Sess.); Iowa Code Ann. § 490.1111 (West, through legislation from the 2012 Reg.Sess.).
- <sup>69</sup> *See* Ariz. Rev. Stat. Ann. § 10-220 (Westlaw through legislation effective May 11, 2012 of the Second Regular Session of the Fiftieth Legislature (2012)); Neb. Rev. St. § 21-20, 181.01 (West, through the 102nd Legislature 1st Special Session (2011)).



## Understanding the Mississippi Registered Agents Act

By Thomas H. Riley, III, Esq., Assistant Secretary of State, Business Services

The Mississippi Registered Agents Act was based upon the Model Registered Agents Act which has been adopted in at least ten other jurisdictions. The original version of the Model Registered Agents Act was adopted by the Uniform Law Commission in 2006. The Model Act was altered to accommodate the various business entity statutes of Mississippi.

Mississippi currently has seven separate registered agent laws. Corporations, LLCs, limited partnerships and nonprofits all have registered agent rules which may vary drastically in fees and filing requirements. For example, under the original Business Corporation Act and the Nonprofit Corporation Act, a limited liability company could not act as a corporate registered agent. This meant a law firm acting as a PLLC could be a registered agent for other LLCs but not for corporations. The reason for this was simple: LLCs did not exist when those corporate acts were passed. By adopting the Mississippi Registered Agents Act (MRAA), all entities which require a registered agent will follow the same rules and have the same applicable fees. These changes allow for consistent procedures and, perhaps most importantly, uniform forms across all entities.

It is important to note the MRAA does not change the duties and responsibilities of a registered agent. In addition, the new law does not require any change in the corporate filings of existing companies. It does alter, however, the manner in which a registered agent is chosen and the way in which changes in that agent's status are made.

### Choosing a Registered Agent

The most radical change promulgated by the MRAA is the creation of two classes of registered agents. A Commercial Registered Agent is an individual or entity classified with the Mississippi

Secretary of State as a registered agent for any entity who chooses them. (79-35-6). An example might be a national service company who provides this function. A Non-Commercial Registered Agent is any other individual or entity, not specifically listed as a commercial registered agent, who is otherwise qualified and chosen to be the registered agent for an entity. (79-35-2 (13)).

Commercial Registered Agents will have to register as such with the Secretary of State's office (79-35-6), and their information provided on a list on the Secretary of State's website. This list represents to the public those entities providing a commercial registered agent service to any new or existing company who needs one. Entities choosing a commercial registered agent would not be required to obtain written consent from those agents. Rather, it would be the responsibility of the commercial registered agent to review who had selected them. Should the commercial registered agent choose not to represent one of those companies, it must repudiate its selection within fourteen (14) days. If it does not do so, it has acquiesced. (79-35-5)

Noncommercial Registered Agents will be selected in much the same way as under current rules. The registered agent must consent to act on behalf of a company but the consent no longer needs to be in writing. Noncommercial Registered Agents will also be able to check which companies have selected them. Unlike commercial registered agents, a noncommercial registered agent is not assumed to have acquiesced to representation if it does not repudiate the listing. In fact, a noncommercial agent selected without its knowledge is not required to accept service of process or other notices. The agent will incur no liability for refusing to do so. (79-35-14)

The Secretary of State will post on its website a list of chosen registered agents, showing the names of the entities which have selected them within the last fourteen (14) days. (79-35-5) The list will be designed to "roll off" the names of companies after fourteen (14) days has expired. This will allow registered agents to view the companies which have chosen them and to repudiate any which have named them without their consent. (79-35-11).

### **Changing Agent Information**

Any entity wishing to change its registered agent uses a common form. (79-35-8) This eliminates the confusion currently existing with different forms for each entity type. Changing your registered agent now costs \$10 for corporations, and \$25 if you have a LLC. Limited partnerships cost \$25 and have their own form, but limited liability partnerships have neither a form nor a fee. The new fee for all entities will be \$10. (79-35-3)

Under the new Act, registered agents needing to change their address for every entity they represent will also be able to use a single form. (79-35-9) On this form, they will be able to list corporations, LLCs or limited partnerships and pay \$10 per entity

with a maximum fee of \$1000. Similarly, registered agents will be able to resign as agent for multiple companies using one form. (79-35-4) These forms are filed on paper. The new corporate filing system currently under development with the Secretary of State's office will soon allow for an online filing of these types of changes.

The duties and responsibilities of a registered agent do not change under the MRAA. As noted above, a Noncommercial Registered Agent chosen without consent may refuse without penalty to fulfill the registered agent's duties. The new Act makes the Secretary of State's office the default registered agent for all entities if the named registered agent has resigned or cannot be found and the principles of the entity cannot be served. (79-35-13). This fixes a long-standing conflict between the Business Corporation Act and the Limited Liability Company Act.

The Mississippi Registered Agents Act went into effect on January 1, 2013. Registration of individuals and entities wishing to act as commercial registered agents began in early December.

## Basel III Threatens Community Banks

By Neal C. Wise, Esq., Jones, Walker, Waechter, Poitevent, Carrère & Denègre L.L.P.

*The article below was first written in late October 2012. In late 2012, the U.S. federal banking agencies issued a joint press release announcing that the implementation of the proposed revisions to the regulatory capital rules commonly referred to as Basel III – and the subject of this article – was being delayed. The press release suggested that the agencies needed more time to digest the large volume of comments and concern they had received from the industry. As explained in this article, the outcry from the industry should come as no surprise due to the serious and potentially devastating implications these proposed rules may have on community banks. State banking associations, such as the Mississippi Bankers Association, and other industry groups submitted over 2,000 comment letters urging the regulatory agencies to reconsider the proposed rules. While the announcement is certainly a cause for optimism among those of us invested in the banking industry, the fight is not over. Therefore, the article below is produced in its original form in order to prepare the legal profession and banking industry if and when this battle resumes.*

### Do Regulators Want to Destroy High School Football?

As fall settles in across Mississippi many of us will enjoy a time-honored, Friday night tradition – high school football. From the pageantry of a 6A showdown in our largest cities to the intimacy of a rural private school contest, these games bring communities together for several hours to unwind from our busy weeks. Often unnoticed for these few hours are the signs and banners dotting the fences and scoreboards around the stadium. But next time you find your seat in the bleachers, see if you can't find a sign or banner for your local community bank. It may not be there much longer.

In Summer 2012, the primary federal banking regulators – the FDIC, the OCC, and the Federal Reserve – jointly released proposed rules implementing recently adopted capital standards of the Basel Committee on Banking Supervision (commonly referred to as Basel III). These rules threatened the ability of many of Mississippi's banks to stay in business.

**Basic Rule:** *All banks are required to maintain minimum capital ratios which means a certain amount of capital compared to the amount of assets they have.* As an equation,  $(\text{Capital}) / (\text{Assets}) = \text{Capital Ratio}$ . The theory goes that the more assets you have the more capital you need, because a bank will need something to fall back on in hard times. Oversimplifying a bit, capital includes the investments of shareholders and earnings from business operations, among other things, that a bank or bank holding company uses to fund its operations. For a small community bank, these capital investments typically come from local community members. Likewise a bank's assets include its products such as loans to local community members to buy the houses and commercial real estate that grow our towns.

For years, regulators have told the banks how they must calculate their Capital Ratio – you can count all of this type of capital, you can only count so much of that type of capital, and so on. On the asset side, the regulators have deemed certain assets more risky than others, such as mortgage loans where the customer is putting very little money down. These perceived risky assets are given a higher “risk-weighting” than other assets, so the more of them you have, the more capital you would be required to keep. Banks have adapted to these rules and for the most part have experienced very little trouble meeting the minimum Capital Ratios.

However, the proposed Basel III rules have completely changed the game in at least three significant ways that will affect Mississippi's community banks.

### 1. Eliminating TRUPS

One of a community bank's favorite ways to raise capital has been the issuance of trust preferred securities, or TRUPS. TRUPS have characteristics of both debt and equity. They generally have long maturities but allow for early redemption, make periodic payments, mature at face value and typically allow for the deferral of interest payments. TRUPS are critical to small banks and bank holding companies because the regulators have allowed them to be treated as Tier 1 (the best form) capital. Under the Dodd-Frank Act of 2010, lawmakers acknowledged the importance of these securities to small banks and bank holding companies – which lack access to public capital markets – by allowing banks and bank holding companies with less than \$15 billion in assets to continue treating TRUPS as Tier 1 capital.

However, the regulators failed to follow the lawmakers' logic when issuing the proposed Basel III rules. Under the proposed rules, all banks and bank holding companies with more than \$500 million in assets, as opposed to \$15 billion, must immediately begin phasing out the treatment of TRUPS as Tier 1 capital over a 10 year span. This phase-out will affect many banks in Mississippi. Without the ability to treat TRUPS as Tier 1 capital, banks must either raise additional capital from shareholders (a daunting prospect in historically difficult economic times) or consider reducing the size of the bank. Reducing the size of the banks could lead to less jobs in the community and fewer products and services for the banks' customers.

### 2. Re-weighting Residential Mortgages

On the asset side the changes are even more harmful. As mentioned above, the regulators require banks to assign certain risk-weighting percentages to every single asset a bank has. The risk weights start at 0% for particularly safe assets, such as cash, and quickly escalate. For a communi-

ty bank in Mississippi, its balance sheet is dominated by two types of assets – residential mortgage loans and commercial real estate loans. Both of these got the short end of the stick under the proposed rules.

Traditionally, a residential mortgage loan was like Goldilocks' favorite porridge – not too hot, not too cold. These assets were considered fairly safe and therefore received a 50% risk weighting. So making a \$100,000 mortgage meant the bank had to put \$50,000 into the denominator of the Capital Ratio. Enter the big, bad wolf...err...housing crisis of 2008 and the regulatory hysteria that ensued. Conflicting fairytale references aside, the result was not pretty for community banks.

Although the housing crisis of late 2008 - present was primarily the result of a few megabanks' irresponsible trading practices, any bank that originated residential mortgages was in the regulatory crosshairs. Under the proposed Basel III rules, residential mortgages can now receive up to a 200% risk weighting if the loan has a balloon payment feature, variable interest rate, and high loan-to-value ratios. That same \$100,000 mortgage may increase the banks' Capital Ratio denominator by \$200,000 rather than \$50,000. The results could be devastating for community banks, which typically are the ones that generate mortgages with these types of features, even though community banks weren't the cause of the housing crisis! If the rules are adopted as proposed, many community banks around Mississippi may have to consider dramatically reducing their mortgage lending or even discontinuing it altogether.

### 3. Stifling Commercial Development

Likewise, the proposed rules would dramatically increase the risk weights assigned to many commercial real estate loans. These loans allow members of the community to buy the real estate to start their own restaurants, convenience stores and other businesses. Under the proposed rules, a loan will be classified as a high volatility commercial real estate loan, and receive a new 150% risk weight, if it does not receive at least 15% of the "as completed" appraised value of the property from the borrower

with a contractual obligation to remain in the project throughout its lifespan. The proposed rule appears to disregard the realities that many of these projects receive financial assistance from third parties, in the form of grants and rent assistance, and many would-be business owners simply do not have that much cash to put towards a down payment. Effectively, the rules are shutting out economic development in small towns across Mississippi and similar communities where it is needed the most.

The real tragedy of the proposed Basel III rules is the disproportionate effect that the rules will have on community banks and small towns across the country. These capital standards were designed to prevent another financial crisis like the one we are slowly climbing out of. However the very financial institutions that were the cause of the financial crisis are the only ones that have the resources to fully understand and implement these excessively cumbersome and complicated rules. Community banks across Mississippi and other states have withstood the turbulence of the last four years and are still standing. Yet with the end of the recession in sight, these banks may not get the chance to see themselves come out on the other side. Small institutions which lack the capabilities and risk-appetite to continue their operations in substantially the same way that they currently do will undoubtedly look to consolidate. It's unlikely that the larger institutions they consolidate with will be interested in sponsoring a local high school football team or holiday parade.

There is some hope however that the proposed rules will not be implemented or will at least exempt community banks. Several high-profile individuals in the regulatory community, including members of the FDIC and OCC, have expressed strong opposition to the rules. Additionally, grass-roots efforts by state banking associations, including the Mississippi Bankers Association, and other organizations have resulted in thousands of financial institutions submitting comment letters to the regulatory agencies in opposition. While proposed rules such as these typically fly under the radar, it

has been encouraging to see the outpouring of concern about the future of our community banks.

If you have made it to the end of this article, I commend you on your perseverance. This is a dense, dry topic that may not seem particularly applicable to your career. However, if you grew up in Mississippi, or any small town around the country, you understand the importance of local community businesses. No industry or business has more of a connection with a community than a local bank. Fall will soon turn to winter and football season will end. But when the next season rolls around, I hope we will still have as many signs on our stadiums.

## An Update on Business Bills from the 2013 Legislative Session

The 2013 Session of the Mississippi Legislature is scheduled to end on April 8. Here is an overview of some of the enacted and active business bills identified by Section members.

*(As of March 11, 2013)*

*Approved by Governor*

### **SB2194: Derivative Transactions**

SB2194 amends the lending limit statutes (Miss. Code § 81-5-77) to provide that credit exposure associated with derivative transactions is included in the individual limit. The legislation is intended to ensure that state-chartered banks in Mississippi engaging in derivative transactions are compliant with Dodd-Frank Section 611. Senator Gary Jackson was the primary sponsor.

*Sent to Governor*

### **Amendments to Uniform Commercial Code (SB2609)**

SB 2609 adopts the 2010 amendments to Article 9 of the UCC as well as the 2012 amendments to Article 4A governing remittance transfers. Of note, under the amended Article 9, an individual debtor's name will be the name that appears on his or her driver's license or non-driver's state identification. For organizations, the name will be as it appears on the organization's public organic record. These amendments are intended to provide secured parties more confidence that they are properly perfected, and to make searching for other filings easier.

*Passed by Both Chambers; Awaiting Concurrence or Non-Concurrence*

### **Workforce Training Alternative to Jobs Tax Credit (HB117)**

The the legislation allows a business qualifying for the Jobs Tax Credit the option of claiming the credit or receive job training grants equal to 75% of the training or retraining costs incurred by the business.

### **Increasing Rebate Amount under Mississippi Motion Picture Investment Act (HB783)**

Under the 2004 Mississippi Motion Picture Investment Act, a motion picture company can receive a rebate of up to 25% of its base investment in a project up to \$8 million dollars and a rebate of up to 25% of its Mississippi payroll up to \$1 million dollars.

The proposed House bill would expand the base investment cap from \$8 million to \$10 million and the payroll cap from \$1 million to \$5 million. The Senate amended the bill to include computer and video games in the definition of motion picture.

### **Transferability of Historic Property Income Tax Credits (HB 1003)**

Currently, an income tax credit is available for the rehabilitation of historic buildings that are determined by the Secretary of Interior to be "certified historic structures." These credits can be carried forward, but not sold.

Under the proposed law, a taxpayer can sell the unused portion of historic property tax credit subject to guidelines established by the Department of Revenue. It also expands the list of eligible certified historic structures to include structures that have been deemed eligible for the National Register of Historic Places. Currently, the structure must already be listed.

### **Strengthening Mississippi Academic Research Through Business Act – The SMART Business Act (SB2537, HB825)**

The SMART Business Act allows a business investing in research at a Mississippi research university to receive a 25% rebate for the research costs incurred by the business.

**Mississippi Consumer Alternative Installment Loan Act (SB2571)**

The legislation prohibits businesses from making consumer installment loans or contracting for interest on those loans without holding a valid license under the Small Loan Privilege Tax Law (Section 75-67-201).

The proposed legislation also sets closing fees for consumer loans, and caps the monthly loan amount at 22.5% of the consumer's gross monthly income.

Persons engaged in extending credit to borrowers primarily for business or commercial purposes are exempted from the requirements.

As of the publication of this update, the House had inserted language into the Senate bill stating the provisions of the bill would only go into effect if the Consumer Financial Protection Bureau adopts a binding regulation.

*Passed in One Chamber***Expanding Health Care Industry Zones (HB722)**

Under the existing Health Care Industry Zone Act signed into law in 2012 (H.B. 1537), certain businesses can qualify for tax incentives if they locate within five miles of a hospital and are in a tri-county area that has 375 or more acute care hospital beds. Over 70 of Mississippi's 82 counties have areas that can be zoned as a health care industry zone.

Under new legislation, businesses would also be eligible for these incentives if they locate within five miles of a SACS-accredited college or university that provides training in health care or pharmaceutical training.

## Contributors to this Issue

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Ken Farmer is an attorney with Young Wells Williams Simmons PA. He is a member of the firm's Business Opportunities Group, and concentrates his law practice in the areas of real estate, commercial transactions and general business/corporate law. Ken graduated from the University of Southern Mississippi with a Bachelor of Business Administration in Management Information Systems. He received his J.D. from the Frederic G. Levin College of Law at the University of Florida, and his Master of Science in Real Estate from the University of Florida's Warrington College of Business. Ken currently serves as Chair of the Business Law Section of the Mississippi Bar Association and Secretary of the Real Property Section.



### Victoria L. Applewhite

Tori Applewhite is a second-year law student at the University of Alabama School of Law. Originally from the Jackson area, Tori graduated from the Sally McDonnell Barksdale Honors College at the University of Mississippi with a Bachelor of Arts in English and minors in Psychology and Business Administration.

### Thomas H. Riley III

Tom Riley is the Assistant Secretary of State, Business Services Division. His Division's areas of focus include business formations, UCC filings, trademark applications, and notaries public. Before joining the Secretary of State's Office in 2008, Tom was a partner with the Jackson-based Wilkins, Stephens & Tipton and the Chicago-based Riley & Riley law firm. He graduated from the University of Notre Dame and earned a J.D. from John Marshall School of Law.



### Neal C. Wise

Neal Wise is an associate at Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P. His practice focuses on representation of banks and other financial institutions. A native of Jackson, Neal graduated *magna cum laude* from The University of Mississippi School of Law. There, he served on the *Mississippi Law Journal* as Mississippi Cases Editor and on the Moot Court Board. Neal received a Bachelor of Business Administration in Economics and in General Business, *cum laude*, from Mississippi State University.



## About the Editor

### Drew L. Snyder

Drew Snyder is Mississippi's Assistant Secretary of State of Policy and Research. Before joining the Secretary of State's Office in January 2012, Drew was an associate at Hollingsworth LLP in Washington D.C. A Eupora native, Drew graduated *summa cum laude* from the University of Mississippi with a Bachelor of Business Administration, with an emphasis in Management and Managerial Finance. He received his J.D. from the University of Virginia School of Law.



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## How to Contribute

Persons interested in submitting news, a proposal or an article for publication in The Mississippi Business Law Reporter should submit it by e-mail to the editor Drew Snyder at [drew.snyder@sos.ms.gov](mailto:drew.snyder@sos.ms.gov). All news, proposals and articles are subject to review and approval by the Editor and Section Leadership.

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Articles should be arranged in the following order: (i) article title, (ii) author's name, (iii) acknowledgement of assistance, if applicable or desired, and (iv) text of the article. All contributions should be submitted in MS Word format.

A short biographical statement should also be provided at the time the article is submitted. The statement should include, at a minimum, the author's (i) current position, (ii) practice areas, (iii) professional affiliations. A head and shoulder photograph of the author(s) in color is requested but not required.

## Section News & Announcements

### *Legislative Update CLE May 14*

The Business Section's annual Legislative Update CLE will be May 14, 2013. State lawmakers and will offer their perspectives on business legislation introduced in the 2013 Legislative Session.

### *Ethics Hour CLE Program June 11*

The Business Section's Ethics Hour CLE will be June 11, 2013. Mississippi Bar General Counsel Adam Kilgore and Page Mannino's David Allen will be panelists. MC law professor Donald Campbell will moderate.

### *2013 Annual Meeting and Summer School July 8-13*

The 2013 Summer School for Lawyers will be held at the Linkside Conference Center in Sandestin Resort July 8-10. The 2013 Annual Meeting will be held at the Sandestin Hilton July 10-13.

## MDA's Christensen Highlights Business Section Social



Tammra Cascio, Brent Christensen, Ken Farmer

Mississippi Development Authority Executive Director Brent Christensen headlined the annual meet and greet social of the Business Law Section and Mississippi Corporate Counsel Association held November 15 at Nick's Restaurant.

The informal event was a valuable opportunity for members to meet Christensen, who was CEO of Gainesville, Fla.'s Chamber of Commerce before becoming head of MDA in June 2012.

According to longtime Section members, the 2012 Social was one of the most well-attended in years. In addition to the strong Section turnout, several law students from the University of Mississippi School of Law's Business Law Institute and Mississippi College School of Law also attended.



Aileen Thomas, Richard Bradley, Peyton Prospere, Bob Lazarus



Drew Snyder, Cheryn Baker, Ryan Pratt

## Member News & Notes



In November **CHERYN BAKER** returned to the public sector as Assistant Secretary of State, Securities Division. Previously, she was Assistant Secretary of State of Policy and Research. Before returning to the Secretary of State's Office, Cheryn was Corporate Counsel at Hancock Bank.



**TRAY HAIRSTON** was named 2012 Young Lawyer of the Year for Mississippi College School of Law. In January 2012, he joined the Governor's Office as Associate Counsel and

Policy Advisor. Previously, Tray was an associate with Balch & Bingham.

**BARRY HASSELL** has been chosen as a Mid-South Super-Lawyers Rising Star.

**TROY JOHNSTON** has joined the Greater Jackson office of Butler, Snow, O' Mara, Stevens & Cannada, PLLC.

**JESSE NEW** was selected to the 2012-2013 Leadership Madison County class.



In March city leaders joined **DAVID PHARR** for the grand opening of the Law Offices of David Pharr, PLLC. Located in Fondren, the firm focuses on services to small and medium size businesses.



**BEN SONES** was appointed by Governor Phil Bryant to represent Mississippi on the Uniform Law Commission, a leading statutory reform group focused on developing well-conceived and well-drafted legislation in areas of state law where uniformity is desirable.

**JEFF STANCILL** was a presenter at the Mississippi and Tennessee Bankers Associations CEO/Executive Management Conference in Bermuda.

In January **NEAL WISE** married Marion Wood.

In November Section members **DAVID MARCHETTI, RICHARD NORRIS, JIM O' MARA, ANDY TAGGART, WALTER WEEMS,** and **SCOTT WELLS** were among the attorneys recognized as "Leaders in Law" by the Mississippi Business Journal.

## Section Leadership

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### A Special Thank You

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