

## **2008 STATE BAR LEGISLATIVE AGENDA**

### **GEORGIA LIMITED LIABILITY COMPANY ACT LEGISLATIVE PROPOSAL**

1. Specific legislation has been proposed and is attached hereto as Exhibit A.
2. An explanation of the proposed legislation is included on Exhibit B.
3. A summary of the relevant existing Georgia law is included in the explanation of the proposed legislation attached hereto as Exhibit B.
4. There are no known opponents of the proposed legislation.
5. The Business Law Section has approved this proposal and recommends that this proposal be adopted by the State Bar of Georgia.
6. This proposal is submitted pursuant to Standing Board Policy 100, and the information included with this proposal is provided pursuant to that Policy.

Date: October 31, 2008

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**EXHIBIT A**

**Proposals to Amend  
Georgia Limited Liability Company Act  
by  
the Business Law Section of the State Bar of Georgia**

The Business Law Section of the State Bar of Georgia proposes to amend the Georgia Limited Liability Company Act to provide certain technical corrections to previously enacted legislation, to clarify certain provisions in the existing statute, to make certain provisions consistent with parallel provisions in the Georgia Business Corporation Code, to clarify the provisions governing the operating agreement of a limited liability company and its binding effect, to provide for automatic resignation of a registered agent following the dissolution of a limited liability company, to provide that statutory liability for wrongful distributions is based solely on violations of the statutory limitations on distributions, to reduce the risk of an unintended dissolution of the limited liability company, and to limit the rights of judgment creditors of a member to interfere with management or force the dissolution of a limited liability company.

Specific legislation has been prepared and is attached hereto.

A BILL TO BE ENTITLED

AN ACT

To amend Title 14 of the Official Code of Georgia Annotated, relating to corporations, partnerships, and associations so as to provide certain technical corrections to previously enacted legislation, to clarify certain provisions in the existing statute, make certain provisions consistent with parallel provisions in the Georgia Business Corporations Code, to clarify the provisions governing the operating agreement of a limited liability company and its binding effect, to provide for automatic resignation of a registered agent following the dissolution of a limited liability company, to provide that statutory liability for wrongful distributions is based solely on violations of the statutory limitations on distributions, to reduce the risk of an unintended dissolution of the limited liability company, and to limit the rights of judgment creditors of a member to interfere with management or force the dissolution of a limited liability company.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

**Amendments to Limited Liability Company Act**

**Section 1.** Amend Code Section 14-11-101(12) by deleting the words “by one or more members” from the end of the subsection.

**Section 2.** Amend Code Section 14-11-101(18) by deleting the subsection in its entirety and inserting the following in lieu thereof:

(18) “Operating agreement” means any agreement, written or oral, of the member or members as to the conduct of the business and affairs of a limited liability company. In the case of a limited liability company with only one member, a writing signed by that member stating that it is intended to be a written operating agreement shall constitute a written operating agreement and shall not be unenforceable by reason of there being only one person who is a party to the operating agreement. A limited liability company is not required to execute its operating agreement and (except as otherwise provided in the operating agreement) is bound by its

operating agreement whether or not the limited liability company executes the operating agreement. An operating agreement may provide enforceable rights to any person, including a person who is not a party to the operating agreement, to the extent set forth therein.

**Section 3.** Amend Code Section 14-11-203 by adding new subsection (e) as follows:

(e) During any period when a limited liability company has any members it may have one or more members.

**Section 4.** Amend Code Section 14-11-212 by:

1. adding the words “general partnership” to the last sentence of subsection (a) so

that such sentence reads as follows:

Such election shall require (1) compliance with Code Section 14-2-1109.1 in the case of a Georgia corporation, or (2) the approval of all of its partners, members or shareholders (or such other approval or compliance as may be sufficient under applicable law or the governing documents of the electing entity to authorize such election) in the case of a foreign corporation, foreign limited liability company, limited partnership, foreign limited partnership, general partnership or foreign general partnership.

2. deleting subsection (b)(6) in its entirety and substituting the following in lieu

thereof:

(6) A statement setting forth either (A) the manner and basis for converting the ownership interests in the entity making the election into interests as members of the limited liability company formed pursuant to such election or cancelling them, or (B) (i) that a written operating agreement has been entered into among the persons who will be the members of the limited liability company formed pursuant to such election, (ii) that such operating agreement will be effective immediately upon the effectiveness of such election, and (iii) that such operating agreement provides for the manner and basis of such conversion or cancellation.

3. adding the words “or cancelled” to subsection (c)(2) so that it reads as follows:

(2) The ownership interests in the entity making the election shall be converted or cancelled on the basis stated or referred to in the certificate of conversion in accordance with paragraph (6) of subsection (b) of this Code section;

**Section 5.** Amend Code Section 14-11-303(a) by adding the parenthetical phrase “(including liabilities and obligations of the limited liability company to any member or assignee)” to the first sentence of the subsection so that it reads as follows:

(a) A person who is a member, manager, agent, or employee of a limited liability company is not liable, solely by reason of being a member, manager, agent, or employee of the limited liability company, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company (including liabilities and obligations of the limited liability company to any member or assignee), whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company, whether arising in contract, tort, or otherwise.

**Section 6.** Amend Code Section 14-11-311(2) by removing the phrase “telegraph, teletype,” and substituting in lieu thereof the phrase “electronic transmission”.

**Section 7.** Amend Code Section 14-11-408 by:

1. deleting the phrase “the articles of organization, a written operating agreement or”

from the two places that it occurs in subsection (a) so that the subsection reads as follows:

(a) A member or manager who votes for or expressly consents to a distribution that is made in violation of Code Section 14-11-407 is personally liable to the limited liability company for the amount of the distribution that exceeds what could have been distributed without violating Code Section 14-11-407, if it is established that such member or manager did not act in compliance with Code Section 14-11-407 and violated a duty owed under Code Section 14-11-305 (without regard to any limitation on such duty permitted by paragraph (4) of Code Section 14-11-305).

2. deleting the phrase “the articles of organization, a written operating agreement or”

from subsection (b)(2) so that the subsection reads as follows:

(2) From each member for the amount the member received knowing that the distribution was made in violation of Code Section 14-11-407.

**Section 8.** Amend Code Section 14-11-504(b) to add the following language to the end of the subsection:

, provided that, except as otherwise provided in the articles of organization or a written operating agreement, a judgment creditor shall have no right under this chapter or any other State law to interfere with the management or force dissolution of a limited liability company or to seek an order of the court requiring a foreclosure sale of the limited liability company interest.

**Section 9.** Amend Code Section 14-11-505 by:

1. deleting the heading in its entirety and substituting in lieu thereof the following heading: “Admission of Members”.

2. deleting the phrase “acquiring a limited liability company interest” from subsection (a) so that it reads as follows:

(a) In connection with the formation of a limited liability company, a person is admitted as a member of the limited liability company upon the later to occur of:

3. deleting the phrase “acquiring a limited liability company interest directly from the limited liability company” from subsection (b) so that it reads as follows:

(b) After the formation of a limited liability company, a person is admitted as a member of the limited liability company at the time provided in and upon compliance with the articles of organization and any written operating agreement or, if the articles of organization or a written operating agreement does not so provide, upon the consent of all members and when the person’s admission is reflected in the records of the limited liability company.

4. deleting the phrase “of a limited liability company interest” from subsection (c) so that it reads as follows:

(c) An assignee is admitted as a member of the limited liability company upon compliance with paragraph (1) of Code Section 14-11-503 and at the time provided in and upon compliance with the articles of organization and any written operating agreement or, if the articles of organization or a written operating agreement does not so provide, when any such person’s permitted admission is reflected in the records of the limited liability company; provided, however, that an assignee shall not be admitted as a member of the limited liability company until such assignee has consented to such admission.

5. adding new subsections (d), (e), and (f) as follows:

(d) A written operating agreement may provide that a person shall be admitted as a member of a limited liability company, or shall become an assignee of a limited liability company interest or other rights or powers of a member to the extent assigned, and shall become bound by the

operating agreement and the provisions of the articles of organization (A) if such person (or a representative authorized by such person) executes the operating agreement or any other writing evidencing the intent of such person to become a member or assignee, or (B) without such execution, if such person (or a representative authorized by such person) complies with the conditions for becoming a member or assignee as set forth in the written operating agreement or any other writing and such person or representative requests in writing that the records of the limited liability company reflect such admission or assignment.

(e) A person may be admitted to a limited liability company as a member of the limited liability company and may receive a limited liability company interest in the limited liability company without making a contribution or being obligated to make a contribution to the limited liability company. Unless otherwise provided in a written operating agreement, a person may be admitted to a limited liability company as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company. Unless otherwise provided in a written operating agreement, a person may be admitted as the sole member of a limited liability company without making a contribution or being obligated to make a contribution to the limited liability company or without acquiring a limited liability company interest in the limited liability company.

(f) In the case of a person being admitted as a member of a surviving limited liability company pursuant to a merger in accordance with Article 9 of this chapter, a person is admitted as a member of the limited liability company as provided in the operating agreement of the surviving limited liability company or in the agreement of merger, and in the event of any inconsistency, the terms of the agreement of merger shall control. In connection with the conversion into a limited liability company in accordance with Code Section 14-11-212, a person is admitted as a member of the limited liability company as provided in the limited liability company agreement.

**Section 10.** Amend Code Section 14-11-506 to add the following new text to the end of the

Section:

Except as otherwise provided in the articles of organization or a written operating agreement, if the last member of a limited liability company dies or a court of competent jurisdiction adjudges him or her to be incompetent to manage his or her person or his or her property, the member's executor, administrator, guardian, conservator, or other legal representative shall become a member of the limited liability company, unless such executor, administrator, guardian, conservator, or other legal representative elects not to become a member by written notice given to the limited liability company within 90 days of such death or adjudication (or within such other period as is provided for in a written operating agreement).

**Section 11.** Amend Code Section 14-11-602 by:

1. deleting subsection (a)(3) in its entirety and substituting in lieu thereof the

following:

(3) Subject to contrary provision in the articles of organization or a written operating agreement, at a time approved by all the members;

2. deleting subsection (b)(3) in its entirety and substituting in lieu thereof the

following:

(3) Subject to contrary provision in the articles of organization or a written operating agreement, at a time approved by all the members;

3. adding new subsection (c) as follows:

(c) Notwithstanding clauses (1), (2), (3), and (4) of subsections (a) and (b) of this Code Section, the limited liability company shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of termination in the office of the Secretary of State, either:

- (i) the limited liability company's articles or organization and/or operating agreement is or are amended such that, after giving effect to such amendment, such event does not result in dissolution of the limited liability company pursuant to subsection (a) or subsection (b) of this Code Section; or
- (ii) if the limited liability company then has at least one member, a decision to continue the limited liability is taken by all of the members of the limited liability company (and all other persons, if any, with power to require dissolution of the limited liability company under its articles of organization or written operating agreement).

Any amendment or other action contemplated by clause (i) or (ii) above shall, to the extent necessary to achieve the purposes of this Subsection (c), be effective as of and from and after the applicable event described in subsection (a) or subsection (b) of this Code Section.

**Section 12.** Amend Code Section 14-11-610 to replace the word "shall" with the word "may" in the first sentence.

**Section 13.** Amend Code Section 14-11-901(a) to add the parenthetical phrase “(which, unless otherwise provided therein, will constitute the plan of merger required by Code Section 14-11-902 if it contains the provisions required by that Code Section)” so that the subsection reads as follows:

(a) Pursuant to a written agreement (which, unless otherwise provided therein, will constitute the plan of merger required by Code Section 14-11-902 if it contains the provisions required by that Code Section), a limited liability company may merge with or into one or more business entities with such limited liability company or other business entity as the agreement shall provide being the surviving limited liability company or other business entity.

**Section 14.** Amend Code Section 14-11-905 by:

1. deleting the word “plan” in subsection (a)(7) and substituting in lieu thereof the word “articles” so that the subsection reads as follows:

(7) The articles of organization of the surviving limited liability company shall be amended to the extent provided in the articles of merger; and

2. adding the words “or cancelled” to subsection (a)(8) so that the subsection reads as follows:

(8) The interests or shares in each merging constituent business entity that are to be converted into interests of the surviving limited liability company, or into cash or other property under the terms of the plan of merger, or cancelled, are so converted or cancelled, and the former holders thereof are entitled only to the rights provided in the plan of merger or their rights otherwise provided by law.

## EXHIBIT B

### Statement Regarding Proposals to Amend Georgia Limited Liability Company Act by the Business Law Section of the State Bar of Georgia

The following statement sets forth the issues to be addressed by the proposed legislation, in each case organized by reference to the Section of the proposed Bill attached as Exhibit A to this submission.

#### **Section 1.**

The proposed amendment to the definition of a “limited liability company” in Code Section 14-11-101(12) would eliminate a possible implication of the current statute that only a “member” may form a limited liability company. Such an implication would be erroneous because Code Section 14-11-203(b) currently states that the organizer of a limited liability company need not be a member. Code Section 14-11-101(12), however, by defining a limited liability company as “a limited liability company formed under this chapter *by one or more members*” (emphasis added) might be read as inconsistent with the statement in Code Section 14-11-203(b) that a limited liability company need not be formed by members. The possible inconsistent implication can be eliminated simply by striking the words “by one or more members” from Code Section 14-11-101(12).

To ensure that it remains clear, despite the amendment to Code Section 14-11-101(12), that a limited liability company may have one (or more) members, a new subsection (e) is proposed for Code Section 14-11-203, as explained below under **Section 3**.

#### **Section 2.**

The proposed amendments to the definition of “operating agreement” (Code Section 14-11-101(18)) would clarify several issues, as follows.

The definition in the current statute includes certain substantive rules of law that are not properly part of the definition of “operating agreement.” In part, these rules address admission to a limited liability company, and the binding effect of the operating agreement. The proposed changes would move certain of these substantive rules, together with additional changes, to Code Section 14-11-505 (see the discussion under **Section 9** below).

The proposed amendments would also eliminate a possible implication under current law that operating agreements are, by definition, binding on the members. The extent to which an operating agreement binds the members is a substantive issue of law, which should not be resolved by reference to the definition of operating agreement.

In addition, new proposed language would confirm that an operating agreement is not unenforceable simply because it is executed by the single member of the limited liability company. It also confirms that a limited liability company is bound by its operating agreement, unless stated otherwise, and is not required to execute its own operating agreement. Members and third parties have a legitimate expectation that the limited liability company will be bound by its own operating agreement, whether or not the company signs the agreement. The proposal expressly validates that expectation, while permitting an operating agreement to provide the extent, if any, to which the agreement is not binding on the company.

The changes proposed here also confirm that that an operating agreement may provide enforceable rights to a person who is not party to the operating agreement. Limited liability companies often find it useful to grant rights to persons (such as lenders, employees, or option holders) who are not parties to the operating agreement, and the statute should provide assurance that Georgia law authorizes operating agreements to do so.

### **Section 3.**

To ensure that the proposed change described above under **Section 1** carries no implication that a limited liability company must have more than one member, a new subsection (e) is proposed to be added to Code Section 14-11-203, stating that a limited liability company may have one or more members.

### **Section 4.**

The proposed amendment to Code Section 14-11-212(a) would add “general partnership” to the list of business entities that may elect to convert to a limited liability company. General partnerships had been inadvertently omitted from this list in 2006, when Code Section 14-11-212(a) was last amended.

The proposed amendments to Code Sections 14-11-212(b) and (c) clarify that interests in an entity may be cancelled when the entity elects to convert to a limited liability company, assuming that the certificate of conversion and the operating agreement address the manner and means, consistent with the requirements of the Code, of such cancellation.

### **Section 5.**

The proposed amendment to Code Section 14-11-303(a) would clarify that, unless otherwise agreed in writing, members, agents, employees, and managers of a limited liability company are not at risk -- merely by virtue of their status as members, agents, employees, and managers -- of facing unlimited personal liability to other members or to assignees of interests.

It seems clear that the existing language of Code Section 14-11-303(a) so limits the liability of members, agents, employees, and managers. However, and surprisingly, similar language in

statutes of other states apparently has been interpreted as leaving members exposed to unlimited personal liability to each other (although not to third parties). A limited liability company, as the name indicates, is intended to provide limited liability. If the members of the limited liability company want to waive that liability protection, they may do so, but unlimited personal liability of the members to each other should be the exception and not the rule.

The shareholder of a corporation does not, merely by being a shareholder, risk unlimited personal liability to other shareholders. The protection given to a member of a limited liability company against unlimited personal liability is generally thought to be at least as strong as the protection given to a shareholder of a corporation. The proposed amendment would help ensure that members of a limited liability company and shareholders of a corporation receive comparable protection under state law.

### **Section 6.**

The proposed amendment to Code Section 14-11-311(2) would clarify that notice may be provided by electronic transmission. This change is intended to help modernize the Georgia Limited Liability Company Act, and to reduce inconsistencies with the Georgia Business Corporation Code.

### **Section 7.**

The proposed amendments to Code Section 14-11-408 would give additional protection to members and managers against personal liability on distributions that do *not* violate Georgia law.

Code Section 14-11-407(a) prohibits distributions that render the limited liability company unable to pay its debts, or that reduce assets below liabilities. The personal liability of a member or manager who wrongfully consents to such a prohibited distribution would be unaffected by the proposed amendment.

However, it is possible for a distribution to violate in some way the provisions of the articles of organization or the operating agreement, while being entirely permissible under Code Section 14-11-407(a). The statute should not impose automatic personal liability for violation of a limited liability company's self-imposed limitation. If the members of the limited liability company want to agree among themselves to bear personal liability on such a distribution, they of course may include such an agreement in the articles of organization or the operating agreement.

### **Section 8.**

The proposed amendment to Code Section 14-11-504(b) is intended to clarify that when a creditor receives a judgment against a member or an assignee of a limited liability company interest, the creditor does not thereby receive a right to interfere in the management of the

limited liability company or to take certain other actions that would be disruptive to the company's business.

The current statute is already clear that when a judgment creditor obtains a "charging order" against the member or against an assignee of an interest in a limited liability company, the judgment creditor has no right to insert itself as a member of the company or otherwise interfere in management. Instead, "the judgment creditor has only the rights of an assignee of the limited liability company interest." Code Section 14-11-504(a). Unless otherwise provided in the articles of organization or operating agreement, an assignee – including a creditor that has the rights of an assignee – has no membership rights and no rights to participate in management. Code Section 14-11-503(3).

The limitation on the rights of a judgment creditor, reflected in the current statute, embodies the so-called "pick your partner" principle. This principle is at the heart of partnership law, and appears to have been adopted by the limited liability company statutes of every state. Under this principle, a court cannot force you into partnership with someone you find objectionable. A partnership cannot be required against its will to admit someone as a partner. Similarly, a limited liability company cannot be required against its will to admit someone as a member. Of course, the partnership or limited liability company can be required against its will to make payments to a third party, such as a judgment creditor of a partner or member.

The concern prompting the proposal to amend Code Section 14-11-504(b) is the risk that some open-ended language in that section might be interpreted as negating the "pick your partner" principle. Under Code Section 14-11-504(b), the "remedy conferred by this Code section shall not be deemed exclusive of others which may exist. . . ." The proposed amendment retains the open-ended structure of this provision, and would not prejudice the issue of what other remedies may exist. However, the proposed amendment to Code Section 14-11-504(b) would clarify that whatever other remedies may exist, the "pick your partner" principle is not abrogated. Judgment creditors would be prohibited from interfering with the management of the limited liability company, forcing a dissolution of the company, or obtaining a court-ordered foreclosure sale of the interest.

## **Section 9.**

The proposal to amend Code Section 14-11-505 addresses two concerns.

First, the proposal attempts to clarify the somewhat confusing relationship between a "member" and the holder of a "limited liability company interest." The proposal would delete certain language in Code Section 14-11-505(a), and thereby eliminate a possible implication that the "member" of a limited liability company must hold a "limited liability company interest."

"Limited liability company interest," as defined in Code Section 14-11-101(13), is a technical term. "Limited liability company interest" is not strictly analogous to corporate "share." Although "limited liability company interest" is often thought to include the full panoply of rights that a member may have in a limited liability company, the term as defined by statute has a

more limited meaning. “Limited liability company interest” refers only to the *economic* interest that the member may have as an equity holder – to the member’s share of profits and losses, and the member’s rights to receive distributions. The rights of a member may, and often do, encompass more than such economic interest, including rights to governance or management or simply the receipt of information. These other rights are not inherently tied to the holding of a “limited liability company interest” in the somewhat narrow sense defined by the statute. If a limited liability company desires to designate some other stakeholder – such as an employee, creditor, or former equity-owner – as a “member,” even though the stakeholder does not have a “limited liability company interest,” the statute should not prohibit the company from doing so.

New proposed subsection (e) clarifies the significance of the proposed deletion in Code Section 14-11-505(a), by stating that a member (including a sole member) may become a member without making a contribution to the limited liability company, and that a member (including a sole member) need not hold a limited liability company interest to continue as a member.

Second, two additional new subsections (d) and (f) are proposed. New subsection (d) would bring forward concepts formerly in the definition of operating agreement (see discussion under **Section 1** and **Section 3** above), concerning the time that a member is admitted to the limited liability company, or an assignee’s rights are recognized, and also concerning the time at which a member or assignee becomes bound by the operating agreement. Subsection (d) elaborates on these concepts, in order to address uncertainties that have arisen in practice as to when a member is bound by an operating agreement, particularly in situations where there is no writing to confirm the intent of the parties. New subsection (f) addresses the same issue, but in the context of admitting a member pursuant to a merger or conversion into a limited liability company.

## **Section 10.**

The proposed additions to Code Section 14-11-506, and to Code Section 14-11-602 (see **Section 11** below), are intended to prevent the undesirable and unintended dissolution of the limited liability company under certain circumstances. The proposals would help ensure that limited liability companies, like corporations, are able to continue in business indefinitely without suffering needless disruptions to their status under state law.

The proposal to amend Code Section 14-11-506 would add new language stipulating that, if there is only one member of a limited liability company, and that member dies or becomes incapacitated, the executor or other legal representative of the member will become the substitute member of the limited liability company.

Members of a limited liability company may “opt out” of this provision by stating otherwise in the articles of organization or a written operating agreement. In addition, the legal representative may “opt out” -- elect not to become a member -- by providing a written notice to that effect within 90 days after the triggering event. Without the proposed change, it is too easy for the death or incapacity of the sole member of a limited liability company to trigger an unexpected and unwanted dissolution.

By providing that an executor or legal representative will by default become a member on the death or disability of the last member, the existence of the company may be continued, and a potential trap for the unwary is eliminated. In the unlikely event that the executor or other legal representative is unwilling to become a member, the executor or other legal representation may elect, within 90 days of the death or adjudication of incapacity, not to become a member.

## **Section 11.**

The proposed amendments to Code Section 14-11-602(a)(3) and (b)(3) would permit the members of a limited liability company to waive their right to authorize the company to wind up and dissolve. Like one of the proposed changes to Code Section 14-11-101(18) (see above **Section 2**), the goal of this proposal is to permit a limited liability company to grant enforceable rights to third parties.

Some lenders require, before providing financing to a limited liability company, that the company's articles of organization or written operating agreement set forth certain limitations on dissolution. The current statute, however, seems to permit the members of the limited liability company to override those restrictions by simply amending the articles of organization or the operating agreement. The risk that the members may override restrictions on dissolution sometimes leads to a reluctance to make loans to Georgia limited liability companies. The effect is that, under current law, some Georgia borrowers have been forced to form limited liability companies under the laws of other states.

In addition, a new subsection (c) is proposed for Code Section 14-11-602, which would permit the limited liability company, before it files a certificate of termination, to reverse certain undesirable and inadvertent dissolutions. This new subsection would allow the members of the limited liability company to amend the articles of organization or operating agreement to undo a dissolution, or, so long as there is at least one member, to continue the existence of the limited liability company after an event of dissolution. Like the changes proposed for Code Section 14-11-506 (see **Section 10** above), proposed Code Section 14-11-602(c) should help limited liability companies avoid unnecessary disruptions.

## **Section 12.**

Code Section 14-11-610 currently provides that a dissolved limited liability company "shall" file a certificate of termination when it has wound up. In practice, many limited liability companies fail to file this certificate after winding up. Once a limited liability company has wound up, it may have no managers, members, or employees to file the certificate of termination. In recognition of that reality it is proposed that the requirement to file a certificate of termination be made optional.

### **Section 13.**

Under the current statute, a merger seems to require both a “written agreement of merger” (Code Section 14-11-901) and a “plan of merger” (Code Sections 14-11-902, -903). In many instances, however, it is unnecessary and potentially confusing to have two similar instruments governing the same merger. The proposed amendment to Code Section 14-11-901(a) would provide that the written agreement of merger may serve as the plan of merger if it contains the required provisions. Companies that wish to utilize a separate plan of merger, in addition to the agreement of merger, could continue to do so by providing for a separate plan in the agreement of merger.

### **Section 14.**

Code Section 14-11-905(a)(7) currently provides that the articles of organization of the surviving limited liability company in a merger shall be amended to the extent provided in the “plan of merger.” The proposed amendment to Code Section 14-11-905(a)(7) would replace “plan of merger” with “articles of merger.” The articles of merger, like the articles of organization – but unlike the plan of merger – are filed with the Secretary of State. It seems more logical that the articles of organization (which is a filed document) would be conformed to the articles of merger (another filed document) than to the plan of merger (a private, unfiled document).

The proposed change to Code Section 14-11-905(a)(b) would state that interests in a merged limited liability company may be cancelled in the merger. This proposal is intended to maintain consistency with the proposed amendment to Code Sections 14-11-212(b) and (c) (see above **Section 4**).