

LIMITED LIABILITY COMPANY ACT 1996

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UNIFORM LIMITED LIABILITY COMPANY ACT (1996)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIFTH YEAR
SAN ANTONIO, TEXAS
JULY 12 - JULY 19, 1996

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

UNIFORM LIMITED LIABILITY COMPANY ACT (1996)

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UNIFORM LIMITED LIABILITY COMPANY ACT (1996)

PREFATORY NOTE

Borrowing from abroad, Wyoming initiated a national movement in 1977 by enacting this country's first limited liability company act. The movement started slowly as the Internal Revenue Service took more than ten years to announce finally that a Wyoming limited liability company would be taxed like a partnership. Since that time, every State has adopted or is considering its own distinct limited liability company act, many of which have already been amended one or more times.

The allure of the limited liability company is its unique ability to bring together in a single business organization the best features of all other business forms -- properly structured, its owners obtain both a corporate-styled liability shield and the pass-through tax benefits of a partnership. General and limited partnerships do not offer their partners a corporate-styled liability shield. Corporations, including those having made a Subchapter Selection, do not offer their shareholders all the pass-through tax benefits of a partnership. All state limited liability company acts contain provisions for a liability shield and partnership tax status.

Despite these two common themes, state limited liability company acts display a dazzling array of diversity. Multistate activities of businesses are widespread. Recognition of out-of-state limited liability companies varies. Unfortunately, this lack of uniformity manifests itself in basic but fundamentally important questions, such as: may a company be formed and operated by only one owner; may it be formed for purposes other than to make a profit; whether owners have the power and right to withdraw from a company and receive a distribution of the fair value of their interests; whether a member's dissociation threatens a dissolution of the company; who has the apparent authority to bind the company and the limits of that authority; what are the fiduciary duties of owners and managers to a company and each other; how are the rights to manage a company allocated among its owners and managers; do the owners have the right to sue a company and its other owners in their own right as well as derivatively on behalf of the company; may general and limited partnerships be converted to limited liability companies and may limited liability companies merge with other limited liability companies and other business organizations; what is the law governing foreign limited liability companies; and are any or all of these and other rules simply default rules that may be modified by agreement or are they nonwaivable.

Practitioners and entrepreneurs struggle to understand the law governing limited liability companies organized in their own State and to understand the burgeoning law of other States. Simple questions concerning where to organize are

increasingly complex. Since most state limited liability company acts are in their infancy, little if any interpretative case law exists. Even when case law develops, it will have limited precedential value because of the diversity of the state acts.

Accordingly, uniform legislation in this area of the law appeared to have become urgent.

After a Study Committee appointed by the National Conference of Commissioners in late 1991 recommended that a comprehensive project be undertaken, the Conference appointed a Drafting Committee which worked on a Uniform Limited Liability Company Act (ULLCA) from early 1992 until its adoption by the Conference at its Annual Meeting in August 1994. The Drafting Committee was assisted by a blue ribbon panel of national experts and other interested and affected parties and organizations. Many, if not all, of those assisting the Committee brought substantial experience from drafting limited liability company legislation in their own States. Many are also authors of leading treatises and articles in the field. Those represented in the drafting process included an American Bar Association (ABA) liaison, four advisors representing the three separate ABA Sections of Business Law, Taxation, and Real Property, Trust and Probate, the United States Treasury Department, the Internal Revenue Service, and many observers representing several other organizations, including the California Bar Association, the New York City Bar Association, the American College of Real Estate Lawyers, the National Association of Certified Public Accountants, the National Association of Secretaries of State, the Chicago and Lawyers Title Companies, the American Land Title Association, and several university law and business school faculty members.

The Committee met nine times and engaged in numerous national telephonic conferences to discuss policies, review over fifteen drafts, evaluate legal developments and consider comments by our many knowledgeable advisers and observers, as well as an ABA subcommittee's earlier work on a prototype. In examining virtually every aspect of each state limited liability company act, the Committee maintained a single policy vision -- to draft a flexible act with a comprehensive set of default rules designed to substitute as the essence of the bargain for small entrepreneurs and others.

This Act is flexible in the sense that the vast majority of its provisions may be modified by the owners in a private agreement. Only limited and specific fundamental matters may not be altered by private agreement. To simplify, those nonwaivable provisions are set forth in a single subsection. Helped thereby, sophisticated parties will negotiate their own deal with the benefit of counsel.

The Committee also recognized that small entrepreneurs without the benefit of counsel should also have access to the Act. To that end, the great bulk of the Act sets forth default rules designed to operate a limited liability company

without sophisticated agreements and to recognize that members may also modify the default rules by oral agreements defined in part by their own conduct. Uniquely, the Act combines two simple default structures which depend upon the presence of designations in the articles of organization. All default rules under the Act flow from these two designations.

First, unless the articles reflect that a limited liability company is a term company and the duration of that term, the company will be an at-will company. Generally, the owners of an at-will company may demand a payment of the fair value of their interests at any time. Owners of a term company must generally wait until the expiration of the term to obtain the value of their interests. Secondly, unless the articles reflect that a company will be managed by managers, the company will be managed by its members. This designation controls whether the members or managers have apparent agency authority, management authority, and the nature of fiduciary duties in the company.

In January of 1995 the Executive Committee of the Conference adopted an amendment to harmonize the Act with new and important Internal Revenue Service announcements, and the amendment was ratified by the National Conference at its Annual Meeting in August of 1995. Those Internal Revenue Service announcements generally provide that a limited liability company will not be taxed like a corporation regardless of its organizational structure. Freed from the old tax classification restraints, the amendment modifies the Act's dissolution provision by eliminating member dissociation as a dissolution event. This important amendment significantly increases the stability of a limited liability company and places greater emphasis on a limited liability company's required purchase of a dissociated member's interest.

The adoption of ULLCA will provide much needed consistency among the States, with flexible default rules, and multistate recognition of limited liability on the part of company owners. It will also promote the development of precedential case law.

UNIFORM LIMITED LIABILITY COMPANY ACT (1996)

[ARTICLE] 1

GENERAL PROVISIONS

- Section 101. Definitions.
- Section 102. Knowledge and Notice.
- Section 103. Effect of Operating Agreement; Nonwaivable Provisions.
- Section 104. Supplemental Principles of Law.
- Section 105. Name.
- Section 106. Reserved Name.
- Section 107. Registered Name.
- Section 108. Designated Office and Agent for Service of Process.
- Section 109. Change of Designated Office or Agent for Service of Process.
- Section 110. Resignation of Agent for Service of Process.
- Section 111. Service of Process.
- Section 112. Nature of Business and Powers.

SECTION 101. DEFINITIONS. In this [Act]:

(1) "Articles of organization" means initial, amended, and restated articles of organization and articles of merger. In the case of a foreign limited liability company, the term includes all records serving a similar function required to be filed in the office of the [Secretary of State] or other official having custody of company records in the State or country under whose law it is organized.

(2) "At-will company" means a limited liability company other than a term company.

(3) "Business" includes every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit.

(4) "Debtor in bankruptcy" means a person who is the subject of an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application or a comparable order under federal, state, or foreign law governing insolvency.

(5) "Distribution" means a transfer of money, property, or other benefit from a limited liability company to a member in the member's capacity as a member or to a transferee of the member's distributional interest.

(6) "Distributional interest" means all of a member's interest in distributions by the limited liability company.

(7) "Entity" means a person other than an individual.

(8) "Foreign limited liability company" means an unincorporated entity organized under laws other than the laws of this State which afford limited liability to its owners comparable to the liability under Section 303 and is not required to obtain a certificate of authority to transact business under any law of this State other than this [Act].

(9) "Limited liability company" means a limited liability company organized under this [Act].

(10) "Manager" means a person, whether or not a member of a manager-managed company, who is vested with authority under Section 301.

(11) "Manager-managed company" means a limited liability company which is so designated in its articles of organization.

(12) "Member-managed company" means a limited liability company other than a manager-managed company.

(13) "Operating agreement" means the agreement under Section 103 concerning the relations among the members, managers, and limited liability company. The term includes amendments to the agreement.

(14) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(15) "Principal office" means the office, whether or not in this State, where the principal executive office of a domestic or foreign limited liability company is located.

(16) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(17) "Sign" means to identify a record by means of a signature, mark, or other symbol, with intent to authenticate it.

(18) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(19) "Term company" means a limited liability company in which its members have agreed to remain members until the expiration of a term specified in the articles of organization.

(20) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, and gift.

Comment

Uniform Limited Liability Company Act ("ULLCA") definitions, like the rest of the Act, are a blend of terms and concepts derived from the Uniform Partnership Act ("UPA"), the Uniform Partnership Act (1994) ("UPA 1994", also previously known as the Revised Uniform Partnership Act or "RUPA"), the Revised Uniform Limited Partnership Act ("RULPA"), the Uniform Commercial Code ("UCC"), and the Model Business Corporation Act ("MBCA"), or their revisions from time to time; some are tailored specially for this Act.

"Business." A limited liability company may be organized to engage in an activity either for or not for profit. The extent to which contributions to a nonprofit company may be deductible for Federal income tax purposes is determined by federal law. Other state law determines the extent of exemptions from state and local income and property taxes.

"Debtor in bankruptcy." The filing of a voluntary petition operates immediately as an "order for relief." See Sections 601(7)(i) and 602(b)(2)(iii).

"Distribution." This term includes all sources of a member's distributions including the member's capital contributions, undistributed profits, and residual interest in the assets of the company after all claims, including those of third parties and debts to members, have been paid.

"Distributional interest." The term does not include a member's broader rights to participate in the management of the company. See Comments to Article 5.

"Foreign limited liability company." The term is not restricted to companies formed in the United States.

"Manager." The rules of agency apply to limited liability companies. Therefore, managers may designate agents with whatever titles, qualifications, and responsibilities they desire. For example, managers may designate an agent as "President."

"Manager-managed company." The term includes only a company designated as such in the articles of organization. In a manager-managed company agency authority is vested exclusively in one or more managers and not in the members. See Sections 101(10) (manager), 203(a)(6) (articles designation), and 301(b) (agency authority of members and managers).

"Member-managed limited liability company." The term includes every company not designated as "manager-managed" under Section 203(a)(6) in its articles of organization.

"Operating agreement." This agreement may be oral. Members may agree upon the extent to which their relationships are to be governed by writings.

"Principal office." The address of the principal office must be set forth in the annual report required under Section 211(a)(3).

"Record." This Act is the first Uniform Act promulgated with a definition of this term. The definition brings this Act in conformity with the present state of technology and accommodates prospective future technology in the communication and storage of information other than by human memory. Modern methods of communicating and storing information employed in commercial practices are no longer confined to physical documents.

The term includes any writing. A record need not be permanent or indestructible, but an oral or other unwritten communication must be stored or preserved on some medium to qualify as a record. Information that has not been retained other than through human memory does not qualify as a record. A record may be signed or may be created without the knowledge or intent of a particular person. Other law must be consulted to determine admissibility in evidence, the applicability of statute of frauds, and other questions regarding the use of records. Under Section 206(a), electronic filings may be permitted and even encouraged.

SECTION 102. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has actual knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows the fact;

(2) has received a notification of the fact; or

(3) has reason to know the fact exists from all of the facts known to

the person at the time in question.

(c) A person notifies or gives a notification of a fact to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact.

(d) A person receives a notification when the notification:

(1) comes to the person's attention; or

(2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(e) An entity knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the entity knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention had the entity exercised reasonable diligence. An entity exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction for the entity and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the entity to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

Comment

Knowledge requires cognitive awareness of a fact, whereas notice is based on a lesser degree of awareness. The Act imposes constructive knowledge under limited circumstances. See Comments to Sections 301(c), 703, and 704.

SECTION 103. EFFECT OF OPERATING AGREEMENT;

NONWAIVABLE PROVISIONS.

(a) Except as otherwise provided in subsection (b), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business,

and to govern relations among the members, managers, and company. To the extent the operating agreement does not otherwise provide, this [Act] governs relations among the members, managers, and company.

(b) The operating agreement may not:

(1) unreasonably restrict a right to information or access to records under Section 408;

(2) eliminate the duty of loyalty under Section 409(b) or 603(b)(3), but the agreement may:

(i) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

(ii) specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(3) unreasonably reduce the duty of care under Section 409(c) or 603(b)(3);

(4) eliminate the obligation of good faith and fair dealing under Section 409(d), but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(5) vary the right to expel a member in an event specified in Section 601(6);

(6) vary the requirement to wind up the limited liability company's business in a case specified in Section 801(3) or (4); or

(7) restrict rights of a person, other than a manager, member, and transferee of a member's distributional interest, under this [Act].

Comment

The operating agreement is the essential contract that governs the affairs of a limited liability company. Since it is binding on all members, amendments must be approved by all members unless otherwise provided in the agreement. Although many agreements will be in writing, the agreement and any amendments may be oral or may be in the form of a record. Course of dealing, course of performance and usage of trade are relevant to determine the meaning of the agreement unless the agreement provides that all amendments must be in writing.

This section makes clear that the only matters an operating agreement may not control are specified in subsection (b). Accordingly, an operating agreement may modify or eliminate any rule specified in any section of this Act except matters specified in subsection (b). To the extent not otherwise mentioned in subsection (b), every section of this Act is simply a default rule, regardless of whether the language of the section appears to be otherwise mandatory. This approach eliminates the necessity of repeating the phrase "unless otherwise agreed" in each section and its commentary.

Under subsection (b)(1), an operating agreement may not unreasonably restrict the right to information or access to any records under Section 408. This does not create an independent obligation beyond Section 408 to maintain any specific records. Under subsections (b)(2) to (4), an irreducible core of fiduciary responsibilities survive any contrary provision in the operating agreement. Subsection (b)(2)(i) authorizes an operating agreement to modify, but not eliminate, the three specific duties of loyalty set forth in Section 409(b)(1) to (3) provided the modification itself is not manifestly unreasonable, a question of fact. Subsection (b)(2)(ii) preserves the common law right of the members to authorize future or ratify past violations of the duty of loyalty provided there has been a full disclosure of all material facts. The authorization or ratification must be unanimous unless otherwise provided in an operating agreement, because the authorization or ratification itself constitutes an amendment to the agreement. The authorization or ratification of specific past or future conduct may sanction conduct that would have been manifestly unreasonable under subsection (b)(2)(i).

SECTION 104. SUPPLEMENTAL PRINCIPLES OF LAW.

(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

(b) If an obligation to pay interest arises under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].

Comment

Supplementary principles include, but are not limited to, the law of agency, estoppel, law merchant, and all other principles listed in UCC Section 1-103, including the law relative to the capacity to contract, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating and invalidating clauses. Other principles such as those mentioned in UCC Section 1-205 (Course of Dealing and Usage of Trade) apply as well as course of performance. As with UPA 1994 Section 104, upon which this provision is based, no substantive change from either the UPA or the UCC is intended. Section 104(b) establishes the applicable rate of interest in the absence of an agreement among the members.

SECTION 105. NAME.

(a) The name of a limited liability company must contain "limited liability company" or "limited company" or the abbreviation "L.L.C.", "LLC", "L.C.", or "LC". "Limited" may be abbreviated as "Ltd.", and "company" may be abbreviated as "Co."

(b) Except as authorized by subsections (c) and (d), the name of a limited liability company must be distinguishable upon the records of the [Secretary of State] from:

(1) the name of any corporation, limited partnership, or company incorporated, organized or authorized to transact business, in this State;

(2) a name reserved or registered under Section 106 or 107;

(3) a fictitious name approved under Section 1005 for a foreign company authorized to transact business in this State because its real name is unavailable.

(c) A limited liability company may apply to the [Secretary of State] for authorization to use a name that is not distinguishable upon the records of the [Secretary of State] from one or more of the names described in subsection (b).

The [Secretary of State] shall authorize use of the name applied for if:

(1) the present user, registrant, or owner of a reserved name consents to the use in a record and submits an undertaking in form satisfactory to the [Secretary of State] to change the name to a name that is distinguishable upon the records of the [Secretary of State] from the name applied for; or

(2) the applicant delivers to the [Secretary of State] a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this State.

(d) A limited liability company may use the name, including a fictitious name, of another domestic or foreign company which is used in this State if the other company is organized or authorized to transact business in this State and the company proposing to use the name has:

(1) merged with the other company;

(2) been formed by reorganization with the other company; or

(3) acquired substantially all of the assets, including the name, of the other company.

SECTION 106. RESERVED NAME.

(a) A person may reserve the exclusive use of the name of a limited liability company, including a fictitious name for a foreign company whose name is

not available, by delivering an application to the [Secretary of State] for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the [Secretary of State] finds that the name applied for is available, it must be reserved for the applicant's exclusive use for a nonrenewable 120-day period.

(b) The owner of a name reserved for a limited liability company may transfer the reservation to another person by delivering to the [Secretary of State] a signed notice of the transfer which states the name and address of the transferee.

Comment

A foreign limited liability company that is not presently authorized to transact business in the State may reserve a fictitious name for a nonrenewable 120-day period. When its actual name is available, a company will generally register that name under Section 107 because the registration is valid for a year and may be extended indefinitely.

SECTION 107. REGISTERED NAME.

(a) A foreign limited liability company may register its name subject to the requirements of Section 1005, if the name is distinguishable upon the records of the [Secretary of State] from names that are not available under Section 105(b).

(b) A foreign limited liability company registers its name, or its name with any addition required by Section 1005, by delivering to the [Secretary of State] for filing an application:

(1) setting forth its name, or its name with any addition required by Section 1005, the State or country and date of its organization, and a brief description of the nature of the business in which it is engaged; and

(2) accompanied by a certificate of existence, or a record of similar import, from the State or country of organization.

(c) A foreign limited liability company whose registration is effective may renew it for successive years by delivering for filing in the office of the [Secretary of State] a renewal application complying with subsection (b) between October 1 and December 31 of the preceding year. The renewal application renews the registration for the following calendar year.

(d) A foreign limited liability company whose registration is effective may qualify as a foreign company under its name or consent in writing to the use of its name by a limited liability company later organized under this [Act] or by another foreign company later authorized to transact business in this State. The registered name terminates when the limited liability company is organized or the foreign company qualifies or consents to the qualification of another foreign company under the registered name.

SECTION 108. DESIGNATED OFFICE AND AGENT FOR SERVICE OF PROCESS.

(a) A limited liability company and a foreign limited liability company authorized to do business in this State shall designate and continuously maintain in this State:

(1) an office, which need not be a place of its business in this State;
and

(2) an agent and street address of the agent for service of process on the company.

(b) An agent must be an individual resident of this State, a domestic corporation, another limited liability company, or a foreign corporation or foreign company authorized to do business in this State.

Comment

Limited liability companies organized under Section 202 or authorized to transact business under Section 1004 are required to designate and continuously maintain an office in the State. Although the designated office need not be a place of business, it most often will be the only place of business of the company. The company must also designate an agent for service of process within the State and the agent's street address. The agent's address need not be the same as the company's designated office address. The initial office and agent designations must be set forth in the articles of organization, including the address of the designated office. See Section 203(a)(2) to (3). The current office and agent designations must be set forth in the company's annual report. See Section 211(a)(2). See also Section 109 (procedure for changing the office or agent designations), Section 110 (procedure for an agent to resign), and Section 111(b) (the filing officer is the service agent for the company if it fails to maintain its own service agent).

SECTION 109. CHANGE OF DESIGNATED OFFICE OR AGENT

FOR SERVICE OF PROCESS. A limited liability company may change its designated office or agent for service of process by delivering to the [Secretary of State] for filing a statement of change which sets forth:

- (1) the name of the company;
- (2) the street address of its current designated office;
- (3) if the current designated office is to be changed, the street address of the new designated office;
- (4) the name and address of its current agent for service of process; and

(5) if the current agent for service of process or street address of that agent is to be changed, the new address or the name and street address of the new agent for service of process.

SECTION 110. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.

(a) An agent for service of process of a limited liability company may resign by delivering to the [Secretary of State] for filing a record of the statement of resignation.

(b) After filing a statement of resignation, the [Secretary of State] shall mail a copy to the designated office and another copy to the limited liability company at its principal office.

(c) An agency is terminated on the 31st day after the statement is filed in the office of the [Secretary of State].

SECTION 111. SERVICE OF PROCESS.

(a) An agent for service of process appointed by a limited liability company or a foreign limited liability company is an agent of the company for service of any process, notice, or demand required or permitted by law to be served upon the company.

(b) If a limited liability company or foreign limited liability company fails to appoint or maintain an agent for service of process in this State or the agent for service of process cannot with reasonable diligence be found at the agent's address,

the [Secretary of State] is an agent of the company upon whom process, notice, or demand may be served.

(c) Service of any process, notice, or demand on the [Secretary of State] may be made by delivering to and leaving with the [Secretary of State], the [Assistant Secretary of State], or clerk having charge of the limited liability company department of the [Secretary of State's] office duplicate copies of the process, notice, or demand. If the process, notice, or demand is served on the [Secretary of State], the [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt requested, to the company at its designated office. Service is effected under this subsection at the earliest of:

(1) the date the company receives the process, notice, or demand;

(2) the date shown on the return receipt, if signed on behalf of the company; or

(3) five days after its deposit in the mail, if mailed postpaid and correctly addressed.

(d) The [Secretary of State] shall keep a record of all processes, notices, and demands served pursuant to this section and record the time of and the action taken regarding the service.

(e) This section does not affect the right to serve process, notice, or demand in any manner otherwise provided by law.

Comment

Service of process on a limited liability company and a foreign company authorized to transact business in the State must be made on the company's agent for service of process whose name and address should be on file with the filing office. If for any reason a company fails to appoint or maintain an agent for service

of process or the agent cannot be found with reasonable diligence at the agent's address, the filing officer will be deemed the proper agent.

SECTION 112. NATURE OF BUSINESS AND POWERS.

(a) A limited liability company may be organized under this [Act] for any lawful purpose, subject to any law of this State governing or regulating business.

(b) Unless its articles of organization provide otherwise, a limited liability company has the same powers as an individual to do all things necessary or convenient to carry on its business or affairs, including power to:

(1) sue and be sued, and defend in its name;

(2) purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;

(3) sell, convey, mortgage, grant a security interest in, lease, exchange, and otherwise encumber or dispose of all or any part of its property;

(4) purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, grant a security interest in, or otherwise dispose of and deal in and with, shares or other interests in or obligations of any other entity;

(5) make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;

(6) lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(7) be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

(8) conduct its business, locate offices, and exercise the powers granted by this [Act] within or without this State;

(9) elect managers and appoint officers, employees, and agents of the limited liability company, define their duties, fix their compensation, and lend them money and credit;

(10) pay pensions and establish pension plans, pension trusts, profit sharing plans, bonus plans, option plans, and benefit or incentive plans for any or all of its current or former members, managers, officers, employees, and agents;

(11) make donations for the public welfare or for charitable, scientific, or educational purposes; and

(12) make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited liability company.

Comment

A limited liability company may be organized for any lawful purpose unless the State has specifically prohibited a company from engaging in a specific activity. For example, many States require that certain regulated industries, such as banking and insurance, be conducted only by organizations that meet the special requirements. Also, many States impose restrictions on activities in which a limited liability company may engage. For example, the practice of certain professionals is often subject to special conditions.

A limited liability company has the power to engage in and perform important and necessary acts related to its operation and function. A company's power to enter into a transaction is distinguishable from the authority of an agent to enter into the transaction. See Section 301 (agency rules).

[ARTICLE] 2
ORGANIZATION

- Section 201. Limited Liability Company as Legal Entity.
- Section 202. Organization.
- Section 203. Articles of Organization.
- Section 204. Amendment or Restatement of Articles of Organization.
- Section 205. Signing of Records.
- Section 206. Filing in Office of [Secretary of State].
- Section 207. Correcting Filed Record.
- Section 208. Certificate of Existence or Authorization.
- Section 209. Liability for False Statement in Filed Record.
- Section 210. Filing By Judicial Act.
- Section 211. Annual Report for [Secretary of State].

SECTION 201. LIMITED LIABILITY COMPANY AS LEGAL

ENTITY. A limited liability company is a legal entity distinct from its members.

Comment

A limited liability company is legally distinct from its members who are not normally liable for the debts, obligations, and liabilities of the company. See Section 303. Accordingly, members are not proper parties to suits against the company unless an object of the proceeding is to enforce members' rights against the company or to enforce their liability to the company.

SECTION 202. ORGANIZATION.

(a) One or more persons may organize a limited liability company, consisting of one or more members, by delivering articles of organization to the office of the [Secretary of State] for filing.

(b) Unless a delayed effective date is specified, the existence of a limited liability company begins when the articles of organization are filed.

(c) The filing of the articles of organization by the [Secretary of State] is conclusive proof that the organizers satisfied all conditions precedent to the creation of a limited liability company.

Comment

Any person may organize a limited liability company by performing the ministerial act of signing and filing the articles of organization. The person need not be a member. As a matter of flexibility, a company may be organized and operated with only one member to enable sole proprietors to obtain the benefit of a liability shield. New and important Internal Revenue Service announcements clarify that a one-member limited liability company will not be taxed like a corporation. Nor will it be taxed like a partnership since it lacks at least two members. Rather, a one-member limited liability company is disregarded for Federal tax purposes and its operations are reported on the return of its single owner.

The existence of a company begins when the articles are filed. Therefore, the filing of the articles of organization is conclusive as to the existence of the limited liability shield for persons who enter into transactions on behalf of the company. Until the articles are filed, a firm is not organized under this Act and is not a "limited liability company" as defined in Section 101(9). In that case, the parties' relationships are not governed by this Act unless they have expressed a contractual intent to be bound by the provisions of the Act. Third parties would also not be governed by the provisions of this Act unless they have expressed a contractual intent to extend a limited liability shield to the members of the would-be limited liability company.

SECTION 203. ARTICLES OF ORGANIZATION.

- (a) Articles of organization of a limited liability company must set forth:
- (1) the name of the company;
 - (2) the address of the initial designated office;
 - (3) the name and street address of the initial agent for service of process;
 - (4) the name and address of each organizer;

(5) whether the company is to be a term company and, if so, the term specified;

(6) whether the company is to be manager-managed, and, if so, the name and address of each initial manager; and

(7) whether one or more of the members of the company are to be liable for its debts and obligations under Section 303(c).

(b) Articles of organization of a limited liability company may set forth:

(1) provisions permitted to be set forth in an operating agreement; or

(2) other matters not inconsistent with law.

(c) Articles of organization of a limited liability company may not vary the nonwaivable provisions of Section 103(b). As to all other matters, if any provision of an operating agreement is inconsistent with the articles of organization:

(1) the operating agreement controls as to managers, members, and members' transferees; and

(2) the articles of organization control as to persons, other than managers, members and their transferees, who reasonably rely on the articles to their detriment.

Comment

The articles serve primarily a notice function and generally do not reflect the substantive agreement of the members regarding the business affairs of the company. Those matters are generally reserved for an operating agreement which may be unwritten. Under Section 203(b), the articles may contain provisions permitted to be set forth in an operating agreement. Where the articles and operating agreement conflict, the operating agreement controls as to members but the articles control as to third parties. The articles may also contain any other matter not inconsistent with law. The most important is a Section 301(c) limitation

on the authority of a member or manager to transfer interests in the company's real property.

A company will be at-will unless it is designated as a term company and the duration of its term is specified in its articles under Section 203(a)(5). The duration of a term company may be specified in any manner which sets forth a specific and final date for the dissolution of the company. For example, the period specified may be in the form of "50 years from the date of filing of the articles" or "the period ending on January 1, 2020." Mere specification of a particular undertaking of an uncertain business duration is not sufficient unless the particular undertaking is within a longer fixed period. An example of this type of designation would include "2020 or until the building is completed, whichever occurs first." When the specified period is incorrectly specified, the company will be an at-will company. Notwithstanding the correct specification of a term in the articles, a company will be an at-will company among the members under Section 203(c)(1) if an operating agreement so provides. A term company that continues after the expiration of its term specified in its articles will also be an at-will company.

A term company possesses several important default rule characteristics that differentiate it from an at-will company. An operating agreement may alter any of these rules. Generally, a member of an at-will company may rightfully dissociate at any time whereas a dissociation from a term company prior to the expiration of the specified term is wrongful. See Comments to Section 602(b). Accordingly, a dissociated member of an at-will company is entitled to have the company purchase that member's interest for its fair value determined as of the date of the member's dissociation. A dissociated member of a term company must generally await the expiration of the agreed term to withdraw the fair value of the interest determined as of the date of the expiration of the agreed term. Thus, a dissociated member in an at-will company receives the fair value of their interest sooner than in a term company and also does not bear the risk of valuation changes for the remainder of the specified term. See Comments to Section 701(a).

A company will be member-managed unless it is designated as manager-managed under Section 203(a)(6). Absent further designation in the articles, a company will be a member-managed at-will company. The designation of a limited liability company as either member- or manager-managed is important because it defines who are agents and have the apparent authority to bind the company under Section 301. In a member-managed company, the members have the agency authority to bind the company. In a manager-managed company only the managers have that authority. New and important Internal Revenue Service announcements clarify that the agency structure of a limited liability company will not cause it to be taxed like a corporation. The agency designation relates only to agency and does not preclude members of a manager-managed company from participating in the actual management of company business. See Comments to Section 404(b).

**SECTION 204. AMENDMENT OR RESTATEMENT OF ARTICLES
OF ORGANIZATION.**

(a) Articles of organization of a limited liability company may be amended at any time by delivering articles of amendment to the [Secretary of State] for filing. The articles of amendment must set forth the:

- (1) name of the limited liability company;
- (2) date of filing of the articles of organization; and
- (3) amendment to the articles.

(b) A limited liability company may restate its articles of organization at any time. Restated articles of organization must be signed and filed in the same manner as articles of amendment. Restated articles of organization must be designated as such in the heading and state in the heading or in an introductory paragraph the limited liability company's present name and, if it has been changed, all of its former names and the date of the filing of its initial articles of organization.

Comment

An amendment to the articles requires the consent of all the members unless an operating agreement provides for a lesser number. See Section 404(c)(3).

SECTION 205. SIGNING OF RECORDS.

(a) Except as otherwise provided in this [Act], a record to be filed by or on behalf of a limited liability company in the office of the [Secretary of State] must be signed in the name of the company by a:

- (1) manager of a manager-managed company;
- (2) member of a member-managed company;
- (3) person organizing the company, if the company has not been formed; or
- (4) fiduciary, if the company is in the hands of a receiver, trustee, or other court-appointed fiduciary.

(b) A record signed under subsection (a) must state adjacent to the signature the name and capacity of the signer.

(c) Any person may sign a record to be filed under subsection (a) by an attorney-in-fact. Powers of attorney relating to the signing of records to be filed under subsection (a) by an attorney-in-fact need not be filed in the office of the [Secretary of State] as evidence of authority by the person filing but must be retained by the company.

Comment

Both a writing and a record may be signed. An electronic record is signed when a person adds a name to the record with the intention to authenticate the record. See Sections 101(16) ("record" definition) and 101(17) ("signed" definition).

Other provisions of this Act also provide for the filing of records with the filing office but do not require signing by the persons specified in clauses (1) to (3). Those specific sections prevail.

SECTION 206. FILING IN OFFICE OF [SECRETARY OF STATE].

(a) Articles of organization or any other record authorized to be filed under this [Act] must be in a medium permitted by the [Secretary of State] and must be delivered to the office of the [Secretary of State]. Unless the [Secretary of State] determines that a record fails to comply as to form with the filing requirements of this [Act], and if all filing fees have been paid, the [Secretary of State] shall file the record and send a receipt for the record and the fees to the limited liability company or its representative.

(b) Upon request and payment of a fee, the [Secretary of State] shall send to the requester a certified copy of the requested record.

(c) Except as otherwise provided in subsection (d) and Section 207(c), a record accepted for filing by the [Secretary of State] is effective:

(1) at the time of filing on the date it is filed, as evidenced by the [Secretary of State's] date and time endorsement on the original record; or

(2) at the time specified in the record as its effective time on the date it is filed.

(d) A record may specify a delayed effective time and date, and if it does so the record becomes effective at the time and date specified. If a delayed effective date but no time is specified, the record is effective at the close of business on that date. If a delayed effective date is later than the 90th day after the record is filed, the record is effective on the 90th day.

Comment

The definition and use of the term "record" permits filings with the filing office under this Act to conform to technological advances that have been adopted

by the filing office. However, since Section 206(a) provides that the filing "must be in a medium permitted by the [Secretary of State]", the Act simply conforms to filing changes as they are adopted.

SECTION 207. CORRECTING FILED RECORD.

(a) A limited liability company or foreign limited liability company may correct a record filed by the [Secretary of State] if the record contains a false or erroneous statement or was defectively signed.

(b) A record is corrected:

(1) by preparing articles of correction that:

(i) describe the record, including its filing date, or attach a copy of it to the articles of correction;

(ii) specify the incorrect statement and the reason it is incorrect or the manner in which the signing was defective; and

(iii) correct the incorrect statement or defective signing; and

(2) by delivering the corrected record to the [Secretary of State] for filing.

(c) Articles of correction are effective retroactively on the effective date of the record they correct except as to persons relying on the uncorrected record and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

**SECTION 208. CERTIFICATE OF EXISTENCE OR
AUTHORIZATION.**

(a) A person may request the [Secretary of State] to furnish a certificate of existence for a limited liability company or a certificate of authorization for a foreign limited liability company.

(b) A certificate of existence for a limited liability company must set forth:

(1) the company's name;

(2) that it is duly organized under the laws of this State, the date of organization, whether its duration is at-will or for a specified term, and, if the latter, the period specified;

(3) if payment is reflected in the records of the [Secretary of State] and if nonpayment affects the existence of the company, that all fees, taxes, and penalties owed to this State have been paid;

(4) whether its most recent annual report required by Section 211 has been filed with the [Secretary of State];

(5) that articles of termination have not been filed; and

(6) other facts of record in the office of the [Secretary of State] which may be requested by the applicant.

(c) A certificate of authorization for a foreign limited liability company must set forth:

(1) the company's name used in this State;

(2) that it is authorized to transact business in this State;

(3) if payment is reflected in the records of the [Secretary of State] and if nonpayment affects the authorization of the company, that all fees, taxes, and penalties owed to this State have been paid;

(4) whether its most recent annual report required by Section 211 has been filed with the [Secretary of State];

(5) that a certificate of cancellation has not been filed; and

(6) other facts of record in the office of the [Secretary of State] which may be requested by the applicant.

(d) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the [Secretary of State] may be relied upon as conclusive evidence that the domestic or foreign limited liability company is in existence or is authorized to transact business in this State.

SECTION 209. LIABILITY FOR FALSE STATEMENT IN FILED

RECORD. If a record authorized or required to be filed under this [Act] contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from a person who signed the record or caused another to sign it on the person's behalf and knew the statement to be false at the time the record was signed.

SECTION 210. FILING BY JUDICIAL ACT. If a person required by Section 205 to sign any record fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the [designate the

appropriate court] to direct the signing of the record. If the court finds that it is proper for the record to be signed and that a person so designated has failed or refused to sign the record, it shall order the [Secretary of State] to sign and file an appropriate record.

SECTION 211. ANNUAL REPORT FOR [SECRETARY OF STATE].

(a) A limited liability company, and a foreign limited liability company authorized to transact business in this State, shall deliver to the [Secretary of State] for filing an annual report that sets forth:

(1) the name of the company and the State or country under whose law it is organized;

(2) the address of its designated office and the name and address of its agent for service of process in this State;

(3) the address of its principal office; and

(4) the names and business addresses of any managers.

(b) Information in an annual report must be current as of the date the annual report is signed on behalf of the limited liability company.

(c) The first annual report must be delivered to the [Secretary of State] between [January 1 and April 1] of the year following the calendar year in which a limited liability company was organized or a foreign company was authorized to transact business. Subsequent annual reports must be delivered to the [Secretary of State] between [January 1 and April 1] of the ensuing calendar years.

(d) If an annual report does not contain the information required in subsection (a), the [Secretary of State] shall promptly notify the reporting limited liability company or foreign limited liability company and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) and delivered to the [Secretary of State] within 30 days after the effective date of the notice, it is timely filed.

Comment

Failure to deliver the annual report within 60 days after its due date is a primary ground for administrative dissolution of the company under Section 809. See Comments to Sections 809 to 812.

[ARTICLE] 3

RELATIONS OF MEMBERS AND MANAGERS
TO PERSONS DEALING WITH
LIMITED LIABILITY COMPANY

Section 301. Agency of Members and Managers.

Section 302. Limited Liability Company Liable for Member's or
Manager's Actionable Conduct.

Section 303. Liability of Members and Managers.

SECTION 301. AGENCY OF MEMBERS AND MANAGERS.

(a) Subject to subsections (b) and (c):

(1) Each member is an agent of the limited liability company for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.

(2) An act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by the other members.

(b) Subject to subsection (c), in a manager-managed company:

(1) A member is not an agent of the company for the purpose of its business solely by reason of being a member. Each manager is an agent of the

company for the purpose of its business, and an act of a manager, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority.

(2) An act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized under Section 404.

(c) Unless the articles of organization limit their authority, any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument.

Comment

Members of a member-managed and managers of manager-managed company, as agents of the firm, have the apparent authority to bind a company to third parties. Members of a manager-managed company are not as such agents of the firm and do not have the apparent authority, as members, to bind a company. Members and managers with apparent authority possess actual authority by implication unless the actual authority is restricted in an operating agreement. Apparent authority extends to acts for carrying on in the ordinary course the company's business and business of the kind carried on by the company. Acts beyond this scope bind the company only where supported by actual authority created before the act or ratified after the act.

Ordinarily, restrictions on authority in an operating agreement do not affect the apparent authority of members and managers to bind the company to third parties without notice of the restriction. However, the restriction may make a

member or manager's conduct wrongful and create liability to the company for the breach. This rule is subject to three important exceptions. First, under Section 301(c), a limitation reflected in the articles of organization on the authority of any member or manager to sign and deliver an instrument affecting an interest in company real property is effective when filed, even to persons without knowledge of the agent's lack of authority. New and important Internal Revenue Service announcements clarify that the agency structure of a limited liability company will not cause it to be taxed like a corporation. Secondly, under Section 703, a dissociated member's apparent authority terminates two years after dissociation, even to persons without knowledge of the dissociation. Thirdly, under Section 704, a dissociated member's apparent authority may be terminated earlier than the two years by filing a statement of dissociation. The statement is effective 90 days after filing, even to persons without knowledge of the filing. Together, these three provisions provide constructive knowledge to the world of the lack of apparent authority of an agent to bind the company.

SECTION 302. LIMITED LIABILITY COMPANY LIABLE FOR MEMBER'S OR MANAGER'S ACTIONABLE CONDUCT. A limited liability company is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a member or manager acting in the ordinary course of business of the company or with authority of the company.

Comment

Since a member of a manager-managed company is not as such an agent, the acts of the member are not imputed to the company unless the member is acting under actual or apparent authority created by circumstances other than membership status.

SECTION 303. LIABILITY OF MEMBERS AND MANAGERS.

(a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A

member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

(b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

(c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

(1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

Comment

A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity. Where a member or manager delegates or assigns the authority or duty to exercise appropriate company functions, the member or manager is ordinarily not personally liable for the acts or omissions of the officer, employee, or agent if the member or manager has complied with the duty of care set forth in Section 409(c).

Under Section 303(c), the usual liability shield may be waived, in whole or in part, provided the waiver is reflected in the articles of organization and the member has consented in writing to be bound by the waiver. The importance and unusual nature of the waiver consent requires that the consent be evidenced by a writing and not merely an unwritten record. See Comments to Section 205. New and important Internal Revenue Service announcements clarify that the owner liability structure of a limited liability company (other than a foreign limited

liability company formed outside the United States) will not cause it to be taxed like a corporation.

[ARTICLE] 4

RELATIONS OF MEMBERS TO EACH OTHER AND
TO LIMITED LIABILITY COMPANY

- Section 401. Form of Contribution.
- Section 402. Member's Liability for Contributions.
- Section 403. Member's and Manager's Rights to Payments and Reimbursement.
- Section 404. Management of Limited Liability Company.
- Section 405. Sharing of and Right to Distributions.
- Section 406. Limitations on Distributions.
- Section 407. Liability for Unlawful Distributions.
- Section 408. Member's Right to Information.
- Section 409. General Standards of Member's and Manager's Conduct.
- Section 410. Actions by Members.
- Section 411. Continuation of Term Company After Expiration of Specified Term.

SECTION 401. FORM OF CONTRIBUTION. A contribution of a member of a limited liability company may consist of tangible or intangible property or other benefit to the company, including money, promissory notes, services performed, or other agreements to contribute cash or property, or contracts for services to be performed.

Comment

Unless otherwise provided in an operating agreement, admission of a member and the nature and valuation of a would-be member's contribution are matters requiring the consent of all of the other members. See Section 404(c)(7). An agreement to contribute to a company is controlled by the operating agreement and therefore may not be created or modified without amending that agreement through the unanimous consent of all the members, including the member to be bound by the new contribution terms. See 404(c)(1).

SECTION 402. MEMBER'S LIABILITY FOR CONTRIBUTIONS.

(a) A member's obligation to contribute money, property, or other benefit to, or to perform services for, a limited liability company is not excused by the member's death, disability, or other inability to perform personally. If a member does not make the required contribution of property or services, the member is obligated at the option of the company to contribute money equal to the value of that portion of the stated contribution which has not been made.

(b) A creditor of a limited liability company who extends credit or otherwise acts in reliance on an obligation described in subsection (a), and without notice of any compromise under Section 404(c)(5), may enforce the original obligation.

Comment

An obligation need not be in writing to be enforceable. Given the informality of some companies, a writing requirement may frustrate reasonable expectations of members based on a clear oral agreement. Obligations may be compromised with the consent of all of the members under Section 404(c)(5), but the compromise is generally effective only among the consenting members. Company creditors are bound by the compromise only as provided in Section 402(b).

SECTION 403. MEMBER'S AND MANAGER'S RIGHTS TO PAYMENTS AND REIMBURSEMENT.

(a) A limited liability company shall reimburse a member or manager for payments made and indemnify a member or manager for liabilities incurred by the member or manager in the ordinary course of the business of the company or for the preservation of its business or property.

(b) A limited liability company shall reimburse a member for an advance to the company beyond the amount of contribution the member agreed to make.

(c) A payment or advance made by a member which gives rise to an obligation of a limited liability company under subsection (a) or (b) constitutes a loan to the company upon which interest accrues from the date of the payment or advance.

(d) A member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.

Comment

The presence of a liability shield will ordinarily prevent a member or manager from incurring personal liability on behalf of the company in the ordinary course of the company's business. Where a member of a member-managed or a manager of a manager-managed company incurs such liabilities, Section 403(a) provides that the company must indemnify the member or manager where that person acted in the ordinary course of the company's business or the preservation of its property. A member or manager is therefore entitled to indemnification only if the act was within the member or manager's actual authority. A member or manager is therefore not entitled to indemnification for conduct that violates the duty of care set forth in Section 409(c) or for tortious conduct against a third party. Since members of a manager-managed company do not possess the apparent authority to bind the company, it would be more unusual for such a member to incur a liability for indemnification in the ordinary course of the company's business.

SECTION 404. MANAGEMENT OF LIMITED LIABILITY

COMPANY.

(a) In a member-managed company:

(1) each member has equal rights in the management and conduct of the company's business; and

(2) except as otherwise provided in subsection (c), any matter relating to the business of the company may be decided by a majority of the members.

(b) In a manager-managed company:

(1) each manager has equal rights in the management and conduct of the company's business;

(2) except as otherwise provided in subsection (c), any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers; and

(3) a manager:

(i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority of the members; and

(ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed.

(c) The only matters of a member or manager-managed company's business requiring the consent of all of the members are:

(1) the amendment of the operating agreement under Section 103;

(2) the authorization or ratification of acts or transactions under Section 103(b)(2)(ii) which would otherwise violate the duty of loyalty;

(3) an amendment to the articles of organization under Section 204;

(4) the compromise of an obligation to make a contribution under Section 402(b);

(5) the compromise, as among members, of an obligation of a member to make a contribution or return money or other property paid or distributed in violation of this [Act];

- (6) the making of interim distributions under Section 405(a), including the redemption of an interest;
- (7) the admission of a new member;
- (8) the use of the company's property to redeem an interest subject to a charging order;
- (9) the consent to dissolve the company under Section 801(b)(2);
- (10) a waiver of the right to have the company's business wound up and the company terminated under Section 802(b);
- (11) the consent of members to merge with another entity under Section 904(c)(1); and
- (12) the sale, lease, exchange, or other disposal of all, or substantially all, of the company's property with or without goodwill.
- (d) Action requiring the consent of members or managers under this [Act] may be taken without a meeting.
- (e) A member or manager may appoint a proxy to vote or otherwise act for the member or manager by signing an appointment instrument, either personally or by the member's or manager's attorney-in-fact.

Comment

In a member-managed company, each member has equal rights in the management and conduct of the company's business unless otherwise provided in an operating agreement. For example, an operating agreement may allocate voting rights based upon capital contributions rather than the subsection (a) per capita rule. Also, member disputes as to any matter relating to the company's business may be resolved by a majority of the members unless the matter relates to a matter specified in subsection (c) (unanimous consent required). Regardless of how the members allocate management rights, each member is an agent of the company with the apparent authority to bind the company in the ordinary course of its

business. See Comments to Section 301(a). A member's right to participate in management terminates upon dissociation. See Section 603(b)(1).

In a manager-managed company, the members, unless also managers, have no rights in the management and conduct of the company's business unless otherwise provided in an operating agreement. If there is more than one manager, manager disputes as to any matter relating to the company's business may be resolved by a majority of the managers unless the matter relates to a matter specified in subsection (c) (unanimous member consent required). Managers must be designated, appointed, or elected by a majority of the members. A manager need not be a member and is an agent of the company with the apparent authority to bind the company in the ordinary course of its business. See Sections 101(10) and 301(b).

To promote clarity and certainty, subsection (c) specifies those exclusive matters requiring the unanimous consent of the members, whether the company is member- or manager-managed. For example, interim distributions, including redemptions, may not be made without the unanimous consent of all the members. Unless otherwise agreed, all other company matters are to be determined under the majority of members or managers rules of subsections (a) and (b).

SECTION 405. SHARING OF AND RIGHT TO DISTRIBUTIONS.

(a) Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares.

(b) A member has no right to receive, and may not be required to accept, a distribution in kind.

(c) If a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution.

Comment

Recognizing the informality of many limited liability companies, this section creates a simple default rule regarding interim distributions. Any interim distributions made must be in equal shares and approved by all members. See Section 404(c)(6). The rule assumes that: profits will be shared equally; some distributions will constitute a return of contributions that should be shared equally rather than a distribution of profits; and property contributors should have the right

to veto any distribution that threatens their return of contributions on liquidation. In the simple case where the members make equal contributions of property or equal contributions of services, those assumptions avoid the necessity of maintaining a complex capital account or determining profits. Where some members contribute services and others property, the unanimous vote necessary to approve interim distributions protects against unwanted distributions of contributions to service contributors. Consistently, Section 408(a) does not require the company to maintain a separate account for each member, the Act does not contain a default rule for allocating profits and losses, and Section 806(b) requires that liquidating distributions to members be made in equal shares after the return of contributions not previously returned. See Comments to Section 806(b).

Section 405(c) governs distributions declared or made when the company was solvent. Section 406 governs distributions declared or made when the company is insolvent.

SECTION 406. LIMITATIONS ON DISTRIBUTIONS.

(a) A distribution may not be made if:

(1) the limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or

(2) the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those receiving the distribution.

(b) A limited liability company may base a determination that a distribution is not prohibited under subsection (a) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(c) Except as otherwise provided in subsection (e), the effect of a distribution under subsection (a) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of a distributional interest in a limited liability company, as of the date money or other property is transferred or debt incurred by the company; and

(2) in all other cases, as of the date the:

(i) distribution is authorized if the payment occurs within 120 days after the date of authorization; or

(ii) payment is made if it occurs more than 120 days after the date of authorization.

(d) A limited liability company's indebtedness to a member incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors.

(e) Indebtedness of a limited liability company, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of determinations under subsection (a) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to members could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

Comment

This section establishes the validity of company distributions, which in turn determines the potential liability of members and managers for improper

distributions under Section 407. Distributions are improper if the company is insolvent under subsection (a) at the time the distribution is measured under subsection (c). In recognition of the informality of many limited liability companies, the solvency determination under subsection (b) may be made on the basis of a fair valuation or other method reasonable under the circumstances.

The application of the equity insolvency and balance sheet tests present special problems in the context of the purchase, redemption, or other acquisition of a company's distributional interests. Special rules establish the time of measurement of such transfers. Under Section 406(c)(1), the time for measuring the effect of a distribution to purchase a distributional interest is the date of payment. The company may make payment either by transferring property or incurring a debt to transfer property in the future. In the latter case, subsection (c)(1) establishes a clear rule that the legality of the distribution is tested when the debt is actually incurred, not later when the debt is actually paid. Under Section 406(e), indebtedness is not considered a liability for purposes of subsection (a) if the terms of the indebtedness itself provide that payments can be made only if and to the extent that a payment of a distribution could then be made under this section. The effect makes the holder of the indebtedness junior to all other creditors but senior to members in their capacity as members.

SECTION 407. LIABILITY FOR UNLAWFUL DISTRIBUTIONS.

(a) A member of a member-managed company or a member or manager of a manager-managed company who votes for or assents to a distribution made in violation of Section 406, the articles of organization, or the operating agreement is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without violating Section 406, the articles of organization, or the operating agreement if it is established that the member or manager did not perform the member's or manager's duties in compliance with Section 409.

(b) A member of a manager-managed company who knew a distribution was made in violation of Section 406, the articles of organization, or the operating agreement is personally liable to the company, but only to the extent that the

distribution received by the member exceeded the amount that could have been properly paid under Section 406.

(c) A member or manager against whom an action is brought under this section may implead in the action all:

(1) other members or managers who voted for or assented to the distribution in violation of subsection (a) and may compel contribution from them; and

(2) members who received a distribution in violation of subsection (b) and may compel contribution from the member in the amount received in violation of subsection (b).

(d) A proceeding under this section is barred unless it is commenced within two years after the distribution.

Comment

Whenever members or managers fail to meet the standards of conduct of Section 409 and vote for or assent to an unlawful distribution, they are personally liable to the company for the portion of the distribution that exceeds the maximum amount that could have been lawfully distributed. The recovery remedy under this section extends only to the company, not the company's creditors. Under subsection (a), members and managers are not liable for an unlawful distribution provided their vote in favor of the distribution satisfies the duty of care of Section 409(c).

Subsection (a) creates personal liability in favor of the company against members or managers who approve an unlawful distribution for the entire amount of a distribution that could not be lawfully distributed. Subsection (b) creates personal liability against only members who knowingly received the unlawful distribution, but only in the amount measured by the portion of the actual distribution received that was not lawfully made. Members who both vote for or assent to an unlawful distribution and receive a portion or all of the distribution will be liable, at the election of the company, under either but not both subsections.

A member or manager who is liable under subsection (a) may seek contribution under subsection (c)(1) from other members and managers who also

voted for or assented to the same distribution and may also seek recoupment under subsection (c)(2) from members who received the distribution, but only if they accepted the payments knowing they were unlawful.

The two-year statute of limitations of subsection (d) is measured from the date of the distribution. The date of the distribution is determined under Section 406(c).

SECTION 408. MEMBER'S RIGHT TO INFORMATION.

(a) A limited liability company shall provide members and their agents and attorneys access to its records, if any, at the company's principal office or other reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access provides the opportunity to inspect and copy records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.

(b) A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability:

(1) without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement or this [Act];
and

(2) on demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) A member has the right upon written demand given to the limited liability company to obtain at the company's expense a copy of any written operating agreement.

Comment

Recognizing the informality of many limited liability companies, subsection (a) does not require a company to maintain any records. In general, a company should maintain records necessary to enable members to determine their share of profits and losses and their rights on dissociation. If inadequate records are maintained to determine those and other critical rights, a member may maintain an action for an accounting under Section 410(a). Normally, a company will maintain at least records required by state or federal authorities regarding tax and other filings.

The obligation to furnish access includes the obligation to insure that all records, if any, are accessible in intelligible form. For example, a company that switches computer systems has an obligation either to convert the records from the old system or retain at least one computer capable of accessing the records from the old system.

The right to inspect and copy records maintained is not conditioned on a member or former member's purpose or motive. However, an abuse of the access and copy right may create a remedy in favor of the other members as a violation of the requesting member or former member's obligation of good faith and fair dealing. See Section 409(d).

Although a company is not required to maintain any records under subsection (a), it is nevertheless subject to a disclosure duty to furnish specified information under subsection (b)(1). A company must therefore furnish to members, without demand, information reasonably needed for members to exercise their rights and duties as members. A member's exercise of these duties justifies an unqualified right of access to the company's records. The member's right to company records may not be unreasonably restricted by the operating agreement. See Section 103(b)(1).

SECTION 409. GENERAL STANDARDS OF MEMBER'S AND MANAGER'S CONDUCT.

(a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).

(b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:

(1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;

(2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

(3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

(c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A member shall discharge the duties to a member-managed company and its other members under this [Act] or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A member of a member-managed company does not violate a duty or obligation under this [Act] or under the operating agreement merely because the member's conduct furthers the member's own interest.

(f) A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.

(g) This section applies to a person winding up the limited liability company's business as the personal or legal representative of the last surviving member as if the person were a member.

(h) In a manager-managed company:

(1) a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member;

(2) a manager is held to the same standards of conduct prescribed for members in subsections (b) through (f);

(3) a member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standards of conduct in subsections (b) through (f) to the extent that the member exercises the managerial authority vested in a manager by this [Act]; and

(4) a manager is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (f) to the extent of the managerial authority delegated to the members by the operating agreement.

Comment

Under subsections (a), (c), and (h), members and managers, and their delegates, owe to the company and to the other members and managers only the fiduciary duties of loyalty and care set forth in subsections (b) and (c) and the obligation of good faith and fair dealing set forth in subsection (d). An operating agreement may not waive or eliminate the duties or obligation, but may, if not manifestly unreasonable, identify activities and determine standards for measuring the performance of them. See Section 103(b)(2) to (4).

Upon a member's dissociation, the duty to account for personal profits under subsection (b)(1), the duty to refrain from acting as or representing adverse interests under subsection (b)(2), and the duty of care under subsection (c) are limited to those derived from matters arising or events occurring before the dissociation unless the member participates in winding up the company's business. Also, the duty not to compete terminates upon dissociation. See Section 603(b)(3) and (b)(2). However, a dissociated member is not free to use confidential company information after dissociation. For example, a dissociated member of a company may immediately compete with the company for new clients but must exercise care in completing on-going client transactions and must account to the company for any fees from the old clients on account of those transactions. Subsection (c) adopts a gross negligence standard for the duty of care, the standard actually used in most partnerships and corporations.

Subsection (b)(2) prohibits a member from acting adversely or representing an adverse party to the company. The rule is based on agency principles and seeks to avoid the conflict of opposing interests in the mind of the member agent whose duty is to act for the benefit of the principal company. As reflected in subsection (f), the rule does not prohibit the member from dealing with the company other than as an adversary. A member may generally deal with the company under subsection (f) when the transaction is approved by the company.

Subsection (e) makes clear that a member does not violate the obligation of good faith under subsection (d) merely because the member's conduct furthers that member's own interest. For example, a member's refusal to vote for an interim distribution because of negative tax implications to that member does not violate that member's obligation of good faith to the other members. Likewise, a member may vote against a proposal by the company to open a shopping center that would directly compete with another shopping center in which the member owns an interest.

SECTION 410. ACTIONS BY MEMBERS.

(a) A member may maintain an action against a limited liability company or another member for legal or equitable relief, with or without an accounting as to the company's business, to enforce:

(1) the member's rights under the operating agreement;

(2) the member's rights under this [Act]; and

(3) the rights and otherwise protect the interests of the member,

including rights and interests arising independently of the member's relationship to the company.

(b) The accrual, and any time limited for the assertion, of a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

Comment

During the existence of the company, members have under this section access to the courts to resolve claims against the company and other members, leaving broad judicial discretion to fashion appropriate legal remedies. A member pursues only that member's claim against the company or another member under this section. Article 11 governs a member's derivative pursuit of a claim on behalf of the company.

A member may recover against the company and the other members under subsection (a)(3) for personal injuries or damage to the member's property caused by another member. One member's negligence is therefore not imputed to bar another member's action.

SECTION 411. CONTINUATION OF TERM COMPANY AFTER EXPIRATION OF SPECIFIED TERM.

(a) If a term company is continued after the expiration of the specified term, the rights and duties of the members and managers remain the same as they

were at the expiration of the term except to the extent inconsistent with rights and duties of members and managers of an at-will company.

(b) If the members in a member-managed company or the managers in a manager-managed company continue the business without any winding up of the business of the company, it continues as an at-will company.

Comment

A term company will generally dissolve upon the expiration of its term unless either its articles are amended before the expiration of the original specified term to provide for an additional specified term or the members or managers simply continue the company as an at-will company under this section. Amendment of the articles specifying an additional term requires the unanimous consent of the members. See Section 404(c)(3). Therefore, any member has the right to block the amendment. Absent an amendment to the articles, a company may only be continued under subsection (b) as an at-will company. The decision to continue a term company as an at-will company does not require the unanimous consent of the members and is treated as an ordinary business matter with disputes resolved by a simple majority vote of either the members or managers. See Section 404. In that case, subsection (b) provides that the members' conduct amends or becomes part of an operating agreement to "continue" the company as an at-will company. The amendment to the operating agreement does not alter the rights of creditors who suffer detrimental reliance because the company does not liquidate after the expiration of its specified term. See Section 203(c)(2).

Preexisting operating-agreement provisions continue to control the relationship of the members under subsection (a) except to the extent inconsistent with the rights and duties of members of an at-will company with an operating agreement containing the same provisions. However, the members could agree in advance that, if the company's business continues after the expiration of its specified term, the company continues as a company with a new specified term or that the provisions of its operating agreement survive the expiration of the specified term.

[ARTICLE] 5

TRANSFEREES AND CREDITORS OF MEMBER

Section 501. Member's Distributional Interest.

Section 502. Transfer of Distributional Interest.

Section 503. Rights of Transferee.

Section 504. Rights of Creditor.

SECTION 501. MEMBER'S DISTRIBUTIONAL INTEREST.

(a) A member is not a co-owner of, and has no transferable interest in, property of a limited liability company.

(b) A distributional interest in a limited liability company is personal property and, subject to Sections 502 and 503, may be transferred in whole or in part.

(c) An operating agreement may provide that a distributional interest may be evidenced by a certificate of the interest issued by the limited liability company and, subject to Section 503, may also provide for the transfer of any interest represented by the certificate.

Comment

Members have no property interest in property owned by a limited liability company. A distributional interest is personal property and is defined under Section 101(6) as a member's interest in distributions only and does not include the member's broader rights to participate in management under Section 404 and to inspect company records under Section 408.

Under Section 405(a), distributions are allocated in equal shares unless otherwise provided in an operating agreement. Whenever it is desirable to allocate distributions in proportion to contributions rather than per capita, certification may be useful to reduce valuation issues. New and important Internal Revenue Service

announcements clarify that certification of a limited liability company will not cause it to be taxed like a corporation.

SECTION 502. TRANSFER OF DISTRIBUTIONAL INTEREST. A

transfer of a distributional interest does not entitle the transferee to become or to exercise any rights of a member. A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled.

Comment

Under Sections 501(b) and 502, the only interest a member may freely transfer is that member's distributional interest. A member's transfer of all of a distributional interest constitutes an event of dissociation. See Section 601(3). A transfer of less than all of a member's distributional interest is not an event of dissociation. A member ceases to be a member upon the transfer of all that member's distributional interest and that transfer is also an event of dissociation under Section 601(3). Relating the event of dissociation to the member's transfer of all of the member's distributional interest avoids the need for the company to track potential future dissociation events associated with a member no longer financially interested in the company. Also, all the remaining members may expel a member upon the transfer of "substantially all" the member's distributional interest. The expulsion is an event of dissociation under Section 601(5)(ii).

SECTION 503. RIGHTS OF TRANSFEE.

(a) A transferee of a distributional interest may become a member of a limited liability company if and to the extent that the transferor gives the transferee the right in accordance with authority described in the operating agreement or all other members consent.

(b) A transferee who has become a member, to the extent transferred, has the rights and powers, and is subject to the restrictions and liabilities, of a member under the operating agreement of a limited liability company and this [Act]. A transferee who becomes a member also is liable for the transferor member's

obligations to make contributions under Section 402 and for obligations under Section 407 to return unlawful distributions, but the transferee is not obligated for the transferor member's liabilities unknown to the transferee at the time the transferee becomes a member.

(c) Whether or not a transferee of a distributional interest becomes a member under subsection (a), the transferor is not released from liability to the limited liability company under the operating agreement or this [Act].

(d) A transferee who does not become a member is not entitled to participate in the management or conduct of the limited liability company's business, require access to information concerning the company's transactions, or inspect or copy any of the company's records.

(e) A transferee who does not become a member is entitled to:

(1) receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

(2) receive, upon dissolution and winding up of the limited liability company's business:

(i) in accordance with the transfer, the net amount otherwise distributable to the transferor;

(ii) a statement of account only from the date of the latest statement of account agreed to by all the members;

(3) seek under Section 801(5) a judicial determination that it is equitable to dissolve and wind up the company's business.

(f) A limited liability company need not give effect to a transfer until it has notice of the transfer.

Comment

The only interest a member may freely transfer is the member's distributional interest. A transferee may acquire the remaining rights of a member only by being admitted as a member of the company by all of the remaining members. New and important Internal Revenue Service announcements clarify that the transferability of membership interests of a limited liability company in excess of these default rules will not cause it to be taxed like a corporation. In many cases a limited liability company will be organized and operated with only a few members. These default rules were chosen in the interest of preserving the right of existing members in such companies to determine whether a transferee will become a member.

A transferee not admitted as a member is not entitled to participate in management, require access to information, or inspect or copy company records. The only rights of a transferee are to receive the distributions the transferor would otherwise be entitled, receive a limited statement of account, and seek a judicial dissolution under Section 801(a)(5).

Subsection (e) sets forth the rights of a transferee of an existing member. Although the rights of a dissociated member to participate in the future management of the company parallel the rights of a transferee, a dissociated member retains additional rights that accrued from that person's membership such as the right to enforce Article 7 purchase rights. See and compare Sections 603(b)(1) and 801(a)(4) and Comments.

SECTION 504. RIGHTS OF CREDITOR.

(a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.

(b) A charging order constitutes a lien on the judgment debtor's distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, a distributional interest in a limited liability company which is charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than the company's property, by one or more of the other members; or

(3) with the company's property, but only if permitted by the operating agreement.

(d) This [Act] does not affect a member's right under exemption laws with respect to the member's distributional interest in a limited liability company.

(e) This section provides the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor's distributional interest in a limited liability company.

Comment

A charging order is the only remedy by which a judgment creditor of a member or a member's transferee may reach the distributional interest of a member or member's transferee. Under Section 503(e), the distributional interest of a member or transferee is limited to the member's right to receive distributions from the company and to seek judicial liquidation of the company.

[ARTICLE] 6

MEMBER'S DISSOCIATION

Section 601. Events Causing Member's Dissociation.

Section 602. Member's Power to Dissociate; Wrongful Dissociation.

Section 603. Effect of Member's Dissociation.

SECTION 601. EVENTS CAUSING MEMBER'S DISSOCIATION. A

member is dissociated from a limited liability company upon the occurrence of any of the following events:

(1) the company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member;

(2) an event agreed to in the operating agreement as causing the member's dissociation;

(3) upon transfer of all of a member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;

(4) the member's expulsion pursuant to the operating agreement;

(5) the member's expulsion by unanimous vote of the other members if:

(i) it is unlawful to carry on the company's business with the member;

(ii) there has been a transfer of substantially all of the member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest which has not been foreclosed;

(iii) within 90 days after the company notifies a corporate member that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the member fails to obtain a revocation of the certificate of dissolution or a reinstatement of its charter or its right to conduct business; or

(iv) a partnership or a limited liability company that is a member has been dissolved and its business is being wound up;

(6) on application by the company or another member, the member's expulsion by judicial determination because the member:

(i) engaged in wrongful conduct that adversely and materially affected the company's business;

(ii) willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under Section 409; or

(iii) engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member;

(7) the member's:

(i) becoming a debtor in bankruptcy;

(ii) executing an assignment for the benefit of creditors;

(iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property; or

(iv) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the member's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

(8) in the case of a member who is an individual:

(i) the member's death;

(ii) the appointment of a guardian or general conservator for the member; or

(iii) a judicial determination that the member has otherwise become incapable of performing the member's duties under the operating agreement;

(9) in the case of a member that is a trust or is acting as a member by virtue of being a trustee of a trust, distribution of the trust's entire rights to receive distributions from the company, but not merely by reason of the substitution of a successor trustee;

(10) in the case of a member that is an estate or is acting as a member by virtue of being a personal representative of an estate, distribution of the estate's entire rights to receive distributions from the company, but not merely the substitution of a successor personal representative; or

(11) termination of the existence of a member if the member is not an individual, estate, or trust other than a business trust.

Comment

The term "dissociation" refers to the change in the relationships among the dissociated member, the company and the other members caused by a member's

ceasing to be associated in the carrying on of the company's business. Member dissociation from either an at-will or term company, whether member- or manager-managed is not an event of dissolution of the company unless otherwise specified in an operating agreement. See Section 801(a)(1). However, member dissociation will generally trigger the obligation of the company to purchase the dissociated member's interest under Article 7.

A member may be expelled from the company under paragraph (5)(ii) by the unanimous vote of the other members upon a transfer of "substantially all" of the member's distributional interest other than for a transfer as security for a loan. A transfer of "all" of the member's distributional interest is an event of dissociation under paragraph (3).

Although a member is dissociated upon death, the effect of the dissociation where the company does not dissolve depends upon whether the company is at-will or term. Only the decedent's distributional interest transfers to the decedent's estate which does not acquire the decedent member's management rights. See Section 603(b)(1). Unless otherwise agreed, if the company was at-will, the estate's distributional interest must be purchased by the company at fair value determined at the date of death. However, if a term company, the estate and its transferees continue only as the owner of the distributional interest with no management rights until the expiration of the specified term that existed on the date of death. At the expiration of that term, the company must purchase the interest of a dissociated member if the company continues for an additional term by amending its articles or simply continues as an at-will company. See Sections 411 and 701(a)(2) and Comments. Before that time, the estate and its transferees have the right to make application for a judicial dissolution of the company under Section 801(b)(5) as successors in interest to a dissociated member. See Comments to Sections 801, 411, and 701. Where the members have allocated management rights on the basis of contributions rather than simply the number of members, a member's death will result in a transfer of management rights to the remaining members on a proportionate basis. This transfer of rights may be avoided by a provision in an operating agreement extending the Section 701(a)(1) at-will purchase right to a decedent member of a term company.

SECTION 602. MEMBER'S POWER TO DISSOCIATE; WRONGFUL DISSOCIATION.

(a) Unless otherwise provided in the operating agreement, a member has the power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to Section 601(1).

(b) If the operating agreement has not eliminated a member's power to dissociate, the member's dissociation from a limited liability company is wrongful only if:

(1) it is in breach of an express provision of the agreement; or

(2) before the expiration of the specified term of a term company:

(i) the member withdraws by express will;

(ii) the member is expelled by judicial determination under Section 601(6);

(iii) the member is dissociated by becoming a debtor in bankruptcy; or

(iv) in the case of a member who is not an individual, trust other than a business trust, or estate, the member is expelled or otherwise dissociated because it willfully dissolved or terminated its existence.

(c) A member who wrongfully dissociates from a limited liability company is liable to the company and to the other members for damages caused by the dissociation. The liability is in addition to any other obligation of the member to the company or to the other members.

(d) If a limited liability company does not dissolve and wind up its business as a result of a member's wrongful dissociation under subsection (b), damages sustained by the company for the wrongful dissociation must be offset against distributions otherwise due the member after the dissociation.

Comment

A member has the power to withdraw from both an at-will company and a term company although the effects of the withdrawal are remarkably different. See

Comments to Section 601. At a minimum, the exercise of a power to withdraw enables members to terminate their continuing duties of loyalty and care. See Section 603(b)(2) to (3).

A member's power to withdraw by express will may be eliminated by an operating agreement. New and important Internal Revenue Service announcements clarify that alteration of a member's power to withdraw will not cause the limited liability company to be taxed like a corporation. An operating agreement may eliminate a member's power to withdraw by express will to promote the business continuity of an at-will company by removing member's right to force the company to purchase the member's distributional interest. See Section 701(a)(1). However, such a member retains the ability to seek a judicial dissolution of the company. See Section 801(a)(4).

If a member's power to withdraw by express will is not eliminated in an operating agreement, the withdrawal may nevertheless be made wrongful under subsection (b). All dissociations, including withdrawal by express will, may be made wrongful under subsection (b)(1) in both an at-will and term company by the inclusion of a provision in an operating agreement. Even where an operating agreement does not eliminate the power to withdraw by express will or make any dissociation wrongful, the dissociation of a member of a term company for the reasons specified under subsection (b)(2) is wrongful. The member is liable to the company and other members for damages caused by a wrongful dissociation under subsection (c) and, under subsection (d), the damages may be offset against all distributions otherwise due the member after the dissociation. Section 701(f) provides a similar rule permitting damages for wrongful dissociation to be offset against any company purchase of the member's distributional interest.

SECTION 603. EFFECT OF MEMBER'S DISSOCIATION.

(a) Upon a member's dissociation:

(1) in an at-will company, the company must cause the dissociated member's distributional interest to be purchased under [Article] 7; and

(2) in a term company:

(i) if the company dissolves and winds up its business on or before the expiration of its specified term, [Article] 8 applies to determine the dissociated member's rights to distributions; and

(ii) if the company does not dissolve and wind up its business on or before the expiration of its specified term, the company must cause the dissociated member's distributional interest to be purchased under [Article] 7 on the date of the expiration of the term specified at the time of the member's dissociation.

(b) Upon a member's dissociation from a limited liability company:

(1) the member's right to participate in the management and conduct of the company's business terminates, except as otherwise provided in Section 803, and the member ceases to be a member and is treated the same as a transferee of a member;

(2) the member's duty of loyalty under Section 409(b)(3) terminates; and

(3) the member's duty of loyalty under Section 409(b)(1) and (2) and duty of care under Section 409(c) continue only with regard to matters arising and events occurring before the member's dissociation, unless the member participates in winding up the company's business pursuant to Section 803.

Comment

Member dissociation is not an event of dissolution of a company unless otherwise specified in an operating agreement. See Section 801(a)(1). Dissociation from an at-will company that does not dissolve the company causes the dissociated member's distributional interest to be immediately purchased under Article 7. See Comments to Sections 602 and 603. Dissociation from a term company that does not dissolve the company does not cause the dissociated member's distributional interest to be purchased under Article 7 until the expiration of the specified term that existed on the date of dissociation.

Subsection (b)(1) provides that a dissociated member forfeits the right to participate in the future conduct of the company's business. Dissociation does not however forfeit that member's right to enforce the Article 7 rights that accrue by reason of the dissociation. Similarly, where dissociation occurs by death, the

decendent member's successors in interest may enforce that member's Article 7 rights. See and compare Comments to Section 503(e).

Dissociation terminates the member's right to participate in management, including the member's actual authority to act for the company under Section 301, and begins the two-year period after which a member's apparent authority conclusively ends. See Comments to Section 703. Dissociation also terminates a member's continuing duties of loyalty and care, except with regard to continuing transactions, to the company and other members unless the member participates in winding up the company's business. See Comments to Section 409.

[ARTICLE] 7

MEMBER'S DISSOCIATION WHEN
BUSINESS NOT WOUND UP

Section 701. Company Purchase of Distributional Interest.
Section 702. Action to Determine Fair Value of Distributional Interest.

Section 703. Dissociated Member's Power to Bind Limited Liability Company.

Section 704. Effect of Dissociation.

SECTION 701. COMPANY PURCHASE OF DISTRIBUTIONAL INTEREST.

(a) A limited liability company shall purchase a distributional interest of a:

(1) member of an at-will company for its fair value determined as of the date of the member's dissociation if the member's dissociation does not result in a dissolution and winding up of the company's business under Section 801; or

(2) member of a term company for its fair value determined as of the date of the expiration of the specified term that existed on the date of the member's dissociation if the expiration of the specified term does not result in a dissolution and winding up of the company's business under Section 801.

(b) A limited liability company must deliver a purchase offer to the dissociated member whose distributional interest is entitled to be purchased not later than 30 days after the date determined under subsection (a). The purchase offer must be accompanied by:

(1) a statement of the company's assets and liabilities as of the date determined under subsection (a);

(2) the latest available balance sheet and income statement, if any;
and

(3) an explanation of how the estimated amount of the payment was calculated.

(c) If the price and other terms of a purchase of a distributional interest are fixed or are to be determined by the operating agreement, the price and terms so fixed or determined govern the purchase unless the purchaser defaults. If a default occurs, the dissociated member is entitled to commence a proceeding to have the company dissolved under Section 801(4)(iv).

(d) If an agreement to purchase the distributional interest is not made within 120 days after the date determined under subsection (a), the dissociated member, within another 120 days, may commence a proceeding against the limited liability company to enforce the purchase. The company at its expense shall notify in writing all of the remaining members, and any other person the court directs, of the commencement of the proceeding. The jurisdiction of the court in which the proceeding is commenced under this subsection is plenary and exclusive.

(e) The court shall determine the fair value of the distributional interest in accordance with the standards set forth in Section 702 together with the terms for the purchase. Upon making these determinations, the court shall order the limited liability company to purchase or cause the purchase of the interest.

(f) Damages for wrongful dissociation under Section 602(b), and all other amounts owing, whether or not currently due, from the dissociated member to a limited liability company, must be offset against the purchase price.

Comment

This section sets forth default rules regarding an otherwise mandatory company purchase of a distributional interest. Even though a dissociated member's rights to participate in the future management of the company are equivalent to those of a transferee of a member, the dissociation does not forfeit that member's right to enforce the Article 7 purchase right. Similarly, if the dissociation occurs by reason of death, the decedent member's successors in interest may enforce the Article 7 rights. See Comments to Sections 503(e) and 603(b)(1).

An at-will company must purchase a dissociated member's distributional interest under subsection (a)(1) when that member's dissociation does not result in a dissolution of the company under Section 801(a)(1). The purchase price is equal to the fair value of the interest determined as of the date of dissociation. Any damages for wrongful dissociation must be offset against the purchase price.

Dissociation from a term company does not require an immediate purchase of the member's interest but the operating agreement may specify that dissociation is an event of dissolution. See Section 801(a)(1). A term company must only purchase the dissociated member's distributional interest under subsection (a)(2) on the expiration of the specified term that existed on the date of the member's dissociation. The purchase price is equal to the fair value of the interest determined as of the date of the expiration of that specified term. Any damages for wrongful dissociation must be offset against the purchase price.

The valuation dates differ between subsections (a)(1) and (a)(2) purchases. The former is valued on the date of member dissociation whereas the latter is valued on the date of the expiration of the specified term that existed on the date of dissociation. A subsection (a)(2) dissociated member therefore assumes the risk of loss between the date of dissociation and the expiration of the then stated specified term. See Comments to Section 801 (dissociated member may file application to dissolve company under Section 801(a)(4)).

The default valuation standard is fair value. See Comments to Section 702. An operating agreement may fix a method or formula for determining the purchase price and the terms of payment. The purchase right may be modified. For example, an operating agreement may eliminate a member's power to withdraw from an at-will company which narrows the dissociation events contemplated under subsection (a)(1). See Comments to Section 602(a). However, a provision in an operating agreement providing for complete forfeiture of the purchase right may be

unenforceable where the power to dissociate has not also been eliminated. See Section 104(a).

The company must deliver a purchase offer to the dissociated member within 30 days after the date determined under subsection (a). The offer must be accompanied by information designed to enable the dissociated member to evaluate the fairness of the offer. The subsection (b)(3) explanation of how the offer price was calculated need not be elaborate. For example, a mere statement of the basis of the calculation, such as "book value," may be sufficient.

The company and the dissociated member must reach an agreement on the purchase price and terms within 120 days after the date determined under subsection (a). Otherwise, the dissociated member may file suit within another 120 days to enforce the purchase under subsection (d). The court will then determine the fair value and terms of purchase under subsection (e). See Section 702. The member's lawsuit is not available under subsection (c) if the parties have previously agreed to price and terms in an operating agreement.

SECTION 702. COURT ACTION TO DETERMINE FAIR VALUE OF DISTRIBUTIONAL INTEREST.

(a) In an action brought to determine the fair value of a distributional interest in a limited liability company, the court shall:

(1) determine the fair value of the interest, considering among other relevant evidence the going concern value of the company, any agreement among some or all of the members fixing the price or specifying a formula for determining value of distributional interests for any other purpose, the recommendations of any appraiser appointed by the court, and any legal constraints on the company's ability to purchase the interest;

(2) specify the terms of the purchase, including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of

the company's other creditors, security for a deferred purchase price, and a covenant not to compete or other restriction on a dissociated member; and

(3) require the dissociated member to deliver an assignment of the interest to the purchaser upon receipt of the purchase price or the first installment of the purchase price.

(b) After the dissociated member delivers the assignment, the dissociated member has no further claim against the company, its members, officers, or managers, if any, other than a claim to any unpaid balance of the purchase price and a claim under any agreement with the company or the remaining members that is not terminated by the court.

(c) If the purchase is not completed in accordance with the specified terms, the company is to be dissolved upon application under Section 801(b)(5)(iv). If a limited liability company is so dissolved, the dissociated member has the same rights and priorities in the company's assets as if the sale had not been ordered.

(d) If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or not in good faith, it may award one or more other parties their reasonable expenses, including attorney's fees and the expenses of appraisers or other experts, incurred in the proceeding. The finding may be based on the company's failure to make an offer to pay or to comply with Section 701(b).

(e) Interest must be paid on the amount awarded from the date determined under Section 701(a) to the date of payment.

Comment

The default valuation standard is fair value. Under this broad standard, a court is free to determine the fair value of a distributional interest on a fair market,

liquidation, or any other method deemed appropriate under the circumstances. A fair market value standard is not used because it is too narrow, often inappropriate, and assumes a fact not contemplated by this section -- a willing buyer and a willing seller.

The court has discretion under subsection (a)(2) to include in its order any conditions the court deems necessary to safeguard the interests of the company and the dissociated member or transferee. The discretion may be based on the financial and other needs of the parties.

If the purchase is not consummated or the purchaser defaults, the dissociated member or transferee may make application for dissolution of the company under subsection (c). The court may deny the petition for good cause but the proceeding affords the company an opportunity to be heard on the matter and avoid dissolution. See Comments to Section 801(a)(4).

The power of the court to award all costs and attorney's fees incurred in the suit under subsection (d) is an incentive for both parties to act in good faith. See Section 701(c).

SECTION 703. DISSOCIATED MEMBER'S POWER TO BIND

LIMITED LIABILITY COMPANY. For two years after a member dissociates without the dissociation resulting in a dissolution and winding up of a limited liability company's business, the company, including a surviving company under [Article] 9, is bound by an act of the dissociated member which would have bound the company under Section 301 before dissociation only if at the time of entering into the transaction the other party:

- (1) reasonably believed that the dissociated member was then a member;
- (2) did not have notice of the member's dissociation; and
- (3) is not deemed to have had notice under Section 704.

Comment

Member dissociation will not dissolve the company unless otherwise specified in an operating agreement. See Section 801(a)(1). A dissociated member

of a member-managed company does not have actual authority to act for the company. See Section 603(b)(1). Under Section 301(a), a dissociated member of a member-managed company has apparent authority to bind the company in ordinary course transactions except as to persons who knew or had notice of the dissociation. This section modifies that rule by requiring the person to show reasonable reliance on the member's status as a member provided a Section 704 statement has not been filed within the previous 90 days. See also Section 804 (power to bind after dissolution).

SECTION 704. STATEMENT OF DISSOCIATION.

(a) A dissociated member or a limited liability company may file in the office of the [Secretary of State] a statement of dissociation stating the name of the company and that the member is dissociated from the company.

(b) For the purposes of Sections 301 and 703, a person not a member is deemed to have notice of the dissociation 90 days after the statement of dissociation is filed.

[ARTICLE] 8

WINDING UP COMPANY'S BUSINESS

- Section 801. Events Causing Dissolution and Winding Up of Company's Business.
- Section 802. Limited Liability Company Continues After Dissolution.
- Section 803. Right to Wind Up Limited Liability Company's Business.
- Section 804. Member's or Manager's Power and Liability as Agent After Dissolution.
- Section 805. Articles of Termination.
- Section 806. Distribution of Assets in Winding Up Limited Liability Company's Business.
- Section 807. Known Claims Against Dissolved Limited Liability Company.
- Section 808. Other Claims Against Dissolved Limited Liability Company.
- Section 809. Grounds for Administrative Dissolution.
- Section 810. Procedure for and Effect of Administrative Dissolution.
- Section 811. Restatement Following Administrative Dissolution.
- Section 812. Appeal from Denial of Reinstatement.

SECTION 801. EVENTS CAUSING DISSOLUTION AND WINDING UP OF COMPANY'S BUSINESS.

A limited liability company is dissolved, and its business must be wound up, upon the occurrence of any of the following events:

- (1) an event specified in the operating agreement;
- (2) consent of the number or percentage of members specified in the operating agreement;
- (3) an event that makes it unlawful for all or substantially all of the business of the company to be continued, but any cure of illegality within 90 days after notice to the company of the event is effective retroactively to the date of the event for purposes of this section;

(4) on application by a member or a dissociated member, upon entry of a judicial decree that:

(i) the economic purpose of the company is likely to be unreasonably frustrated;

(ii) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;

(iii) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement;

(iv) the company failed to purchase the petitioner's distributional interest as required by Section 701; or

(v) the managers or members in control of the company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner;

(5) on application by a transferee of a member's interest, a judicial determination that it is equitable to wind up the company's business:

(i) after the expiration of the specified term, if the company was for a specified term at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer; or

(ii) at any time, if the company was at will at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer; or

(6) the expiration of the term specified in the articles of organization.

Comment

The dissolution rules of this section are mostly default rules and may be modified by an operating agreement. However, an operating agreement may not modify or eliminate the dissolution events specified in subsection (a)(3) (illegal business) or subsection (a)(4) (member application). See Section 103(b)(6).

The relationship between member dissociation and company dissolution is set forth under subsection (a)(1). Unless member dissociation is specified as an event of dissolution in the operating agreement, such dissociation does not dissolve the company. New and important Internal Revenue Service announcements clarify that the failure of member dissociation to cause or threaten dissolution of a limited liability company will not cause the company to be taxed like a corporation.

A member or dissociated member whose interest is not required to be purchased by the company under Section 701 may make application under subsection (a)(4) for the involuntary dissolution of both an at-will company and a term company. A transferee may make application under subsection (a)(5). A transferee's application right, but not that of a member or dissociated member, may be modified by an operating agreement. See Section 103(b)(6). A dissociated member is not treated as a transferee for purposes of an application under subsections (a)(4) and (a)(5). See Section 603(b)(1). For example, this affords reasonable protection to a dissociated member of a term company to make application under subsection (a)(4) before the expiration of the term that existed at the time of dissociation. For purposes of a subsection (a)(4) application, a dissociated member includes a successor in interest, e.g., surviving spouse. See Comments to Section 601.

In the case of applications under subsections (a)(4) and (a)(5), the applicant has the burden of proving either the existence of one or more of the circumstances listed under subsection (a)(4) or that it is equitable to wind up the company's business under subsection (a)(5). Proof of the existence of one or more of the circumstances in subsection (a)(4), may be the basis of a subsection (a)(5) application. Even where the burden of proof is met, the court has the discretion to order relief other than the dissolution of the company. Examples include an accounting, a declaratory judgment, a distribution, the purchase of the distributional interest of the applicant or another member, or the appointment of a receiver. See Section 410.

A court has the discretion to dissolve a company under subsection (a)(4)(i) when the company has a very poor financial record that is not likely to improve. In this instance, dissolution is an alternative to placing the company in bankruptcy. A court may dissolve a company under subsections (a)(4)(ii), (a)(4)(iii), and (a)(4)(iv)

for serious and protracted misconduct by one or more members. Subsection (a)(4)(v) provides a specific remedy for an improper squeeze-out of a member.

In determining whether and what type of relief to order under subsections (a)(4) and (a)(5) involuntary dissolution suits, a court should take into account other rights and remedies of the applicant. For example, a court should not grant involuntary dissolution of an at-will company if the applicant member has the right to dissociate and force the company to purchase that member's distributional interest under Sections 701 and 702. In other cases, involuntary dissolution or some other remedy such as a buy-out might be appropriate where, for example, one or more members have (i) engaged in fraudulent or unconscionable conduct, (ii) improperly expelled a member seeking an unfair advantage of a provision in an operating agreement that provides for a significantly lower price on expulsion than would be payable in the event of voluntary dissociation, or (iii) engaged in serious misconduct and the applicant member is a member of a term company and would not have a right to have the company purchase that member's distributional interest upon dissociation until the expiration of the company's specified term.

SECTION 802. LIMITED LIABILITY COMPANY CONTINUES

AFTER DISSOLUTION.

(a) Subject to subsection (b), a limited liability company continues after dissolution only for the purpose of winding up its business.

(b) At any time after the dissolution of a limited liability company and before the winding up of its business is completed, the members, including a dissociated member whose dissociation caused the dissolution, may unanimously waive the right to have the company's business wound up and the company terminated. In that case:

(1) the limited liability company resumes carrying on its business as if dissolution had never occurred and any liability incurred by the company or a member after the dissolution and before the waiver is determined as if the dissolution had never occurred; and

(2) the rights of a third party accruing under Section 804(a) or arising out of conduct in reliance on the dissolution before the third party knew or received a notification of the waiver are not adversely affected.

Comment

The liability shield continues in effect for the winding up period because the legal existence of the company continues under subsection (a). The company is terminated on the filing of articles of termination. See Section 805.

SECTION 803. RIGHT TO WIND UP LIMITED LIABILITY

COMPANY'S BUSINESS.

(a) After dissolution, a member who has not wrongfully dissociated may participate in winding up a limited liability company's business, but on application of any member, member's legal representative, or transferee, the [designate the appropriate court], for good cause shown, may order judicial supervision of the winding up.

(b) A legal representative of the last surviving member may wind up a limited liability company's business.

(c) A person winding up a limited liability company's business may preserve the company's business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the company's business, dispose of and transfer the company's property, discharge the company's liabilities, distribute the assets of the company pursuant to Section 806, settle disputes by mediation or arbitration, and perform other necessary acts.

**SECTION 804. MEMBER'S OR MANAGER'S POWER AND
LIABILITY AS AGENT AFTER DISSOLUTION.**

(a) A limited liability company is bound by a member's or manager's act after dissolution that:

- (1) is appropriate for winding up the company's business; or
- (2) would have bound the company under Section 301 before dissolution, if the other party to the transaction did not have notice of the dissolution.

(b) A member or manager who, with knowledge of the dissolution, subjects a limited liability company to liability by an act that is not appropriate for winding up the company's business is liable to the company for any damage caused to the company arising from the liability.

Comment

After dissolution, members and managers continue to have the authority to bind the company that they had prior to dissolution provided that the third party did not have notice of the dissolution. See Section 102(b) (notice defined). Otherwise, they have only the authority appropriate for winding up the company's business. See Section 703 (agency power of member after dissociation).

SECTION 805. ARTICLES OF TERMINATION.

(a) At any time after dissolution and winding up, a limited liability company may terminate its existence by filing with the [Secretary of State] articles of termination stating:

- (1) the name of the company;
- (2) the date of the dissolution; and

(3) that the company's business has been wound up and the legal existence of the company has been terminated.

(b) The existence of a limited liability company is terminated upon the filing of the articles of termination, or upon a later effective date, if specified in the articles of termination.

Comment

The termination of legal existence also terminates the company's liability shield. See Comments to Section 802 (liability shield continues in effect during winding up). It also ends the company's responsibility to file an annual report. See Section 211.

SECTION 806. DISTRIBUTION OF ASSETS IN WINDING UP LIMITED LIABILITY COMPANY'S BUSINESS.

(a) In winding up a limited liability company's business, the assets of the company must be applied to discharge its obligations to creditors, including members who are creditors. Any surplus must be applied to pay in money the net amount distributable to members in accordance with their right to distributions under subsection (b).

(b) Each member is entitled to a distribution upon the winding up of the limited liability company's business consisting of a return of all contributions which have not previously been returned and a distribution of any remainder in equal shares.

SECTION 807. KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY.

(a) A dissolved limited liability company may dispose of the known claims against it by following the procedure described in this section.

(b) A dissolved limited liability company shall notify its known claimants in writing of the dissolution. The notice must:

- (1) specify the information required to be included in a claim;
- (2) provide a mailing address where the claim is to be sent;
- (3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the written notice is received by the claimant; and
- (4) state that the claim will be barred if not received by the deadline.

(c) A claim against a dissolved limited liability company is barred if the requirements of subsection (b) are met, and:

- (1) the claim is not received by the specified deadline; or
- (2) in the case of a claim that is timely received but rejected by the dissolved company, the claimant does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of the rejection.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

Comment

A known claim will be barred when the company provides written notice to a claimant that a claim must be filed with the company no later than at least 120 days after receipt of the written notice and the claimant fails to file the claim. If the claim is timely received but is rejected by the company, the claim is nevertheless barred unless the claimant files suit to enforce the claim within 90 days after the receipt of the notice of rejection. A claim described in subsection (d) is not a "known" claim and is governed by Section 808. This section does not extend any other applicable statutes of limitation. See Section 104. Depending on the

management of the company, members or managers must discharge or make provision for discharging all of the company's known liabilities before distributing the remaining assets to the members. See Sections 806(a), 406, and 407.

SECTION 808. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY.

(a) A dissolved limited liability company may publish notice of its dissolution and request persons having claims against the company to present them in accordance with the notice.

(b) The notice must:

(1) be published at least once in a newspaper of general circulation in the [county] in which the dissolved limited liability company's principal office is located or, if none in this State, in which its designated office is or was last located;

(2) describe the information required to be contained in a claim and provide a mailing address where the claim is to be sent; and

(3) state that a claim against the limited liability company is barred unless a proceeding to enforce the claim is commenced within five years after publication of the notice.

(c) If a dissolved limited liability company publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved company within five years after the publication date of the notice:

(1) a claimant who did not receive written notice under Section 807;

(2) a claimant whose claim was timely sent to the dissolved company but not acted on; and

(3) a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim not barred under this section may be enforced:

(1) against the dissolved limited liability company, to the extent of its undistributed assets; or

(2) if the assets have been distributed in liquidation, against a member of the dissolved company to the extent of the member's proportionate share of the claim or the company's assets distributed to the member in liquidation, whichever is less, but a member's total liability for all claims under this section may not exceed the total amount of assets distributed to the member.

Comment

An unknown claim will be barred when the company publishes notice requesting claimants to file claims with the company and stating that claims will be barred unless the claimant files suit to enforce the claim within five years after the date of publication. The procedure also bars known claims where the claimant either did not receive written notice described in Section 807 or received notice, mailed a claim, but the company did not act on the claim.

Depending on the management of the company, members or managers must discharge or make provision for discharging all of the company's known liabilities before distributing the remaining assets to the members. See Comment to Section 807. This section does not contemplate that a company will postpone member distributions until all unknown claims are barred under this section. In appropriate cases, the company may purchase insurance or set aside funds permitting a distribution of the remaining assets. Where winding up distributions have been made to members, subsection (d)(2) authorizes recovery against those members. However, a claimant's recovery against a member is limited to the lesser of the member's proportionate share of the claim or the amount received in the distribution. This section does not extend any other applicable statutes of limitation. See Section 104.

SECTION 809. GROUNDS FOR ADMINISTRATIVE DISSOLUTION.

The [Secretary of State] may commence a proceeding to dissolve a limited liability company administratively if the company does not:

- (1) pay any fees, taxes, or penalties imposed by this [Act] or other law within 60 days after they are due; or
- (2) deliver its annual report to the [Secretary of State] within 60 days after it is due.

Comment

Administrative dissolution is an effective enforcement mechanism for a variety of statutory obligations under this Act and it avoids the more expensive judicial dissolution process. When applicable, administrative dissolution avoids wasteful attempts to compel compliance by a company abandoned by its members.

SECTION 810. PROCEDURE FOR AND EFFECT OF ADMINISTRATIVE DISSOLUTION.

(a) If the [Secretary of State] determines that a ground exists for administratively dissolving a limited liability company, the [Secretary of State] shall enter a record of the determination and serve the company with a copy of the record.

(b) If the company does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the [Secretary of State] that each ground determined by the [Secretary of State] does not exist within 60 days after service of the notice, the [Secretary of State] shall administratively dissolve the company by signing a certification of the dissolution that recites the ground for

dissolution and its effective date. The [Secretary of State] shall file the original of the certificate and serve the company with a copy of the certificate.

(c) A company administratively dissolved continues its existence but may carry on only business necessary to wind up and liquidate its business and affairs under Section 802 and to notify claimants under Sections 807 and 808.

(d) The administrative dissolution of a company does not terminate the authority of its agent for service of process.

Comment

A company's failure to comply with a ground for administrative dissolution may simply occur because of oversight. Therefore, subsections (a) and (b) set forth a mandatory notice by the filing officer to the company of the ground for dissolution and a 60 day grace period for correcting the ground.

SECTION 811. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

(a) A limited liability company administratively dissolved may apply to the [Secretary of State] for reinstatement within two years after the effective date of dissolution. The application must:

(1) recite the name of the company and the effective date of its administrative dissolution;

(2) state that the ground for dissolution either did not exist or have been eliminated;

(3) state that the company's name satisfies the requirements of Section 105; and

(4) contain a certificate from the [taxing authority] reciting that all taxes owed by the company have been paid.

(b) If the [Secretary of State] determines that the application contains the information required by subsection (a) and that the information is correct, the [Secretary of State] shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites this determination and the effective date of reinstatement, file the original of the certificate, and serve the company with a copy of the certificate.

(c) When reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the company may resume its business as if the administrative dissolution had never occurred.

SECTION 812. APPEAL FROM DENIAL OF REINSTATEMENT.

(a) If the [Secretary of State] denies a limited liability company's application for reinstatement following administrative dissolution, the [Secretary of State] shall serve the company with a record that explains the reason or reasons for denial.

(b) The company may appeal the denial of reinstatement to the [name appropriate] court within 30 days after service of the notice of denial is perfected. The company appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the [Secretary of State's] certificate of dissolution, the company's application for reinstatement, and the [Secretary of State's] notice of denial.

(c) The court may summarily order the [Secretary of State] to reinstate the dissolved company or may take other action the court considers appropriate.

(d) The court's final decision may be appealed as in other civil proceedings.

[ARTICLE] 9
CONVERSIONS AND MERGERS

- Section 901. Definitions.
- Section 902. Conversion of Partnership or Limited Partnership To Limited Liability Company.
- Section 903. Effect of Conversion; Entity Unchanged.
- Section 904. Merger of Entities.
- Section 905. Articles of Merger.
- Section 906. Effect of Merger.
- Section 907. [Article] Not Exclusive.

SECTION 901. DEFINITIONS. In this [article]:

- (1) "Corporation" means a corporation under [the State Corporation Act], a predecessor law, or comparable law of another jurisdiction.
- (2) "General partner" means a partner in a partnership and a general partner in a limited partnership.
- (3) "Limited partner" means a limited partner in a limited partnership.
- (4) "Limited partnership" means a limited partnership created under [the State Limited Partnership Act], a predecessor law, or comparable law of another jurisdiction.
- (5) "Partner" includes a general partner and a limited partner.
- (6) "Partnership" means a general partnership under [the State Partnership Act], a predecessor law, or comparable law of another jurisdiction.
- (7) "Partnership agreement" means an agreement among the partners concerning the partnership or limited partnership.
- (8) "Shareholder" means a shareholder in a corporation.

Comment

Section 907 makes clear that the provisions of Article 9 are not mandatory. Therefore, a partnership or a limited liability company may convert or merge in any other manner provided by law. However, if the requirements of Article 9 are followed, the conversion or merger is legally valid. Article 9 is not restricted to domestic business entities.

SECTION 902. CONVERSION OF PARTNERSHIP OR LIMITED PARTNERSHIP TO LIMITED LIABILITY COMPANY.

(a) A partnership or limited partnership may be converted to a limited liability company pursuant to this section.

(b) The terms and conditions of a conversion of a partnership or limited partnership to a limited liability company must be approved by all of the partners or by a number or percentage of the partners required for conversion in the partnership agreement.

(c) An agreement of conversion must set forth the terms and conditions of the conversion of the interests of partners of a partnership or of a limited partnership, as the case may be, into interests in the converted limited liability company or the cash or other consideration to be paid or delivered as a result of the conversion of the interests of the partners, or a combination thereof.

(d) After a conversion is approved under subsection (b), the partnership or limited partnership shall file articles of organization in the office of the [Secretary of State] which satisfy the requirements of Section 203 and contain:

(1) a statement that the partnership or limited partnership was converted to a limited liability company from a partnership or limited partnership, as the case may be;

(2) its former name;

(3) a statement of the number of votes cast by the partners entitled to vote for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion under subsection (b); and

(4) in the case of a limited partnership, a statement that the certificate of limited partnership is to be canceled as of the date the conversion took effect.

(e) In the case of a limited partnership, the filing of articles of organization under subsection (d) cancels its certificate of limited partnership as of the date the conversion took effect.

(f) A conversion takes effect when the articles of organization are filed in the office of the [Secretary of State] or at any later date specified in the articles of organization.

(g) A general partner who becomes a member of a limited liability company as a result of a conversion remains liable as a partner for an obligation incurred by the partnership or limited partnership before the conversion takes effect.

(h) A general partner's liability for all obligations of the limited liability company incurred after the conversion takes effect is that of a member of the company. A limited partner who becomes a member as a result of a conversion remains liable only to the extent the limited partner was liable for an obligation incurred by the limited partnership before the conversion takes effect.

Comment

Subsection (b) makes clear that the terms and conditions of the conversion of a general or limited partnership to a limited liability company must be approved by all of the partners unless the partnership agreement specifies otherwise.

SECTION 903. EFFECT OF CONVERSION; ENTITY UNCHANGED.

(a) A partnership or limited partnership that has been converted pursuant to this [article] is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting partnership or limited partnership vests in the limited liability company;

(2) all debts, liabilities, and other obligations of the converting partnership or limited partnership continue as obligations of the limited liability company;

(3) an action or proceeding pending by or against the converting partnership or limited partnership may be continued as if the conversion had not occurred;

(4) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting partnership or limited partnership vest in the limited liability company; and

(5) except as otherwise provided in the agreement of conversion under Section 902(c), all of the partners of the converting partnership continue as members of the limited liability company.

Comment

A conversion is not a conveyance or transfer and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. Under subsection (b)(1), title to all partnership property, including real estate, vests in the limited liability company as a matter of law without reversion or impairment.

SECTION 904. MERGER OF ENTITIES.

(a) Pursuant to a plan of merger approved under subsection (c), a limited liability company may be merged with or into one or more limited liability companies, foreign limited liability companies, corporations, foreign corporations, partnerships, foreign partnerships, limited partnerships, foreign limited partnerships, or other domestic or foreign entities.

(b) A plan of merger must set forth:

(1) the name of each entity that is a party to the merger;

(2) the name of the surviving entity into which the other entities will merge;

(3) the type of organization of the surviving entity;

(4) the terms and conditions of the merger;

(5) the manner and basis for converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or in part; and

(6) the street address of the surviving entity's principal place of business.

(c) A plan of merger must be approved:

(1) in the case of a limited liability company that is a party to the merger, by all of the members or by a number or percentage of members specified in the operating agreement;

(2) in the case of a foreign limited liability company that is a party to the merger, by the vote required for approval of a merger by the law of the State or foreign jurisdiction in which the foreign limited liability company is organized;

(3) in the case of a partnership or domestic limited partnership that is a party to the merger, by the vote required for approval of a conversion under Section 902(b); and

(4) in the case of any other entities that are parties to the merger, by the vote required for approval of a merger by the law of this State or of the State or foreign jurisdiction in which the entity is organized and, in the absence of such a requirement, by all the owners of interests in the entity.

(d) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

(e) The merger is effective upon the filing of the articles of merger with the [Secretary of State], or at such later date as the articles may provide.

Comment

This section sets forth a "safe harbor" for cross-entity mergers of limited liability companies with both domestic and foreign: corporations, general and limited partnerships, and other limited liability companies. Subsection (c) makes clear that the terms and conditions of the plan of merger must be approved by all of the partners unless applicable state law specifies otherwise for the merger.

SECTION 905. ARTICLES OF MERGER.

(a) After approval of the plan of merger under Section 904(c), unless the merger is abandoned under Section 904(d), articles of merger must be signed on behalf of each limited liability company and other entity that is a party to the merger and delivered to the [Secretary of State] for filing. The articles must set forth:

(1) the name and jurisdiction of formation or organization of each of the limited liability companies and other entities that are parties to the merger;

(2) for each limited liability company that is to merge, the date its articles of organization were filed with the [Secretary of State];

(3) that a plan of merger has been approved and signed by each limited liability company and other entity that is to merge;

(4) the name and address of the surviving limited liability company or other surviving entity;

(5) the effective date of the merger;

(6) if a limited liability company is the surviving entity, such changes in its articles of organization as are necessary by reason of the merger;

(7) if a party to a merger is a foreign limited liability company, the jurisdiction and date of filing of its initial articles of organization and the date when its application for authority was filed by the [Secretary of State] or, if an application has not been filed, a statement to that effect; and

(8) if the surviving entity is not a limited liability company, an agreement that the surviving entity may be served with process in this State and is subject to liability in any action or proceeding for the enforcement of any liability

or obligation of any limited liability company previously subject to suit in this State which is to merge, and for the enforcement, as provided in this [Act], of the right of members of any limited liability company to receive payment for their interest against the surviving entity.

(b) If a foreign limited liability company is the surviving entity of a merger, it may not do business in this State until an application for that authority is filed with the [Secretary of State].

(c) The surviving limited liability company or other entity shall furnish a copy of the plan of merger, on request and without cost, to any member of any limited liability company or any person holding an interest in any other entity that is to merge.

(d) Articles of merger operate as an amendment to the limited liability company's articles of organization.

SECTION 906. EFFECT OF MERGER.

(a) When a merger takes effect:

(1) the separate existence of each limited liability company and other entity that is a party to the merger, other than the surviving entity, terminates;

(2) all property owned by each of the limited liability companies and other entities that are party to the merger vests in the surviving entity;

(3) all debts, liabilities, and other obligations of each limited liability company and other entity that is party to the merger become the obligations of the surviving entity;

(4) an action or proceeding pending by or against a limited liability company or other party to a merger may be continued as if the merger had not occurred or the surviving entity may be substituted as a party to the action or proceeding; and

(5) except as prohibited by other law, all the rights, privileges, immunities, powers, and purposes of every limited liability company and other entity that is a party to a merger vest in the surviving entity.

(b) The [Secretary of State] is an agent for service of process in an action or proceeding against the surviving foreign entity to enforce an obligation of any party to a merger if the surviving foreign entity fails to appoint or maintain an agent designated for service of process in this State or the agent for service of process cannot with reasonable diligence be found at the designated office. Upon receipt of process, the [Secretary of State] shall send a copy of the process by registered or certified mail, return receipt requested, to the surviving entity at the address set forth in the articles of merger. Service is effected under this subsection at the earliest of:

- (1) the date the company receives the process, notice, or demand;
- (2) the date shown on the return receipt, if signed on behalf of the company; or
- (3) five days after its deposit in the mail, if mailed postpaid and correctly addressed.

(c) A member of the surviving limited liability company is liable for all obligations of a party to the merger for which the member was personally liable before the merger.

(d) Unless otherwise agreed, a merger of a limited liability company that is not the surviving entity in the merger does not require the limited liability company to wind up its business under this [Act] or pay its liabilities and distribute its assets pursuant to this [Act].

(e) Articles of merger serve as articles of dissolution for a limited liability company that is not the surviving entity in the merger.

SECTION 907. [ARTICLE] NOT EXCLUSIVE. This [article] does not preclude an entity from being converted or merged under other law.

[ARTICLE] 10

FOREIGN LIMITED LIABILITY COMPANIES

- Section 1001. Law Governing Foreign Limited Liability Companies.
- Section 1002. Application for Certificate of Authority.
- Section 1003. Activities Not Constituting Transacting Business.
- Section 1004. Issuance of Certificate of Authority.
- Section 1005. Name of Foreign Limited Liability Company.
- Section 1006. Revocation of Certificate of Authority.
- Section 1007. Cancellation of Authority.
- Section 1008. Effect of Failure to Obtain Certificate of Authority.
- Section 1009. Action by [Attorney General].

SECTION 1001. LAW GOVERNING FOREIGN LIMITED LIABILITY COMPANIES.

(a) The laws of the State or other jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and their transferees.

(b) A foreign limited liability company may not be denied a certificate of authority by reason of any difference between the laws of another jurisdiction under which the foreign company is organized and the laws of this State.

(c) A certificate of authority does not authorize a foreign limited liability company to engage in any business or exercise any power that a limited liability company may not engage in or exercise in this State.

Comment

The law where a foreign limited liability company is organized, rather than this Act, governs that company's internal affairs and the liability of its owners. Accordingly, any difference between the laws of the foreign jurisdiction and this Act will not constitute grounds for denial of a certificate of authority to transact

business in this State. However, a foreign limited liability company transacting business in this State by virtue of a certificate of authority is limited to the business and powers that a limited liability company may lawfully pursue and exercise under Section 112.

**SECTION 1002. APPLICATION FOR CERTIFICATE OF
AUTHORITY.**

(a) A foreign limited liability company may apply for a certificate of authority to transact business in this State by delivering an application to the [Secretary of State] for filing. The application must set forth:

(1) the name of the foreign company or, if its name is unavailable for use in this State, a name that satisfies the requirements of Section 1005;

(2) the name of the State or country under whose law it is organized;

(3) the street address of its principal office;

(4) the address of its initial designated office in this State;

(5) the name and street address of its initial agent for service of process in this State;

(6) whether the duration of the company is for a specified term and, if so, the period specified;

(7) whether the company is manager-managed, and, if so, the name and address of each initial manager; and

(8) whether the members of the company are to be liable for its debts and obligations under a provision similar to Section 303(c).

(b) A foreign limited liability company shall deliver with the completed application a certificate of existence or a record of similar import authenticated by

the secretary of state or other official having custody of company records in the State or country under whose law it is organized.

Comment

As with articles of organization, the application must be signed and filed with the filing office. See Sections 105, 107 (name registration), 205, 206, 209 (liability for false statements), and 1005.

SECTION 1003. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.

(a) Activities of a foreign limited liability company that do not constitute transacting business in this State within the meaning of this [article] include:

- (1) maintaining, defending, or settling an action or proceeding;
- (2) holding meetings of its members or managers or carrying on any other activity concerning its internal affairs;
- (3) maintaining bank accounts;
- (4) maintaining offices or agencies for the transfer, exchange, and registration of the foreign company's own securities or maintaining trustees or depositories with respect to those securities;
- (5) selling through independent contractors;
- (6) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;
- (7) creating or acquiring indebtedness, mortgages, or security interests in real or personal property;

(8) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts, and holding, protecting, and maintaining property so acquired;

(9) conducting an isolated transaction that is completed within 30 days and is not one in the course of similar transactions of a like manner; and

(10) transacting business in interstate commerce.

(b) For purposes of this [article], the ownership in this State of income-producing real property or tangible personal property, other than property excluded under subsection (a), constitutes transacting business in this State.

(c) This section does not apply in determining the contacts or activities that may subject a foreign limited liability company to service of process, taxation, or regulation under any other law of this State.

SECTION 1004. ISSUANCE OF CERTIFICATE OF AUTHORITY.

Unless the [Secretary of State] determines that an application for a certificate of authority fails to comply as to form with the filing requirements of this [Act], the [Secretary of State], upon payment of all filing fees, shall file the application and send a receipt for it and the fees to the limited liability company or its representative.

SECTION 1005. NAME OF FOREIGN LIMITED LIABILITY COMPANY.

(a) If the name of a foreign limited liability company does not satisfy the requirements of Section 105, the company, to obtain or maintain a certificate of authority to transact business in this State, must use a fictitious name to transact business in this State if its real name is unavailable and it delivers to the [Secretary of State] for filing a copy of the resolution of its managers, in the case of a manager-managed company, or of its members, in the case of a member-managed company, adopting the fictitious name.

(b) Except as authorized by subsections (c) and (d), the name, including a fictitious name to be used to transact business in this State, of a foreign limited liability company must be distinguishable upon the records of the [Secretary of State] from:

- (1) the name of any corporation, limited partnership, or company incorporated, organized, or authorized to transact business in this State;
- (2) a name reserved or registered under Section 106 or 107; and
- (3) the fictitious name of another foreign limited liability company authorized to transact business in this State.

(c) A foreign limited liability company may apply to the [Secretary of State] for authority to use in this State a name that is not distinguishable upon the records of the [Secretary of State] from a name described in subsection (b). The [Secretary of State] shall authorize use of the name applied for if:

- (1) the present user, registrant, or owner of a reserved name consents to the use in a record and submits an undertaking in form satisfactory to the [Secretary of State] to change its name to a name that is distinguishable upon the

records of the [Secretary of State] from the name of the foreign applying limited liability company; or

(2) the applicant delivers to the [Secretary of State] a certified copy of a final judgment of a court establishing the applicant's right to use the name applied for in this State.

(d) A foreign limited liability company may use in this State the name, including the fictitious name, of another domestic or foreign entity that is used in this State if the other entity is incorporated, organized, or authorized to transact business in this State and the foreign limited liability company:

(1) has merged with the other entity;

(2) has been formed by reorganization of the other entity; or

(3) has acquired all or substantially all of the assets, including the name, of the other entity.

(e) If a foreign limited liability company authorized to transact business in this State changes its name to one that does not satisfy the requirements of Section 105, it may not transact business in this State under the name as changed until it adopts a name satisfying the requirements of Section 105 and obtains an amended certificate of authority.

SECTION 1006. REVOCATION OF CERTIFICATE OF AUTHORITY.

(a) A certificate of authority of a foreign limited liability company to transact business in this State may be revoked by the [Secretary of State] in the manner provided in subsection (b) if:

- (1) the company fails to:
 - (i) pay any fees, taxes, and penalties owed to this State;
 - (ii) deliver its annual report required under Section 211 to the [Secretary of State] within 60 days after it is due;
 - (iii) appoint and maintain an agent for service of process as required by this [article]; or
 - (iv) file a statement of a change in the name or business address of the agent as required by this [article]; or
- (2) a misrepresentation has been made of any material matter in any application, report, affidavit, or other record submitted by the company pursuant to this [article].

(b) The [Secretary of State] may not revoke a certificate of authority of a foreign limited liability company unless the [Secretary of State] sends the company notice of the revocation, at least 60 days before its effective date, by a record addressed to its agent for service of process in this State, or if the company fails to appoint and maintain a proper agent in this State, addressed to the office required to be maintained by Section 108. The notice must specify the cause for the revocation of the certificate of authority. The authority of the company to transact business in this State ceases on the effective date of the revocation unless the foreign limited liability company cures the failure before that date.

SECTION 1007. CANCELLATION OF AUTHORITY. A foreign limited liability company may cancel its authority to transact business in this State by filing

in the office of the [Secretary of State] a certificate of cancellation. Cancellation does not terminate the authority of the [Secretary of State] to accept service of process on the company for [claims for relief] arising out of the transactions of business in this State.

SECTION 1008. EFFECT OF FAILURE TO OBTAIN CERTIFICATE OF AUTHORITY.

(a) A foreign limited liability company transacting business in this State may not maintain an action or proceeding in this State unless it has a certificate of authority to transact business in this State.

(b) The failure of a foreign limited liability company to have a certificate of authority to transact business in this State does not impair the validity of a contract or act of the company or prevent the foreign limited liability company from defending an action or proceeding in this State.

(c) Limitations on personal liability of managers, members, and their transferees are not waived solely by transacting business in this State without a certificate of authority.

(d) If a foreign limited liability company transacts business in this State without a certificate of authority, it appoints the [Secretary of State] as its agent for service of process for [claims for relief] arising out of the transaction of business in this State.

SECTION 1009. ACTION BY [ATTORNEY GENERAL]. The [Attorney General] may maintain an action to restrain a foreign limited liability company from transacting business in this State in violation of this [article].

[ARTICLE] 11
DERIVATIVE ACTIONS

Section 1101.	Right of Action.
Section 1102.	Proper Plaintiff.
Section 1103.	Pleading.
Section 1104.	Expenses.

SECTION 1101. RIGHT OF ACTION. A member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed.

Comment

A member may bring an action on behalf of the company when the members or managers having the authority to pursue the company recovery refuse to do so or an effort to cause them to pursue the recovery is not likely to succeed. See Comments to Section 411(a) (personal action of member against company or another member).

SECTION 1102. PROPER PLAINTIFF. In a derivative action for a limited liability company, the plaintiff must be a member of the company when the action is commenced; and:

(1) must have been a member at the time of the transaction of which the plaintiff complains; or

(2) the plaintiff's status as a member must have devolved upon the plaintiff by operation of law or pursuant to the terms of the operating agreement from a person who was a member at the time of the transaction.

SECTION 1103. PLEADING. In a derivative action for a limited liability company, the complaint must set forth with particularity the effort of the plaintiff to secure initiation of the action by a member or manager or the reasons for not making the effort.

Comment

There is no obligation of the company or its members or managers to respond to a member demand to bring an action to pursue a company recovery. However, if a company later decides to commence the demanded action or assume control of the derivative litigation, the member's right to commence or control the proceeding ordinarily ends.

SECTION 1104. EXPENSES. If a derivative action for a limited liability company is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited liability company the remainder of the proceeds received.

[ARTICLE] 12

MISCELLANEOUS PROVISIONS

- Section 1201. Uniformity of Application and Construction.
- Section 1202. Short Title.
- Section 1203. Severability Clause.
- Section 1204. Effective Date.
- Section 1205. Transitional Provisions.
- Section 1206. Savings Clause.

SECTION 1201. UNIFORMITY OF APPLICATION AND

CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

SECTION 1202. SHORT TITLE. This [Act] may be cited as the Uniform

Limited Liability Company Act (1996).

SECTION 1203. SEVERABILITY CLAUSE. If any provision of this [Act]

or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 1204. EFFECTIVE DATE. This [Act] takes effect

[_____].

SECTION 1205. TRANSITIONAL PROVISIONS.

(a) Before January 1, 199__, this [Act] governs only a limited liability company organized:

(1) after the effective date of this [Act], unless the company is continuing the business of a dissolved limited liability company under [Section of the existing Limited Liability Company Act]; and

(2) before the effective date of this [Act], which elects, as provided by subsection (c), to be governed by this [Act].

(b) On and after January 1, 199__, this [Act] governs all limited liability companies.

(c) Before January 1, 199__, a limited liability company voluntarily may elect, in the manner provided in its operating agreement or by law for amending the operating agreement, to be governed by this [Act].

Comment

Under subsection (a)(1), the application of the Act is mandatory for all companies formed after the effective date of the Act determined under Section 1204. Under subsection (a)(2), the application of the Act is permissive, by election under subsection (c), for existing companies for a period of time specified in subsection (b) after which application becomes mandatory. This affords existing companies and their members an opportunity to consider the changes effected by this Act and to amend their operating agreements, if appropriate. If no election is made, the Act becomes effective after the period specified in subsection (b). The period specified by adopting States may vary, but a period of five years is a common period in similar cases.

SECTION 1206. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before the effective date of this [Act].