

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2190

SPONSOR: Senator Saunders

SUBJECT: Business Entities/Merger/Conversion

DATE: March 23, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This committee substitute eliminates the requirement that title to real property held by certain business entities merging with other business entities be conveyed by recordation of a deed. Accordingly, title to real property owned by the merging entity would, upon filing of articles of merger with the Secretary of State, pass by operation of law to the surviving entity without the requirement of recording a deed and paying the applicable documentary stamp tax required when recording a deed. This bill also provides that title to real property owned by a business entity that merged prior to the effective date of the act is vested in the surviving entity.

The bill also adds a new subsection (3) to s. 608.406, F.S., to provide that limited liability companies that register fictitious names pursuant to s. 865.09, F.S., are exempt from the provisions of subsection (1)(a) of s. 608.406, F.S.

The bill takes effect upon becoming law.

This bill substantially amends sections 607.11101, 608.406, 608.4383, 620.204, 620.8904, and 620.8906, of the Florida Statutes and creates section 694.16 of the Florida Statutes.

II. Present Situation:

Sections 607.1101 and 607.1107, F.S., allow the merger of corporations, both domestic and foreign.¹ Under these types of mergers, title to real property owned by the merging entity will transfer to the surviving entity by operation of law, which, pursuant to s. 607.1106, F.S., does not

¹"Domestic" means a business entity formed under the laws of this state. "Foreign" means a business entity formed under the laws of any other government.

require recordation of a deed. The act of filing the articles of merger with the Secretary of State is sufficient to transfer title to real property from the merging entity to the surviving entity.²

Sections 607.11101 (merger of a corporation with another business entity³), 608.4383(2) (merger of a limited liability company with another or with any other business entity⁴), and 620.204(1)(b) (merger of a limited partnership with another or with any other business entity⁵), F.S., which became law in 1998 pursuant to Chapter 98-101, L.O.F., require recordation of a deed and payment of documentary stamp taxes thereon in order to transfer title to real property pursuant to a merger.

Section 620.8906(1)(b), F.S., which became law in 1995 pursuant to Chapter 95-242, L.O.F., requires recordation of a deed⁶ in order to transfer title to real property pursuant to a merger of partnerships. Section 620.8904(2)(a), F.S., also created by the same act, requires a partnership or limited partnership that is converting from one type of partnership to the other to transfer title to real property by deed to the converted entity.

The original filed bills that created these five sections of law regarding the effect of a merger of business entities were apparently based on the merger provisions of the Uniform Limited Liability Company Act (1996) and the Uniform Partnership Act (1997).⁷ The Uniform Limited Liability Act provides: “When a merger takes effect . . . all property owned by each of the limited liability companies and other entities that are party to the merger vests in the surviving entity . . .” The wording of the Uniform Partnership Act is nearly the same. The Uniform Limited Partnership Act, last modified in 1985, does not have a section on mergers. The current working draft of the

²Title Note 11.07.01. In order to help future title examiners, many attorneys will record a certified copy of the articles of merger with the clerk of the circuit court in any county where the merging corporation owned real property. There is no documentary stamp tax liability under current law for recording corporate articles of merger, the recording fee is nominal.

³Section 607.1108(1), F.S., provides that “the term ‘other business entity’ means a limited liability company, a foreign corporation, a not-for-profit corporation, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership, a limited partnership, or any other entity that is formed pursuant to the requirements of applicable law.”

⁴Section 608.438(1), F.S., provides that “the term ‘other business entity’ includes a corporation, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership, a limited partnership, a limited liability company other than a limited liability company organized under the laws of this chapter, or any other entity that is formed pursuant to the requirements of applicable law.”

⁵Section 620.201(1), F.S., provides that “the term ‘other business entity’ includes a corporation, a limited liability company, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership or a limited partnership but excluding a domestic limited partnership, or any other entity that is formed pursuant to the requirements of applicable law.”

⁶Unlike the other sections referenced in this paragraph, this section omits the phrase “and payment of applicable taxes thereon.” However, a documentary stamp tax is required on all deeds. Section 201.02, F.S.

⁷Uniform Acts are proposed legislation drafted for the purpose of encouraging state governments to adopt uniform acts on a subject. “The National Conference of Commissioners on Uniform State Laws (NCCUSL) is now in its 108th year. The organization is comprised of more than 300 lawyers, judges, and law professors, appointed by the states as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft proposals for uniform and model laws and work toward their enactment in legislatures. Since its inception in 1892, the group has promulgated more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Partnership Act.” From <http://www.nccusl.org/>

Uniform Limited Partnership Act provides: “[A]ll property owned, and every contract and other right possessed by, each constituent business organization that ceases to exist is vested in the surviving business organization without reversion or impairment.” There is no uniform corporations act.

Prior to the enactment of ss. 607.11101, 608.4383(2), 620.204(1)(b), and 620.8906, F.S., there was no specific statutory authority for the merger of entities other than a merger of corporations pursuant to ss. 607.1101 or 607.1107, F.S. A true merger of other entities could not occur under Florida law, although an effective merger could be accomplished by several means. If one of the entities was a corporation and the other not a corporation, the non-corporation could dissolve and reform itself as a corporation, and then a merger could occur. Another possibility was that the entities would withdraw their Florida registration and register in another jurisdiction that allows cross-entity merger, and then merge with one another. Under either of these scenarios, title to real property would pass by operation of law, without the requirement that a deed be recorded; thus no associated documentary stamp tax would be required. The merging entity could also sell all of its assets and goodwill to the surviving entity, and then dissolve. However, that form of “merger” requires recordation of a deed in order to transfer title to real estate owned by the merging entity,⁸ and thus payment of the documentary stamp tax.

Several issues have arisen regarding the law on mergers, including:

What real property is covered by these statutes?

A literal reading of ss. 607.11101, 608.4383(2), 620.204(1)(b), and 620.8906, F.S., requires a deed to be recorded in any state⁹ where real property was owned by a merging entity, even if those states recognize articles of merger as transferring title to the real property. On the other hand, there is no penalty for failure to comply with the law requiring that a deed be recorded. Failure to record a deed results in a cloud on the title of real property located in Florida, but if the property is located in another state, it is unclear whether a cloud would exist. Another question to consider is what effect these statutes have on the title to Florida real property owned by an out-of-state entity that merges with a different out-of-state entity. If the state where the merger occurred does not require a recorded deed, but Florida does, it is unclear which law controls.

Who executes the deed?

Florida law contains provisions and procedures relating to who may act for a dissolved entity,¹⁰ but do not specifically state who acts on behalf of a merging entity. In a corporate dissolution the corporation continues its corporate existence, but upon merger the merging entity “ceases” to exist.¹¹ Because the merging entity ceases to exist, the authority of the officers and directors of the merging entity also cease. The surviving entity has the only officers and directors who can

⁸Title Note 11.01.03.

⁹“State” is used in the discussion for simplicity. Mergers are permitted with entities of any other state, territory, or country.

¹⁰For example, s. 607.1405, F.S., states that the corporate officers remain in their positions and have the authority to take steps necessary to wind up the affairs of the corporation.

¹¹Section 607.11101(1), F.S.

execute contracts or other documents relating to the property of the surviving entity, but they cannot state that they are officers of the merging entity because at this point the merging entity no longer exists (yet it still has real property titled in its name). Possibly the president (or other authorized officer) of the surviving entity is supposed to execute the deed post-merger, though the statutes do not address this issue.

What happens if a deed is not recorded?

There is no apparent immediate consequence for failure to record the deed. Even if the Department of Revenue's audit procedure cross-references mergers with property records, the department does not have specific enforcement authority. There is no penalty in the statutes for delay in filing the deed, and there is no deadline for filing the deed.

Until a deed or other document is recorded in the public records, the tax collector will continue sending ad valorem tax statements to the owner of record. Eventually, every property is sold or transferred, and at that point a deed or other document showing that the surviving entity is the owner of the real property will likely have to be recorded to preserve the chain of title. Perhaps two deeds will have to be recorded at that point in time, one from the merging entity to the surviving entity, to comply with the statute, and a second one from the surviving entity to the purchaser.

Section 608.406, F.S., provides certain requirements and restrictions for the names of limited liability companies. Subsection (1)(a) requires that the name of the limited liability company must contain the word "limited liability company," "limited company," or the abbreviations "L.L.C." or "L.C.," or the designations "LLC" or "LC" as the last words of the name of the company. Subsection (1)(a) also provides that omission of any of the required words, abbreviations or designations renders any person who knowingly participates in the omission, or knowingly acquiesces in the omission, liable for any indebtedness, damage, or liability caused by the omission.

III. Effect of Proposed Changes:

This bill eliminates the requirement that title to real property held by a business entity merging with another be conveyed by recordation of a deed. Accordingly, title to real property owned by the merging entity would, upon filing of articles of merger with the Secretary of State, pass by operation of law to the surviving entity without the requirement of recording a deed and paying the applicable documentary stamp tax required when recording a deed.

This bill echoes language which was removed from the bills that created ss. 607.11101, 608.4383(2), 620.204(1)(b), and 620.8906, F.S., with minor grammatical and technical changes. This bill makes the law regarding business entity mergers uniform across all types of business entities, and follows the general theory regarding property of merging entities as set forth in the applicable uniform acts. More particularly, title to property owned by a merging entity vests in the surviving entity without the necessity of filing a deed or other document representing a conveyance of property.

This bill also echoes language which was removed from the bill that created s. 620.8904, F.S., regarding conversions of partnerships, with minor grammatical and technical changes, to conform to the changes made in business entity mergers by this bill. Accordingly, title to real property owned by a converting partnership vests in the surviving partnership without the necessity of filing a deed or other document representing a conveyance of the real property.

This bill also creates s. 694.16, F.S., which provides that title to all real estate, or any interest therein, owned by a business entity that was a party to a merger or conversion is vested in the surviving entity without reversion or impairment, even if a deed was not recorded, as is required by current law. This provision addresses the concern that there may be unmarketable titles to real property as a result of the current law on mergers and conversions if a deed was not recorded.

The bill adds subsection (3) to s. 608.406, F.S., to provide that the provisions of paragraph (1)(a) of s. 608.406, F.S., shall not apply to a fictitious name registered pursuant to s. 865.09, F.S. Section 865.09, F.S., is the Fictitious Name Act and basically provides that a person may not engage in business under a name other than the person's legal name unless the person first registers the fictitious name with the Division of Corporations of the Department of State. Accordingly, limited liability companies that have registered a fictitious name in accordance with s. 865.09, F.S., are not required to have the words, abbreviations or designations identified in s. 608.406(1)(a), F.S., in their names. Also, the bill would exempt those same companies from the liability provisions in s. 608.406(1)(a), F.S.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will result in an economic benefit to business entities that merge under Florida law by not requiring the payment of documentary stamp tax on the transfer of real property incident to the merger.

C. Government Sector Impact:

This bill will have an indeterminate, but probably insignificant, negative fiscal impact on local governments as a result of eliminating the recordation of certain deeds. The county comptroller, or the clerk of the court if there is no county comptroller, receives a collections commission of 0.5% of documentary stamp tax collected.¹² The clerk of court also receives \$6 for the first page, and \$4.50 for each subsequent page, for a recorded deed.¹³

The current Revenue Estimating Conference report (March 2, 2000) on this bill indicates an insignificant loss to state revenues. However, the Revenue Estimating Conference had analyzed the portions that became Chapter 98-101, L.O.F., regarding transfer of title to real property, and estimated that the provision represented approximately \$3 million annually in lost potential revenue if the state were to exempt business entities from the documentary stamp tax when transferring real property incident to merger. The House bill analysis for CS/HB 1657 (1998), states:

The Revenue Estimating Conference bases its negative fiscal impact estimate on the amount of documentary stamp tax revenue that might have been generated as a result of recording title transfers of certain business mergers, but is not generated because HB 1657 does not require the recordation of property title transfers due to mergers.

According to representatives from the Business Law Section of The Florida Bar, if two different business entities (e.g., a corporation and a partnership) wish to merge, in the absence of this bill, one of the entities (most likely the partnership) may dissolve and reform itself as a like entity and merge into the other. Another possibility is that the businesses will register in another jurisdiction that permits cross entity merger (e.g., Delaware) and perform the merger there. In either case, [the Business Law Section of the Florida Bar believes] there is a strong chance that Florida will receive no documentary stamp tax revenue as a result of the merger. [emphasis in original]¹⁴

¹²Section 201.11(2), F.S.

¹³Section 28.24, F.S.

¹⁴House Committee on Finance and Taxation Bill Research & Economic Impact Statement, on CS/HB 1657, dated April 15, 1998.

The staff analysis to the companion bill, CS/SB 518, in discussing this same economic forecast, stated: “These costs are quite speculative.”¹⁵

The Florida Secretary of State advises¹⁶ that during fiscal year 1998-99 there were 101 total cross-entity mergers under ss. 607.11101, 608.4383(2), and 620.204(1)(b), F.S. There have been 47 such mergers from July 1, 1999, through November 19, 1999.

Staff of the Revenue Estimating Conference¹⁷ state that the revenue estimate was provided to the Conference by the Department of Revenue. The Conference does not have a procedure to verify the accuracy of prior estimates by comparing them against current revenues.¹⁸

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Florida Secretary of State supports this bill, stating:

In view of the fact that this legislation will reduce both paperwork and taxes on Florida business entities, the Department of State wholeheartedly supports its adoption.¹⁹

A bill proponent has advised that it is possible under current law to avoid the requirement of a deed, and thereby the requirement of paying documentary stamp tax, by merging a Florida entity with a Delaware entity as an interim step in the merger process that would otherwise require a deed. The bill proponent asserts that, because tax avoidance is possible, this bill has little fiscal impact, stating:

Florida's present merger statutes require deeds and stamp taxes in some cases but not in others, create title marketability problems, and create disincentives against using Florida business entities for transactions involving Florida real property. Under the existing

¹⁵Senate Staff Analysis and Economic Impact Statement, by Committee on Commerce and Economic Opportunities, March 4, 1998, page 5.

¹⁶Telephone conference with Ben McKay, legislative liaison for the Florida Secretary of State, on November 19, 1999.

¹⁷Telephone conference with Edward Montanaro, Coordinator of the Office of Economic & Demographic Research, on November 15, 1999.

¹⁸The revenue estimate for 1998-99 was \$3,300,000.00. There were 101 mergers in that fiscal year. Accordingly, the average expected revenue from each merger was supposed to have been \$32,673.27. To create \$32,673.27 in documentary stamp tax revenue at the current rate would require real estate valued at \$4,667,609.62 to be transferred. Staff is currently not able to determine the amount of documentary stamp tax revenue actually generated by the 101 mergers.

¹⁹Letter from Benjamin J. McKay, January 18, 2000.

statutes, unwary taxpayers are the only merger parties who . . . pay documentary stamp transfer taxes.²⁰

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

²⁰Letter from Burt Bruton, Esquire, February 9, 2000.